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STOP THE COUNT; The Historically Discriminatory Nature of the Bar Exam Requires Adjustments in How Bar Passage Rates are Reported, If at All

Nachman N. Gutowski

ABSTRACT

Despite its ugly history and persistent disparate impact on racial and minority groups, the Bar Exam is still a required step for (nearly) every jurisdiction in a law school graduate's quest to become an attorney. Deficiencies abound in the exam's inability to effectively evaluate the minimum competency of what newly minted attorneys should possess. It is left to the local jurisdiction to collect, analyze, and determine what mode to release and calculate results. There has been a recent shift in focus, and change of scope, in the American Bar Association Ultimate Bar Passage, Standard 316. Nevertheless, the local authorities provide pass rate data via public reports that are often not in line, or are even in definitional conflict, with the ABA standard.

A lack of standardized public disclosure for statistics on bar results has exacerbated inequities. The meteoric rise of the Uniform Bar Exam and its widespread adoption is impacting how results are compiled and reported. Solutions are straightforward, if not simple, to implement. Reporting agencies must assess and update their individualized calculation and publication methods to ensure accuracy and conformity to set standards. The American Bar Association must update its questionnaire and, at the very least, clarify its definition of first-time takers. Finally, the National Conference of Bar Examiners must proactively assist and provide data to law schools on examinees who transfer Uniform Bar Exam scores between jurisdictions, particularly within the first two years of graduation.

I. INTRODUCTION

In October 2020, Brianna Hill, a recent law school graduate, did what nearly all recent law school graduates do shortly after graduation: she sat for the Bar Exam. Sitting for the Bar Exam is an intense, nerve-wracking, two-day ordeal that impacts which law school graduates will be eligible to become licensed attorneys. The exam itself is challenging on its own, but circumstances beyond the test taker's control can often affect their ability even to complete the examination.¹ 2020 presented additional challenges for Bar Exam takers as accommodations had to be made for public health concerns during the height of the COVID-19 pandemic.²

Florida, for example, canceled its original July exam just weeks before it was planned to be administered and moved to a digital format.³ Due to security concerns, software issues, and pressure from outside groups, the

¹ Above the Law routinely collects Bar Exam horror stories from prospective lawyers nationwide. See Kathryn Rubio, *The Annual Legal Profession Hazing Ritual Strikes Again*, ABOVE THE LAW, (July 25, 2022), <https://abovethelaw.com/2022/07/the-annual-legal-profession-hazing-ritual-strikes-again> (linking to “[p]oop stories, birth stories, fires, seizures, bugs, tech issues, peeping toms, awful proctors, strokes . . . pretty much all manner of awfulness.”) [<https://perma.cc/M22W-AXY5>]; see also Kathryn Rubio, *Be Prepared to be Terrified: Bar Exam Horror Stories!*, ABOVE THE LAW, (July 29, 2022), <https://abovethelaw.com/2022/07/be-prepared-to-be-terrified-bar-exam-horror-stories> [<https://perma.cc/MS6U-QQ9H>]; see, e.g., Kathryn Rubio, *The Worst Bar Exam Horror Stories From This Year*, ABOVE THE LAW, (Aug. 2, 2021), <https://abovethelaw.com/2021/08/the-worst-bar-exam-horror-stories-from-this-year> [<https://perma.cc/J5C5-2CSL>]; see, e.g., Staci Zaretsky, *Bar Exam Catastrophes That'll Give You Nightmares*, ABOVE THE LAW, (Aug. 1, 2019), <https://abovethelaw.com/2019/08/bar-exam-catastrophes-thatll-give-you-nightmares> [<https://perma.cc/4EH7-VADV>]; see, e.g., Kathryn Rubio, *Some Truly Awful Things Can Happen During the Bar Exam*, ABOVE THE LAW, (July 28, 2017), <https://abovethelaw.com/2017/07/some-truly-awful-things-can-happen-during-the-bar-exam> [<https://perma.cc/E9Z5-9G8L>].

² See *COVID-19: Implications for 2020 Statistics*, THE BAR EXAM’R, <https://thebarexaminer.ncbex.org/2020-statistics/covid-19-implications-for-2020> [<https://perma.cc/AG6S-48W3>].

³ See *Florida Bar Exam Moves to Online Format in August 2020 due to Pandemic*, FLA. SUP. CT., (July 1, 2020, 12:30 PM), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-Moves-to-On-Line-Format-in-August-2020-due-to-Pandemic> [<https://perma.cc/8FF9-PEM3>].

Florida Board of Bar Examiners (“FBBE”) changed vendors and moved the exam again, this time to an October 2020 date.⁴ The exam pivoted to a remote, ‘proctored’ format, reduced to a single day, and was pushed back two times, including changing the original July exam to August and then again to October, while only notifying the examinees the week of the scheduled exam.⁵ This altered format of the test materials, remote and virtual administration, and additional logistical and technical issues plagued examinees. Florida was not alone in its struggle, as nearly every jurisdiction made modifications and encountered issues trying to navigate the pandemic.⁶

As she sat for the Bar Exam, Brianna Hill had an additional concern: she was thirty-eight weeks pregnant.⁷ On the first day of her Exam, Hill’s water broke.⁸ Nevertheless, she completed the first part of the test, gave birth to her son that evening, and completed the second part of the exam the next day from her hospital bed.⁹ Incredibly, Hill passed.¹⁰

⁴ See *Board of Bar Examiners Postpones August 2020 Bar Examination; Works to Create a Supervised Practice Program*, FLA. BAR NEWS, (Aug. 17, 2020), <https://www.floridabar.org/the-florida-bar-news/board-of-bar-examiners-postpones-august-2020-bar-examination-works-to-create-a-supervised-practice-program/> [<https://perma.cc/77ZB-KJUZ>]; see also Jack Evans, *The Florida Bar Exam Software Crashes, Freezes and Can Lead to Hacks, Examinees Say*, TAMPA BAY TIMES, (Aug. 11, 2020), <https://www.tampabay.com/news/2020/08/11/the-florida-bar-exam-software-crashes-freezes-and-can-lead-to-hacks-examinees-say/> [<https://perma.cc/7WE9-8EIJ>].

⁵ See *Florida Bar Exam Rescheduled for October 13*, CT. NEWS FLA., (Aug. 26, 2020), <https://news.flcourts.org/All-Court-News/Florida-Bar-Exam-rescheduled-for-October-13> [<https://perma.cc/J3W8-WGSU>].

⁶ 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/WU4B-467K>].

⁷ Heather Murphy, *She Was Going Into Labor. But She Had a Bar Exam to Finish*, N.Y. TIMES, (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/us/bar-exam-labor.html> [<https://perma.cc/6G45-9F48>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Woman Who Took Bar Exam While in Labor, Finished After Giving Birth Passes Test*, NBC CHICAGO, (Dec. 1, 2020), <https://www.nbcchicago.com/news/local/woman-who-took-bar-exam-while-in-labor-finished-after-giving-birth-passes-test/2383951> [<https://perma.cc/LKY3-N9SA>].

The history of the Bar Exam and its inability to effectively test competency have a complex and flawed story. Its role in controlling admission to the profession is ineffective and has had a disparate impact on underrepresented groups entering the profession. Commonly used tools to predict performance and ultimate success on the Bar Exam consist primarily of first-year law school grades and lean heavily on earned scores from the Law School Admission Test (“LSAT”).¹¹ Before being able to attempt the exam, an examinee is required, almost universally, to graduate from an approved law school. The American Bar Association (“ABA”), a legal professional organization, sets standards and requirements for accreditation status of law schools.¹²

The Bar Exam is partially or entirely created by a third-party, private, not-for-profit organization called the National Conference of Bar Examiners (“NCBE”).¹³ It works closely with oversight authority, the state supreme court or their designee, often a Board of Bar Examiners, to execute a standardized exam for its applicants.¹⁴ The results of these jurisdictional exams are undoubtedly crucial to applicants, their schools with reporting requirements to the ABA, and the public. Two significant areas of concern, however, diminish the usefulness of this data. First, states use inconsistent methods for counting and reporting results. Second, the focus on “first-time” results is misleading, no longer in line with the ABA standard, and causes harm.

¹¹ See Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205 (2016)

¹² See AM. BAR. ASS’N., A.B.A STANDARD AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022, 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/LB6M-N33U>]

¹³ *About NCBE*, NAT’L CONF. BAR EXAM’RS, <https://ncbex.org/about> [<https://perma.cc/6BSG-6WDK>].

¹⁴ *Id.*

First, varied reporting mechanisms exist, but there is not currently a standard or accepted operating procedure for releasing Bar Exam results. Several jurisdictions have created their own definitional approaches, sometimes inconsistent with the ABA.¹⁵ As a result, confusing, ambiguous, or outright incorrect data is produced. Historically, the primary standard needed to maintain a law school's accreditation from the ABA, specifically referencing particularized bar results, is Standard 316.¹⁶ This standard, until 2019, contained a provision where performance by a graduating law class could be measured as compared to a state average pass results of first-time bar takers.¹⁷ No longer is this quantitative data used. There is currently no standard component that requires first-time taker status for accreditation.

Second, understandably, the public looks to and utilizes officially released exam results, particularly as they are curated, compiled, and released by the respective Boards of Bar Examiners, to be accurate and reliable sources of information. When these press releases contain data outside the scope of Standard 316, as they relate to first-time taker status, there is the possibility for further confusion and even weaponization of the data. To make matters worse, when the results contain references to the law school from which an applicant graduates, that publication provides a false narrative of the quality and value of the institution. This first-time pass rate focus harms reputations and can negatively impact student desire to apply or even remain at an institution that is reported and perceived as underperforming.

¹⁵ The easiest example is Florida's definition of 'first time' taker being related to 'overall taker' status of both components of the Florida Bar Exam, concurrently; while, the ABA defines first time status as the first attempt. It does not differentiate how many portions of an exam are attempted, or previous status of admission.

¹⁶ See AM. BAR. ASS'N, *supra* note 12 ("At least 75 percent of a law school's graduates in a calendar year who sat for a Bar Examination must have passed a Bar Examination administered within two years of their date of graduation.").

¹⁷ See A.B.A STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2029, AM. BAR. ASS'N (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf [<https://perma.cc/3KJY-R346>].

Additionally, the focus on first-time examinee performance disproportionately impacts “access schools”. These schools provide an opportunity to underrepresented groups who, historically, do not score as well on standardized admission exams for many reasons, and understandably struggle with the Bar Exam on the first attempt.¹⁸ Additionally, with almost three-fourths of jurisdictions now utilizing a standardized exam called the Uniform Bar Exam (“UBE”) as their licensing test, unanticipated issues are erupting from the compilation and release of these results. While the UBE may be uniform, the minimum passing score is not.¹⁹ The impact of differences in threshold scores, or the numerical outcome needed, by varying UBE jurisdictions plays into the concern on result publication. Not only have required scores not been static, but there are conflicts in definitions and logistical meaning of results, what is transferable, and how results are compiled, tracked, and reported.²⁰ All of these impact accreditation requirements and equity.

Without a readily accessible repository of methods for releasing results, tracking, and understanding, the scale of this issue is admittedly tricky. As a result, a Herculean effort to create and publish such a repository has been undertaken. There are many concerns and issues that need to be addressed. However, three recommendations go a long way to resolving many big-ticket problems. First, the reporting agencies should take an inventory and assess the impact of the format of their data reporting. They should steer away from compiling lists or unnecessarily grouping applicants. Second, the ABA should amend its questionnaire to remove any reference to first-time taker status or, at the very least, redefine it to include UBE examinees for whom a

¹⁸ Michael II Couch et al., *Rethinking Standardized Testing From An Access, Equity And Achievement Perspective: Has Anything Changed For African American Students?*, 5 J. OF RSCH. INITIATIVES 3 (2021).

¹⁹ See *Understanding the Uniform Bar Exam*, NAT’L CONF. BAR EXAM’RS, <https://ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [https://perma.cc/QG3Y-TTAS].

²⁰ Gutowski & Bell, *infra* note 282.

transferred score admits them without having to retake the exam. Finally, the NCBE should work with law schools to proactively provide a timely and accurate list of transfer score examinees to ensure comprehensive and inclusive reporting for ABA accreditation standards.

Every year, tens of thousands of would-be attorneys fail the Bar Exam.²¹ Bar Exam takers face challenges that impact their performance, often caused by outside influences over which the examinee has little or no control, and often for reasons that have near nothing to do with their knowledge of the law or their ability to practice law competently.²² The good news for those who fail the Bar on their first attempt is that they will likely pass on a subsequent attempt, and usually within the next two years.²³ This two-year window—known as the Ultimate Bar Passage Rate—is the primary standard that the ABA uses in accordance with accrediting a law schools' alumni performance on a Bar Exam.²⁴ In multiple jurisdictions, the state Bar Examiners also release passage rates for first-time takers.²⁵ This method of

²¹ See *2021 Statistics Snapshot*, NAT'L CONF. BAR EXAM'RS, <https://thebarexaminer.ncbex.org/wp-content/uploads/Snapshot.pdf> [<https://perma.cc/H8TT-EN5X>].

²² See Joshua J. Jackson & Tiffane Cochran, *Approaching the Bar: An Analysis of Post-Graduation Bar Exam Study Habits*, ACCESSLEX INST. (2021) <https://www.accesslex.org/approaching-the-bar> [<https://perma.cc/HJ2J-SQ9H>].

²³ See generally *Various Statistics on ABA Approved Law Schools*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/ [<https://perma.cc/REA5-ND5V>] (the data provided by the American Bar Association on bar passage rates for the years 2017, 2018, and 2019 to see the three most recent graduating classes who have met the 2-year window for Ultimate Bar Passage under the amended 2-year timeframe of Standard 316, these students do eventually pass. The first-time bar passage nationally for students who graduated in 2017 was 77%, whereas the Ultimate Bar Passage rate for this same cohort achieved an 89% success rate. Similarly, first-time takers in 2018 passed at a 75% rate, while they ultimately hit 90% for Standard 316. Finally, 2019 graduates performed at an 80% first-time rate and finished the 2-year Ultimate Bar Passage window with a 91% pass rate.).

²⁴ See AM. BAR. ASS'N, *supra* note 12 (ABA Standard 316 states that “[a]t least 75 percent of 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.”).

²⁵ See *Bar Exam Results by Jurisdiction—July 2022 Bar Exam*, NAT'L CONF. BAR EXAM'RS, (Nov. 16, 2022, 7:26 AM), <https://www.ncbex.org/statistics-and-research/bar>

reporting is inaccurate, incomplete, often misleading, and can harm a law schools' reputation and future student access. It also incentivizes law schools to try and improve their metrics using methods that are not in the best interests of their students.²⁶

This article argues that the current disjointed system for reporting Bar results is broken. It is also unfairly prejudicial to publish Bar results by first-time taker status, and any probative value first-time passage rates may have is outweighed by the harm publishing such results may cause.²⁷ In Section II, this article discusses the Bar Exam itself, including criticisms and calls to do away with the bar entirely. In Section III, this article examines the role of the American Bar Association in collecting bar results and using those results for the accreditation of law schools. In Section IV, this article discusses how different jurisdictions utilize and disseminate Bar Exam results. Section V examines the harm caused by disharmonious reporting schemes to schools and students. In Section VI, this article concludes by recommending that all jurisdictions releasing pass rate data conform to a method of uniformity consistent with Standard 316, that the ABA update its definition of first-time taker on its bar questionnaire and have a requirement that the NCBE facilitate UBE transfer data proactively within the first two years of graduation.

exam-results/ [<https://perma.cc/38YS-HMQH>] (see bar results for Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington State).

²⁶ These can include delaying taking the July exam until February, which has less prominence due to its smaller sample size. It can also disappear entirely from reporting by choosing where to sit first or taking only one element of the exam where permitted. The list of 'workarounds' gets longer every year.

²⁷ FED. R. EVID. 403.

II. THE BAR EXAM: FROM START TO FINISH

A. What is the Bar Exam?

1. History and Components

The Bar Exam, in its current iteration, is the licensing test administered by each independent jurisdiction twice a year in February and July.²⁸ But the ability to practice law in the United States has evolved over its history and has not always included graduating from law school or taking a written exam. In the late 1700s, the concept called “reading the law” was utilized, consisting of a combination of apprenticeships or other direct supervision and support from practicing attorneys.²⁹ President John Adams is one of the more famous examples of becoming a lawyer in this format.³⁰ This standard, often requiring two or more years of apprenticeship, was also not universal in its application.³¹ President Abraham Lincoln provided what may have been the least extensive reading and oral exam ever administered to Jonathan Birch.³² Consisting only of a handful of questions about his latest readings and general conversation, much of which lacked any relation to the law, before writing and recommending his admission to the court.³³

²⁸ Noted exceptions include the Puerto Rico exam, which is administered in March and September, as well as in Spanish. Additionally, the Delaware and Palau exams are still currently only once a year, in July. Delaware is adjusting to twice a year beginning in 2024. During the Covid-19 pandemic, many jurisdictions adjusted not only their date of administration but also their format. Some jurisdictions, like Florida, cut the exam into only one day and most required remote testing options only.

²⁹ Debra Cassens Wein, *Students Try to Avoid Law School Costs With ‘Reading Law’ Path to Law License*, A.B.A. J., (July 30, 2014), https://www.abajournal.com/news/article/want_to_avoid_the_costs_of_law_school_these_students_try_reading_law_path_t [<https://perma.cc/M837-QU4R>].

³⁰ See Early Life Education, JOHN ADAMS HIST. SOC’Y, (Feb. 29, 2012), <http://www.john-adams-heritage.com/early-life-education/> [<https://perma.cc/FC4D-6MB9>].

³¹ Richard Abel, *AMERICAN LAWYERS* 51–52 (1989).

³² ALBERT J. BEVERIDGE, *ABRAHAM LINCOLN, 1809–1858, VOL. I*, 528–29 (1928).

³³ *Id.*

Slowly, states began to organize legal professional association groups to facilitate and execute examinations and standards for future tests. The Bar Associations within each jurisdiction is the self-governing body—made up of licensed attorneys from the jurisdiction—who are responsible for maintaining and restricting membership for the practice of law locally.³⁴ These are a separate and distinct group from the Board of Bar Examiners. The Board of Bar Examiners is created and appointed powers by the state supreme court, with the express purpose of administering a Bar Exam and conducting “Character and Fitness” background checks for applicants.³⁵ Such background checks can be intrusive and historically biased.

The early Bar Examinations took the format of oral administrations, though they evolved into more standardized written versions in the last century.³⁶ The rules and standards for admission varied across the jurisdictions. The lack of uniformity was of particular concern for the Legal Education section of the American Bar Association, which had previously been instrumental in forming the Association of American Law Schools.³⁷ In 1931, a committee was appointed to investigate the idea of creating a national Bar Examiner group; this was also the same year that the National Conference of Bar Examiners (NCBE) was founded.³⁸

The NCBE is a corporation run as a not-for-profit entity to formulate, research, and assist in creating and administering Bar Exam licensing exams.³⁹ The NCBE provides access to several exam components and options, including the Multistate Bar Exam (MBE), Multistate Essay Exam

³⁴ See Abel, *supra* note 31.

³⁵ Similarly situated high court of appeals, with some jurisdictions also allowing the legislation to exert influence.

³⁶ Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, (Jan. 2. 2021), https://media.law.wisc.edu/s/c_420/ywq4n/gargoyle_21_1_2.pdf [<https://perma.cc/6P2K-JCJC>].

³⁷ *Id.*

³⁸ *Id.*

³⁹ NCBE, *supra* note 13.

(MEE), Multistate Performance Test (MPT), Uniform Bar Exam (UBE),⁴⁰ and jurisdictions can decide which elements, if any, to use. At the jurisdictional level, licensing material is created and administered utilizing NCBE materials in conjunction with internally created state-specific materials.⁴¹ Alternatively, each jurisdiction can choose to utilize and adopt the increasingly popular prepackaged set of exams known as the UBE.⁴²

From the beginning, the NCBE worked closely with the ABA to fine-tune what should be included on a national legal licensing exam and made great strides away from generic fill-in-the-blank, and list response-inducing prompts. Working together, the NCBE and the ABA created the Code of Recommended Standards for Bar Examiners, initially created in 1959, revised in 1980, adjusted in 1987, and added minor updates in 2010 and 2019.⁴³ “The Recommended Standards are offered in an effort to provide guidance and assistance and will lead toward uniformity of objectives and practices in bar admissions throughout the United States.”⁴⁴

In 1970, the Multi-State Bar Exam (MBE) was born, and this was the first time that a uniform exam, multiple-choice in nature, could be administered nationally for admission to the practice of law.⁴⁵ The MBE is a 200-question multiple-choice exam broken into two sections allotted three hours each.⁴⁶ The topics covered are Contracts, Constitutional Law, Criminal Law,

⁴⁰ NCBE Media Kit, NAT’L CONF. OF BAR EXAM’RS, [hereinafter MEDIA KIT], <https://www.ncbex.org/about/media-kit/> [<https://perma.cc/8LLX-D2F6>].

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *Code of Recommended Standards for Bar Examiners*, Comprehensive Guide to Bar Admission Requirements, <https://reports.ncbex.org/comp-guide/code-of-recommended-standards/#:~:text=A%20bar%20examiner%20should%20be%20just%20and%20impartial%20in%20recommending,lack%20moral%20character%20and%20fitness> [<https://perma.cc/FVK2-XCJ6>].

⁴⁴ *Id.*

⁴⁵ See NCBE TESTING MILESTONES, [hereinafter MILESTONES], NAT’L CONF. BAR EXAM’RS, <https://nextgenbarexam.ncbex.org/wp-content/uploads/NCBE-Testing-Program-Timeline.pdf> [<https://perma.cc/KSW7-KDH2>].

⁴⁶ *Multistate Bar Examination*, NCBE, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mbe/> [<https://perma.cc/55JX-57N4>].

Criminal Procedure, Evidence, Real Property, Torts, and Civil Procedure.⁴⁷ While there was an obvious appeal for a national exam, it took nearly three decades for its first iteration to come to pass.⁴⁸ One of the main criticisms was the fear that a lack of autonomy and control at the jurisdiction level would occur.⁴⁹ As a result, the setting of scoring standards and admission to practice is managed exclusively by each jurisdiction.⁵⁰

The Multi-State Professional Responsibility Exam (MPRE) was introduced in 1980 by the NCBE as an additional national component for jurisdictions to utilize in their admission standards.⁵¹ The MPRE is a sixty-question multiple-choice exam, allotted two hours and administered three times a year; it is intended to measure candidates' knowledge and understanding of established standards related to the professional conduct of lawyers.⁵² Deviating from the MBE element of the national test, control over the MPRE has never been relinquished, and to this day, it is still administered through the NCBE and not the local jurisdictions. Examinees take the MPRE in testing centers nationally and indicate which jurisdiction they would like a score report sent to.⁵³ Each jurisdiction still controls and sets its score requirements.⁵⁴

In 1988, the NCBE released the MEE, its newest option.⁵⁵ The MEE consists of six 30-minute essays covering “the 7 MBE topics plus Business Associations, Conflicts of Laws, Family Law, UCC Art. 9 (Secured

⁴⁷ *Preparing for the MBE*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/preparing/> [<https://perma.cc/65UN-RTX2>].

⁴⁸ MILESTONES, *supra* note 45.

⁴⁹ Melli, *supra* note 36.

⁵⁰ *Id.*

⁵¹ MILESTONES, *supra* note 45.

⁵² *Multistate Professional Responsibility Examination*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mpre/> [<https://perma.cc/5ATA-R9MT>].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ MILESTONES, *supra* note 45.

Transactions), and Trusts & Estates.”⁵⁶ Thus, the first national standardized exam for lawyer admittance, which moved away from the multiple-choice format and embraced the newer and more acceptable essay approach, was born.

Finally, in 1997, the NCBE created and administered the Multistate Performance Test (MPT) which was initially utilized in less than a handful of jurisdictions.⁵⁷ The MPT consists of two 90-minute sections, which cover “a simulated case file presented in a realistic setting and calling for the test candidate to demonstrate fundamental lawyering skills regardless of the area of law in which the task arises.”⁵⁸ This shift to more practice focused tasks paves the way for future adjustments to the exam. The MPT creates a “closed universe” exam that does not rely on the memorization skills of an examinee to test aptitude;⁵⁹ instead, tending to replicate the skills a first-year associate would need in performance of both practical and focused skills beginning the practice of law. These include using time-sensitive material absorption, analysis, the ability to follow instructions, and attention to detail.⁶⁰

The Bar Exam is currently administered in fifty-six jurisdictions.⁶¹ All jurisdictions decide how to administer their Bar Exam and whether they wish to utilize all, any, or no components of the available tests created and curated by the NCBE.⁶² While not required, nearly every jurisdiction currently works with the NCBE in some capacity or another.⁶³ However, places such as Louisiana and Puerto Rico utilize no elements from the NCBE, and they

⁵⁶ *Multistate Essay Examination*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mee/> [<https://perma.cc/F7NA-9X6D>].

⁵⁷ MILESTONES, *supra* note 45.

⁵⁸ *Multistate Performance Test*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/mpt/> [<https://perma.cc/W7QV-72PU>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Every state plus the District of Columbia, Guam, Puerto Rico, U.S. Virgin Isles, Northern Mariana Islands, and Palau.

⁶² MEDIA KIT, *supra* note 40.

⁶³ See NAT’L CONF. BAR EXAM’RS, *supra* note 46.

create and administer their examinations without input from these outside influences.⁶⁴ Some states, such as Florida, only utilize NCBE's MBE component.⁶⁵ The state-specific portion consists of three essays in the morning and 100 state-specific multiple-choice questions, administered as two three-hour sections the day before the MBE.⁶⁶ The number of similarly deviating jurisdictions used to be higher but has fallen precipitously since the growth and adoption of the Uniform Bar Exam.

2. The Uniform Bar Exam

By combining the MEE, MPT, and MBE into a single two-day exam, a cohesive test is implemented nationally, with a score intended to be portable between participating jurisdictions.⁶⁷ The UBE seeks to create "the same exam, administered consistently."⁶⁸ Some UBE jurisdictions also have additional requirements for state-specific components.⁶⁹ However, in order to be considered a UBE exam at all, all the following elements must be

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FLA. BD. BAR EXAM'RS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748> [<https://perma.cc/YFV8-6SKK>].

⁶⁷ See UNDERSTANDING THE UNIFORM BAR EXAM, NAT'L CONF. BAR EXAM'RS, <https://ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209> [<https://perma.cc/QG3Y-TTAS>].

⁶⁸ KELLY R. EARLY, THE UBE: THE POLICIES BEHIND THE PORTABILITY [hereinafter POLICIES BEHIND THE PORTABILITY], THE BAR EXAM'R, (Sept. 2011), https://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800311Early.pdf [<https://perma.cc/SL9Q-FUML>].

⁶⁹ See NAT'L CONF. OF BAR EXAM'RS, *supra* note 67.

present: the MPT, MEE, and MBE.⁷⁰ A typical breakdown of point allocation is 50% MBE, 30% MEE, and 20% MPT.⁷¹

The NCBE creates the UBE and is responsible for disseminating the exam components to jurisdictions that implement it.⁷² The NCBE utilizes drafting committees composed of professors, lawyers, and judges who have subject matter expertise.⁷³ An internal and external review of all questions, including for validity and fairness, is undertaken, including the use of pretests.⁷⁴ The UBE has been available for states to adopt since 2011, when only Missouri, North Dakota, and Alabama adopted this format.⁷⁵ Since then, the growth of the UBE has exploded to the current forty-one of fifty-six jurisdictions participating.⁷⁶ This represents an incredible 73% of all jurisdictions utilizing the UBE as their exam of choice.⁷⁷ As a result, most students nationally sit for a jurisdiction that administers the UBE.⁷⁸

⁷⁰ *Id.* (jurisdictions with state-specific elements include New Mexico, which administers a live course. Alabama, Arizona, Kentucky, Michigan, Montana, New York, North Carolina, South Carolina, Tennessee, and Texas have online courses. Lastly, Maryland, Massachusetts, Missouri, New York, Ohio, the Virgin Islands, and Washington have an online, open-book multiple-choice test).

⁷¹ *Id.*

⁷² See *Understanding the Uniform Bar Exam*, NAT'L CONF. BAR EXAM'RS, <https://ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [https://perma.cc/QG3Y-TTAS].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Adoption of the Uniform Bar Examination with NCBE Tests Administered by Non-UBE Jurisdictions*, NAT'L CONF. BAR EXAM'RS (Feb. 22, 2022), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F196> [https://perma.cc/6FKA-VG2Z].

⁷⁶ *Id.*

⁷⁷ *Id.* (41 out of 56 jurisdictions).

⁷⁸ See *The Uniform Bar Examination (UBE)*, NCBE, <https://thebarexaminer.ncbex.org/2021-statistics/the-uniform-bar-examination-ube/> [https://perma.cc/5LNH-DEA2] (in 2021, 40,502 examinees sat for the Uniform Bar out of 64,833 who sat for any examination); see *2021 Statistics Snapshot*, NCBE, <https://thebarexaminer.ncbex.org/2021-statistics/2021-statistics-snapshot/> [https://perma.cc/MSE7-2327].

The UBE is scored by combining the components of both exam days according to predetermined formulas. The exam is scored out of a total of 400 scaled points.⁷⁹ Each UBE jurisdiction is in charge of setting its own scoring requirements, or what is commonly referred to as “cut scores.”⁸⁰ There are several groupings of cut scores for the UBE, ranging from a low of 260 to a high of 280.⁸¹ There is much discussion about the process, or lack of, that goes into setting these cut scores and the impact that raising or lowering them has on examinees and the profession.⁸²

After taking the UBE, regardless of the physical location of the administering jurisdiction, the score should be transferable amongst all participating jurisdictions.⁸³ The receiving jurisdiction does not adopt admission status or any other requirements of the administering jurisdiction.⁸⁴ This distinction is crucial because otherwise, examinees who attempt but fail in jurisdictions with higher cut scores could never transfer to another lower cut score jurisdiction.⁸⁵ The score is what examinees transfer, not the admissibility or pass status in the location they attempted.

B. What is the Purpose of the Bar Exam?

The history and purpose of the Bar Exam are complex and nuanced. However, many people take the position that it is intended as a gatekeeping tool to protect the public—some argue by ensuring minimum competence.⁸⁶ While minimum competence in law practice appears to be the express purpose of the Bar Exam, there does not appear to be a readily identifiable

⁷⁹ NAT’L CONF. BAR EXAM’RS, *supra* note 67.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Michael B. Frisby, et al., *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, 70 J. LEGAL EDUC. 125 (2020); *see also* Anderson & Muller, *infra* note 261.

⁸³ POLICIES BEHIND THE PORTABILITY, *supra* note 68.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565 (2015).

definition, clearly articulated meaning, or measurement of its effectiveness.⁸⁷ While some jurisdictions have recently conducted studies and even memorialized the intent of their definitions,⁸⁸ others have no posted definition, or worse, still seemingly use ad hoc understandings and references to vague, broad, and difficult-to-apply standards.⁸⁹ Critics have argued whether the Bar Exam achieves its presumed goals and what should be done to amend it more closely with its purpose.⁹⁰ Some argue that the essential tools and elements necessary to succeed on this exam are made up of elements not particularly useful—or even applicable—to the effective practice of law.⁹¹

⁸⁷ See Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. L. REV. 675, 684–90 (2016).

⁸⁸ See Chad Buckendahl, *Conducting a Standard Setting Study for the California Bar Exam, Final Report* (July 28, 2017), <https://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001929.pdf> [<https://perma.cc/6QMW-52GW>] (A minimally competent applicant will be able to demonstrate the following at a level that shows meaningful knowledge, skill and legal reasoning ability, but will likely provide incomplete responses that contain some errors of both fact and judgment: (1) Rudimentary knowledge of a range of legal rules and principles in a number of fields in which many practitioners come into contact. May need assistance to identify all elements or dimensions of these rules. (2) Ability to distinguish relevant from irrelevant information when assessing a particular situation in light of a given legal rule, and identify what additional information would be helpful in making the assessment. (3) Ability to explain the application of a legal rule or rules to a particular set of facts. An applicant may be minimally competent even if s/he may over or under-explain these applications, or miss some dimensions of the relationship between fact and law. (4) Formulate and communicate basic legal conclusions and recommendations in light of the law and available facts.)

⁸⁹ On November 8, 2022 at a LexCon conference in Nashville, Tennessee, Supreme Court Chief Justice for Delaware, the Honorable Collins J. Seitz, Jr., as a member on a panel covering reforming the bar and the NCBE, stated in response to the question of how is minimally competent defined, they compared it to the “definition of obscenity. We will know it when we see it.” (Using such an approach is clearly problematic.)

⁹⁰ See Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 7 (2019); see also Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002).

⁹¹ See Andrea A. Curcio et al., *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206 (2014) (discussing the failures of the bar examiner to consider outside impacting factors on success when it comes to standardized exams, particularly as they impact diversity).

C. Criticisms of the Bar

Significant criticism of the Bar Exam over its many years of existence is not new. There are those in legal academia pushing for more extensive legal licensure reform over a more limited one.⁹² Dean Emerita Howarth, of Michigan State University College of Law and Dean Emerita Wegner, of University of North Carolina School of Law provide an extensive discussion of potential alternatives and how they would be implemented.⁹³ A longer discussion of these alternatives requires its own discussion. Though, criticism of the need for an exam is far from universal or harmonious.

One of the strongest arguments for such an exam to exist is that attorneys are professionals in a unique position where they can cause significant harm to those they represent if there is not a minimum standard of professionalism, expertise, and accountability imposed by some authoritative governing body.⁹⁴ However, present in the creation and evolution of many professional industries in this country, there is a pattern of implicit bias in admission to the Bar. This is visible through more examples than many people care to admit of explicit ugliness in the creation, administration, and dissemination of information related to this test. Criticisms of the Bar Exam fall generally into one of four categories: 1) its failures to measure competency; 2) active and historical discrimination; 3) the preparations necessary; and 4) other life impediments.

⁹² See Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383 (2019).

⁹³ *Id.*

⁹⁴ See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 437–38 n.26 (2001).

1. The Bar Exam Does Not Measure Competency

A familiar and recurring criticism is that the exam is not a good measurement tool for competency.⁹⁵ Any attempt to argue that the Exam is evaluating competency and skills needed for a practicing attorney is challenging and either ill-informed, or just dishonest. The current Exam format relies heavily on memorizing rules, elements, and specific distinctions.⁹⁶ While impressive, this skill is not explicitly necessary, or reflective of competence, in a practicing attorney.⁹⁷ Newly minted lawyers who respond to a problem presented by a client, strictly from memory, are arguably teetering on malpractice. The existence of this Exam is not a forgone requirement in the creation of attorneys, and for much of the early history of the adoption of a Bar Exam requirement, large portions of attorneys did not think the test was necessary.⁹⁸

In 2002, the Society of American Law Teachers (“SALT”) released a statement on the Bar Exam touching upon the following three areas: the Bar Exam’s failure as a measurement tool for competent lawyering, the Bar Exam’s impact on law school admission and curriculum focus, and the Bar Exam’s harmful impediment of a more diverse legal community.⁹⁹ For this paper, I pay particular attention to the six stated reasons SALT provides as to why the Bar Exam fails to ensure minimum competency for a new attorney, all of which are equally relevant twenty years later.

⁹⁵ Leanne Fuith, *Building a Better Bar Admissions Process: A Look at What the Minnesota State Board of Law Examiners Is Doing in Its Two-Year Study of the Bar Exam—and What Other Jurisdictions Are Considering*, 79 BENCH & B. MINN. 14 (2022).

⁹⁶ Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam—July 2002*, 52 J. LEGAL EDUC. 446, 452 (2002).

⁹⁷ *Id.*

⁹⁸ Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 173 (2022) (citing Richard A. Stack Jr., *Attorneys: Admission Upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 122 (1975)).

⁹⁹ See Curcio, *supra* note 96.

The reasoning begins with the severely limited function of the exam to test essential skills relevant to practice, including, but not limited to, negotiating, counseling, and problem-solving.¹⁰⁰ Additionally, the Bar problematically focuses on memorization and an artificial application of the rules in an unrealistic timed setting.¹⁰¹ There is a national movement towards a non-state specific testing scheme.¹⁰² This is not only unhelpful in measuring competence since most attorney practice is jurisdictionally based, but it also does not take into consideration that most practicing attorneys are specialists in their field, rather than focusing on generalized law across all disciplines.¹⁰³ Finally, the prevalence of commercial Bar preparation companies focused on guiding students through the exam means that the Bar Exam is not testing competence, but rather whether an examinee has access, and time, dedicated to learning how to beat the system.¹⁰⁴

2. The Bar Exam Perpetuates Discrimination

*“Persistent gaps in average test scores among ethnic groups have less to do with underlying ability than how that ability is measured.”*¹⁰⁵

There are many concerns with the Bar Exam and its ability to function to its potential, including its disproportionately negative impact on certain groups.¹⁰⁶ Discrimination and the Bar Exam are no strangers. Black law

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Deborah Jones Merritt, *Raising the Bar: Limiting Entry to the Legal Profession*, 70 THE BAR EXAM EXAMINER 70.4 (2001)

¹⁰³ See Curcio, *supra* note 96.

¹⁰⁴ *Id.*

¹⁰⁵ PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA’S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 218 (Da Capo Press, 1999).

¹⁰⁶ See Scott DeVito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J.L. REFORM 597 (2022); see also Terra Nevitt, *Examining the Bar Exam: Exploring Alternative Models for Licensing*, 75 WASH. ST. B. NEWS 10 (2021) (discussing the need to address the disproportionate impact of the Bar on underrepresented groups).

school graduates have been discriminated against in admission to the practice of law for as long as they have been allowed to attend law school. When the first three Black attorneys were admitted to the ABA, a vote was taken to remove them for the purpose of “keeping pure the Anglo-Saxon race.”¹⁰⁷ Currently, prospective Black lawyers experience exclusion and marginalization in law school matriculation, in law school, in the Bar Exam, and in the legal profession.¹⁰⁸

While, thankfully, enrollment of minority students in law schools nationally is growing consistently since the early 1970s, the issues of disparity and impact have not been adequately addressed yet.¹⁰⁹ The Law School Admission Council (“LSAC”) conducted a National Longitudinal Bar Passage study, which showed that nationally, for a period of five years beginning in 1991, Black examinees substantially underperformed all other groups, both in first attempts and eventual success.¹¹⁰

Some people believe that the Bar Exam is so steeped in a history of racism and inequality that it must be abolished entirely.¹¹¹ As a glaring singular example of the historical reality of this position, we need only look to South Carolina in the 1950s. South Carolina implemented the need for a Bar Exam after utilizing diploma privilege for many years, only after it became clear that there was an increasing number of Black law school graduates becoming

¹⁰⁷ 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).

¹⁰⁸ See Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489 (2019).

¹⁰⁹ See 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 (2004).

¹¹⁰ Linda F. Wightman, *LSAC Nat’l Longitudinal Bar Passage Study*, L. SCH. ADMISSION COUNCIL 80 (1998).

¹¹¹ Oday Yousif Jr., *The Bar Exam Is Stained with Inequality and Racism. It Needs to be Abolished*, SAN DIEGO UNION-TRIB., (Dec. 7, 2020), <http://www.sandiegouniontribune.com/opinion/commentary/story/2020-12-07/abolishing-the-bar-exam-bias> [<https://perma.cc/RNK6-UK3Q>].

eligible to become attorneys.¹¹² The Speaker of the South Carolina General Assembly clearly expressed the purpose and said this shift was adopted to “bar Negroes and some undesirable whites.”¹¹³ The new rule and administration of the Bar Exam in South Carolina did precisely that; it resulted in only 15% of Black examinees succeeding compared to 90% of their white counterparts for years to come.¹¹⁴

Performance differences exist for the Bar Exam, which vary based on race and other elements.¹¹⁵ The source of the disparity in performance is debated, and perhaps to some extent still somewhat unclear, but it exists all the same.¹¹⁶ We need to draw attention to these inequities if we seek to eradicate them. Issues related to disparities in access and outcome are of particular concern, specifically regarding race, gender, and ethnicity.¹¹⁷ Research continues to show significant disparities between, and underperformance by, minorities as compared to their white counterparts.¹¹⁸ Historically, minority students also have earned lower grade point averages in law school, as

¹¹² R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935–1975*, 109 AM. J. EDUC. 320, 331 (2001).

¹¹³ *Id.* (This language is included to show the audacity, openness, and level of hostility prevalent in the legislative bodies impacting the ability to practice law. This is a direct rebuke and response to those who would say this exam is to ‘protect the public’, ‘ensure minimum competency’, or some other hurried justification for the exam.).

¹¹⁴ *Id.* (citing *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976) trial tr. vol. 1, 10 (Baker gives additional examples of similar travesties, including the great state of Mississippi.)).

¹¹⁵ See DeVito, *supra* note 106.

¹¹⁶ Katherine L. Vaughns, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities between Racial and Ethnic Groups*, 16 T. MARSHALL L. REV. 425 (1991); see also Sybil Rosado, *When Will Black Lives Matter to the Florida Board of Bar Examiners?*, JURIST (June 30, 2020), <http://www.jurist.org/commentary/2020/06/sybil-rosado-black-lives-matter-florida-bar-exam/> [<https://perma.cc/3KMD-APFR>].

¹¹⁷ See Leanne Fuith, *Is There a Better Way to Admit Lawyers?: The Future of the Bar Exam Needs a Hard Look*, 78 BENCH & B. MINN. 12 (2021); see also Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799 (2020).

¹¹⁸ See Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, 61 N.Y. ST. B.J. 42 (1989).

compared to their white counterparts.¹¹⁹ Research on bar performance and racial impact shows a significant relationship between socioeconomic origin and performance in law school, and—as an extension—the Bar Exam.¹²⁰ This connection was reconfirmed in a 2021 study, which showed that support has an outsized impact on performance on the Bar Exam.¹²¹

Furthermore, the heavily standardized format of the Bar Exam is disproportionately discriminatory to minority students while being advantageous to others. Changes to the content, cut scores needed for admission, and even format of the exam have been made over the years, and those adjustments tend to be on a national scale.¹²² Nevertheless, despite these changes, the Bar Exam is still testing too much and not enough, negatively impacting Bar pass results and actual competency.¹²³ Jurisdictions, associations, professors, and other interested stakeholder continue to conduct national research and analysis of performance metrics based on the MBE.¹²⁴ The performance deviations and grouping are consistent with the most recently available data from the ABA.¹²⁵

Black students underperforming their white counterparts on the Bar Exam is a problem that has coincided with the legal field for many years. Despite attempts to clarify the source and formulate a solution to this issue, we still struggle with this reality.¹²⁶ Addressing racially diverse outcomes in the legal field, particularly in admission to and success on the Bar, are not simple problems. While admitting a problem exists is always the first step toward

¹¹⁹ See Vaughns, *supra* note 116.

¹²⁰ See Timothy T. Clydesdale, *A Forked River Runs through Law School: Toward Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage*, 29 L. & SOC. INQUIRY 711 (2004).

¹²¹ See Jackson & Cochran, *supra* note 22.

¹²² See Merritt, *supra* note 102.

¹²³ See *id.*

¹²⁴ Clydesdale, *supra* note 120.

¹²⁵ See Douglas R. Ripkey & Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, B. EXAM’R 21 (Aug. 2007).

¹²⁶ See Dan Subotnik, *Does Testing = Race Discrimination: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013).

recovery,¹²⁷ working to address the issue with accurate data is an important and good second step.¹²⁸ The NCBE has taken steps to try and remedy some inherent concerns, but these steps remain grossly inadequate in their impact.¹²⁹ Comprehensive ABA rules and standards already exist to both regulate and ensure the quality of law school graduates.¹³⁰ The duplicative gatekeeper function of the Bar Exam, for the legal profession, contributes little more than being a discriminatory barrier to entry.¹³¹

There are obvious reasons why the Bar Exam should be non-discriminatory, not the least of which is the ethical implications and professional responsibility of those creating and administering the exam.¹³² However, it is insufficient to state that only the exam itself is anti-discriminatory. The legal community must also demand transparency where the methods and formats used to disclose statistics and bar passage results match that standard of harm reduction. Breaking results down by race, ethnicity, and gender paints a stark picture, which is made worse when making artificial distinctions between first-time and Ultimate Bar Passage results.¹³³ One of the primary methods of collecting data is the ABA bar

¹²⁷ *12-Step Recovery*, GUARDIAN RECOVERY NETWORK, <https://www.guardianrecoverynetwork.com/addiction-treatment/12-step-recovery/step-1-admit-powerlessness-over-addiction/> [https://perma.cc/Y724-7BGA] (The addiction here has been, and continues to be, disparate outcomes.).

¹²⁸ Cross, *supra* note 109.

¹²⁹ *Diversity, Fairness, and Inclusion*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/about/diversity-fairness-and-inclusion/> [https://perma.cc/A5UB-T2XG].

¹³⁰ See AM. BAR. ASS'N, *supra* note 12.

¹³¹ Markovic, *supra* note 98.

¹³² See Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931 (2020) (discussing Title VII and how workplace discrimination standards relate to disparate impact while not applying to licensure exams like the bar exam should nonetheless be the standard to which we aim to adhere. The discussion culminates with alternative options and considerations for a less discriminatory exam. While this is a vital and lofty goal, achieving it for the structure of the exam may prove more difficult.).

¹³³ *Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire*, AM. BAR ASS'N,

passage questionnaire. This document, which all law schools are required to submit to the ABA, contains data on the performance results of graduates on the Bar Exam, as well as artificial distinctions between first-time takers and Ultimate Bar Passage results.¹³⁴ These outcomes are also separated by student self-identified race, gender, and ethnicity groupings.¹³⁵

Taking the only recent complete national set of data available as it relates to results and race, gender, and ethnicity, we see alarming results. Students who self-identified as Black recorded first-time-taker results for the class of 2019 of only 61%; this same group one year later had a one-year Ultimate Pass Rate of 75% and, after two full years, produced an Ultimate Pass Rate of 81%.¹³⁶ The growth in performance represents a remarkable 51% pass rate amongst the same Black students who *did not pass on the first attempt yet did so in the remaining two-year window*.¹³⁷ Nationally, during the same graduating class year, self-identified white students passed under the first-time-taker designation at a reported 85%; one year later, at 91% and posted an Ultimate Passage two years out at 94%.¹³⁸ This represents a similarly impressive 60% pass rate amongst white students who did not pass on the first attempt but did manage to do so in the remaining two-year allotted time.

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/Y2JK-GMPP>]; *Summary Bar Pass Data: Race, Ethnicity, and Gender 2021 and 2022 Bar Passage Questionnaire*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf [<https://perma.cc/2ZFF-LW2D>] [hereinafter *Data*].

¹³⁴ See *Questionnaires and Applications*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/questionnaire/ [<https://perma.cc/6ZDH-4X9F>] and open the 2022 Bar Passage Questionnaire Instructions.

¹³⁵ See generally *The Bar Passage Questionnaire*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov20/bar-passage-questionnaire.pdf [<https://perma.cc/X9T8-P4GK>].

¹³⁶ *Data*, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ *Id.*

The discrepancy between Black and white students is easily visible in the aggregate data.¹³⁹ However, it is arguably the most striking in the first-time category. In 2019, 2020, and 2021, the difference in the first-time Bar Examinee category for successful bar takers between Black and white students were twenty-four points, twenty-two points, and twenty-four points, respectively.¹⁴⁰ The most glaring gender statistic is when differentiating between Black male and female examinees who are first-time Bar Examinees. Women tend to outperform on the first attempt by an average of 5% points, with a noticeable deviation from the trend in the 2021 data.¹⁴¹ However, men close the gap to an average of one point by the time the two-year Ultimate Rate period comes and goes.¹⁴² No statistically relevant difference or trend is readily ascertainable for white males and females in the same time window.¹⁴³

The impact of choices and changes to cut scores, bar result reporting metrics, and disparate racial impacts are all problems that continue to exist nationally. To further support this, let us turn our attention to when Florida revealed its statistics and cut score decision making on its Bar Exam at the turn of the 21st century. In 2001, the Florida Supreme Court required the Board of Bar Examiners to release racial data on the February 2000 and July 2000 Florida Bar Exams.¹⁴⁴ The results revealed that 68.5% of whites passed compared to 53.2% of minorities when the Florida Bar Exam utilized a 136 threshold score, and 79.7% of white students would pass compared to 65.6% of minority students with a 131 threshold score.¹⁴⁵ Despite this, the Florida

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & Soc. INQUIRY 547 (2004) (this concept is explored in greater detail in a discussion on national cut scores and the continuing decline in the MBE scores).

¹⁴⁵ *Id.*

Supreme Court decided to raise the cut score.¹⁴⁶ This story has played out countless times nationally.

The data is clear: there are substantial differences between the Ultimate Bar Pass Rate of Black and white students.¹⁴⁷ Even more importantly, the data shows two other trends that cannot be ignored. First-time-examinee pass rates for Black students are well below the national average and similar groupings of students, with only a 61% pass rate nationally in two of the last three years and an aggregate of 63% over the last three years.¹⁴⁸ Second, most Black students who are unsuccessful on their first attempt are successful in subsequent attempts, and most even do so within the two-year allotted time of the ABA Standard 316 Ultimate Bar requirements.¹⁴⁹

The reality that there are visible disparate impacts on performance when talking about the Bar Exam results and race should trigger serious discussions and potential solutions.¹⁵⁰ An unhealthy focus on first-time status also hurts Black students disproportionately, by dissuading repeat attempts, which is not in line with the ABA Standard 316. The Longitudinal report mentions that while “overall, the number of first-time failures who did not make a second attempt is small, they represent a substantial portion of Black and Hispanic law school graduates.”¹⁵¹ Social capital, defined as familial engagement in the legal community, particularly having close relatives who are also practicing attorneys, is most lacking, unsurprisingly, with Black students.¹⁵² This lack of social capital, support in navigating law school and the Bar Exam process, is a predictable outcome of years of discrimination.

The situation we find ourselves in is that the standardized admissions test for attorneys created and released by the NCBE is discriminatory and

¹⁴⁶ *Id.*

¹⁴⁷ *Data, supra* note 133.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Curcio, supra* note 91.

¹⁵¹ *Wightman, supra* note 110.

¹⁵² *Clydesdale, supra* note 120.

deficient. There is even a strong argument that the NCBE continues to contribute to increased bias in the legal profession.¹⁵³ There is some hope that more can be considered and delivered in creating and executing the NCBE's NextGen Bar Exam.¹⁵⁴ The NCBE released a final report in April 2021 about the shift toward, its reasoning for, and the potential makeup of the next version of the Bar Exam.¹⁵⁵ The current round of recommendations focuses on reducing the number of tested topics and decreasing the amount of generalized broad topics and materials assessed.¹⁵⁶ This change in direction for what the NCBE wants to transition to, focuses on what they refer to as lawyering skills while continuing to create "a fair, accessible exam" with the greatest ability for a transferable and portable score nationwide.¹⁵⁷

3. The Harsh Realities of the Bar

Each year, thousands of people fail the Bar Exam. In 2021, 64,833 people sat for a Bar Exam in one of the fifty-six jurisdictions in the U.S.¹⁵⁸ Roughly 60%, or a total of 38,806 individuals, passed.¹⁵⁹ The other side of this 2021 bar taker statistic is that 26,027 people who endured all the hardships of law school, test preparation, and the exam itself, still fell short of passing. Over

¹⁵³ Heather Antecol et al., *Bias in the Legal Profession: Self-Assessed Versus Statistical Measures of Discrimination*, 43 J. LEGAL STUD. 323 (2014).

¹⁵⁴ See FINAL REPORT OF THE TESTING TASK FORCE, NAT'L CONF. BAR EXAM'RS TESTING TASK FORCE (Apr. 2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf> [<https://perma.cc/H5QY-CMMB>].

¹⁵⁵ *Id.*

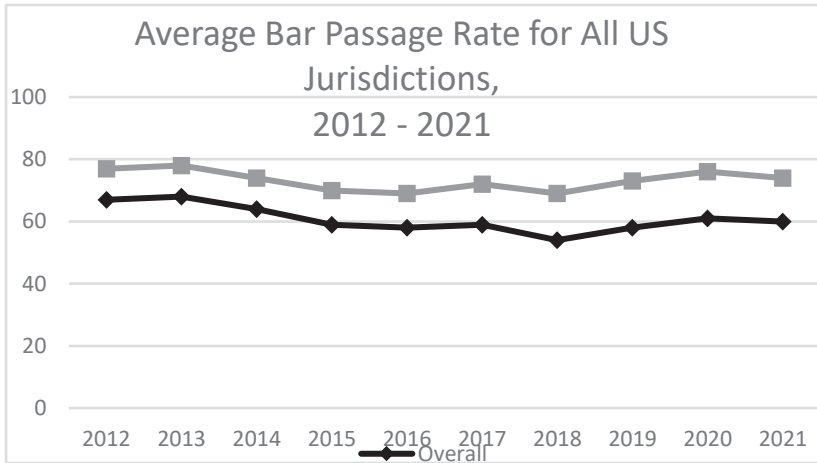
¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Persons Taking and Passing the 2021 Bar Examination*, BAR EXAM'RS, <https://thebarexaminer.ncbex.org/2021-statistics/persons-taking-and-passing-the-2021-bar-examination/> [<https://perma.cc/JFE9-8K6Z>].

¹⁵⁹ *Id.*

the last ten years, an average of 60.8% of all bar takers will pass.¹⁶⁰ First-time takers fare better, with an average 73.2% passage rate.¹⁶¹



The Bar requires a specific approach and comprehensive support system, without which securing a passing score on this already difficult exam becomes all but unattainable for some. Significant swaths of examinees are unsuccessful on the Bar every administration, regardless of jurisdiction. Below is a discussion of some aspects of the Bar Exam that lead to adverse outcomes, including costs associated with preparing for the Bar Exam that places a significant financial strain on examinees.

4. What To Expect When You Are Expecting to Take the Bar Exam

While there is no homogeneous experience or timeline to preparing for the Bar Exam, a typical law school student can expect to encounter many, if not all, the following hurdles before ever sitting for the actual test. Beginning

¹⁶⁰ TEN-YEAR SUMMARY OF BAR PASSAGE RATES, OVERALL AND FIRST-TIME, 2012–2021, BAR EXAM’R, <https://thebarexaminer.ncbex.org/wp-content/uploads/2016/June/Spreadsheets/Ten-Year-Summary-of-Bar-Passage-Rates-2006%E2%80%932015.pdf> [<https://perma.cc/4LWA-QWE6>].

¹⁶¹ *Id.*

with the first year, all the mandatory classes are the same ones tested in the MBE component of the exam.¹⁶² In their second year, students begin to think about and prepare for the MPRE by taking ethics-focused classes. Students are strongly encouraged to apply to their jurisdiction's Board of Bar Examiners early. One of the more tangible barriers to successful preparation for the Bar Exam is the exorbitant costs associated with this process. A student needs to become an applicant in the jurisdiction they are planning to physically sit for the exam, and the initial cost for this can be as high as \$875.¹⁶³

As the examinee gets closer to graduation, they need to convert their application, or if they have procrastinated, they need to apply initially. The cost for this varies widely, with many jurisdictions easily exceeding \$1,000.¹⁶⁴ In many cases, this also triggers the beginning of the intrusive character and fitness background check.¹⁶⁵ The aim is to gain a complete picture of the applicant, their faults, and their risks. Fingerprinting and collecting any additional documents are also compiled during this time.¹⁶⁶

In addition, the various deadlines cover nearly the entire calendar and have additional fees for character and fitness review if submitted late.¹⁶⁷ Incredibly, for an examinee to utilize their laptop on the Exam for the essay component(s), in most jurisdictions there is an additional fee, as high as another \$200.¹⁶⁸ Since the test is in person, the examinee must be physically present at the examination center, which requires the examinee to rent a hotel

¹⁶² *Law School First Year Curriculum*, USLEGAL, <https://lawschool.uslegal.com/resources-when-you-are-in-law-school/law-school-first-year-curriculum/> [<https://perma.cc/8TR2-A42Q>].

¹⁶³ *Chart 7: Uniform Bar Examination Jurisdictions—Bar Examination Application Deadlines and Fees*, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-7/> [<https://perma.cc/TSF2-Z9HP>].

¹⁶⁴ *Id.*

¹⁶⁵ *Comprehensive Guide to Bar Admission Requirements*, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/> [<https://perma.cc/4LWA-QWE6>].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Chart 7: Uniform Bar Examination Jurisdictions, *supra* note 163.

room for at least two nights and purchase flights in many instances.¹⁶⁹ The Exam also incentivizes full-time study for up to 10 weeks, which conflicts with earning a paycheck. To ignore the reality and burden these extra costs place on examinees would be foolhardy.

After graduation, but before the Bar Exam, an examinee needs to exert incredible effort and time into studying and preparing, if they wish to succeed. Bar prep is generally referred to as the study period before taking the Bar. Even with a good faith attempt and earnest effort, failure is always a possibility. Using a commercially available bar preparation program is seen by many as a necessary reality for just about every student.¹⁷⁰ For most first-time takers, this is typically a two-month period immediately after graduation, filled with intense study, practice of multiple-choice exams and seemingly endless practice of writing essays.¹⁷¹ The Bar preparation programs provide structure, focused teaching, practice questions, and support for those about to take the Bar.¹⁷² Determining which approach is best and sticking to the program offers the best chance for success.¹⁷³

The Bar process is simple, but hardly easy. Ask any recently graduated law student, and they will respond that engaging in Bar preparation, is the least enjoyable task of their lives up to that point.¹⁷⁴ The commercially available

¹⁶⁹ With the bar exam being given the same date range and in the same locations every year, the surrounding hotels are aware of the influx of examinees, and already expensive hotel rooms closest to the exam location often skyrocket in price. Flying into and out of the location means traveling early and staying late, which beyond the cost of the plane ticket, includes additional time, transportation, and lodging costs.

¹⁷⁰ At the same time, there is a growing voice in the legal community advocating taking back the preparation of students in-house. See Georgakopoulos, Nicholas L., *Bar Passage: GPA and LSAT, Not Bar Reviews* (Sept. 19, 2013), Ind. U. Robert H. McKinney School of L., Research Paper No. 2013-30.

¹⁷¹ See generally BARBRI BAR REVIEW, <https://www.barbri.com/bar-review-course/bar-review-course-details/> [<https://perma.cc/EUD5-RFSP>].

¹⁷² *Id.*

¹⁷³ Internal statistical data shows that the most impactful, trackable metrics for success on the Bar Exam are student engagement and work applied. It is difficult to imagine this would not also be true universally.

¹⁷⁴ They have yet to conduct endless hours of mind-numbing document review.

Bar preparation programs can be completed either in person or online, usually at an individualized pace or some mixture of both.¹⁷⁵ The format of Bar prep is foundationally substantive rule proficiency. Preparation is organized using comprehensive outlines and condensed and focused lectures, followed by practice questions in the form of multiple-choice and essay questions.¹⁷⁶ Studying for the bar, particularly for first-time takers, should reflect eight to ten hours a day of studying during the nine to ten weeks before the exam.¹⁷⁷ Some law schools invest heavily into providing additional support to students through supplemental bar programs, tutors, discounted or even free access to programs, and more.¹⁷⁸ Several Bar review companies provide this support. In the interest of full disclosure, this author worked for one such enterprise for nearly eight years.¹⁷⁹

On average, students will spend hundreds of hours studying for the two months after graduation until the Exam. Many living what can only be described as a hermitic lifestyle, locked away in their room or a reserved space on campus if they are lucky. These examinees shun contact with most of the outside world for fear of what negative impact deviating from their assigned tasks may have on their chances of passing. Unless their family

¹⁷⁵ BARBRI BAR REVIEW, *supra* note 171.

¹⁷⁶ *Id.*

¹⁷⁷ I always remind students that these are like billable hours and that simply staring at the materials will not, through osmosis, assist in absorption and retention, let alone proficiency.

¹⁷⁸ The bar review companies have varying degrees of institutional partnerships nationally with increasing clientele to provide support and access to graduates at a negotiated discounted rate, drastically reduced rate, or at no additional cost to students. *See, e.g., Pitt Law Launches New Bar Exam Prep Partnership with Themis Bar Review*, PITT. UNIV. SCH. L., <https://www.law.pitt.edu/news/pitt-law-launches-new-bar-exam-prep-partnership-themis-bar-review> [https://perma.cc/K5KL-QM3P]; *WMU-Cooley Law School And Barbri Bar Review Enter Into Partnership*, W. MICH. UNIV. COOLEY L. SCH., (May 17, 2022), <https://www.cooley.edu/news/wmu-cooley-law-school-and-barbri-bar-review-enter-partnership> [https://perma.cc/8KTX-5B7D].

¹⁷⁹ I worked with students throughout the state of Florida, Puerto Rico, and the Southeast United States. In addition, I have had the distinct pleasure of sitting for and successfully passing both the Florida Bar and the UBE in July 2012 and February 2018, respectively.

includes another attorney, there is no practical way to express the anxiety and pressure they are experiencing. This stress cannot be understated.

5. Life Impediments

There is a phrase that my students are often told when they are getting ready to prepare for this exam: “Life does not stop for the Bar Exam.”¹⁸⁰ This is another way to express that the world keeps spinning, and as much as examinees wish that they had nothing else to worry about other than to study, that is rarely the situation. Children need additional attention as they are out of school in the summer, and childcare can often be an out-of-reach luxury for examinees. Becoming physically, mentally, and emotionally drained is par for the course, and this is to say nothing of the most recent global pandemic. Wars, insurrections, racial reckonings, and literal plagues are all things that have occurred just in the past few years during the time that examinees should otherwise be focusing on studying for the Bar Exam. Someone will get married, someone will become ill, and sadly someone will even die along the ride to prepping for this exam.¹⁸¹

When a student finally does make it to the test day and finds their way into the examination hall, stress and fear are firmly in the driver’s seat. The following is a true story that happened during the July 2022 Florida Bar Exam in Tampa: One examinee arrived shortly before the exam was scheduled to begin. Parking in a public lot several blocks from the exam, they are flustered by the understandable panic of potentially not being allowed into the testing room should they be even a moment late. In haste, they closed the driver’s door, locking the car with the keys in the ignition, the engine running, and a computer bag in the front seat. With no time or money to pay for the meter, they rush to the examination center, hoping to still arrive on time. Luckily,

¹⁸⁰ I cannot recall if this phrase was imparted to me by one of the many professors, mentors, or guides along my journey or if it came to me while engaging in a sleep-deprived presentation preparation session, but it remains true all the same.

¹⁸¹ Hopefully, not all the same individual.

there are still a few minutes before the start of the Bar Exam. Quickly, they find a professor standing at the entrance to the escalator leading to the testing room. While absorbing a few kind words, grabbing a set of earplugs, and even devouring a light snack, the student can stop long enough to explain the situation. Hoping and praying their professor can find which lot the car is in before the engine dies, the computer is stolen, or even the car is towed, they head upstairs.¹⁸²

Examinees stumble into the exam room in this, or another similarly flustered, state. The reality of sitting for the exam is quite frightening under the best circumstances. Examinees are corralled into large halls, often filled with several thousand students. Desks and chairs appear to extend to the horizon, and shuffling papers and keyboards clacking sound deafening. Dare to arrive even a moment late, and the doors are locked with no hope for a reprieve. The only option left is to wait six months until the next administration. In this deodorant-optional, water-bottle-label, and wristwatch-devoid environment, examinees are expected to excel and perform. The list of things that can go wrong and impact a positive outcome is long. Seemingly simple tasks and preparation items that otherwise would not even be given a second thought become massive impediments to success. This fear, anxiety, and stress can quickly snowball out of control and detrimentally impact the probability of successful outcomes.

¹⁸² If you are wondering about the conclusion of the story, after about forty-five minutes of wandering under the Florida summer heat, I found the car. Thankfully it was still there, engine running, doors locked, the computer on the front seat, and no ticket or tow truck in sight. I spent another forty-five minutes waiting for AAA to break into the car, but we successfully turned off the engine, put the computer bag in the trunk, and even paid for the parking meter. All before heading back to the hotel to change out of a very sweaty dress shirt and jacket, just in time to return for lunch with the examinees after the morning session concluded ninety minutes later.

D. Push for Diploma Privilege

Diploma privilege is the general concept of permitting graduates from approved law schools within a jurisdiction to practice law upon graduation without the additional step of engaging with or passing a bar licensure examination.¹⁸³ These can include the form of additional limited supervised practice and licensed attorney oversight elements.¹⁸⁴ Clinical education, supervised practice of law, and even programs such as Lawyer Justice Corps have all been suggested as tangible alternate licensure paths, beyond the current Bar Exam.¹⁸⁵

Emergency diploma privilege, while offered in a handful of states during the start of COVID-19,¹⁸⁶ was pulled back almost universally, opting instead to adopt remote, alternative testing, despite previously acknowledged deficiencies with the exam.¹⁸⁷ The current format and application of the Bar Exam is not a predictive tool of successful legal practice but rather an impediment to one.¹⁸⁸ “If the Bar Exam is a known impediment to access to the legal profession, it is beyond time that our accrediting bodies recognize

¹⁸³ See Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WIS. L. REV. 645 (2000).

¹⁸⁴ *Id.*

¹⁸⁵ See Carol L. Chomsky et al., *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883 (2021).

¹⁸⁶ Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81 (2021) (Oregon, Washington, Louisiana, and Utah all decided at different times and for varying reasons to implement an emergency diploma privilege during the pandemic. Limited language was included, having a limiting factor to elements such as only allowing this privilege to in-state students, of ABA approved schools, with specific first-time bar pass rates, or even only to those who had already applied.).

¹⁸⁷ See Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. SOC. JUST. 287 (2021).

¹⁸⁸ See Brian R. Gallini, *Rethinking the Bar Exam for Good*, BL (Apr. 27, 2021), <https://news.bloomberglaw.com/us-law-week/rethinking-the-bar-exam-for-good> [<https://perma.cc/4BFC-Q23J>]; Ayanna Alexander, *Racial Gaps in Bar Passage Force Reckoning with Legal Education*, BL (June 23, 2021), <https://news.bloomberglaw.com/social-justice/racial-gaps-in-bar-passage-force-reckoning-with-legal-education> [<https://perma.cc/4W8N-2NCE>].

alternative measures of professional competence.”¹⁸⁹ Since the legal licensure associations tasked themselves with creating admission standards, there has always been an air of protectionism and elitism that is also prevalent in other professional licensure associations.¹⁹⁰ Decisions are made by otherwise unaccountable, unregulated, and what at times can only be described as ethically questionable circumstances, devoid of meaningful feedback, input from stakeholders, and examinees’ best interests.¹⁹¹

Established arguments for diploma privilege and moving away from a Bar Exam include the reality that for most examinees, the information does not remain accessible after the exam as practical working knowledge.¹⁹² The law is constantly evolving and changing, even in rare cases where photographic recall memory is applicable.¹⁹³ There are alternatives to the exam without giving free rein licensure to any law school graduate. Limitations include having a supervised practice where oversight, skills, and performance evaluation can be better tracked by working attorneys rather than an emotionless multiple-choice or essay exam.¹⁹⁴ Learning to be a good attorney takes time. Most attorneys learn through work experience, and a progression of employment opportunities is expected. These positions give the perfect breeding ground for professional development, growth, and ultimately the

¹⁸⁹ See Ayanna Alexander, *Racial Gaps in Bar Passage Force Reckoning With Legal Education*, BL (June 23, 2021), <https://news.bloomberglaw.com/us-law-week/racial-gaps-in-bar-passage-force-reckoning-with-legal-education?context=search&index=40> [<https://perma.cc/4W8N-2NCE>] (Quoting Griggs, *supra* note 90).

¹⁹⁰ See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016).

¹⁹¹ Ashley London, *Who Watches the Watchmen? Using the Law Governing Lawyers to Identify the Applicant Duty Gap and Hold Bar Examiner Gatekeepers Accountable*, MICH. ST. L. REV., (forthcoming 2023).

¹⁹² See Moran, *supra* note 183.

¹⁹³ See Debra Moss Curtis, *They’re Digging in the Wrong Place How Learning Outcomes Can Improve Bar Exams and Ensure Practice Ready Attorneys*, 10 ELON L. REV. 239 (2018).

¹⁹⁴ Cassandra Burke Robertson, *How Should We License Lawyers?*, 89 FORDHAM L. REV. 1295 (2021).

ability to engage in competent legal representation on behalf of clients, independently and as a member of the Bar.¹⁹⁵

Diploma privilege is one of the approved methods of tracking bar passage compliance data for the ABA. It is essential to acknowledge that diploma privilege has been in place at one time or another in thirty-three jurisdictions since 1843, and it still exists in Wisconsin and, to a lesser extent, New Hampshire.¹⁹⁶ Its use is also actively being considered as an alternative to licensure requirements in several jurisdictions.¹⁹⁷ One strong consideration in support of alternative licensure paths, such as more widespread adoption of diploma privilege, is the strides such a move would have on increasing equity and inclusion for underrepresented minorities.¹⁹⁸

Louisiana, the District of Columbia, Oregon, Utah, and Washington State enacted emergency diploma privilege or examination waiver rules during and in response to the COVID-19 emergency.¹⁹⁹ Without minimizing the impact and scale of the global health emergency, the emergency of equity, fairness, and access as they relate to the Bar and its licensing exam has been around for a long enough time already. It is difficult to claim that the current disparity relating to the Bar Exam is not a similarly significant crisis. With an increase in jurisdictions exploring alternative admission practices such as diploma privilege, there is a discussion to ensure that any impact this would have on Standard 316, considering that the language as written now does not “unduly

¹⁹⁵ *Id.*

¹⁹⁶ Moran, *supra* note 183.

¹⁹⁷ Levin, *supra* note 186.

¹⁹⁸ Moran, *supra* note 183.

¹⁹⁹ See *Covid-19 Implications for the 2020–2021*, BAR EXAM’R (Spring 2022), <https://thebarexaminer.ncbex.org/2021-statistics/covid-19-implications-for-2020-2021-admissions/> [<https://perma.cc/7DR5-HLRK>]. Simultaneously, thirty-one jurisdictions “expanded or adopted temporary supervised practice rules to allow qualified candidates to engage in limited practice of law under supervision of a licensed attorney until they were able to take the Bar Exam.”

dissuade” such work.²⁰⁰ Alternative paths that do not include a Bar Exam should be more widely considered and adopted.

While the NCBE is making changes, primarily in its push for the widespread adoption of the NextGen exam, its previous lack of urgency and insufficiency to resolve inequities is apparent. Not only will the new exam not be ready for distribution at least until 2026,²⁰¹ but the current exam is also admittedly ineffective due to many proposed changes. The revamped format still fails to address the longstanding and continuing inequity issues and negative impacts of the exam. If meaningful changes are not on the immediate horizon, and being proactive in addressing systemic issues related to the exam are not at the forefront of change, examinees will continue to be negatively impacted and disparately affected.

III. THE AMERICAN BAR ASSOCIATION

A. History of the ABA

When looking at discriminatory historical context for the ABA, for nearly the first half of the 20th century, “the settled practice of the association [was] to elect only white men to membership.”²⁰² While that is no longer the case, it is important for understanding the context of the role the ABA has played over the years. The ABA is the primary accrediting body for law schools.²⁰³ Several states, including Alabama and California, also permit students who

²⁰⁰ Stephanie Francis Ward, *As Some Jurisdictions Consider Bar Exam Alternatives, ABA Legal Ed Section Again Looks at Bar Pass Standard*, A.B.A. J. (Aug. 19, 2022, 2:54 PM), <https://www.abajournal.com/web/article/as-some-jurisdictions-consider-bar-exam-alternatives-legal-ed-again-looks-at-bar-pass-standard> [https://perma.cc/3PR4-K26G].

²⁰¹ *See Implementing the Next Generation of the Bar Exam, 2021–2026*, NAT’N CONF. BAR EXAM’RS, <https://nextgenbarexam.ncbex.org/about/implementation-timeline/> [https://perma.cc/4YKC-4QGY].

²⁰² Nies, *supra* note 187; Shepherd, *supra* note 107.

²⁰³ There are 199 ABA-accredited law schools nationally, by far the primary accreditation method. *See List of ABA-Approved Law Schools—In Alphabetical Order*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_scho ols/in_alphabetical_order/ [https://perma.cc/2JV6-CXMP].

graduated from regionally accredited law schools to sit for and attempt their state Bar Exam.²⁰⁴ Neither the state board of Bar Examiners, the local bar association, nor the state supreme court conducts any review or evaluation of the quality of any law school.²⁰⁵ Instead, they rely solely on accrediting bodies, such as the ABA, to perform that job.²⁰⁶ Since all jurisdictions accept the ABA accreditation as being sufficient, the ABA standard is what sets the tone, decides what is necessary and adequate, and determines who provides comprehensive reporting and data publication.²⁰⁷ This is true regardless of whether the jurisdiction permits other accrediting bodies also to operate.²⁰⁸

Annually, the ABA, through its public reporting and law school disclosures, provides statistics and data on schools, bar takers, and results.²⁰⁹

²⁰⁴ In 2021, twenty jurisdictions had at least one school not accredited by the ABA yet had students attempt a Bar Exam. They are not always allowed to take the exam in the physical state they graduate from due to rules by the Board of Bar Examiners. However, in 2021, the vast majority (1,323) of the students came from California schools. Regarding results for all conventional schools that are non-ABA accredited, their bar takers in 2021 resulted in 462/2049 passing a bar, for a 23% pass rate. *See 2021 Exam Takers and Passers from Non-ABA-Approved Law Schools by Type of School*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2021-statistics/2021-exam-takers-and-passers-from-non-aba-approved-law-schools-by-type-of-school/> [<https://perma.cc/Z7ZK-7YVW>].

²⁰⁵ Some jurisdictions, like New York, have a variety of permitted bar takers. They are among a handful of jurisdictions that can conceivably be an exception. However, any adjusted review or evaluation is not geared toward the law school but the practice of law or foreign school for LLM students. *See generally, e.g., Part 520. Rules of the Court of Appeals for Admission of Attorneys and Counselors at Law*, CT. APP. N.Y., <https://www.nycourts.gov/ctapps/520rules10.htm> [<https://perma.cc/2Y2P-V5NF>].

²⁰⁶ *See* AM. BAR. ASS’N, *supra* note 12.

²⁰⁷ *See 2021 Exam Takers and Passers from Non-ABA-Approved Law Schools by Type of School*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2021-statistics/2021-exam-takers-and-passers-from-non-aba-approved-law-schools-by-type-of-school/> [<https://perma.cc/Z7ZK-7YVW>].

²⁰⁸ *ABA Section of Legal Educ. Releases Comprehensive Report on Bar Passage Data*, AM. BAR ASS’N, (Apr. 23, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/04/aba-section-of-legal-education-releases-comprehensive-report-on/> [<https://perma.cc/527M-ZEKX>].

²⁰⁹ 509 disclosures are compiled and reported by the schools, and the ABA even explicitly states, “The data reported here are submitted by law schools to the ABA. The ABA assumes no responsibility for inaccuracies or for changes in such information that may occur after publication.” *See* <https://www.abarequireddisclosures.org/Disclosure509.aspx>

According to the ABA, in 2019, 91% of graduates who attempted a Bar Exam within the Ultimate Bar Passage window of two years from graduation passed.²¹⁰ At the same time, only 80% of 2019 exam takers, labeled as first-time takers, were successful on the first attempt.²¹¹ 3,448 students who met the ultimate pass rate requirements for the class of 2019 were not originally included as part of the first-time pass results right after graduation.²¹² This equals a substantial element of that class’s total Ultimate Bar Passage.

B. ABA Standard 316

Under the current ABA Standard 316, the Ultimate Bar Passage rate is the primary bar result measurement used by the ABA to determine whether a law school complies with accrediting standards.²¹³ What can at times present itself as an obsession over first-time examinee results is not a meaningful or helpful metric for compliance with ABA bar passage standards. Until May 2019, Standard 316 included the ability for a school to show a first-time pass rate as a basis for compliance.²¹⁴ It formerly allowed a school to maintain

[<https://perma.cc/NCC8-CSFJ>]. Information on 509s includes things such as incoming 1L acceptance rates, metrics of LSAT and GPA ranges, cost of attendance, attrition rates, race/gender/ethnicity information, transfer data, and more.

²¹⁰ AM. BAR ASS’N, *supra* note 23 (click on 2019 Ultimate Bar Pass Data found under Bar Passage Data, Ultimate (Graduation Year), and then choose 2019. Utilizing the most recent data for which Ultimate Bar Results are available publicly at the time of the writing of this article, this data set is accurate and complete.).

²¹¹ *Id.*; see also Christine Chamosky, *ABA Releases Bar Passage Data: 3% Decrease for First-Time Takers*, LAW.COM, (Apr. 26, 2022, 11:31 AM), <https://www.law.com/2022/04/26/aba-releases-bar-passage-data-3-decrease-for-first-time-takers/?slreturn=20220614160121> [<https://perma.cc/4KJP-UTJU>].

²¹² AM. BAR ASS’N, *supra* note 23.

²¹³ See A.B.A STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022—STANDARD 316, AM. BAR. ASS’N (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_administrations_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-3.pdf [<https://perma.cc/V4N6-S69A>] (“At least 75 percent of a law school’s graduates in a calendar year who sat for a Bar Examination must have passed a Bar Examination administered within two years of their date of graduation.”).

²¹⁴ See A.B.A STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2029, AM. BAR. ASS’N (2018),

accreditation compliance by showing a first-time bar passage rate within 15% of where most of their examinees' state average came out.²¹⁵ This has now been entirely removed.²¹⁶ The reporting requirements have also increased from 70% of graduates to 100%.²¹⁷ Finally, the time frame to achieve the 75% Ultimate Bar Passage was reduced from five years to two.²¹⁸ All these changes fundamentally changed what is being measured and, as a result, what should be tracked and reported.

The change in the ABA Standard 316 was not always guaranteed, and pushback and concern over the potential impact of adjustments stalled its initial adoption.²¹⁹ While it initially was unsuccessful in being adopted in its current form, that failed outcome was used to justify some alternative positions on performance.²²⁰ However, since this standard is now the controlling metric by which to gauge compliance and performance, we must proactively fight against any propagation of the myth that students must pass the Bar Exam on their first attempt! It is not of any "Ultimate" importance whether an examinee passes on the first attempt or a later one. The only focus is that they do so within some reasonable timeframe, such as within two years or within four successive attempts after graduation.²²¹ The accrediting body

https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf [<https://perma.cc/3KJY-R346>].

²¹⁵ *Id.*

²¹⁶ BARRY A. CURRIER, NOTICE TO CONSTITUENCIES ON STANDARD 316, ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR (Sept. 4, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/19-sept-notice-to-constituencies-on-standard-316.pdf [<https://perma.cc/9FNB-6TLM>].

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See Jeffrey S. Kinsler & Jeffrey Omar Usman, *Law Schools, Bar Passage, and Under and Over-Performing Expectations*, 36 QUINNIPAC L. REV. 183 (2018) (discussing how LSAT and GPA predictors are used to identify both top and bottom-performing schools).

²²⁰ *Id.*

²²¹ See generally Article 316 amended (May 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/19-may-amended-standard-316.pdf.

for law schools, the ABA, has made its position clear, and it is high time everyone else responded accordingly.

C. The ABA Questionnaire

Every year, to measure performance and maintain accreditation, law schools are required by the ABA to fill out a form referred to as the Bar Passage Questionnaire.²²² This questionnaire was added to the Annual Questionnaire and was done so since “moving bar passage outcome data collection here allows for a more timely reporting of this data.”²²³ Reporting data collected includes Ultimate Bar Passage, first-time examinees, diploma privilege, as well as self-reported race, gender, and ethnicity for all graduates.²²⁴ There is still a designated space for law schools to report the results of their “first-time-takers.” Since this is no longer part of the calculus and is not included in accreditation compliance standards, this questionnaire section must be amended, and all references to first-time status need to be removed.

The Ultimate Bar Passage data collected on the ABA Questionnaire is aimed at consolidating results for all students from an institution both within one year, and within the two-year definition for standard 316.²²⁵ “For Ultimate Bar Passage, the questionnaire follows graduates by calendar year of graduation and asks for information about the number who passed the Bar Examination within one year after graduation and within two years after

ssions_to_the_bar/standards/2019-2020/19-sept-notice-to-constituencies-on-standard-316.pdf [https://perma.cc/X78D-AXL9].

²²² See generally *The Bar Passage Questionnaire*, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov20/bar-passage-questionnaire.pdf [https://perma.cc/X9T8-P4GK].

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

graduation. Each year, schools [are] asked to report on graduates from two calendar years.”²²⁶

The ABA allocates first-time taker status as having a specific and distinct definition, which is mercifully straightforward: “Only those taking a Bar Examination for the first time may be counted as a first-time taker.”²²⁷ Now, this is where it gets interesting. The ABA makes special instructions on how to report graduates sitting in a UBE jurisdiction:

A graduate who takes the Bar Examination in a UBE jurisdiction is counted as a first-time taker in the jurisdiction where the examination was taken. The graduate must be reported as having passed or failed as a first-time taker in that jurisdiction. If a second UBE jurisdiction *later* accepts the score of a graduate who failed in the first jurisdiction, that graduate is not considered a first-time taker in the second jurisdiction but can be counted as a passer for reporting Ultimate Bar Passage results.²²⁸

The takeaway is that for purposes of reporting first-time taker status and results, only the status in the jurisdiction the student attempts count.²²⁹ Explicitly and unequivocally, this means that the score is unimportant. Instead, only whether the applicant achieved the scaled cut score required in the jurisdiction where they sat is of interest for ABA first-time designation. Interestingly though, for purposes of the Ultimate Bar Passage, the same exam, same result, same applicant can instantly transfer the score.²³⁰ When the results meet the cut score requirements in another jurisdiction, that exam

²²⁶ *Id.* (There is even a section asking for students who never sit for a Bar Examination or cannot be located. Those students are not part of the calculations of Ultimate Bar Results for Standard 316.)

²²⁷ *Id.* (“While a person might take a bar examination in successive administrations in different jurisdictions and may be taking the examination for the first time in each of those jurisdictions, a person is only reported as a first-time taker when taking the examination for the first time in any jurisdiction.”).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See POLICIES BEHIND THE PORTABILITY, *supra* note 68.

is considered passing for the school's Standard 316 calculations.²³¹ The implications of this are incredibly profound.

Let us look at an illustration of what this means. Imagine a student who wishes to transfer their score into Alabama; a scaled UBE score of 260 is required.²³² For this example, their first and only attempt is for the Alaska exam, which requires a 280 scaled score.²³³ Lastly, the examinee scores 279.4, which the examiners round to the nearest whole number, so they end up with a 279-scaled score.²³⁴ Presuming they are a recent graduate, and this is their first "bite at the apple," their home school would have to report them on the questionnaire as a first-time failure statistic since they did not earn at least a 280-scaled score. In Alaska, when this same student, having only taken that one attempt, transfers their score to another jurisdiction, in this example, Alabama, they will also be counted as passing for the Ultimate Bar Passage statistic. That means that schools geographically located in higher cut score states, and presumably have more of their graduates taking the Bar Exam in that state, must withstand the worst of the first-time designation. This is true despite potentially having little or no impact on their Ultimate Bar Passage as defined in Standard 316.

It is not difficult to think of a situation where this quagmire of reporting would impact schools in any of the top five cut-score jurisdictions. Conceivably, an institution would be able to simultaneously report a 0% first-

²³¹ See AM. BAR ASS'N, *supra* note 222.

²³² See RULES GOVERNING ADMISSION TO THE ALA. STATE BAR—RULE VI(B), ALA. STATE BAR, <https://admissions.alabar.org/rule-6b> [<https://perma.cc/8LCN-S6DT>] (last visited Nov. 29, 2022) (specifically C1 "An examinee who achieves a total UBE score of 260 or above passes the Academic Bar Examination.").

²³³ See ALASKA BAR RULES, ALASKA BAR ASS'N, <https://public.courts.alaska.gov/web/rules/docs/bar.pdf> [<https://perma.cc/PK5Q-SHQH>] (specifically, Rule 4, section 6, which states, "[a] scaled score of 280 or above, as calculated by the National Conference of Bar Examiners, shall be the passing grade on the Bar Examination.").

²³⁴ POLICIES BEHIND THE PORTABILITY, *supra* note 68, at 19 ("The written-component and MBE scaled scores are rounded to one decimal; these two decimal scores are combined, and the UBE total score is rounded to a whole number and stated on a 400-point scale.").

time pass rate and a 100% Ultimate Pass rate, with their students taking only a single exam in a single administration. Additionally, the school could report this information on the same form since it is not submitted until February of the following year,²³⁵ leaving plenty of time for an examinee to transfer the score to another UBE jurisdiction. This situation alone, with no other qualifying reasons for abandoning the first-time designation, is more than sufficient to understand the disutility of focusing on first-time status.

Knowing the structural makeup of the reporting and the narrow and heavy focus given to first-time taker status, schools and students are now heavily incentivized to work around this system. We start to see increased participation in what is commonly referred to as UBE forum shopping.²³⁶ Why should an examinee take the exam in a jurisdiction with a high cut score and risk of failing, even if they can technically transfer the score elsewhere later? If the examinee cherry-picks and the institution encourages completing the first-time taker attempt in a lower cut score jurisdiction, this throws off the reporting entirely.

When, inevitably, the score is high enough to transfer it later to the higher cut score jurisdiction, the reporting statistics become meaningless because the first attempt is executed just to secure the initial pass. This is proving to be not just a theoretical issue but one so prevalent that increased UBE jurisdictions are not allowing what is commonly referred to as courtesy seating.²³⁷ “Courtesy seating allows an applicant to sit for the UBE in the

²³⁵ See AM. BAR ASS'N, *Questionnaires & Applications*, https://www.americanbar.org/groups/legal_education/resources/questionnaire/ [<https://perma.cc/6PX4-AWF3>] and open the 2022 Bar Passage Questionnaire Instructions for detailed instructions on reporting bar passage from schools to the ABA.

²³⁶ See Suzanne Darrow-Kleinhaus, *UBE-Shopping: An Unintended Consequence of Portability*, 88 N.Y. ST. B.A. J. 46 (2016).

²³⁷ See Chart 6: Uniform Bar Examination Jurisdictions—MPRE Requirements, MBE Score Transfers, Courtesy Seating, and Attorneys' Exams, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-6/> [<https://perma.cc/ZHM6-99C6>] (currently, only five jurisdictions remain that allow for courtesy seating. They are Arizona, Arkansas, Iowa, Maine, and Montana.).

jurisdiction for geographical convenience without having the intention to seek admission in that jurisdiction, as long as the jurisdiction is satisfied that the applicant is a bona fide candidate for admission in another UBE jurisdiction.”²³⁸

Some jurisdictions, like the District of Columbia (“DC”), with its relatively low 266 score requirement, have even recently added a requirement for an attestation that the applicant intends to apply for admission to practice in DC with the intent to remain.²³⁹ This has its enforcement problems, of course, since many examinees take the test without having yet secured employment. Furthermore, the format of what is acceptable to gain entry to the profession in DC has also been adjusted as of 2021 in response to and adopted after the COVID-19 pandemic. The changes relate to Rule 46 on admission, specifically regarding eliminating the ability to waive into DC utilizing only a 133 MBE scaled score.²⁴⁰ It is reasonable to foresee that more examinees would need to sit for the exam. However, whether it has had the chilling effect that this change intends is less clear, and only time will tell.

IV. BAR EXAM RESULTS

Results for the Bar Exam are collected by the NCBE as raw scores and then are scaled according to local or national standards. Undoubtedly everyone would enjoy in-depth analysis of how scores are scaled, particularly as it is often difficult to believe they are consistent in application. Unfortunately, the publicly available information provided by the NCBE regarding scaling and final scoring has been less than clear and is increasingly guarded better than current and former Presidents of the United States guard

²³⁸ *Id.*

²³⁹ See *Admission by Examination—General Information*, D.C. CT. APP., <https://admissions.dccourts.gov/appinfo.action?id=1> [<https://perma.cc/JV5F-T4BT>].

²⁴⁰ See *Rule 46 5-2021 Amendments*, D.C. CT. APP., https://www.dccourts.gov/sites/default/files/2021-05/M-273-21%20Promulgation%20Order%20for%20Rule%2046%205-2021%20Amendments%205.13.21_0.pdf [<https://perma.cc/3PXY-SJKS>].

top secret material. In the past, the NCBE has released data and statistics relating to individualized performance on the exam components directly to students and, in many situations, even schools.²⁴¹

However, in recent years a shift to the black hole format of withholding data on specific and overall performance seems to be the new normal. The student report simply states the percentage rank they performed nationally on each MBE component.²⁴² It is commonly understood that a score of thirty or below is not sufficient for passing, but this is not a written rule and is, therefore, only anecdotal at this time. Incidentally, in this period of reduced transparency, the performance on the most used test nationally for the Bar Exam, the MBE, has also plummeted. The mean scaled score for the MBE has dropped from a high of 144.3 in July 2013, to a low of 132.6 as recently as February 2020.²⁴³

Once scores are tallied, they are released to the local jurisdiction via their Board of Bar Examiners under the authority of their supreme court or similar appeals court.²⁴⁴ They make any local scaling adjustments, incorporate state-specific scoring, and produce a result. For jurisdictions using the UBE exam, the NCBE releases a scaled score. Based on that information, the individual jurisdiction chooses what and how the information on pass status is published.²⁴⁵ The NCBE only parrots publicly released press releases, not publicly posting scores or jurisdictional performance as compiled by them internally. The score remains private unless the applicant chooses to disclose it or when they attempt to transfer to another UBE. This is done when their

²⁴¹ This was done in the form of a report on performance after the results were released to the individual student. In addition, there was also a report that was sent to schools with some basic data.

²⁴² See Score Report produced and distributed directly only to unsuccessful students on the Bar Exam.

²⁴³ See *The Multistate Bar Examination (MBE)*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2021-statistics/the-multistate-bar-examination-mbe/> [<https://perma.cc/EU8R-5M6A>].

²⁴⁴ Gutowski & Bell, *infra* note 282.

²⁴⁵ *Id.*

score is sufficiently high and within the acceptable time for transferring UBE scores. At that time, the score is sent directly to the other jurisdiction.

Bar Exam results and success rates are as inconsistent and varied as the fifty-six jurisdictions that offer an exam. The ABA website is a natural starting point when attempting to collect and analyze data from a single source.²⁴⁶ The problem is that categorization and identification of results are not always consistent with how jurisdictions report. With a distinction of graduation year versus calendar year, as opposed to individual administrations of the examination, as well as typographical errors in year identification, sometimes lining up data to be able to review and compare information is a near impossible task.

It is evident that the methods of reporting dictated by the licensing boards need updating to increase transparency and usefulness as a real measure of success. For various compelling reasons, some call for wholesale changes and even call into question the legitimacy of similar associations and licensing boards.²⁴⁷ I am advocating for, among other items, that the Board of Bar Examiners strongly consider making minor, fact-based adjustments in how they produce press releases. Better yet, they should get out of the business of data compilation and publication entirely. With recent changes in the format of the exam, as well as adjustments in reporting requirements for accreditation by the ABA, it is time to revisit why, how, and if there is any value added to releasing information on bar results by any entity other than the ABA, if at all.

²⁴⁶ AM. BAR ASS'N, *supra* note 21.

²⁴⁷ See Ronald L. Akers, *The Professional Association and the Legal Regulation of Practice*, 2 L. & SOC'Y REV. 463 (1968); see also Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093 (2014); see also Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards up Close*, 105 CALIF. L. REV. 1567 (2017).

A. Ultimate Bar Passage Rate

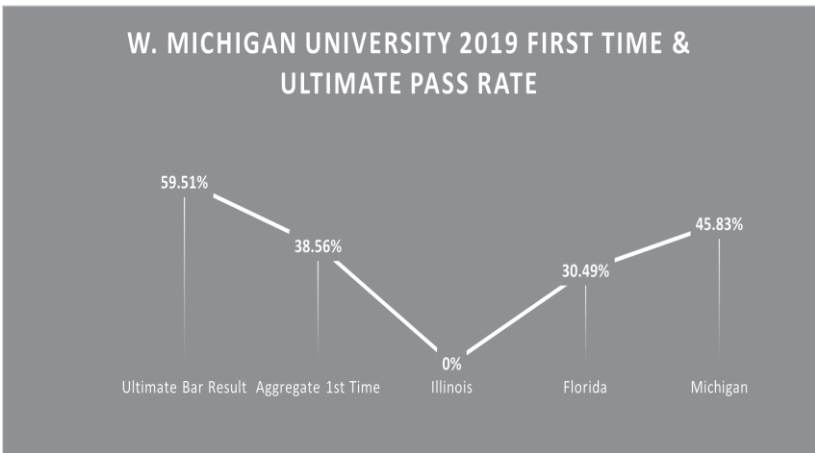
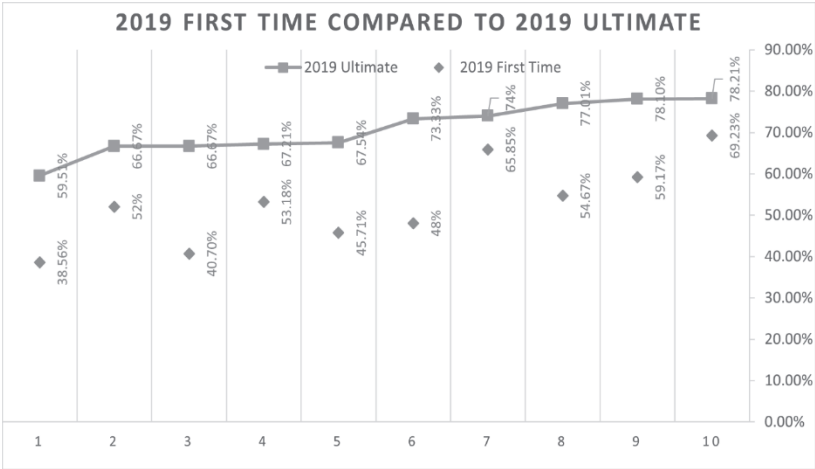
Ultimate Bar Passage, not first-time status, is the standard presently required by the ABA. The Ultimate Bar Passage rate is an artificial grouping of statistics. It represents the percentage of students from a given calendar year who pass any Bar Exam nationally, within two years of graduation. That means those graduating students who sit for any exam must pass on one of the attempts made within two years. Since the exam is available twice a year, this effectively provides for four consecutive attempts. Standard 316 references this Ultimate Pass rate and sets the range and percentage of students who must meet this minimum standard for a law school to maintain accreditation. There is no distinction given whether the attempt is the first, fourth, or anything in between so long as it is within two years.

Ultimate Bar Passage rates and first-time numbers do not line up, and the discrepancy is remarkable. Looking at the most recent comprehensive data, as compiled and released by the ABA, the 2019 Ultimate Bar Results, we can understand how misleading a first-time-only approach is. For example, the ten schools with the lowest performance related to the most recent Ultimate Bar Results are an excellent place to see how problematic this can be.²⁴⁸ Looking at these ten schools and comparing their aggregate total first-time taker results nationally for 2019 as they relate to their reported state-specific first-time results for the same year show inconsistencies for schools where graduates sit in more than one jurisdiction.²⁴⁹ At least three of these schools have significantly different actual aggregate first-time results nationally in

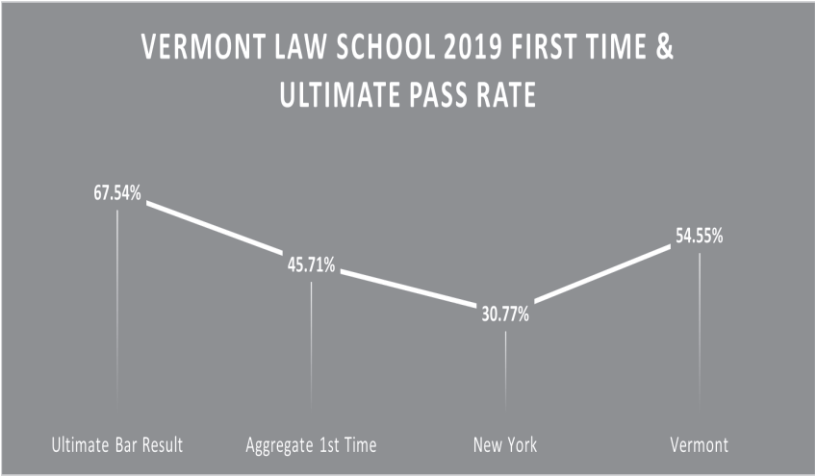
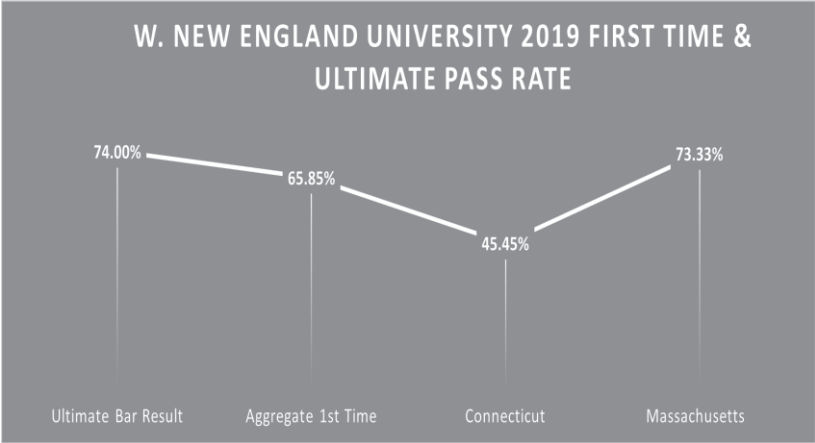
²⁴⁸ See AM. BAR ASS'N, *supra* note 21 (click on the Ultimate (Graduation Year) Bar Results for 2019 and sort from lowest to highest on percentage passers (column E). There are three Puerto Rico schools on the list, which are removed due to the inconsistency with the time of the year the exam is given, as well as the fact that it is in Spanish and uses none of the same NCBE materials in its construction. No accurate comparison can be made.); see also AM. BAR ASS'N, *supra* note 21 (click on First Time Takers (Calendar Year), click on the tab on the bottom marked Sheet 1, and sort by the school.).

²⁴⁹ See the charts addendum below, of the 2019 UBPR and 2019 FTBPR.

2019 from some of the jurisdictions where they are reported.²⁵⁰ In addition, comparing the first-time taker results shows how misleading a first-time taker-focused report is compared to the Ultimate Bar Result.



²⁵⁰ *Id.* (These schools reported results in more than one jurisdiction. As a result, the outcomes are wildly misleading depending on where the number is reported compared to their total aggregate and ultimate result.).



B. Uniform Bar Exam Issues

More students nationally sit for a jurisdiction that administers the UBE than all other forms of the Bar Exam.²⁵¹ In 2021, 40,502 examinees sat for the UBE out of 64,833 who sat for any nationwide examination.²⁵² UBE jurisdictions have their minimum passing score fall into one of eight categories.²⁵³ To fully understand the issue of first-time examinee reporting, it is important to realize that Bar Exam cut scores, and UBE required scores, have not been static. Despite being an exam that has been around for barely a decade, cut scores have moved in multiple jurisdictions for various reasons.²⁵⁴ Changes in admission rates, bar passage results, and impacts on diverse student applications are not a new problem. There are assorted reasons and explanations for when results drop and an increase in exam

²⁵¹ 2021 Statistics, *supra* note 78.

²⁵² *Id.*

²⁵³ See Chart 5: *Uniform Bar Examination Jurisdictions—Admission by Examination or by Transferred UBE Score*, NAT'L CONF. BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-5/> [<https://perma.cc/FFN3-75P2>] (260: Alabama, Minnesota, Missouri, New México & North Dakota; 264: Indiana & Oklahoma; 266: Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina & Virgin Islands; 268: Michigan; 270: Arkansas, Colorado#, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina*, Ohio, Oregon†, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington‡, West Virginia, Wyoming; 272: Idaho & Pennsylvania; 273: Arizona; 280: Alaska).

²⁵⁴ *Id.* * The minimum passing score in North Carolina was temporarily reduced to 268 for the July 2020 and February and July 2021 exams; † The minimum passing score in Oregon was temporarily reduced from 274 to 266 for the July 2020 exam. 270 effective with the July 2021 examination; ‡The minimum passing score in Washington was temporarily reduced to 266 for July 2020, February and July 2021, and February 2022 exams; ! Rhode Island-To pass the examination, applicants seeking admission under Article II, Rule 1 (admission on examination) must achieve a combined total score of 270 or greater. Applicants seeking admission under Article II, Rule 2(a) (attorney admission on examination) do not take the MBE and must score 135 or greater on the written component of the examination; # The 270 minimum passing UBE score in Colorado is effective with the February 2023 exam administration, replacing a score of 276. Applicants transferring a UBE score earned prior to February 2023 exam administration must have earned a minimum score of 276.

difficulty is perceived to occur.²⁵⁵ One of these reasons include the statement by former NCBE President Erica Moeser, that “the group that sat in July 2014 was *less able* than the group that sat in July 2013.”²⁵⁶ Perhaps the definition of irony, neither the former NCBE President, Erica Moeser, nor the current President, Judith Gunderson, took the Bar Exam to become licensed attorneys; after graduating from law school in Wisconsin, they both enjoyed the benefits of diploma privilege.²⁵⁷

In 2021, nearly two-thirds of UBE jurisdictions with a cut score of 270 or higher had more than 80% of their admissions come by examination.²⁵⁸ While the same year, only slightly over one-fourth of UBE jurisdictions with a cut score of 266 and below had the same percentage range of their admission by examination.²⁵⁹ This shows, among other things, that admission by transferred score, as opposed to examination, is more heavily concentrated in the lower cut score jurisdictions. A more detailed list of who these students

²⁵⁵ Kidder, *supra* note 144, at 570 (discussing the rationale and impact of changes to the MBE as they relate to performance and dealing with concepts of why scores dropped must be due to an increase in less capable applications coupled with law schools letting in students who in the past would not have been admitted. Surely it cannot have anything to do with the exam itself or those responsible for its creation and adoption.).

²⁵⁶ See *National Conference of Bar Examiners Memorandum to Law School Deans*, NAT’L CONF. BAR EXAM’RS, https://www.wsj.com/public/resources/documents/2014_1110_moesermemo.pdf [<https://perma.cc/PYL2-LRG9>].

²⁵⁷ See generally Joe Patrice, *NCBE President Gives Trainwreck of an Interview*, ABOVE THE LAW (Aug. 14, 2020), <https://abovethelaw.com/2020/08/ncbe-president-gives-trainwreck-of-an-interview/> [<https://perma.cc/S3P2-6MVM>]; see also Joe Patrice, *The Nation’s Top Defender of the Bar Exam Knows Exactly How to Value Diploma Privilege Systems*, ABOVE THE LAW (Apr. 15, 2020), <https://abovethelaw.com/2020/04/the-nations-top-defender-of-the-bar-exam-knows-exactly-how-to-value-diploma-privilege-systems/?amp=1> [<https://perma.cc/AH9D-ASVM>] and <https://abovethelaw.com/2020/04/the-nations-top-defender-of-the-bar-exam-knows-exactly-how-to-value-diploma-privilege-systems/2/> [<https://perma.cc/3WFD-2VM5>].

²⁵⁸ See *ADMISSION TO THE BAR BY EXAMINATION AND BY TRANSFERRED UBE SCORE, 2017–2021, THE BAR EXAM’R* (Spring 2022), <https://thebarexaminer.ncbex.org/wp-content/uploads/Admissions-to-the-Bar-by-Examination-and-by-Transferred-UBE-Score-2017%E2%80%932021.pdf> [<https://perma.cc/LB78-UH7X>].

²⁵⁹ *Id.*

are and whether they were also admitted in their initial location needs to be released by the NCBE to understand the situation better. Reporting metrics and data can be made to coincide and adhere to the ABA questionnaire of bar results. Perhaps even sharing the data directly with the ABA and cutting the school out of acting as an intermediary. To their credit, the NCBE does track and release similar data related to each jurisdiction's total transferred in and transferred out numbers. However, part of the concern is that the source data concerning these transfer students are not uniformly and freely shared with their graduating university, making tracking, and reporting for the ABA a venerable nightmare.

C. National Cut Scores

As we have seen, the performance on the Bar Exam and results from year to year is anything but consistent. Cut scores have been anything but static, particularly recently in the UBE. Cut scores have been adjusted before and outside the UBE jurisdictions as well. The disparity and lack of data supporting reasoning associated with Bar Exam cut score implementation, heightened levels, and adjustments have historically negatively affected admission to the legal profession.²⁶⁰

Many proponents in high cut-score jurisdictions hold tight to the notion that the levels chosen are intended to protect the public somehow and reduce issues of malpractice as well as ensure general competency.²⁶¹ However, the reality—it turns out—is not so clear on the issue, and what little research is available only muddies the waters.²⁶² The inherent truth is that now, perhaps more than ever, the cut score plays an immensely prominent role in first-time taker statistics, even more so than Ultimate Bar Passage results. This creates tension and unequal focus on the impact of these results, skewing results and

²⁶⁰ See Frisby *supra* note 82.

²⁶¹ See Robert IV Anderson & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307 (2019).

²⁶² *Id.*

manipulating elements impacting reporting metrics to the perceived benefit of institutions. It is essential to understand that cut scores existed long before the UBE became widely adopted. Many examples of non-UBE examinations, such as Florida and California, have cut scores, for which the level they are set at significantly impacts admission standards.

D. Transferability of Results

One of the primary purposes of adopting a uniform exam in the format of the UBE is to allow for increased portability and transferability beyond the originating jurisdiction. Suppose the exam is identical, and the examinee earns a satisfactory score. In that case, they can use that result for a set period and not retake the exam in the other jurisdiction. It is a way to port in a result, though it does nothing to reduce any additional requirements or obligations, such as MPRE score or character and fitness review. While admittedly not a perfect comparison, the MPRE has a lot to show us in terms of a better approach that the Bar Exam should be adopting.

For the MPRE, it does not matter where an examinee is physically located when they take the exam so long as they are at an approved testing center.²⁶³ Only after earning a score does the NCBE pass that score to an applied jurisdiction. It makes infinitely more sense to adjust the exam scoring and reporting of the Bar Exam, particularly the UBE, to this model. We should have the score earned in the UBE treated similarly to what is in place for the MPRE, where it is unimportant which jurisdiction the examinees' butt is physically located when they take the exam. The score earned is requested by the examinee to be sent to the jurisdiction(s) they want to apply for, and it is then sent after achieving the requisite score. This would be a simple solution.

²⁶³ See *MPRE Registration Information*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/mpre/registration/> [<https://perma.cc/593H-LFUF>].

Let us return to the example of an examinee sitting for the UBE in Alaska but only achieving a 279 scaled score on the exam. If there were portability only for examinees who passed their “home” jurisdiction where they first attempted, this student would not be able to transfer the score. Whereas, if they originally sat in New York, where the cut score is a 266 scaled,²⁶⁴ they would be able to. Same student, same exam, same score, but other jurisdictions would not accept the score depending on where the examinee attempts. This is *not* the current arrangement, but it is a good illustration of why the portability of score, and not conditions, is so important. When reporting is done, the first-time taker status is not in line with the same reasoning, which is a problem.

As previously established, by the very nature of the administration of the UBE, a student can achieve a high enough score to transfer to another jurisdiction and be considered passing, while in the location where they first physically sit, they fail.²⁶⁵ In addition to the score earned, there are limitations on the time in which a score is transferable to another jurisdiction. The timeframe ranges from two to five years.²⁶⁶ What is clear is that there is consideration given that an earned score, while coming up short in one jurisdiction, should not impact the ability of another lower cut-score administration to accept it. A suggestion and potential solution is that the ABA go even further and say that if it is accepted in any jurisdiction, it should then be considered a pass on the first attempt. After all, it is acceptable for

²⁶⁴ See *Uniform Bar Exam, New York Law Course & New York Law Exam—Informational Guide for New York Applicants*, N.Y. STATE BD. L. EXAM’RS, <https://www.nybarexam.org/UBE/UBE.html> [<https://perma.cc/KNW8-KUHL>] (“The passing score for the UBE in New York is 266 on a 400-point scale.”).

²⁶⁵ See *The Uniform Bar Examination (UBE)*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/2021-statistics/the-uniform-bar-examination-ube/#step2> [<https://perma.cc/ZNJ6-5CYW>] (for a breakdown of cut scores by jurisdiction and a detailed list of total examinees earning the necessary UBE scaled score for each jurisdiction as it relates to transfer in and transfer out numbers. Some interesting information here that we will continue to try and dissect.).

²⁶⁶ NAT’L CONF. BAR EXAM’RS, *supra* note 237.

the Ultimate Bar Results. Either the first-time status, as it currently is, should not be reported since it is incomplete, or the definition needs correcting and updating to be more inclusive and accurate.

E. First-Time Bar Takers

The motto of “one and done” has an excellent sound to it, but it cannot be our rallying cry at the expense of those it leaves behind.²⁶⁷ The hard truth is that not everyone passes on the first attempt for various reasons.²⁶⁸ However, once they successfully pass the bar, these examinees are no less qualified simply because they failed on their first attempt. Furthermore, the schools

²⁶⁷ *One and done*, CAMBRIDGE ADVANCED LEARNER’S DICTIONARY (4th ed. 2013) (according to the Cambridge Dictionary, the phrase “one and done” is an idiom meaning “done, or doing something, only once and never again.” Examinees will tell you that it means they had better pass or they are not willing to go through the process a second time. It is often referenced as a goal of passing on the first attempt.).

²⁶⁸ President Franklin Roosevelt failed the New York Bar Exam. Secretary of State Hillary Clinton failed the Bar in the District of Columbia. First Lady Michelle Obama failed the Illinois Bar Exam, despite graduating from Harvard Law. Vice President Kamala Harris also failed the California exam on her first attempt. President John F. Kennedy Jr. failed the New York Bar Exam twice. California Governor Pete Wilson failed the bar three times. California Governor Jerry Brown failed on his first attempt as well. Florida Governor, Attorney General, and Congressmen Charlie Crist failed the Bar Exam twice. Mayor of New York City Ed Koch failed the Bar Exam on his first attempt. Chicago Mayor Richard Daley failed the bar twice. New York Governor David Paterson failed the Bar on his first attempt. Every one of these examples are people who not only ended up passing the Bar Exam but also has gone on to execute successful and meaningful legal careers. See generally Ammon Jeffery, *20 Famous People Who Failed the Bar Exam*, CRUSHENDO (last updated Apr. 2022), <https://crushendo.com/famous-people-failed-the-bar-exam/> [<https://perma.cc/V7QK-9NA2>]; Alexandra Muskat, *Five Famous People Who Failed the Bar*, BAR EXAM TOOLBOX (May 27, 2020), <https://barexamtoolbox.com/five-famous-people-who-failed-the-bar/> [<https://perma.cc/2LL7-LRTH>]; Ehline Law Firm, *Famous People Who Have Failed the Bar Exam* (last updated Dec. 2022), <https://ehlinelaw.com/blog/famous-people-who-failed-bar-exam> [<https://perma.cc/FF2Z-525Y>]; *Having Doubts? 10 Famous People Who Failed the Bar*, THE BAR EXAM, <https://barexam.info/having-doubts-10-famous-people-who-failed-the-bar/> [<https://perma.cc/UFF5-MBST>]; Adam Music, *Nobody Wants to Fail the Bar Exam, but it Happens—Even to Kamala Harris*, ABA (June 20, 2017), <https://abaforlawstudents.com/2017/06/20/success-after-failing-the-bar-exam/> [<https://perma.cc/HC2X-7FXC>].

they graduate from are not somehow automatically and generally failing to prepare them because of these results, and to present data in a manner that suggests otherwise is misleading and harmful. After all, the ABA changed Standard 316 to allow for a window of four consecutive attempts within two years of graduation.²⁶⁹ Saying that a more stringent standard must be the focus is dishonest.

Failing to pass the Bar on one's first attempt says little about that individual's ability to pass on a subsequent attempt and have a successful legal career. Kevin Callahan failed the bar ten times before succeeding and then practicing law in Massachusetts.²⁷⁰ Paulina Bandy failed the California Bar Exam thirteen times before finally succeeding.²⁷¹ The example many people give is the former Dean of Stanford Law School, Kathleen Sullivan, who failed the Bar Exam in California on her first attempt.²⁷² It must be clarified that she not only passed on a subsequent attempt after taking time to prepare, but she was also already a barred member of two other jurisdictions.²⁷³ This famously referenced situation shows how performance on the exam, in and of itself, is not indicative of legal ability or ultimate success in the profession. Instead, it only shows whether the examinee is prepared for that specific exam on that day. While the first-time rate used to mean something, once ABA Standard 316 was amended, it is no longer a standard anyone should use.

One would be hard-pressed to argue that being able to pass the Bar Exam on the first attempt is not an aspirational and positive goal. However, the exam statistics over the most recent six years tell us that this will not be true

²⁶⁹ CURRIER, *supra* note 216.

²⁷⁰ See generally Jeffery, *supra* note 268.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

for nearly a quarter of students.²⁷⁴ The data shows that from the most recent years available in the archive, 2016–2021, the first-time pass rate fluctuated between 74–83%, with an average of 78%.²⁷⁵ These numbers do not consider the setup of the Uniform Bar Exam and the role score cutoffs play in what is considered passing in another jurisdiction. It is unrealistic to think there can or will be a 100% pass rate on the first attempt. Understanding this and using the statistics of the exam itself shows that due to the current structure of the Bar Exam, it is not even possible for everyone to achieve a passing score on the Bar Exam.

Interestingly, not everyone who sits for the bar for the first time is a recent graduate, and conversely, not every recent graduate attempts the Bar Exam right away. In 2021 more than 13% of graduates nationally did not attempt a Bar Exam in the same calendar year as their Juris Doctor completion.²⁷⁶ Eighty-eight percent of those who did not attempt were “replaced” with first-time designated students who graduated in prior years but were making the first attempt in 2021.²⁷⁷ It just makes sense that the longer an examinee waits after graduation to sit for the Bar Exam, the more difficult it is for them to pass, considering that life obligations get in the way and they have actively exited the student mentality.

Why then focus on first-time takers? Why are we still talking about first-time bar pass rates at all? We should move on and away from the “first-time

²⁷⁴ *Stats.* Archives, AM. BAR ASS’N., https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ [<https://perma.cc/CU2F-YM3R>].

²⁷⁵ *Id.*

²⁷⁶ See *First Time Bar Passage Calendar Year 2021*, AM. BAR ASS’N., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-2021-firsttime-bar-passage-stat.xlsx [<https://perma.cc/3AFE-2E4B>] (any corrections in the data after Apr. 23, 2021, can be found at <http://www.abarequireddisclosures.org/BarPassageOutcomes.aspx>).

²⁷⁷ *Id.* (4,119/4704) (there is no other breakdown showing how long ago these students graduated or a distinction in releasing results to track nationally. The only data accessible is internal, and it has students as recent as the 2022 calendar year for the bar, sitting for the first time, who graduated a decade previously.).

pass rate” as though it is the measure of anything useful. As educators, academic success professionals, and individuals who have developed deep, personal connections and investments in the success of our students, we all want nothing more than their best outcomes. We all face many challenges in our legal careers and personal lives. However, perhaps this group of students will be slightly more prepared for them, having navigated this initial hurdle with the grace and determination to persevere.

V. REPORTING MECHANISMS NATIONALLY

A. *Disharmonious Methods*

Three methods of data collection are approved by the ABA when law schools are reporting and responding to bar passage results.²⁷⁸ Perhaps the most heavily relied on of the three, due to ease of access and perceived reliability, is the publicly available reports many jurisdictions put out after each administration.²⁷⁹ “In reporting a graduate as a bar passer, a law school may rely on reports published or sent to the school by a jurisdiction’s bar admissions office, listing a graduate on a roll of licensed attorneys published in a jurisdiction, or the direct report of the graduate to the law school.”²⁸⁰ Each jurisdiction, by way of their Board of Bar Examiners and through the direction and authority given to them by the state’s supreme court, oversees collecting and releasing results in the fashion they deem most appropriate.²⁸¹

There is little consensus among the fifty-six jurisdictions administering a Bar Exam regarding a standardized format for the release of data regarding

²⁷⁸ See *Standard 316 and Reporting of Bar Exam Outcomes*, AM. BAR ASS’N, (June 2019) 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/2CKB-4JYA>].

²⁷⁹ *Id.*

²⁸⁰ *Id.* The focus here is “in good faith.”

²⁸¹ See Chart 1: Promulgation of Rules, Prelegal Education Requirements, Law Student Registration, and Bar Exam Eligibility Before Graduation, NAT’L CONF. BAR EXAM’RS, <https://reports.ncbex.org/comp-guide/charts/chart-1/> [<https://perma.cc/3H8Q-LMAG>].

what to include and how.²⁸² Bar Exam results are published by various methods, though certain hallmarks are pervasive and important to explore. These include a focus on examinee identity, taker status in its multitude of forms, and even unique elements such as listing graduating institutions. Each format has theoretical value, though some seemingly less than others. Examples of less-than-helpful identifiers include first-time designation as well as school identification.

1. List of Names

Many jurisdictions release a list of the names of those takers who passed the Bar Exam.²⁸³ This is often done without attributing identifiers tying the examinees to any specific location or attempt count. To avoid confusion, many of these jurisdictions include in their press releases specific and limiting language, clarifying that those successful examinees may not yet be cleared for admission to the Bar.²⁸⁴ Overall pass rates are a general identifier of the people sitting for a specific exam, divided by the total number of passing scores achieved for the same exam on that day. These are overly simplified overview statistics and little else. In many of these jurisdictions, the focus is on the names of individuals who passed. This method of releasing Bar Exam results adheres most closely to the primary purpose of many state

²⁸² Nachman N. Gutowski & Kayla S. Bell, *How are Bar Exam Results Published? A Guide*. (Feb. 1, 2023) (unpublished manuscript) (on file with author). At the start of this project, I wished there was a place to point to for a reliable existing repository of information on how each jurisdiction releases its results. Unfortunately, it did not exist. Any NCBE data has been either found to have inaccuracies or claims of results that are not otherwise corroborated by the jurisdiction represent. Therefore, not without a substantial amount of time and effort, such a repository has been created and should not only be used in conjunction with this article, but it is intended to support other scholars in exploring the data further.

²⁸³ *Id.*

²⁸⁴ *Id.*

Bar Exams to ensure admitted examinees have at least displayed some level of minimum competence.²⁸⁵

Many jurisdictions release a public list of names of those who pass, and even in this format, a significant number of variations exist. Hawaii is a classic example, releasing only the names of successful examinees with no other information provided.²⁸⁶ The District of Columbia gives a similar total taker result statistic in addition to a public list of successful examinees.²⁸⁷ These are examples on the far end that are the standard other jurisdictions should emulate; they advance the goal of providing detailed, accurate information on who passed, without risking overexposing information.

2. Percentages

A considerably less sizable percentage of US jurisdictions report the percentage passing by first-time, repeat takers, and all takers without additional categorization. Providing an overall success rate without additional qualifiers can often provide an incomplete picture. The results can be skewed depending on the makeup of the students sitting, such as in states that allow or have large foreign Master of Law (LLM) classes.²⁸⁸ Foreign LLM students are licensed attorneys from other countries, and as a result the format of testing that is heavy on reading and comprehension under time constraints, understandably can lead to lower success rates.

²⁸⁵ See R. Regul. Fla. Bar 1-15.1 (as a singular example of the language, which is not uncommon. Bar Exam, Purpose: “To ensure that all who are admitted to The (State) Bar have demonstrated minimum technical competence.”).

²⁸⁶ See *Notice of Passing the Hawai'i Bar Exam*, SCMF-12-0000538 In The Supreme Court of The State of Hawai'i, <https://www.courts.state.hi.us/wp-content/uploads/2022/04/SCMF-12-0000538bar.pdf> [https://perma.cc/SS8R-6NPF].

²⁸⁷ See DISTRICT OF COLUMBIA, COURT OF APPEALS, Notice of the July 2021 Bar Examination Results, <https://admissions.dcappeals.gov/jul-2021-exam-announce> [https://perma.cc/KQ7D-TQE4].

²⁸⁸ Several jurisdictions allow applicants to sit for the Bar Exam if they have an LLM, without a U.S. based Juris Doctor, or have already been admitted in another jurisdiction. For our discussion on releasing and skewing results, New York, Texas, and Washington D.C. are good examples. They have significant numbers of LLMs taking the exam.

Additionally, it is unclear what general purpose there is to knowing the overall passage rates other than perhaps as a reflection on the validity or difficulty of a jurisdiction's exam. This method of focusing on examinee status makes for a situation that requires decoding hard-to-understand data and reporting. While this focus on overall results is not an ideal method, one rosy element of its incorporation is that it does not risk misreporting the results of a particular law school or erroneously identifying it by name. That category is discussed last and is easily the least desirable or equitable format to report results for the Bar Exam.

3. Schools

The least common method for jurisdictions reporting Bar Exam results is identifying the law school from which the examinee received their law degree.²⁸⁹ The discussion here is another opportunity to repeat that these are not always the same schools that initially admitted the examinees, as they may have transferred after their first year. There is a variation here as well, as some of these jurisdictions distinguish between in-state versus out-of-state schools, and others even have an ABA accredited versus regionally accredited delineation.²⁹⁰ Ironically, some of these jurisdictions go out of their way to make notations and statements that the results are not a reflection of the institution but only on the individual exam taker.²⁹¹ There can even be an attempt to clarify that the report released is not intended to be used as ranking, despite clear and public knowledge that they are used precisely for such purposes. Florida is an excellent example of this, with the limiting

²⁸⁹ Gutowski & Bell, *supra* note 282.

²⁹⁰ *Id.*

²⁹¹ Michele A. Gavagni, *Florida Board of Bar Examiners Announces Release of Feb. 2022 Gen. Bar Examination Results*, FLA. BD. OF BAR EXAM'RS (Apr. 11, 2022), <https://www.floridasupremecourt.org/content/download/834778/file/Feb%202022%20FL%20Bar%20Exam%20Press%20Release.pdf> [https://perma.cc/MF22-FU5L].

language used on their public press release: “These statistical data do not represent an evaluation of the listed law schools.”²⁹²

All the areas discussed below relate directly to the reliability and accuracy in reporting specific to the Florida Board of Bar Examiners (FBBE) decision in how to release results, specifically in their decision to name schools. There is, at first glance, a seemingly reasonable and valid concern to want to release results by school cohorts. Perhaps this is thought to show institutional educational quality and competence somehow and as such reflect on the desirability of any specific law school. Such information could inevitably allow the consumer to conclude the value and merits of that school’s education.²⁹³

Theoretically, this may lead to a possible net positive in the marketplace, presuming the numbers and data are standardized and well-defined. Unfortunately, this position runs into serious problems. Lumping only one set of students—say, first-timers—regardless of graduation date, does nothing to reflect on the quality of the education or support the law schools provide.²⁹⁴ Of course, it is also not the job of the FBBE to engage in student recruitment or to influence and use Bar Exam results to make claims as to the veracity or quality of the education provided by any law school. That job is reserved for the ABA, apparently.

²⁹² *Id.* (This concept is discussed in greater detail later but was also verbally confirmed on two separate occasions, as being factual and that the FBBE is aware it is being used this way. While not its intended purpose, they have thus far chosen not to adjust for it. To be fair, they have claimed to be interested in revisiting it and looking into whether they are as unique in their dissemination of results as they have been made aware. My sincerest hope is that the information here will, in some small way, assist in their meaningful and earnest review process. There is no reason to think it will not.)

²⁹³ This is the exact stated reason for the FBBE’s continued use of result publishing in this format. (Confirmed in phone conversation with FBBE Director Missy Gavagni in January 2023.)

²⁹⁴ Leaving aside that this is an inaccurate phrase since it is only a first timer in the State of Florida who is not licensed in another jurisdiction and who has never attempted any component of the Florida exam.

One clear depiction of why this is so worrisome is the example of an examinee who is no longer within the two-year ABA timeframe for Ultimate Bar Passage. Reporting their results within the same grouping of first-time takers by school would seem inconsistent with the purpose of releasing the results, particularly when the school names are presented as though this is a reflection or representation of that specific university student's abilities or the quality of instruction and preparation given. Another of the many problems with data compilation, statistical generation, and public release of information, particularly by school name, and artificial groupings, is that it is unmistakably and irredeemably misleading at best. Concerns about utilizing the release of information by school name include the worry that when completed in this fashion, they are often incomplete and error prone. A quick glance at what is occurring in Florida gives a scary glimpse at this method's potential harm and inaccuracy.

B. Anomalies, Issues, and Statistical Errors

Releasing statistics and results is not without risk. In September 2022, the FBBE, through the Florida Supreme Court, released its much-anticipated press release on the third Monday of the month, as it usually does.²⁹⁵ However, they almost immediately had to revise and republish the release when an error was brought to its attention. At the bottom of the column, the total number of students identified as first-time takers in Florida was listed as 2,794.²⁹⁶ It should have read 2,225. This inadvertent disclosure gave the public a confirmed, albeit rare, glance at the actual pass rate in the state,

²⁹⁵ Michele A. Gavagni, *Florida Board of Bar Examiners Announces Release of July 2022 Gen. Bar Examination Results*, FLA. BD. OF BAR EXAM'RS (Sept. 19, 2022), <https://www.flcourts.gov/content/download/849556/file/July22ExamResultsPR-corrected.pdf>

²⁹⁶ *Id.*


covering all examinees, a lowly 51.2%.²⁹⁷ See the comparison side by side below.

Florida Board of Bar Examiners
ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

GENERAL BAR EXAMINATION
FORM

BAR EXAMINER
MELISSA A. BARNARD
DIRECTOR

MEMBERS
DAVID A. BARNARD
JAMES J. BARNARD
JAMES J. BARNARD
JAMES J. BARNARD
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JAMES J. BARNARD
JAMES J. BARNARD



September 16, 2022

JULY 2022 GENERAL BAR EXAMINATION
OVERALL METHOD

TESTING CENTER
TALLAHASSEE, FL 32309-0100

BAR EXAMINER
MELISSA A. BARNARD
DIRECTOR


MEMBERS
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Florida Board of Bar Examiners
ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

GENERAL BAR EXAMINATION
FORM

BAR EXAMINER
MELISSA A. BARNARD
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September 19, 2022

JULY 2022 GENERAL BAR EXAMINATION
OVERALL METHOD

TESTING CENTER
TALLAHASSEE, FL 32309-0100

BAR EXAMINER
MELISSA A. BARNARD
DIRECTOR

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The Supreme Court of Florida has released the following bar examination statistical information developed by the Florida Board of Bar Examiners. These results apply to the July 2022 General Bar Examination administered on July 26-27, 2022 in Tampa, Florida. This datum applies to only those persons sitting for the examination in Florida for the first time.

	Number Taking	Number Passing	Percent Passing
Ave Maria School of Law	42	30	71.4
Barry University School of Law	118	58	49.2
Florida A&M University College of Law	95	50	52.6
Florida Coastal School of Law	13	4	30.8
Florida International University College of Law	133	108	81.2
Florida State University College of Law	183	137	74.9
Nova Southeastern University College of Law	134	73	54.5
St. Thomas University College of Law	167	101	60.5
Sageon University College of Law	203	130	64.0
University of Florida College of Law	150	118	78.7
University of Miami School of Law	264	190	72.0
non-Florida law schools	457	245	53.6
Admitted to the Practice of Law	268	188	70.7
Totals	2225	1432	64.4

The Florida Bar Examination consists of the following: General Bar Examination (Part A and Part B) Multistate Professional Responsibility Examination

Note: The enclosed results reflect the performance of individuals on the July 2022 General Bar Examination. These statistical data do not represent an evaluation of the listed law schools.

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non-Florida law schools	457	245	53.6
Admitted to the Practice of Law	268	188	70.7
Totals	2,794	1,432	64.4

The Florida Bar Examination consists of the following: General Bar Examination (Part A and Part B) Multistate Professional Responsibility Examination

Note: The enclosed results reflect the performance of individuals on the July 2022 General Bar Examination. These statistical data do not represent an evaluation of the listed law schools.

Additionally, in the list of results of student performance released to the schools for the February 2022 exam, the FBBE had to send a revised detailed list of the results multiple times after finding and adjusting for errors. Normally errors in numerical reporting from the Bar Examiners on press releases are rarely publicly acknowledged or corrected. This impacts the perception and reality of the public when the results are unreliable, inaccurate, or misleading. Finding errors in the calculation, reporting, and statistics released by the examiners has unfortunately become a regular procedural component annually.

While it can be easy to single out the “Florida Man Taking the Bar Exam,” unfortunately, Florida is not alone in errors related to the Bar Exam scoring, grading, or publishing of results and outcomes. Georgia, in 2015 and 2016, informed ninety examinees that they had failed the exam when they actually

²⁹⁷ *Id.*

passed.²⁹⁸ What is worse, many of these examinees went on to retake the exam to pass, and when the error was discovered, the examinees were unable to recover damages or relief.²⁹⁹ Michigan is another offender regarding the release of passage results, as it mixed up data of seventeen people with the same last name.³⁰⁰ Several of the applicants were told initially that they failed when in fact, they passed.³⁰¹ Kentucky made a similar error in 2020, which was even more egregious.³⁰² It, too, informed three applicants who passed that they failed.³⁰³ However, in a heartbreaking and uniquely cruel twist, the examiners also told fifteen applicants that the examinees had passed, only to take it all away and tell them later that they failed.³⁰⁴ These are only a handful of the most recent examples of a system that is clearly not working well. The impact and disturbance to life function and jobs, not to mention the mental impacts, are devastating.

²⁹⁸ Chloe Knue, *Oops! We Miscalculated Your Bar Exam Score*, U. CIN. L. REV.: BLOG ARTICLES (Feb. 21, 2020), <https://uclawreview.org/2020/02/21/oops-we-miscalculated-your-bar-exam-score/> [https://perma.cc/C8JX-EEJ]

²⁹⁹ See *Georgia Bar Exam Scoring Error Results in False Failures*, ASSOCIATED PRESS (Sept. 6, 2016), https://www.northwestgeorgianews.com/associated_press/news/state/georgia-bar-exam-scoring-error-results-in-false-failures/article_bff6045a-745c-11e6-8789-c3947611ac7e.html [https://perma.cc/5DFP-FK79].

³⁰⁰ *Michigan Bar Exam Results—Clerical Error Led to Score Report Mistakes for 17 Bar Exam Takers*, JD ADVISING, <https://jedadvising.com/michigan-bar-exam-results-clerical-error-led-to-score-report-mistakes-for-17-bar-exam-takers/> [https://perma.cc/TM4N-DJPC].

³⁰¹ *Id.*

³⁰² Marika Gerken & Rebekah Riess, *15 Were Informed They Did Not Pass the Kentucky Bar Exam After Being Previously Told They Did*, CNN (Dec. 7, 2020, 7:10 PM), <https://www.cnn.com/2020/12/07/us/kentucky-bar-exam-error-trnd/index.html> [https://perma.cc/G9ST-97DU].

³⁰³ *Id.*

³⁰⁴ Joe Patrice, *Because The Bar Exam Wasn't Screwed Up Enough, State Tells Celebrating Applicants 'Sorry, You Actually Failed'*, ABOVE THE LAW (Dec. 4, 2020, 1:13 PM), <https://abovethelaw.com/2020/12/because-the-bar-exam-wasnt-screwed-up-enough-state-tells-celebrating-applicants-sorry-you-actually-failed/> [https://perma.cc/3CL4-B8RQ].

Returning to Florida, again; Florida publishes only first-time state-specific exam takers and does not include similar repeater or overall results uniformly, due in large part to their independent definitional approach to, and hyper-focus on, first-time takers. As briefly mentioned, Florida is the only jurisdiction where an ABA defined first-time Bar Examinees can choose to split its exam.³⁰⁵ This means examinees can sit for one portion of the exam at a time rather than complete it all in a typical two-day schedule.³⁰⁶ They can pass the exam in two separate ways: passing both days independently and without relying on averaging a passing result or utilizing the “overall method.”³⁰⁷

By allowing examinees to sit for one portion at a time and, more importantly, not reporting that information in the press release, creates a cascade of problems. Once an attempt is made in Florida, whether in whole or for half the exam, that student is no longer considered a first-time Florida taker. Therefore, any subsequent attempts are never reported if they split the exam.³⁰⁸ Similar to the *U.S. News and World Report* (USNWR) ranking, schools and participants in this system are incentivized to game the impacting factors. They do so by adjusting the makeup of the examinee pool, primarily

³⁰⁵ FL Rule 4-25. “**b. Individual Method.** Individual method is used if the applicant takes only 1 part of the General Bar Examination. Applicants who elect to take only 1 part of the General Bar Examination under the individual method may not combine a score attained on 1 part from 1 administration with a score on the other part from a different administration. Applicants may not take Part A only using this method unless they have previously taken the Multistate Bar Examination (MBE) in Florida.” (emphasis in original), <https://www.floridabarexam.org/web/website.nsf/rule.xsp> [<https://perma.cc/2V33-7NNV>].

³⁰⁶ *Id.*

³⁰⁷ *Id.* See FL Rule 4-25 “**a. Overall Method.** Overall method is used only if the applicant takes Parts A and B during the same administration of the General Bar Examination.” (emphasis in original).

³⁰⁸ Since only first-time attempts are reported and counted, when an examinee only attempts a portion, they disappear from and are never reported in the result reporting data. More about this fantastic concept shortly.

when the release of school names is used as a ranking system.³⁰⁹ Presenting and manipulating results from standardized tests for ranking and statistical purposes is not the original intended use of such exams. Despite best intentions, this leads to adverse outcomes, particularly for students of color.³¹⁰

C. Consequences

1. Rankings

Ranking systems are problematic in and of themselves, but particularly as commonly used systems related to educational institutions.³¹¹ Recently, several law schools have announced they are no longer participating in the USNWR Law School Rankings.³¹² This doesn't mean that USNWR will stop, only that they will shift to using publicly available information. This makes the need to change the reporting format, and the importance of accuracy, even more urgent. Even the United States Secretary of Education, Miguel Cardona, is on record saying that college rankings are "a joke" and the time and money spent chasing after them are worthless.³¹³ However, rankings can

³⁰⁹ Darren Bush & Jessica Peterson, *Jukin' the Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235 (2013).

³¹⁰ See Couch, *supra* note 18.

³¹¹ See Stephanie Saul, *Despite Years of Criticism, the U.S. News College Rankings Live On*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/us-us-news-college-ranking.html> [<https://perma.cc/JG8K-F4GT>]; see also Chris McGreal, *Columbia Whistleblower on Exposing College Rankings: 'They Are Worthless'*, THE GUARDIAN, (Sept. 15, 2022), <https://www.theguardian.com/us-news/2022/sep/16/columbia-whistleblower-us-news-rankings-michael-thaddeus> [<https://perma.cc/4S6K-R8VL>].

³¹² See Nick Anderson & Susan Svrluga, *Law School Revolt Against U.S. News Rankings Gains Steam*, WASH. POST (Dec. 3, 2022), <https://www.washingtonpost.com/education/2022/12/03/law-schools-protest-us-news-rankings/> [<https://perma.cc/ZE52-ZC6C>]; see also Jacob H. Rooksby et al., *Law School Rankings Worsen Profession's Socioeconomic Gaps*, SEATTLE TIMES (Dec. 12, 2022) <https://www.seattletimes.com/opinion/law-school-rankings-worsen-professions-socioeconomic-gaps/> [<https://perma.cc/E4ES-3RXY>].

³¹³ Brianna Hatch, *College Rankings Are 'a Joke,' Education Secretary Says*, CHRONICLE HIGHER EDUC., (Aug. 11, 2022), <https://www.chronicle.com/article/college-rankings-are-a-joke-education-secretary-says> [<https://perma.cc/MZ2Y-FD32>].

have a real and detrimental effect on law schools and how they effectuate change. The only changes being made are in areas where perceived importance and influence on ranking are given. This is visible in the Bar Exam context by the impact it has on the curriculum in the third year, focused on preparing students for the test.

Ranking distortion has gotten to the point that adjustments begin to cater to the ranking system and schools shift resources to improving those factors that impact the rank and away from factors that count for less in the rankings and yet are equally as important.³¹⁴ The same is true for the Bar Exam and its decisions in the various jurisdictions when it comes to results reporting, i.e., first-time taker status. It is causing a race to the bottom in gaming the system and leads to a focus on responding to reporting rather than ensuring competence and students' best interests. We must be mindful not to change the outcome simply by measuring it.³¹⁵

Many legal education stakeholders, including administrators, students, alums, and faculty members, care about their school's rank in the various official and unofficial published rankings. When changes are made to adhere to perceived ranking standards, the question must be asked, "Is our children learning?"³¹⁶ Institutions inevitably spend money and resources trying to

³¹⁴ See Jeffrey Evans Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Misperceive*, 81 IND. L.J. 229 (2006).

³¹⁵ See *Futurama: The Luck of the Fryish* (FOX television broadcast Mar. 11, 2001) (Statement of Professor Hubert Farnsworth) ("No fair! You changed the outcome by measuring it!"). While this topic is incredibly serious, I must take the opportunity to reference what is my favorite law review article (what a weird thing to say) and draw small inspiration by shamelessly imitating it here, even if the example is a less-than-perfect fit. See Justin S. Wales, *FUTURLAWMA: 21st Century Solutions to 31st Century Problems*, 68 U. MIAMI L. REV. 87 (2013).

³¹⁶ See PAUL BEGALA, *Is Our Children Learning?: The Case Against George W. Bush*, (2000) (George W. Bush, referencing childhood education, but for our purposes, it is intended to bring to mind where educators should focus. That is, on education and student support, certainly not ranking metrics. In the law school arena, this finds its way into attempts to adjust curriculum, replace non-tenured faculty or staff, hire so-called bar 'gurus,' or any combination of remedial actions perhaps not all otherwise wise to implement.).

bolster the tracked and reported metrics. For purposes of the Bar Exam, first-time taker results adjust the focus from holistic student support into a competition of ensuring reporting data to bolster perceived rank. According to the former Dean of Stanford Law School, Larry Kramer, “You distort your policies to preserve your ranking, that’s the problem.”³¹⁷

This distortion of policies is happening. It is made worse by jurisdictions where results are released attached in some fashion to first-time taker status or school identity, such as in Florida. Schools are changing and adjusting to what they perceive is being measured, even if it is not in line with the accrediting standards of the ABA. They could advise students not to sit for the whole exam while poaching transfer students with better metrics rather than taking the chance on them as incoming students. They could encourage them to sit for the UBE and transfer in the MBE score. Schools can even successfully petition the Board of Bar Examiners to implement an entirely new category, arguably to soften the impact for schools with a large alum base.³¹⁸

This focus on ranking, these results, and how they are framed affects not only students but also faculty. Academic Success and Bar Preparation faculty and staff too often shoulder the blame when other additional factors are in place.³¹⁹ I want to be explicitly clear; I am not saying that *Academic Success* professionals and the schools they represent play no role in the success of their students; the opposite is undeniably true. Hundreds of educational

³¹⁷ Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, (July 31, 2005), <https://www.nytimes.com/2005/07/31/us/education/the-878-million-maneuver.html> [<https://perma.cc/A7DT-BH7X>].

³¹⁸ These are situations of already admitted attorneys who make lateral moves, often from the Northeast and elsewhere, back to Florida later in their careers. Many of whom it does not affect highly and is less critical on which attempt they complete the Florida Bar successfully. This may be how the Admitted to Practice category on the Florida press release came to exist.

³¹⁹ One need only look at the frequency with which there is turnover and changes in law school’s academic success and bar preparation departments. These often untenured, non-faculty members are low-hanging fruit when it comes time to play the blame game. Results are bad; it must be someone’s fault. That is incorrect.

professionals dedicate their lives to the betterment of their students and ensure their success.³²⁰ What must be acknowledged, though, is that some external elements and factors play a pivotal role in a student's ultimate success. How results are released, how much focus is placed on the status of a Bar Examiner, and what position they historically are in, are also impactful.

Returning to Florida, one last time, the final sentence of the Florida bar results release says, "These statistical data do not represent an evaluation of the listed law schools."³²¹ Despite this disclaimer, the results are listed by the Florida Supreme Court as "Florida Bar Exam Result Comparisons" and state, "Recent comparisons of Bar Exam results grouped by law school are below."³²² If the data is not meant "to represent an evaluation of the listed law schools," what is the purpose of the comparison? Additionally, it has become indisputable that the public perceives and celebrates the press release as an evaluation of the listed law schools. It is also public knowledge that some law schools further the perception that the FBBE's Press Release is a ranking.³²³ By not disavowing this use, or reprimanding such actions, the FBBE is endorsing it.

³²⁰ See generally ASS'N OF ACADEMIC SUPPORT EDUCATORS (AASE), <https://associationofacademicsupportededucators.org/> [<https://perma.cc/J5PU-VJE8>].

³²¹ Gavagni, *supra* note 295.

³²² *Florida Bar Exam Results Comparisons*, FLA. SUP. CT., (Sept. 19, 2022), <https://www.floridasupremecourt.org/Bar-Scores/Florida-Bar-Exam-Results-Comparisons> [<https://perma.cc/MB36-QX23>].

³²³ See, e.g., Morgan Hughes, *FIU Law Graduates' Bar Passage Rate Top in The State*, FLA. INT'L UNIV., (Nov. 20, 2020, 4:15 PM), <https://news.fiu.edu/2020/fiu-law-graduates-bar-passage-rate-top-in-the-state> [<https://perma.cc/RQR4-PRMY>] (referring to the October 2021 administration, FIU's website stated, "Despite the challenges FIU Law graduates have faced during the COVID-19 pandemic, FIU has once again ranked as the top-performing Florida law school."); Alex Harris, *FIU Law Grads Most Likely to Pass The Bar*, MIAMI HERALD, (Sept. 21, 2016), <https://www.miamiherald.com/news/local/education/article103249897.html> [<https://perma.cc/2D7S-KNHC>] ("For the third Bar Exam in a row, FIU students had the highest rate of passing the exam that lets them practice law in Florida."); Samantha Joseph, *FSU Is No. 1: Florida Bar Exam Results Are in. Here Are the Best and Worst Performers*, LAW, (Apr. 11, 2022, 2:11 PM), <https://www.law.com/dailybusinessreview/2022/04/11/fsu-is-no-1-florida-bar-exam->

Regardless of the jurisdiction, from a UBE state to Florida, whether they release data by name only, by overall metrics, or even by the school and a special first-time designation, ultimately, the choices made by reporting agencies in disseminating results information are vital due to their impact. The methods affect the schools and the community, particularly when the outcome is viewed and used as a ranking.³²⁴ These decisions affect student access, reinforce race and gender bias and ability discrepancy, and can be exacerbated in cases with low self-esteem.³²⁵ When students attend a law school that they are now told is somehow less capable and that their odds of passing the Bar are diminished simply because of attending that school, it causes a problem. One needs little imagination to understand the devastating effect and impact had on students. This leads these same students to question their abilities.³²⁶ This is a direct relationship between the successful diversification of the legal community and the choices made around the phrasing and framing of data distribution.

results-are-in-here-are-the-best-and-worst-performers/ [https://perma.cc/5XSB-D6M3]; *FSU Law Grads No. 1 in Passing Florida Bar; College Tops Ranks For Hispanic Students*, FLA. STATE UNIV. NEWS, (Sept. 19, 2006) <https://news.fsu.edu/news/business-law-policy/2006/09/19/fsu-law-grads-no-1-passing-florida-bar-college-tops-ranks-hispanic-students/> [https://perma.cc/WCE7-4DCL]; Michael E. Miller, *FIU First, Ave Maria Law School Dead Last in Florida Bar Exam Passage Rate; University of Miami Stinks*, MIAMI NEW TIMES, (Sept. 21, 2011, 9:20 AM), <https://www.miaminewtimes.com/news/fiu-first-ave-maria-law-school-dead-last-in-florida-bar-exam-passage-rate-university-of-miami-stinks-6534626> [https://perma.cc/K296-NJ7R].

³²⁴ See Jane Easter Bahls, *The Ranking Game*, 31 STUDENT LAW. 16 (2003) (We have seen this already play out in understanding the game that is involved with any ranking criteria.).

³²⁵ See Robert J. Rydell & Kathryn Boucher, *Capitalizing On Multiple Social Identities to Prevent Stereotype Threat: The Moderating Role of Self-Esteem*, 36 PERSONALITY SOC. PSYCH. BULL. 2 (2010).

³²⁶ See Ronald A. Elizaga & Keith D. Markman, *Peers and Performance: How In-Group and Out-Group Comparisons Moderate Stereotype Threat Effects*, 27 CURRENT PSYCH. 27 (2008).

2. Law School Transfers

At the end of their first year, some law students, who performed exemplary, attempt to transfer to another law school. There are many reasons why transferring can be beneficial to students, including access to an expanded alumni base or perception of added value a particular school's name may have on their diploma. Often, the ability to move to a higher-ranked institution, with a perceived better Bar pass rate, is at the top of a transfer student's consideration to leave their home law school. The ABA has standards dealing with transfers for disclosure and attrition purposes.³²⁷ Historically, first-year law school performance, the same metric needed to successfully transfer, plays a significant role as a marker of a student's likelihood when it comes to passing the Bar Exam.³²⁸ As such, the students who transfer out of their admitting institution and into a higher ranked law school are more likely to pass the exam³²⁹ than the students who remained behind, and yes, even on the first time.³³⁰

³²⁷ CHAPTER 5 *Admissions and Student Services*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standard-ch5.pdf [<https://perma.cc/E24W-P5P6>] (Standard 502, discussing educational requirements and Standard 509 covering required disclosures).

³²⁸ See Katherine A. Austin et al., *Will I Pass the Bar Exam: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753 (2017); see also Rory Bahadur & Kevin Ruth, *Quantifying the Impact of Matriculant Credentials & Academic Attrition Rates on Bar Exam Success at Individual Schools*, 99 U. DET. MERCY L. REV. ONLINE 6.

³²⁹ See Rory D. Bahadur et al., *Reexamining Relative Bar Performance as a Function of Non-Linearity, Heteroscedasticity, and a New Independent Variable*, 52 N.M. L. REV. 1119 (2022); see also Bahadur & Ruth, *supra* note 328, at n.37.

³³⁰ This phenomenon has been documented and observed at St. Thomas University College of Law over the recent years. By tracking 1L transfer students, two years later, when bar results are posted and admission to the bar is available, an expected trend is visible. Those students who had top predictors of success as 1Ls, and as a result transferred out, did in fact, overwhelmingly, pass the bar at their new institution. However, they were marked as a graduate of their transferred law school. All opportunity focused schools should conduct, and if possible, publish, an internal review and assessment of the impact of transfer students. Particularly as to the metrics reported in the 509 disclosures of the transferred

Schools that admit these students take all the risk in potential attrition, while simultaneously nurturing their growth in the first year, without being properly credited for their ultimate success on the Bar Exam. Many of the foundational courses for the bar, and certainly for the MBE portion, are covered as first year classes.³³¹ “The 175 scored questions on the MBE are distributed evenly, with twenty-five questions from each of the seven subject areas: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts.”³³² Access schools are taking the chance on, and providing the legal framework, for students whose LSAT and GPA metrics are otherwise insufficient for entry to other schools, due to the risk of failing the Bar Exam.

The fact that the school from which they graduate, and not the school who admits them, is the one under which the results are attributed is problematic. This is what Professor Rory Bahadur calls “changing the denominator,” and it leads to a false understanding of the statistics attached to each school.³³³ This creates a situation where the LSAT and GPA metric used to admit these

school as compared to the admitting institution. What has been observed to be true, particularly in Florida based schools, is more than likely to be replicated nationally.

³³¹ See *First Year J.D. Curriculum*, STU COLLEGE OF LAW, <https://www.stu.edu/law/academics/first-year-curriculum/> [https://perma.cc/6SJ6-W7GQ]; *First-Year Curriculum*, BERKLEY LAW <https://www.law.berkeley.edu/academics/jd/first-year-curriculum/> [https://perma.cc/H8JP-BQQQ]; *What is Law School Like: First-Year Curriculum*, PRINCETON REVIEW, <https://www.princetonreview.com/law-school-advice/first-year-curriculum> [https://perma.cc/6QAR-9E9S]; *How to Succeed in Law School: A Guide by a Student Who Graduated as the #1 Law Student*, JD ADVISING, <https://jddadvising.com/what-classes-do-you-take-your-first-year-of-law-school/> [https://perma.cc/V365-5XLB]; *Law School First Year Curriculum*, USLEGAL, <https://lawschool.uslegal.com/resources-when-you-are-in-law-school/law-school-first-year-curriculum/> [https://perma.cc/8TR2-A42Q].

³³² NAT’L CONF. BAR EXAM’RS, *MBE, Multistate Bar Examination; Preparing for the MBE*, <https://www.ncbex.org/exams/mbe/preparing/> [https://perma.cc/95QK-KR7P].

³³³ See Rory Bahadur & Dr. Kevin Ruth, *Bad Math, Bar Sauce and the ABA as a Skill for the NCBE*, HOW. L. REV. (forthcoming) (Professor Bahadur uses the illustration of a horticulturalist and depending on how you count, different success rates are produced. Substituting students for plants, the analogy (forgive the pun), holds water.).

same students into the law school as first-year students is not within the same acceptable range of the schools they ultimately transfer to. The schools that gave them their chance and start are being raided by those who previously were uninterested in these same students, as applicants.

3. Public Perception

How does the public digest and understand the mountain of data available when trying to determine a law school's worth and, for lack of a better term, quality? The ABA curates and publishes law school data through commonly referenced '509' data.³³⁴ However, even this is not arranged in a way that allows for easy dissection or comparison. Time and again, one of the most easily referenced and widely used data points for law school law personnel and administrators is the public press release put out by the local jurisdictions. It is understandable why it is so popular. In a single, easy-to-understand document produced and released by a trustworthy entity, all the seemingly relevant and complete pass rate data on the most recent Bar Exam is visible. What could be simpler? The devil, as with anything, is in the detail.

The LSAT and undergraduate grade point average are touted as strong predictive tools of success in law school.³³⁵ While there is room for reasonable debate on the truth of those claims, the next step of attaching those same predictive metrics to the Bar Exam can be problematic. There are dangers when attempting to portray and explain bar results, particularly at individual institutions, as somehow a result tied explicitly to

³³⁴ See A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023—STANDARD 316, AM. BAR. ASS'N (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-rules.pdf [https://perma.cc/LL29-B44S].

³³⁵ See Marks & Moss, *supra* note 11; see also Kinsler & Usman, *supra* note 219.

“outperformance” or “overperformance” of some otherwise static metrics, usually a combination of GPA and LSAT.³³⁶

The LSAT is a particular fan favorite for its presumptive ability to predict Bar Exam performance.³³⁷ That approach is inherently misleading, not only because for every article talking about the value of the LSAT, another is decrying its lack of use, but also because even law schools are now accepting alternative exams, such as the GRE, for admission purposes.³³⁸ Additionally, underrepresented minorities, particularly Black students, historically underperform on the LSAT, creating a smaller pool of admitted applicants in law school from this group.³³⁹ Furthermore, when it comes to the Bar Exam, there is a severe and disproportionate limitation on the number of examinees who are Black who will be eligible to practice law using arbitrary cut scores and systemic bottlenecks.³⁴⁰

Taking it all too far, there is an attempt to portray a correlation between solid performances relative to these metrics as something uniquely and exclusively connected to actions by the law school.³⁴¹ Similarly, there are comparative issues when looking at numbers from varying institutions, depending on class makeup and other incompatible factors. Beyond those problems, this approach of claiming “outperformance” or “overperformance”

³³⁶ See Louis N. Schulze Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 68 J. LEGAL EDUC. 230 (2019).

³³⁷ See Austin, *supra* note 328; see Deborah J. Merritt, *LSAT Scores and Eventual Bar Passage Rates*, FAC. LOUNGE, (Dec. 15, 2015, 9:45 PM), <https://www.thefacultylounge.org/2015/12/lSAT-scores-and-eventual-bar-passage-rates.html> [<https://perma.cc/HDH3-WQZT>].

³³⁸ See Stephanie Francis Ward, *With GRE Restrictions Lifted for Law Schools, Some Urge Caution*, A.B.A. J., (Dec. 16, 2021, 11:56 AM) <https://www.abajournal.com/web/article/with-gre-restrictions-lifted-for-law-schools-some-urge-caution> [<https://perma.cc/4RBD-8YG9>].

³³⁹ See Alex M. Johnson, Jr., *Knots in the Pipeline For Perspective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL'Y REV. 379 (2013).

³⁴⁰ *Id.*

³⁴¹ See Schulze, *supra* note 336.

is fundamentally flawed.³⁴² This is due to, among other issues, its failure to acknowledge outside impactors, such as transfer rates, attrition, physical location, and other elements.³⁴³ The only clear thing is that while *Academic Success* professors play an inseparable role in the success of their students, there is not some magic approach or tool that the failure of which to integrate its use is the reason for negative student performance on the Bar Exam.

4. Stereotype Threat

The perception of ranking perpetuated by press releases utilizing the first-time data or school names negatively affects many of those officially named institutions and their students. These law schools are part of very few institutions actively and heavily engaged in diversifying the profession by opening doors of opportunity to minority and traditionally under-represented groups.³⁴⁴ This perception carries a real danger of stereotype threat, which will likely influence law school graduates' opportunities when they sit for the Bar Exam. Stereotype threat is a phenomenon that occurs when there is an opportunity or perceived opportunity for an individual to satisfy or confirm a negative stereotype of a group of which they are a member.³⁴⁵ The threat of possibly satisfying or confirming the stereotype can interfere with the subject's performance in various tasks, including, but not limited to, academic performance.³⁴⁶

³⁴² See Christopher Ryan, and Derek T. Muller, *The Secret Sauce: Examining Law Schools that Overperform on the Bar Exam*, FLA. L. REV. (forthcoming).

³⁴³ See Rory Bahadur, *Blinded by Science? A Reexamination of the Bar Ninja and Silver Bullet Bar Program Cryptids*, 49 J.L. & EDUC. 241 (2020); see also Jason M. Scott, & Josh Jackson, *Are Law Schools Cream-Skimming to Bolster Their Bar Exam Pass Rates?*, (AccessLex Inst. Rsch. Working Paper No. 22-03, 2022).

³⁴⁴ See Kennedy, *supra* note 117.

³⁴⁵ See *What is Stereotype Threat?*, RUTGERS SCH. ARTS & SCIS – DEP'T PHI., <https://philosophy.rutgers.edu/climate-v2/climate-issues-in-academic-philosophy/stereotype-threat> [<https://perma.cc/FJ58-RC69>].

³⁴⁶ *Id.*

Stereotype threat harms performance across many learning fields, and law is not immune to such impacts.³⁴⁷ Stereotype threat is not something that happens overnight or in a vacuum. After law students enter the institution, it is not uncommon for them to feel this stereotypical impact of underperformance. It only becomes exacerbated and reinforced by using standardized examinations for admittance.³⁴⁸ There is no reason to think anything different would occur when it comes time to sit for the Bar Exam, particularly in jurisdictions where there is a focus on institutional performance, and they are attending an access school.

Failed first-time status plays into stereotype threat. This is a significant problem for students who, due to poor predictive metrics, already had trouble getting into law school and are now attending so-called “access schools” that give opportunities and attempt to expand diversity and equity in legal education. When members of groups who are already marginalized and perceived to be less capable are self-aware of this position, the impact is more potent.³⁴⁹ By reinforcing these stereotypes about the abilities of underrepresented groups, we are actively harming them.³⁵⁰

Knowing what we know now, there should be zero focus on the first-time examinee results. Any iteration of its use only reinforces negative confirmation bias and, when linked to students and law schools, creates an

³⁴⁷ CHARLOTTE R. PENNINGTON, ET AL., TWENTY YEARS OF STEREOTYPE THREAT RESEARCH: A REVIEW OF PSYCHOLOGICAL MEDIATORS, PLOS ONE, (Jan. 11, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4713435/pdf/pone.0146487.pdf> [<https://perma.cc/TP7K-ATFF>].

³⁴⁸ See Russel A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016).

³⁴⁹ See generally Ryan P. Brown & Elizabeth C. Pinel, *Stigma on My Mind: Individual Differences in the Experience of Stereotype Threat*, 39 J. EXPERIMENTAL SOC. PSYCH. 626 (2003).

³⁵⁰ See Sian L. Beilock et al., *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. EXPERIMENTAL PSYCH. 256 (2007); see also Steven J. Spencer et al., *Stereotype Threat*, 67 ANN. REV. PSYCH. 415 (2016).

environment that hurts diversity.³⁵¹ Funding for schools, enrollment applications, and transfer rates are all foreseeable areas that are impacted by a focus on reporting first-time status results. Schools that are disproportionately affected by this inevitably are access institutions.³⁵² These law schools output the lion's share of lifting and giving opportunities to traditionally underrepresented students. There is an inherent failure of the Bar Exam to consider the diverse nature of applicants' educational access, cultural experiences, and even how differences in interpretive understandings of question prompts on standardized exams impact performance.³⁵³ Sadly, one logical conclusion is that there is a fear of natural diversity and inclusion in schools where the only concern is the appearance of first-time results.

VI. CALL FOR CHANGE

The publicly released pass rate information on bar passage rates on the local level serves as a point of first impression for the public. These metrics, without additional information and a complete understanding of the ABA standards, create an environment where incomplete data is setting the talking points. So-called first-time taker results are a relic of the past, from which we as a legal community need to acknowledge the importance of abandoning. Its failure to effectively convey meaningful information undoubtedly has affected the ABA's decision to no longer use it in accreditation Standard 316. Furthermore, the negative influence of focusing on this metric far outweighs any potential utility it used to have. The number of attempts on an admitted attorney's record or bar card is nowhere to be found, nor is disclosure of attempts to potential clients required. It is a safe inference that whichever

³⁵¹ See Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 31 (2018).

³⁵² See Kennedy, *supra* note 117 (access institutions are those whose LSAT, UGPA, and minority incoming class statistics significantly deviate from other similarly situated schools in their inclusion of minority and traditionally underrepresented groups).

³⁵³ Chong, *supra* note 351.

attempt an examinee passes the Bar Exam has no bearing on competence, since in the end both examinees are admitted. If it did, the Bar Examiners would have to admit the test is fundamentally worthless.

Three suggestions are put forth to help remedy some of the concerns raised. Firstly, each jurisdiction needs to take an inventory of its reporting mechanisms, review the historical background and local impact of its methods, and if necessary, make changes to their reporting of Bar Exam results. Secondly, the ABA should abandon either entirely or, at the very least, update their definition of first-time taker to be more accurate and comprehensive. Supposing a definitional update is the preferred route taken, they should strongly consider including any examinee with a transferred UBE score accepted in another jurisdiction within the reporting window (February of the following year), who has only physically sat for the exam once. Lastly, the NCBE should compile and facilitate pass rate data, specifically the list of transfer examinees for the UBE, and share it with the graduating schools and the ABA. This will allow for better tracking, a more robust and accurate reporting for, and by the ABA, ensuring comprehensive and reliable data.

A. Board of Bar Examiners

One of the most impactful and influential dams propping up the myth of first-time bar taker results having meaning is the varied jurisdictional Board of Bar Examiners; specifically, their continued use of the multiple distinctions on the many national press releases used to disseminate information on performance after each exam. The individual jurisdictions' Board of Bar Examiners, or equivalent regulatory body, should assess the current format and make changes to their press releases, as appropriate. Despite the plethora of jurisdictions administering a Bar Exam and releasing results, many (but not enough) have already moved away from this problematic style of data analysis that places a premium on first-time taker status. Exacerbating the concerns are jurisdictions that also compound result

reporting by attributing individual student results to the school they last attended. Comparatively impactful and standardized exams, like the medical boards, make no mention of which attempt an examinee is on, nor identify the school from which they graduated.³⁵⁴ It is understood that it has no bearing and provides no additional valuable data to the public. Following the example of medical education, the approach has valuable information that we can apply to legal admissions exams.

1. Releasing Examinee Names

What is the purpose of releasing the results of the Bar Exam from the perspective of the Bar Examiners? If it is to ensure that the public knows who is successful, what better way than an uncomplicated, open, comprehensive list of students who passed? There is no mistaking if someone's name is on the list or not, and as such, if they passed. The overall pass rate, the first-time designation, the cut scores of the UBE jurisdictions, the use of the overall method, the ability to split an exam, the fact that students can fail one portion yet still pass, the issue of transfer rates, and many other elements all make results released in formats other than a list of names more likely for confusion and inaccuracy in the market. Schools, employers, and examinees could all identify the actual results immediately. It would be clear that this person passed; nothing additional is needed.

It must be conceded that releasing names alone does not consider if someone does not end up sitting for the entire exam or if there is some other reason they are not visible on the list. This could mean someone splitting and attempting one portion passes yet is not on the pass list. It also could allow an examinee to pass one portion, fail the other, fail using the overall method

³⁵⁴ See Jennifer L. Swails et al., *The Conundrum of the United States Medical Licensing Examination Score Reporting Structure*, 322 JAMA, 605–06 (2019) (The medical field Step exam results are assigned to each student and are not used to reflect their graduating school affiliation or attempt. Schools themselves make all kinds of wild claims as to the value of their program, but that is a wholly different problem.).

and not be on the list. Of course, this criticism applies heavily to Florida, but similar concerns are applicable nationally; how the results are released currently leads to manipulation in attempts to separate the components. The problem of not knowing if a student attempted and failed is not solved by releasing only a list of names of those who passed. The jurisdictions currently share and should continue to provide that information privately to the law schools.

It should not be ignored that legitimate privacy concerns can be raised as a pushback in publishing names as part of results releases. However, that cannot be the false wall behind which we cower. Releasing data relating to individual students can be accomplished while still maintaining the individual's privacy. For example, Illinois has no publicly available released statistics; instead, individuals are notified directly.³⁵⁵ There is no threat of privacy being impacted, and no one can know the results. Presumably, the Illinois public is still protected since passing is not the standard, admission is necessary, and there is a public repository of practicing attorneys. Likewise, Mississippi also does not publicly release statistics on bar takers.³⁵⁶ Instead, it only provides results via a master list using otherwise non-attributable bar numbers to indicate success.³⁵⁷ Maryland similarly is a good example: it identifies the total number of takers, provide a repeater distinction by attempt number, and then privately post results to student accounts.³⁵⁸ This gives a greater level of detail to the interested public without divulging personal data.

³⁵⁵ *July 2022 Bar Examination Results Released September 30th*, ILL. BD. ADMISSIONS TO THE BAR, <https://www.ilbaradmissions.org/allnews.action> [<https://perma.cc/5KCF-M3E5>] (“Results from the July 2022 Illinois Bar Examination have been posted to the private user accounts of the individual test takers.”).

³⁵⁶ MISS. BAR EXAM RESULTS—JULY 2022, STATE OF MISS. JUDICIARY (July 2022), https://courts.ms.gov/bar/baradmissions/barresults/bar_results_july2022.pdf [<https://perma.cc/TG4Y-LZQ9>]; see also *Bar Results*, STATE OF MISS. JUDICIARY, <https://courts.ms.gov/bar/baradmissions/barresults.php> [<https://perma.cc/8EDA-GNCE>].

³⁵⁷ *Id.*

³⁵⁸ *July 2022 Uniform Bar Exam in Maryland Results*, MD. BD. L. EXAM'RS, <https://www.courts.state.md.us/ble/examresults> [<https://perma.cc/7U7K-LU4Z>].

Releasing data to include overall percentages and even in-state versus out-of-state status is possible while being mindful of its impact. This already works in large population jurisdictions without identifying other elements, such as the school from which they graduated. Delaware reports results by total takers, first-time distinction, repeat taker category, and a list of successful names.³⁵⁹ Washington D.C., Nevada, and New Jersey all provide notice of the overall results and include a list of names for successful examinees only.³⁶⁰ Kentucky uses a similar system, providing a total-only result and a list of successful names.³⁶¹ Maryland includes results by total takers; it uses a repeat taker distinction by attempt number and privately post results to student accounts.³⁶² New York dives deeper into its reporting by listing results by in-state designation and whether the students graduated from ABA accredited schools, as well as including a list of successful names.³⁶³ In addition, they also provide a link to the ABA for school data as compiled and released to the ABA.³⁶⁴ Ohio utilizes the first-time status, total results, and repeat attempt distinction, identifies schools by name nationally,

³⁵⁹ *Past Bar Results*, BD. BAR EXAM'RS SUP. CT. DEL., <https://courts.delaware.gov/bbe/pastbarresults.aspx> [<https://perma.cc/Z3QX-EGVP>].

³⁶⁰ *Notice of the July 2021 Bar Examination Results*, D.C. CT. APP., <https://admissions.dcaappeals.gov/jul-2021-exam-announce> [<https://perma.cc/KM6Q-VQXM>]; *Exam Results*, STATE BAR OF NEV., <https://nvbar.org/licensing-compliance/admissions/bar-exam/exam-results/> [<https://perma.cc/BQ3J-LWEY>]; *July 2021 Successful Candidates*, N.J. BD. BAR EXAM'RS, <https://www.njbarexams.org/news.action?id=2123&keyword=july%202021%20successfull> [<https://perma.cc/2LZR-5X63>].

³⁶¹ *Past Bar Results*, KY. OFF. BAR ADMISSIONS, https://www.kyoba.org/Views/public/Content.aspx?page_id=31 [<https://perma.cc/39L4-A757>].

³⁶² HISTORICAL PASS-FAIL STATISTICS FOR MARYLAND GENERAL BAR EXAMS AND UNIFORM BAR EXAMS IN MARYLAND, MD. STATE BD. L. EXAM'RS (Oct. 21, 2022), <https://www.courts.state.md.us/sites/default/files/import/ble/pdfs/passfailstats.pdf> [<https://perma.cc/XZ4A-EG64>].

³⁶³ *Bar Exam Pass Result Lookup*, N.Y. STATE BD. L. EXAM'RS, https://www.nybarexam.org/Lookup.html?_ga=2.200169511.847603604.1662140169-164105699.1661781302 [<https://perma.cc/QC9H-NXN5>].

³⁶⁴ *Id.*

and includes a list of successful applicant names.³⁶⁵ These are only a handful of examples of the many varieties in how results of the Bar Exam are released.

2. Best Practices

What are the best practices to be used? What advantages or disadvantages come with the choices in how to release and what to release concerning the Bar Exam results? Hawaii, Delaware, Washington D.C., Illinois, Maryland, Mississippi, and New Jersey are solid examples of jurisdictions to emulate. They are all slight variations, but none of them include graduated school designation. They utilize total takers, overall results, or otherwise do not say anything generally unnecessary. Some of these jurisdictions distinguish first-time takers, and others even distinguish which repeat attempt it is. Though, it is unclear what purpose this information serves.

To address these concerns, there must be assurances that the Bar Exam results press releases are complete, accurate, and of value. It is recommended that the state Board of Bar Examiners announce examination results by creating and releasing a public list of names. The list would be exclusive to examinees who sit for and pass the exam on its most recent administration. This list should not reference the status of attempts, in-state or out-of-state status, or identification of the law school with which an examinee is otherwise associated. The results list should clarify that the listed examinees have passed based on the method approved in that jurisdiction, including cut-off scores for the UBE, or that they have met all the testing requirements. Limiting language can clarify that inclusion on the passing list does not

³⁶⁵ *Bar Examination Results*, SUP. CT. OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/AdmissionsPortal/#/bar-exam-results> [<https://perma.cc/MDW5-ZP3F>]; see also *Ohio Bar Exam*, SUP. CT. OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/AttySvcs/Admissions/barExam.asp#tabulations> [<https://perma.cc/5TJX-HPZM>].

indicate that examinees have satisfied all character and fitness requirements for admission to the Bar.

An alternative to the recommendation above is to release category-based bar results. However, the announcement of these results should not be listed by schools. Instead, the information should focus on some or all the following data points for all examinees: overall state results; the jurisdiction in which exam applicants received their law school education; or classification of applicants based on admission to practice. Any known press releases being used in a format not intended, such as for law school ranking, should reform their structure immediately.

B. American Bar Association

The ABA questionnaire must be updated to remove any reference to first-time status. Alternatively, redefining first-time takers to account for UBE concerns is also a helpful potential. Finally, there needs to be a reaffirming of the purpose of standard 316 stated explicitly, as well as an acknowledgment of the harm caused by first-time taker status focus. If only an update is the route taken, the corrected definition should expressly include any examinee with a transferred UBE score accepted in another jurisdiction within the reporting window (February of the following year), and who has only physically sat for the exam once. Additionally, the ABA should curate and release a yearly comprehensive Ultimate Pass Rate list that can be public-facing, simple to locate, and easy-to-navigate as a source of accurate data.

C. National Conference of Bar Examiners

The NCBE should proactively and without charge, compile and facilitate a yearly list of transfer data, and most importantly, share it with the law schools. This allows for better tracking and more robust and accurate reporting for the ABA and ensures comprehensive data all around. Helping provide and track this information at the point of origin guarantees that regardless of whether the ABA updates its definition of first-time taker status,

schools can accurately respond to the questionnaire. Better still, the NCBE should also share the same data with the ABA and reduce the impact and reporting load on every law school nationally, thus providing the public with actual results and complete metrics to protect and inform interested parties.

D. Final Takeaways

The Bar Exam in its current format is far from perfect. We do not need to add to this burdensome gatekeeping exercise by continuing to fail students, schools, faculty, and the public by publishing and focusing on inconsistent and unhelpful metrics. A national standard is already in place to protect the public and ensure quality education from legal institutions. This is, among other assorted items, Standard 316 of the ABA. The focus on results, which was already tightened in May 2019, believes that passing within two years, up to four attempts, is just as good as passing on the first attempt. We know this to be true since it is the standard now. Additionally, these lawyers are considered every bit as qualified by their local licensing jurisdictions to practice law. We must stop holding onto this fallacious notion of first-time results being important, or that bar passage rates are complete or accurate pictures of anything useful.

Despite the facts laid out above, the position taken in this article is not yet, at least vocally, the mainstream in the legal academic community. Indeed, traditional notions of competence and pass rates as meaningful metrics are difficult and slow concepts to adopt change. The current system undoubtedly hurts students and institutions that are disadvantaged or otherwise underrepresented. Underrepresented groups already face barriers to entry into the legal profession for various and often ridiculous reasons.³⁶⁶ They do not need additional impediments. We should have an honest discussion about who benefits from opposing changes to the currently accepted format. It is

³⁶⁶ See J. Cunyon Gordon, *Painting by Numbers: And, Um, Let's Have a Black Lawyer Sit at Our Table*, 71 *FORDHAM L. REV.* 1257 (2003).

impossible to deny the reality of manipulation in data reporting, impact on student enrollments and transfers, all of which continue to limit certain members of our society from the practice of law. We must do better.

