Putting the Bar Exam on Constitutional Notice: Cut Scores, Race & Ethnicity, and the Public Good

By Scott Johns[*]

ABSTRACT

Nothing to see here. Season in and season out, bar examiners, experts, supreme courts, and bar associations seem nonplussed, trapped by what they see as the facts, namely, that the bar exam has no possible weaknesses, at least when it comes to alternative licensure mechanisms, that the bar exam is not to blame for disparate racial impacts that spring from administration of this ritualistic process, and that there are no viable alternatives in the harsh cold world of determining minimal competency for the noble purpose of protecting the public from legal harms. All a lie, of course.

But rather than challenging our assumptions, state bar associations and bar examiners keep going as business as usual. We might even say that it's just the cost of doing business. Yes, some bar applicants will pay the price, they admit, by not passing bar exams, but protecting the public good demands that we be demanding, that we not yield to temptation to soften our approach. We can never be too cautious when it comes to protecting the public. After all, the public good is at risk. Or is it?

This Article challenges conventional stories told about the bar exam. Part I describes the background of the bar exam as currently used by most jurisdictions to include a hypothetical "Socratic" conversation as a prelude to understanding the bar exam and its impact on demography and the public good. Part II catalogues stories we tell to justify our recurrent resort to bar exams as the penultimate source of wisdom in making licensure decisions. Part III exposes fallacies behind many of these justifications. Part IV analyzes whether we might look to common law tort principles as a tool for exposing whether the bar exam, by producing recurrent well-

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known racial disparate impacts, might suffer from constitutional infirmity. Part V concludes with an exploration of some common-sense alternatives to the behemoth of the bar exam to better protect the public.

CONTENTS

I. BACKGROUND

A. Overview of Argument

This Article argues that the bar exam suffers from a constitutional defect, namely, that the bar exam as an assessment apparatus lacks empirical support sufficient to justify its continued use considering the bar exam's persistent disparate impacts based on race and ethnicity. As an exclusionary instrument, ostensibly separating competent from noncompetent attorneys, the bar exam does something much different. Rather than protecting the public, the bar exam restrains competition, restricting entry to the profession, notably favoring certain racial and ethnic groups over other groups.

To begin, the data indicates the bar exam acts as a barrier to entry to the legal professional by producing significant disparate impacts against marginalized groups. In this Article, I explore jurisdictional reports detailing the impacts based on race and ethnicity. Based on the evidence of disparate demographic impacts, the Article then argues that the evidence to justify the continued use of the bar exam for its publicly stated purpose, to ensure attorney competence, is lacking. Indeed, the evidence cuts the other way. The bar exam has little-to-no empirical association with measuring minimal competency to practice law.

Finally, the Article argues, in reliance on intentional tort principles based on human dignity, that bar examiners and state supreme courts are on constitutional notice that, by remaining willfully blind to the overwhelming evidence that the bar exam is irrelevant to the practice of law, are committing "constitutional torts," so to speak, particularly against marginalized groups. To cut to the chase, I argue that such willful blindness satisfies the requisite constitutional intent to establish viable equal protection claims based on race and ethnicity against bar examiners and state supreme courts. To set the stage, let's briefly review the bar exam and its impacts on marginalized groups.

B. Bar Exam Formats and Cut Scores

For this Article, I explore data produced primarily out of two jurisdictional bar exams—the California Bar Exam (CBE) and the

Uniform Bar Exam (UBE). Although both bar exams are quite similar, it's worthwhile looking closer at the format of these two exams.[1]

1. Overview of the Uniform Bar Exam

The UBE, as the most prevalent, is currently used by thirty-nine jurisdictions.[2] The National Conference for Bar Examiners (NCBE), a nonprofit group that produces the UBE, describes the purpose of the UBE as follows: "The UBE tests knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills to determine readiness to enter legal practice in any jurisdiction."[3] The UBE is described as "a uniformly administered, graded, and scored bar examination that results in a portable score, not a portable status."[4] As such, the UBE does not test jurisdictional-specific law.[5] Rather, it tests "generally applicable principles of law."[6]

The UBE is a two-day bar exam.[7] The first day involves a written examination—six essays (MEE) and two performance tests (MPT). The essays, thirty minutes in length each, revolve around hypotheticals that test issues within in the following subjects: Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Real Property, Torts, Civil

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1. As of the date of publication, thirty-night jurisdictions use the UBE, with two more on the horizon: Pennsylvania and Michigan. *List of UBE Jurisdictions*, NAT'L CONF. OF BAR EXAM'RS (2022), https://www.ncbex.org/exams/ube/list-ube-jurisdictions [https://perma.cc/8694-29LS]. A few jurisdictions, such as Florida and Louisiana, have their own format, as does California. *Chart 9: Non–Uniform Bar Examination Jurisdictions—Admission by Examination*, NAT'L CONF. OF BAR EXAM'RS (2022), https://reports.ncbex.org/comp-guide/charts/chart-9 [https://perma.cc/984M-CE7H]. The Florida Bar Exam does not use performance tests, but Florida does use the NCBE multiple-choice exam while, in Florida, essays and a set of Florida multiple-choice questions are written by Florida bar examiners. *Id.* Louisiana does not use any NCBE materials, with its entire exam based on Louisiana materials. *Id.*

2. *Chart 9: Non–Uniform Bar Examination Jurisdictions—Admission by Examination*, NAT'L CONF. OF BAR EXAM'RS (2022), https://reports.ncbex.org/comp-guide/charts/chart-9 [https://perma.cc/984M-CE7H].

3. NAT'L CONF. OF BAR EXAM'RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION (2022), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209 [https://perma.cc/K7ML-Y8RY] (slide 4).

4. *Id.* at slide 3.

5. Kellie R. Early, *The UBE: The Policies Behind the Portability*, BAR EXAM'R, Sept. 2011, at 17, 18.

6. *Id.* The National Conference of Bar Examiners (NCBE) drafts the MEE, the MPT, and the MBE tests, which Colorado then purchases from the NCBE for use in the Colorado Bar Exam. For background information about the UBE, see *Uniform Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, http://www.ncbex.org/exams/ube; *General Information About the Colorado Bar Exam*, COLO. SUP. CT., http://www.coloradosupremecourt.com/Future%20Lawyers/AboutBarExam.asp [https://perma.cc/GCM8-FZEM].

7. NAT'L CONF. OF BAR EXAM'RS, *supra* note 3, at slide 11.

Procedure, Business Associations, Conflict of Laws, Family Law, UCC Article 9 (Secured Transactions), and Trusts & Estates.[8]

The performance tests consist of two ninety-minute exams involving a simulated case file with applicants drafting a work product such as a memo, letter, or brief in response to a hypothetical client issue or problem.[9] The case file includes a memo from a supervisor, a fact file, and a file of library materials (usually a combination of statutes, regulations, and cases).[10]

The second day involves a 200-question multiple-choice examination, which is also used on the CBE.[11] The all-day multiple-choice exam, consisting of 200 questions, allows 1.8 minutes per question, involving four option choices in response to hypothetical disputes involving Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Real Property, Torts, and Civil Procedure.[12]

8. *Id.* at slide 5.

9. *Preparing for the MPT*, NAT'L CONF. OF BAR EXAM'RS (2022), https://www.ncbex.org/exams/mpt/preparing [https://perma.cc/B6BF-6H8R] (providing a descriptive overview of performance tests).

10. NAT'L CONF. OF BAR EXAM'RS, *supra* note 3, at slide 11.

11. *Id.* at slide 5; *Scope of the California Bar Examination*, THE STATE BAR OF CAL. (2022), https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope [https://perma.cc/2M7X-UHB6] (describing the format and the subjects tested on the California Bar Exam).

12. *Preparing for the MBE*, NAT'L CONF. OF BAR EXAM'RS (2022), https://www.ncbex.org/exams/mbe/preparing [https://perma.cc/VL96-3V7K].

Exhibit 1: Uniform Bar Exam (UBE) Format and Subjects[13]

UBE DAY 1	**UBE DAY 2**
AM – Six (6) Essays (120 pts) – 3 hours	AM – 100 MC MBE (100 pts) – 3 hours
PM – Two (2) PT's (80 pts) – 3 hours	PM – 100 MC MBE (100 pts) – 3 hours
Subjects Tested:	**Subjects Tested:**
Con Law, Contracts/Sales, Property, Torts, Criminal Law & Procedure, Evidence, Civil Procedure, Family Law, Secured Transactions, Business Associations, Wills & Trusts, and Conflicts of Law	Con Law, Contracts/Sales, Property, Torts, Criminal Law & Procedure, Evidence, and Civil Procedure
Day 1 – 200 pts possible	**Day 2 – 200 pts possible**
Total Possible Points = 400 pts	
UBE Minimum Passing Scores = 260 pts to 280 pts depending on UBE Jurisdiction	

The entire UBE exam is closed book with no access to notes or other outside materials.[14] Although "uniform" in nature, each jurisdiction sets its own minimum passing score (also known as the "cut score"), and the written exam answers are graded separately by each jurisdiction.[15] The map and table below indicate the current jurisdictions that use the UBE

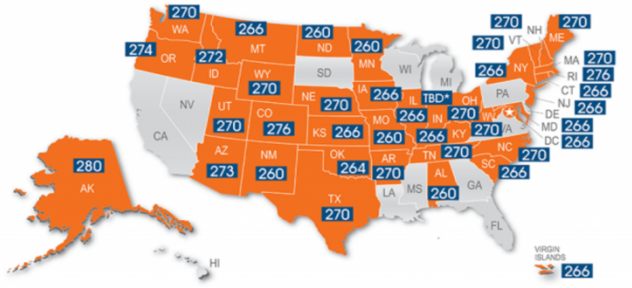
13. *Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS (2022), https://www.ncbex.org/exams/ube [https://perma.cc/4ZNV-8YVJ] (providing overview information regarding the format of the UBE); *see Minimum Scores: Minimum Passing UBE Score by Jurisdiction*, NAT'L CONF. OF BAR. EXAM'RS (2022), https://ncbex.org/exams/ube/score-portability/minimum-scores/ [https://perma.cc/PJ6P-UA5M] (providing score information); *Understanding the Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS (2022), https://ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209 [https://perma.cc/GP5P-WZQP] (providing details about the two test days and details about the subjects tested on each day:; *UBE Scores*, NAT'L CONF. OF BAR EXAM'RS (2022), https://ncbex.org/exams/ube/scores/ [https://perma.cc/XT8L-L6VC] (providing details about points and weighting).

14. *See, e.g.*, COLO. OFF. OF ATT'Y ADMISSIONS (OAA), FEBRUARY 2022 COLORADO BAR EXAMINATION – APPLICANT AGREEMENT 3 (Oct. 2021), https://www.coloradosupremecourt.us/PDF/BLE/Febr%202022%20Bar/Applicant%20Agreement%20-%20Feb%202022.pdf [https://perma.cc/F952-KDWE] (specifying that bar applicants are prohibited from bring "reference materials, bar review materials, [or] notes of any kind" into the exam administration site for the February 2022 bar exam).

15. Early, *supra* note 5 (describing and comparing commonalities among UBE jurisdictions and cataloguing permitted differences among UBE jurisdictions).

and the varying cut scores required as minimums to earn passing scores depending on the jurisdiction of admittance.

Exhibit 2: Uniform Bar Exam (UBE) NCBE Map of Minimum Passing Cut Scores by Jurisdictions[16]



Uniform Bar Exam (UBE)

Exhibit 3: NCBE Table of Minimum Passing Cut Scores by Jurisdictions[17]

Minimum Passing UBE Score*	Jurisdiction
260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Arkansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho
273	Arizona
276	Colorado
280	Alaska

2. Overview of the California Bar Exam (CBE)

The CBE is also a two-day exam.[18] The first day, as a written exam, includes five essays (one hour each) and one performance test (ninety minutes).[19] Unlike the UBE, the entire written CBE is produced by the

16. *Minimum Passing UBE Score by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/ube/score-portability/minimum-scores [https://perma.cc/W9H4-YE8S].

17. *Id.*

18. *Scope of the California Bar Examination*, *supra* note 11.

19. *Examinations*, THE STATE BAR OF CAL. (2022), https://www.calbar.ca.gov/Admissions/Examinations [https://perma.cc/JLW5-D3XB] (providing an overview of the California Bar Exam).

California bar examiners. The essays, however, test both generally legal principles and some state-specific California legal principles within the following subjects: Business Associations, Civil Procedure, Community Property, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Professional Responsibility, Real Property, Remedies, Torts, Trusts, and Wills and Succession.[20] The California performance test is similar to the UBE performance test, although written by California.

The second day of the CBE is identical to the UBE, administering the NCBE-produced 200-question multiple-choice exam, testing hypothetical disputes involving Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Real Property, Torts, and Civil Procedure.[21] Like the UBE, the CBE is graded within California and sets its own minimum passing cut score.[22]

20. *Scope of the California Bar Examination*, *supra* note 11.

21. *See Examinations*, *supra* note 19 (referencing the two-hundred question MBE).

22. *Scope of the California Bar Examination*, *supra* note 11.

Exhibit 4: California Bar Exam (CBE) Format and Subjects

CBE DAY 1	**CBE DAY 2**
AM – Five (5) Essays (120 pts) – 5 hours	AM – 100 MC MBE (100 pts) – 3 hours
PM – One (1) PT (80 pts) – 1.5 hours	PM – 100 MC MBE (100 pts) – 3 hours
Subjects Tested:	**Subjects Tested:**
Con Law, Contracts/Sales, Property, Torts, Criminal Law & Procedure, Evidence, Civil Procedure, Family Law, Secured Transactions, Business Associations, Wills & Trusts, and Conflicts of Law	Con Law, Contracts/Sales, Property, Torts, Criminal Law & Procedure, Evidence, and Civil Procedure
Day 1 – 1000 pts possible (200 pts on UBE scale)	**Day 2 – 1000 pts possible (200 pts on UBE scale)**
Total Possible Points = 2000 pts (400 pts on UBE scale)	
CBE Minimum Passing Scores = 1390 pts (278 pts on UBE scale)	

3. Cut Score Anomalies

Anecdotally, as suggested by the NCBE table of minimum UBE passing scores and the high California cut score (278 based on a UBE adjusted scale), states such as Colorado (276) and Alaska (280) would seem to lose more than a handful of aspiring attorneys to other jurisdictions because of the higher cut score required than in comparison to other jurisdictions, for example, such as New York (266), Minnesota (260), and Illinois (266).[23]

For example, I recall one person unsuccessful in Colorado giving up on Colorado because of recurring resource issues, family needs, and medical problems.[24] Unfortunately for Colorado, that person was admitted

23. *Minimum Passing UBE Score by Jurisdiction*, *supra* note 16.

24. Email from Fionna Mejia Gatica, Esq., Mejia Gatica Immigr., to Scott Johns, Professor of the Practice of L., Univ. of Denver Sturm Coll. of L. (Jan. 25, 2022, 20:55 MST) (on file with author).

to another jurisdiction via UBE transfer and now serves as a public interest attorney.[25] Such persons, I believe, are more than needed as members of the Colorado bar. We also tend to observe numbers of unsuccessful bar takers who were public defender hires, with the costs reportedly tending to fall heavily upon diverse communities.[26]

Let me say, before I move on, I am not asking bar examiners or state supreme courts to lower standards in any way to serve the public trust. Rather, the question comes down to the confidence that jurisdictions have in selecting cut scores, the costs that cut score decisions might place upon those most needing legal services, and the measurable benefits to the public at large, if any. As suggested by the data in the next section of this article, the costs of the bar exam are not negligible.[27] To be frank, those costs are borne by human beings and not equally distributed across all demographic groups.[28]

Consequently, it's imperative that bar examiners and state supreme courts analyze data regarding the bar exam and cut scores and its impacts on various demographics to include race, ethnicity, and gender; its impact on the provision of quality legal services; and its impact on the public trust, public service, and marginalized communities.[29] That's particularly true, I think, in states with higher-than-usual cut scores because the line between passing and failing is so sharply drawn.[30] As mentioned earlier, the UBE with cut scores in the range of 260 to 280 (with the median and mean at 266) draws a fine line between passing and failing, particularly depending on jurisdictional cut scores.[31]

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25. *Id.* (the bar taker failed the Colorado UBE by five points, passing in many jurisdictions such as New York).

26. Email and publication permission source on file to Scott Johns, Professor of the Practice of L., Univ. of Denver Sturm Coll. Of L. (Mar. 14, 2022, 11:00 MDT).

27. *New ABA Data Indicate Minorities Lagging in Bar Pass Rates*, AM. BAR ASS'N (July 5, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/bar-passage-rates [https://perma.cc/V8TZ-4G67] (summarizing disclosures about the impact of bar exams on racial and ethnic diversity).

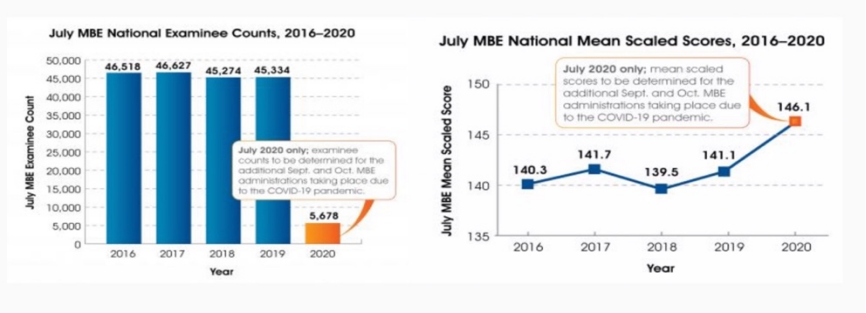
28. AM. BAR ASS'N, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER—2020 AND 2021 BAR PASSAGE QUESTIONNAIRE (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf [https://perma.cc/6ZFB-VAU6] (providing a data summary of the disparate impacts across jurisdictions based on race and ethnicity).

29. *New ABA Data Indicate Minorities Lagging in Bar Pass Rates*, *supra* note 27 (suggesting without citation that the "bar exam, the primary tool used nationwide to determine who gets to practice law, is under intense scrutiny").

30 Minimum Passing UBE Score by Jurisdiction, *supra* note 16.

31. *Id.*

Exhibit 5: Historical Mean MBE Multiple-Choice Scores NCBE Charts[32]



As illustrated above (except for July 2020 due to a limited pool of bar takers with many states postponing bar exams due to the pandemic), the mean MBE, which counts for 50% of the UBE score, falls roughly in the 140-range. In other words, being an "average" American Bar Association (ABA) law school graduate, who has accomplished much and proven much, means little on the bar exam. As such, just a slight downtrend can have significant impact on bar takers.[33] As the MBE multiple-choice scores rise or fall, so goes the impact on bar takers, with much resting on fine-line distinctions, likely producing distinctions without meaningful meanings—distinctions, as discussed later, that seem arbitrary (irrational) and capricious (based on impulse or whim or lacking good faith belief).[34]

C. The Crux of the Issue—Race & Ethnicity and the Bar Exam

The next question is whether bar exam cut scores impact bar passage outcomes based on racial and ethnic group identities. Because California is among one of the states with robust reporting of exam statistics and analysis of the bar exam, I start with California. As will be shown, based on publicly available data, cut score calculus impacts bar passage outcomes across racial and ethnic groups with those most impacted: historically disadvantaged groups. Let's take a closer look at how bar exam cut scores and race and ethnicity relate by looking first at predicted

32. *July 2020 MBE Mean Score Increases*, NAT'L CONF. OF BAR EXAM'RS (Sept. 1, 2020), https://www.ncbex.org/news/july-2020-mbe-mean-score-increases [https://perma.cc/3PRJ-45XB].

33. Karen Sloan, *Ominous Early Signs Emerge for July 2021 Bar Takers*, REUTERS (Sep. 15, 2021, 3:10 PM), https://www.reuters.com/legal/legalindustry/ominous-early-signs-emerge-july-2021-bar-exam-pass-rates-2021-09-15 [https://perma.cc/T843-BXEY].

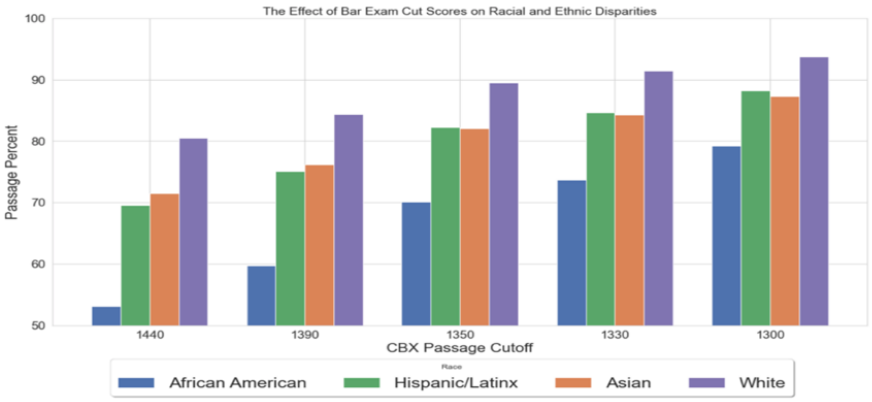
34. *See, e.g.*, Karen Sloan, *Bar Exam Scores Keep Rolling in, Nearly All Lower Than Last Year*, REUTERS (Sept. 23, 2021), https://www.reuters.com/legal/legalindustry/bar-exam-scores-keep-rolling-nearly-all-lower-than-last-year-2021-09-22 [https://perma.cc/ZN5S-FPCM] (indicating that early bar results for the July 2021 were down dramatically and implicitly suggesting that the downward trend was associated with a .7 point downward trend in mean MBE scores); *see also infra* Section IV.B.

impacts, and, second at actual impacts based on the California Supreme Court data lowering its cut score permanently in July 2020, and third, at actual impacts based on ABA data.

1. Predictive California Data

First, I turn to predictive data to demonstrate that higher cut scores are demographically exclusionary. The chart below, based on research funded by nonprofit AccessLex, predicts California bar passage outcomes based on four different cut scores and then explores the impacts of those cut scores on race and ethnicity.[35]

Exhibit 6: The Effect of Bar Exam Cut Scores on Narrowing Racial and Ethnic Achievement Gaps[36]



The chart above explores predicted bar passage rates based on various racial and ethnic groups.[37] As observed, the chart predicts that lowering cut scores results in increased pass rates across all groups. Notably, according to the AccessLex researchers, although all groups

35. Mitchel Winick, Victor D. Quintanilla, Sam Erman, Chirstina Chong-Nakatsuchi & Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, ACCESSLEX INST. RSCH. PAPER (Nov. 11, 2020), https://ssrn.com/abstract=3707812 [https://perma.cc/FF8D-T5BA].

36. *Id.* at 20.

37. Note: Although California uses a 2000-point scale, for purpose of interpretation, the scales below can be converted to the UBE scale roughly as follows:

1440 California score corresponds to 288 UBE score (previous California cut score)

1390 California score corresponds to 278 UBE score (amended California cut score)

1330 California score corresponds to 266 UBE score

1300 California score corresponds to 260 UBE score.

See STATE BAR OF CALIF., FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES app. A (2017), https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf [https://perma.cc/KQ6Q-SRXW] (indicating that a California score of 1330 is equivalent to a standard of 133 used in New York, which as the NCBE indicates is the equivalent of 266 out of 400 points in New York on the UBE).

benefit from lowering cut scores, the gap among various groups decreases significantly as cut scores decrease, indicating that higher cut scores are demographically exclusionary.[38]

2. Actual California Data

Second, I turn to actual data that tends to show how cut score decisions can either moderate or inflame disparate impacts. As background, the previous California cut score was 1440 (288 based on a UBE adjusted score).[39] In July 2020, the Supreme Court of California issued an order lowering the cut score to 1390 (278 based on a UBE adjusted score).[40] Because of the Supreme Court of California's 2020 order lowering its cut score, we have real world data about the impact that lowering cut scores can have on race and ethnicity in the profession.[41]

In the tables below, California compares first-time and repeater bar exam outcomes by various racial and ethnic groupings both before the cut score adjustment (1440) and after the cut score adjustment (1390). The tabular data below, presented by California, suggests that California's cut score adjustment positively impacted bar passage outcomes for all groups and historically disadvantaged groups, too. Take, for example, the pass data for first-time takers comparing 2019 and 2020. The column labeled "percent" indicates the percent of benefit based on group identifications. Lowering the cut score from 1440 to 1390 (UBE equivalent 288 to 278) increased the percent pass difference for whites (33.1%), Blacks (75.5%), Hispanics (75.4%), and Asians (72.7%), suggesting that cut score decisions can moderate disparate impacts or inflame disparate impacts.

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38. Winick, Quintanilla, Erman, Chong-Nakatsuchi & Frisby, *supra* note 35.

39. *See, e.g.*, *Bar Exam Calculator*, ONE-TIMERS: THE CALIFORNIA BAR REVIEW COURSE, https://one-timers.com/one-timers-bar-exam-calculator [https://perma.cc/M6ZH-YTVW] (providing a score comparison calculator and explaining that California "uses a thousand-point scale [and that bar applicants can] simply move the decimal point over. Hence, a scaled 1440 score is really a 144 [score on the UBE score].").

40. Jorge E. Navarrete, *California Bar Exam*, SUP. CT. OF CAL. (July 16, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FINAL.pdf [https://perma.cc/JW39-GXPH].

41. What makes this information particularly helpful is that the data compares—not perfectly—performance under the prior higher California cut score of 1440 versus the amended current California cut score of 1390. I say "not perfectly" because the impact of COVID-19 resulted in a significant change in the way that California administered the summer 2020 bar exam; it was postponed and finally given via remote exam in October 2020. *See* Merrill Balassone, *California Supreme Court Orders Bar Exam Delayed, Administered Online*, CAL. CTS. NEWSROOM (Apr. 27, 2020), https://newsroom.courts.ca.gov/news/california-supreme-court-orders-bar-exam-delayed-administered-online [https://perma.cc/93VB-RC6T]; *State Bar of California Releases Results of October 2020 Bar Exam*, STATE BAR OF CAL. (Jan. 8, 2021), https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-results-of-october-2020-bar-exam [https://perma.cc/SQA8-XPJ5].

Exhibit 7: California Bar Exam Report Race and Ethnicity Impacts[42]

The State Bar of California

Pass Rate Comparisons between 2019 July and 2020 October General Bar Exams, by Race/Ethnicity and First-Time/Repeater Status

	First-Time Takers				Repeat Takers				All Takers			
	Pass Rate (%)		Difference		Pass Rate (%)		Difference		Pass Rate (%)		Difference	
			Percentage				Percentage				Percentage	
Race/Ethnicity	2019	2020	Point	Percent	2019	2020	Point	Percent	2019	2020	Point	Percent
White	62.9	83.7	20.8	33.1	30.2	46.3	16.1	53.3	42.0	69.3	27.2	64.9
Black	32.1	56.0	23.9	74.5	15.1	37.7	22.6	149.7	18.4	45.0	26.5	143.8
Hispanic	37.8	66.3	28.5	75.4	25.0	37.7	12.7	50.8	27.9	50.6	22.7	81.3
Asian	35.5	61.3	25.8	72.7	24.8	45.8	21.0	84.7	28.5	53.8	25.3	88.7
Other	69.9	77.5	7.6	10.9	28.3	45.7	17.4	61.5	69.3	68.5	-0.8	-1.2
Decline to Answer	NA	75.7	NA	NA	NA	40.0	NA	NA	NA	65.4	NA	NA
Total	64.4	74.1	9.8	15.2	25.9	43.4	17.5	67.6	50.1	60.7	10.6	21.1

Pass Rate Comparisons between 2018 July and 2020 October General Bar Exams, by Race/Ethnicity and First-Time/Repeater Status

	First-Time Takers				Repeat Takers				All Takers			
	Pass Rate (%)		Difference		Pass Rate (%)		Difference		Pass Rate (%)		Difference	
			Percentage				Percentage				Percentage	
Race/Ethnicity	2018	2020	Point	Percent	2018	2020	Point	Percent	2018	2020	Point	Percent
White	63.1	83.7	20.6	32.6	18.4	46.3	27.9	151.4	49.2	69.3	20.1	40.9
Black	32.3	56.0	23.7	73.4	8.1	37.7	29.6	366.0	19.8	45.0	25.1	126.8
Hispanic	48.4	66.3	17.9	36.9	17.4	37.7	20.3	116.5	35.4	50.6	15.1	42.7
Asian	46.2	61.3	15.1	32.8	13.5	45.8	32.3	239.0	33.5	53.8	20.3	60.7
Other	47.1	77.5	30.4	64.5	19.7	45.7	26.0	132.0	35.3	68.5	33.2	94.0
Decline to Answer	NA	75.7	NA	NA	NA	40.0	NA	NA	NA	65.4	NA	NA
Total	54.5	74.1	19.6	36.0	15.8	43.4	27.6	174.8	40.3	60.7	20.4	50.6

3. Actual ABA Data

The next question is whether bar exams produce racial and ethnic impacts, not just in California but across jurisdictions. With respect to jurisdictions at large, the differential impacts across various racial and ethnic demographics have also been reported as observed by the American Bar Association as indicated in the tables below.[43] The data below shows ultimate bar passage (U) for 2018 and 2019 and first-time bar passage for 2020 (FT). As observed below, there are significant bar passage differences reported across demographic groups.

42. THE STATE BAR OF CAL., PASS RATE COMPARISONS BETWEEN 2019 JULY AND 2020 OCTOBER GENERAL BAR EXAMS, BY RACE/ETHNICITY AND FIRST-TIME/REPEATER STATUS, https://www.calbar.ca.gov/Portals/0/documents/Pass-rate-difference-by-race-eth-2018-2020.pdf [https://perma.cc/VH87-BXJ6].

43. AM. BAR ASS'N, *supra* note 28.

Exhibit 8: American Bar Association Report Race and Ethnicity Impacts[44]

2021 BPQ Aggregate Data

	2018U	2019U	2020 FT
TOTAL Graduates	33,739	33,942	34,162
Total Takers	32,047	31,720	29,531
Total Passers	28,839	27,767	24,463
Total Pass Rate	90%	88%	83%
Diploma Privilege	345	352	1,501
Pass % + DP	90%	88%	84%
Ethnicity Data includes DP			
White	93%	91%	88%
Black	79%	75%	66%
Hispanic	84%	80%	76%
Asian	88%	84%	80%
Native American	86%	87%	78%
Hawaiian	71%	79%	78%
Non-Residents	90%	86%	86%
Race Unknown	89%	88%	84%
2 or more	88%	84%	82%

2020 BPQ Aggregate Data

	2017U	2018U	2019 FT
White	92%	90%	85%
Black	75%	71%	61%
Hispanic	82%	75%	69%
Asian	87%	86%	74%
Native American	83%	82%	72%
Hawaiian	84%	68%	71%
Non-Residents	84%	94%	79%
Race Unknown	90%	88%	79%
2 or more	88%	83%	74%

Based on this data, the questions as I see them for states that do or do not report demographic impacts are: (1) whether jurisdictions see similar patterns because of the bar exam; (2) if so, whether jurisdictions ought to maintain current cut scores, which vary greatly; and (3) whether jurisdictions ought to use the current bar exam for licensure assessment given its biases. As such, cut score determinations have significant costs, particularly for those most unrepresented in the legal profession.

D. A Cautionary Tale—Data Storytelling

People say that a picture is better than a thousand words. There's much to be said for that especially with respect to data interpretation. To be frank, data is not self-interpretating.[45] That's because data is an artificial construct that we use to try to better understand ourselves, our

44. *Id.*

45. *See, e.g.*, Lydia Denworth, *A Significant Problem*, SCI. AM., Oct. 2019, at 62, 66 (mentioning that "[j]ust how much trouble is science in? There is fairly wide agreement among scientists in many disciplines that misinterpretation and overemphasis of *p* values and statistical significance are real problems, although some are milder in their diagnosis of its severity than others.").

communities, and the worlds around us. As such, data requires elaboration and explanations, what we might call storytelling in other contexts.

Exhibit 9: Pepper . . . And Salt[46]

The stories that we tell say much about us. Take the cartoon depicted above. It suggests, at least to me, that there are multiple ways that we can use data to tell stories about reality, whether true or not. First, the cartoon suggests that we can fix the data (even innocently by failing to ensure data accuracy), or second, we can misstate what the data means or describes (by forcing the data to tell a story that we yearn to hear, rather than letting the data help illuminate and expose what we don't yet know or understand).[47] In short, we, as human beings, tend to be blindsided by data. It's a shortcoming that I will try to tackle throughout this Article. Let me share some examples.

First, we can manipulate the data or not understand the limits of how we gathered the data. An example of that is an election poll, showing a clear-cut winner, and yet the actual outcome goes to a different candidate. How come? Because it's impossible to collect perfect data. It is always partial, always limited, always conditional. Perhaps the election surveys

46. Kaarman Hafeez, *Pepper … and Salt*, WALL ST. J., Cartoon Features Syndicate, Oct. 2, 2021.

47. Lydia Denworth described that

> [t]he goal of science is to describe what is true in nature. Scientists use statistical models to infer that truth—to determine, for instance, whether one treatment is more effective than another or whether one group differs from another. Every statistical model relies on a set of assumptions about how data are collected and analyzed and how the researchers choose to present their results.

Denworth, *supra* note 45, at 66. In other words, our research always requires evaluating the integrity of our data and the integrity of the claims that we make about our data. *See also* Hans IJzerman, Neil A. Lewis Jr., Andrew K. Przybylski, Netta Weinstein, Lisa DeBruine, Stuart J. Ritchie, Simine Vazire, Patrick S. Forscher, Richard D. Morey, James D. Ivory & Farid Anvari, *Use Caution When Applying Behavioural Science to Policy*, 4 NATURE HUM. BEHAV. 1092 (2020) (arguing that caution is needed when extrapolating behavioral studies for public policy purposes because of the many fundamental limits to social science research).

didn't include the groups most likely to vote or excluded communication modes that were more popular than previous methods of obtaining accurate samples. Poor design is often at issue.

Second, even in the best of cases in which we are confident that the data is the best available, we can sometimes force the data to tell us more than what it says, often trying to defend a position rather than using data to undermine our positions. For example, there's been some talk of late about the "replication crisis" in the sciences, particularly in medicine and the social sciences, where ideas with little support gain widespread acceptance in the scientific community before later being invalidated.[48] Rather than let the data speak, we can speak over the data, bending it—of sorts—into our whims, always a dangerous maneuver.

E. A "Socratic" Conversation about Cut Scores, Race & Ethnicity, and the Public Good

To set the stage for the argument in this Article, I'll share a mythical conversation between the ancient Socrates as Socrates speaks with a cast of hypothetical characters: a bar examiner, a jurist, a legal educator, a law student, a bar taker, and a law school academic support professional.[49] The setting is the mythical state of Franklin, one of the states in the United States of America. The purpose of this dialogue is to explore possible ways that people see and experience themselves as actors in the context of the bar exam as used by most jurisdictions in the United States. My hope is that this dialogue allows us to reevaluate and think curiously, creatively, and courageously about the roles we all play in the bar exam debate. In this narrative, we'll hear mythical conversations among the major authorities and participants responsible for administering, grading, and supervising bar exams and the participants most impacted by the process and their decisions. Let's begin the conversation.

1. Socrates Meets a Franklin Bar Examiner

Bar Examiner: What's the getup? I mean, look how you are dressed, with the robe and all, and the sandals too. I mean, you look straight out of ancient Athens.

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48. Denworth, *supra* note 45, at 64 (indicating, for example, that "[o]ne of the more notorious examples is the idea of the power pose, the claim that assertive body language changes not just your attitude but your hormones, which was based on one paper that has since been repudiated by one of its authors").

49. The idea for this "Socratic" conversation comes from reading two extremely interesting books by philosopher Peter Kreeft. *See generally* PETER KREEFT, THE BEST THINGS IN LIFE (1984); PETER KREEFT, SOCRATES MEETS JESUS (1987). I was especially intrigued with this technique of communication because we commonly use the "Socratic" method in law school.

Socrates: Perhaps I am. Sometimes we can trust our senses; sometimes not. But yes; it is I.

Bar Examiner: Come on. What's the gig?

Socrates: The gig? What do you mean by "gig?"

Bar Examiner: You know what I mean.

Socrates: How can I know what you mean unless you tell me what you mean. Can I read your mind like a book? Unless you tell me your thoughts, they remain hidden, unless, of course, your actions reveal your thoughts. Perhaps that is the case. Perhaps not.[50]

Bar Examiner: I'm not sure what you are up to, but you certainly look authentic. And talk authentically.

Socrates: Sometimes the authentic is the author itself, don't you think? Isn't that what "authentic" means?

Bar Examiner: Well, enough of this, I see we aren't getting anywhere with all these questions and conjectures.

Socrates: But isn't it in the questions that we learn?

Bar Examiner: Yes, of course, provided the questioner is authentically seeking and not answering. For a question posed as an answer is no question at all. We lawyers know that all too often, for in law school we are told to never ask a question in trial that you don't already know the answer to.

Socrates: You sound like a philosopher yourself.

Bar Examiner: No, I'm much more pragmatic than to sit around questioning everything. I'm a bar examiner.

Socrates: What do you examine?

Bar Examiner: I examine people, really, law school graduates, to see if they are prepared for the practice of law, to see that they are really competent to practice law.

Socrates: Why do you do that? Hmm. It sounds like you don't trust law schools with training students. Is there something wrong with legal education?

Bar Examiner: Oh no. It's not that we bar examiners don't trust law schools but, as Ronald Regan said about the Soviet Union to President Gorbachev, we must always trust but verify.[51]

Socrates: So, trust requires trustworthiness. I see, you don't really trust law schools, do you?

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50. This line of questioning is not original to me. It's like the line of probing found in Dr. Kreeft's books, cited in *supra* note 49.

51. *See Trust but Verify*, YOUTUBE (Mar. 7, 2008), https://www.youtube.com/watch?v=As6y5eI01XE [https://perma.cc/8U2X-4RYG]; *see also* RONALD REAGAN PRESIDENTIAL LIBR., REMARKS ON SIGNING THE INTERMEDIATE-RANGE NUCLEAR FORCES TREATY (1987), https://www.reaganlibrary.gov/public/documents/1-remarks-on-inf.pdf [https://perma.cc/A874-J73A] (transcript of Reagan and Gorbachev bantering about arms reductions negotiations).

Bar Examiner: Of course not; they have their purposes. But their purpose is different than our purpose. Theirs is to educate; ours is to verify the quality of the education. That the product that the law school produces is really worthy of trust.[52] We protect the public by ensuring that law school graduates are up to the task of serving the public.[53]

Socrates: I see. It sounds like you then administer an exam. But isn't that what law schools do too?

Bar Examiner: Yes, of course. But our exam is much better prepared, drafted, administered, and graded. It's the "gold standard" of exams. As you might have said in Athens, it's Olympian.

Socrates: I'm not sure what you mean. But how do you know that your exam is the gold standard, as you say?

Bar Examiner: Oh, we have lots of data.

Socrates: What sort of data?

Bar Examiner: Oh, lots of statistical results.

Socrates: So then you are a mathematician? I dabbled in mathematics myself.

Bar Examiner: Oh no; but we have lots of mathematicians and statisticians to analyze the bar exam for us.

Socrates: So you trust the experts but do you verify them?

Bar Examiner: What do you mean, Socrates, as you call yourself?

Socrates: Data can tell a story, can it not? But the story it tells is not told by the data. Doesn't that take interpretation? A bit of art, so to speak?

Bar Examiner: Oh, but the interpretation of the data verifies that the exam does what it means. Our bar exam and the data that it produces verifies that law school graduates have the necessary skills to serve competently as attorneys in positions of public trust.

Socrates: What sort of data verifies that your exam is accomplishing its purpose?

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52. For an interesting commentary about why states seem to prefer bar exams over alternative licensure mechanisms, see Derek T. Muller, *Disaggregating the Debate Over the Bar Exam and Diploma Privilege*, EXCESS OF DEMOCRACY (July 10, 2020), https://excessofdemocracy.com/blog/2020/7/disaggregating-the-debate-over-the-bar-exam-and-diploma-privilege [https://perma.cc/KT4G-BUP5] ("I think the bar exam today reflects a fundamental distrust of law schools (that law schools, either specific schools or a cohort at given schools, admit, retain, and graduate too many students who lack the minimum competence to practice law) and the American Bar Association's accreditation practices (the belief that they are too loose and fail to enforce admissions, retention, and standards, perhaps in part due to Department of Justice pressure.)").

53. Erica Moeser, *President's Page*, BAR EXAM'R, Dec. 2014, 4, 4–6 (suggesting that bar passage declines are related to law school declines in LSAT scores for admitted students, an emphasis on experiential learning and other curricular changes); *see also* Memorandum from Erica Moeser, President, Nat'l Conf. of Bar Exam'rs, to Law School Deans (Oct. 23, 2014), https://online.wsj.com/public/resources/documents/2014_1110_moesermemo.pdf [https://perma.cc/AUV2-N9JK] (suggesting that bar exam declines in 2014 were due to "less able" test-takers than in prior years).

Bar Examiner: Well, it's quite simple . . . .

Socrates: We philosophers find that the simple is sometimes the most confounding of all. But go on; please tell me more.

Bar Examiner: Well, if I remember my college class in logic, it's a basic syllogism. Let me see if I can get this right. I'm a bit rusty at logic.

Socrates: So I observe.[54]

Bar Examiner: There's no need to ruffle my feathers, Socrates.

Socrates: Ruffling feathers might be just what is needed, don't you think? For a bird that cannot ruffle its feathers probably is a bird that cannot fly (or perhaps is even dead). The ruffles of life might sometimes lead to the best of life. But please continue.

Bar Examiner: I'm starting to get your "gig," Socrates. Here's what the data shows, or should I say, "reveals" to us. First, we write the bar exam to test core minimum competencies beginner attorneys should be able to demonstrate. Second, we administer the exam in strict test conditions to ensure that all test takers are tested in similar circumstances. Third, we then carefully scale and equate those scores so that each bar taker receives a numerical score. Fourth, those scores then determine who passes the bar exam. Depending on the jurisdiction, bar takers achieving scores above a certain point pass. Others do not.

Socrates: But that hasn't answered my question? How do you know that your exam tests minimum competence? Indeed, your answer suggests a weakness in your logic.

Bar Examiner: What do you mean?

Socrates: I mean precisely what I say, nothing more and nothing less.

Bar Examiner: I'm troubled by your tone, Socrates. Do you not trust us? After all, I've had lots of training. I'm an expert in what I do. We calibrate and recalibrate everything.

Socrates: Everything?

Bar Examiner: Well, not everything, of course. But everything that is important.

Socrates: You still don't see a weakness to your logic, do you? Let me ask you this. You said that each jurisdiction sets its own minimum passing score. Isn't that true?

Bar Examiner: Yes, that's true.

Socrates: And do some states have higher minimum passing scores while others have lower minimum passing scores?

Bar Examiner: Of course, that's the logic behind the reality that each jurisdiction sets its own minimum score. Some states, like Colorado and

54. Again, this sort of dialogue is similar to that in Dr. Kreeft's two books, cited above, with credit to Dr. Kreeft for originating this line of conversation. *See* KREEFT, *supra* note 49.

California, require higher scores. Others, like New York and Minnesota, require lower scores. That's their prerogative.

Socrates: Perhaps so, but only if the minimum score has reality behind it too, as you say, to ensure minimum competence. These then must be different exams, for Colorado to require a higher score than New York, for surely the practice of law in Colorado is not more nuanced than New York, is it? In other words, there must be a real difference either between the exam or the necessary skills between these two states.

Bar Examiner: I see. But you still don't get it Socrates. We have more data too. You see, bar exam scores correlate with law school grades. In other words, those who performed better academically in law school tend to perform better on bar exams, statistically speaking?

Socrates: But are we mere statistics or persons?

Bar Examiner: Of course, we are more than statistics; statistics illuminate the truth, the patterns behind our numerical observations.

Socrates: I see, we are back to where we began. Storytelling.

Bar Examiner: Again, your tone suggests doubts.

Socrates: That's who I am. I cannot be who I am not. Truly, you've spoken wisely. Doubt and skepticism are the true beginnings for knowledge and understanding. Indeed, in some of your culture's books, I've been reading about something called the "scientific method," which seems to be a bit like our ancient gods, sometimes poorly understood and rarely apprehended, especially because they were not real but rather figments of our imaginations run wild. But I digress. Let's see. What was I learning? That science is the skeptical art of doubt, always testing, always cautious, always questioning how to know what can be known. Science, it seems to some of your scientists, is less certain of itself than you are of your bar exam.

Bar Examiner: Oh Socrates. You just don't get it. We too use the scientific method to ensure that our bar exams do what we say they do. But the evidence is in. It's clear. Bar exam scores correlate with law school grades, so bar exams can be trusted as valid.

Socrates: Valid for what, may I ask?

Bar Examiner: You've already asked. Sorry to be so snarky Socrates. However, as I said, valid for ensuring minimum competency.

Socrates: So, do law school assessments test minimum competency? If not, then you can neither assert—by mere correlation with grades itself—that bar exams also test competency. For one to be valid, it must be authentic, true to its purpose. What's the purpose of law school grades?

Bar Examiner: That's easy, to grade.

Socrates: But to grade what?

Bar Examiner: To grade the students.

Socrates: You still haven't answered my question. Not to grade who but what? What is the purpose behind the thing, the purpose behind the method or the assessment? That's what we seek, if we really seek what is real.

Bar Examiner: I haven't really thought about that. I'm not quite sure. But, as a law school graduate myself, it's about sorting students based on whether students can demonstrate what they learned in their law school courses.

Socrates: Are they then learning to practice law in their law school courses?

Bar Examiner: Oh no, much more. They are learning to think like a lawyer. Very few courses are about the practice of law. Mostly it's about the theory of the law. Lots of hypotheticals. We call it the "Socratic method."

Socrates: So then, law schools are about training future philosophers then. Very good, provided your bar exam is a philosophy exam. But, as you say, your exam is about testing minimum competence to practice law. Do you also test "thinking like a lawyer"? If so, what lawyer? Lincoln, Ginsberg, Scalia, Thomas, Sotomayor? In reading your newspapers, it seems like your culture has many types of lawyers, so there must be many types of thoughts, unless the law is merely mechanical—a matter of robotic physics.

Bar Examiner: Yes, there are my types of lawyers as there are many types of people. But all lawyers share common patterns of thinking, communicating, and analysis.

Socrates: I see, I think. But is that what law schools teach? Test? Assess? How do you know? Your syllogism seems to be this. Law school grades rank students based on demonstrations of abilities to practice law. Bar exam scores correlate with law school grades. Therefore, bar exam scores also rank students based on demonstrations of abilities to practice law. But are law school exams subjective or objective? In other words, are they designed to assess the practice of law or what one teacher thinks one should have learned in a course? Or, are teachers merely sorting students, using a curve of sorts, without reference to considerations of attorney competence? A curve without reference to shape has no meaning, doesn't it follow?

Bar Examiner: That's a difficult question to answer. Mostly subjective, I suppose. I don't think that there is much thought about the design of law school exams or even much science about assessing student performance. But it all seems to work out quite well. Don't you believe in coincidence?

Socrates: I believe what I see. I delight in coincidences, like our meeting together today for this enlightening conversation. But even our conversation might not be as coincidental as it seems at first blush. For there is a method behind our experiences as people, and that method is what we are exploring together. Now back to your answer: "It all seems to work out quite well." Quite well for who? You, the public, future attorneys?

Bar Examiner: For all of us. We have a reliable and valid exam; the public can trust us because we have lots of data to back up our exam; and those law school graduates can have confidence that they can do well on the exam if they study for a couple of months.

Socrates: "If" is a cautious word. Conditional. In other words, legal education is necessary but not sufficient to pass your bar exams. One must apply oneself with diligence. Mere academic accolades are not enough. More is needed and that more is what we are after here, trying to discover together. What is that more? Why must one study for a few more months if one has spent several years, I believe it is three years, immersed in learning to "think like a lawyer"? It seems like your test is not verifying what was learned in law school but rather what one learns after law school for several reasons. First, you seem to say that one is not ready for your bar exam just because of graduation from a law school. Otherwise, one need not delay the exam for a few months until after graduation. Second, you seem to admit that there's little evidence to support differences in minimum scores among exams, especially because your exams are the same in many jurisdictions and you have not established that practicing law is more difficult or complicated in one state than another. Third, you seem to beg the question, assuming what you want to find, that your exam (and law school exams) test the practice of law, but rather you admit that legal education doesn't focus much training for the practice of law. Surely a few months of studying for a bar exam, which is similar in nature to law school exams, isn't much of a training at all for practicing and working with real people with real legal problems.

Bar Examiner: Socrates, you've given me a lot to think about. But you don't understand. It's the best we can do to protect the public. We aren't gods, after all. But we are good people at heart, looking after the public good.

Socrates: Only if your exam protects the public good rather than restrains the public good. And there are lots of other ways to protect the public good, assuming that one person can know what is good for all people. However, let me go back to your reliance on law school grades to verify your exam instrument. Why not just use law school grades if there's such a strong relationship between grades and bar exams? Is there no

oversight of law schools? Do all who enter law school graduate? If not, isn't it enough of a demonstration that one has graduated from a law school, as I understand that you only permit "accredited" law school graduates to take your bar exams? Indeed, I was reading that some of your states, and most in the past, had no bar exams, or nothing like the exams that you are administering today. I think they call that "diploma privilege" but I would call that "diploma licensure." Might the "gold standard" for licensure be such a system or even a system of mentorship? Indeed, in reading through some of your literature, it seems like most of your state's problems with attorney misconduct have very little to do with competency and everything to do with wisely handling life's struggles and challenges with integrity. If so, maybe your exam is indeed testing the wrong things?

Bar Examiner: It's what we've got because it's what we've got. It's practical, objective, efficient. It's the "gold standard" because it works.

Socrates: I see, we are back to where we started. It works because it works. That is indeed an answer, but an answer without meaning. Perhaps that *is* what is the practice of law. Answering without answering. Answering without knowing. Answering without thinking. If so, then your exam might be right on point.

Bar Examiner: Oh no, Socrates. Not at all. I've said precisely what I mean, not more or less, as you say.[55] Well, I've enjoyed our little conversation, but I have got to get back to work. We've got lots of exams to grade, data to be analyzed, and reports to be issued. But I'll be sure to give your line of questioning serious thought. Oh, and I see one of our supreme court justices. Let me introduce you so that you can continue your query.

Socrates: Thank you for your candid conversation. I've learned much. But I still don't know what you know. That's how it can be with expertise. It's like secret knowledge, accessible to only the few. Much like our ancient gods in Athens, I suppose. Thank you too for your time and I look forward to talking with one of your jurists.

2. Socrates Meets a Franklin Supreme Court Justice

Jurist: Oh, I had heard that you were in town. I can't believe my eyes. It sure looks like you, Socrates. I understand that you'd like to talk with me about our bar exam. I'll play your little game. I'd be glad to talk with you.

Socrates: I'm pleased to meet you too. But I'm not sure it's a little game, this act of thinking.

Jurist: Oh, of course not. Not a game at all. We are all thinkers.

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55. Again, this line of questioning is like that in Dr. Kreeft's books. *See* KREEFT, *supra* note 49.

Socrates: That's what we are here to find out. I find that thinkers are quite few. But let us begin. May I ask you what you have in your hand? It looks to be some numerical data of some sort.

Jurist: Oh, it's a chart of bar exam results based on race and ethnicity. Just published by the State of California. It sort of tracks the trends that we observe too here in Franklin. One can never have too much data to stir one's thoughts.

Socrates: Well, what do you see?

Jurist: I see just what you see, nothing more and nothing less.

Socrates: So, you agree that there is objective truth, truth that is independent of the subject. But let us find out if we do indeed see the same things as senses can be deceiving, I'm afraid.

Jurist: Well in this case, the data is clear. Some groups do better than others and the pattern has held true for years. However, you'll notice that results for 2020 showed that the gaps between the groups were narrowed.

Socrates: I see, I think. But why is that?

Jurist: The California Supreme Court lowered its minimum passing score starting with the 2020 bar exam and permanently too.

Socrates: But I see significant differences in pass rates among different races and ethnicities. Surely race and ethnicity are not relevant to the bar exam?

Jurist: Of course not. Our bar exam is finely tuned to ensure that race and ethnicity play no part in the bar exam.

Socrates: No part? Is that what you see from the chart? I see real differences—especially for those who did not pass the bar exams.

Jurist: That's not what I mean, Socrates.

Socrates: What then do you mean by "no part"?

Jurist: No influence. No relationship.

Socrates: What do you mean by "no relationship"?

Jurist: Let me speak plainly, Socrates. We've scrubbed the exam of any sort of language that might lead to biases. We've tested the exam to ensure that no such biases ended up inadvertently disadvantaging one group or another. We are sticklers for data and analytics. I've personally asked the drafters of our exam to scrutinize all available data to make sure that race and ethnicity played no part. The statistical research is clear. It's not race and ethnicity at work. It's different grades and admission scores for certain groups versus other groups. We can't control that. In fact, as California indicated, it's not the test that leads to bias. It's just a fact of life due to historical and social-economic discrimination that is systemic across the United States. It's not us at all, just because law school grades and admission scores indicate that some groups overall have lower

credentials. Those are factors, simply put, that are outside our control as jurists overseeing bar exams.

Socrates: I'm starting to see a pattern here in Franklin. The bar exam works because it works. It's not biased because it is not biased. It seems like we've gotten no further along than we first began. But let me see if we can learn some more about these other factors that you point too. Are admission scores and law school grades relevant to the practice of law?

Jurist: Of course, Socrates. Admission scores and law school grades match quite well with bar exam scores.

Socrates: So then, do admission scores and grades indicate competency to practice law?

Jurist: Sort of. It depends.

Socrates: That sounds like a very lawyerly answer.

Jurist: It depends on the quality of the school one attends and the robustness of its assessment methods and its educational program. One can never be too sure when it comes to letting someone practice law, you know.

Socrates: I know very little. That's what we are here to learn. So why not limit bar admission to those schools that are accredited by your state if it's merely a trust issue?

Jurist: We just don't have resources to scrutinize all law schools. And we aren't the experts in legal education—just the practice of law.

Socrates: So, in your experience, are grades reflective of competency to practice law? Your bar examiner indicated that very few law schools actually teach students to practice law. Rather, I believe that the bar examiner stated that law schools teach students to think like an attorney, whatever that might mean.

Jurist: You are correct, Socrates. That's why we have to administer a bar exam—to make sure that individuals seeking to serve clients in our state are competent to practice law.

Socrates: So, you are an educator so to speak, aren't you? For education includes assessment and you are assessing whether certain individuals are ready to practice law in your state. As such, why not permit individuals to skip the law school experience and simply take, what I understand are two-month courses, to prepare them for your bar exam that tests practice competencies? That would surely be a more efficient process and less costly process.

Jurist: It's complicated.

Socrates: I think we are starting to get somewhere. Wisdom begins when we start to realize that we don't have answers.

Jurist: Well said Socrates. But what would you suggest?

Socrates: I suggest what I always suggest, no more or no less. Question everything. Don't assume. Don't presume. Human dignity requires no less of us, all of us. "It's complicated" is no answer at all, is it? For it seems the legal profession has much to lose by excluding many competent people from the practice of law.

Jurist: It's not really an answer, but I have to say, it's all I've got, for now. You've given me much to think about. For that I am thankful. Perhaps you should join us on the bench?

Socrates: I'm not sure what a bench is. But if you mean something like Mars Hill in our ancient Athens, open to the public with robust dialogue, I'd be glad to join you again to see what we can see, together. I look forward to our next conversation. I hope it will be soon.

Jurist: Me too.

3. Socrates Meets a Law School Educator

Professor: There you are. Shall I call you Socrates? I heard you were on campus today.

Socrates: That's my name so that shall do very well indeed, thank you very much.

Professor: Okay, Socrates. By the way, we use your method all the time.

Socrates: Oh, so you know that you know my method so often leads to much confusion.

Professor: What do you mean?

Socrates: I mean that I rarely or never know the answer to the questions I ask. For if I knew the answers, there would be no need to ask the questions. But in questioning I learn to see. Often dimly. Sometimes brightly. But always softly.

Professor: Very interesting. What can I help you with?

Socrates: Well, I've been talking with people about your bar exam.

Professor: Oh, it's not our bar exam; it's our state's bar exam. Nutty really.

Socrates: What do you mean by "nutty"?

Professor: This will be fun, I think. But before I begin, I must say I don't know much about the bar exam.

Socrates: That's a good place to start, then. But why do you say that you don't know much about the bar exam? It seems to mean a very great deal to your students, I think.

Professor: It's just a rite of passage; something our students must achieve. Sort of a gatekeeper of sorts. I don't concern myself with the bar exam much. It's not like my exams at all.

Socrates: I see. It seems like we have something to look at here. How can you say that the bar exam is not like your exams at all but also say that you don't concern yourself much with the bar exam? What evidence do you have to make that claim that one is not like another? Do you look at the bar exam?

Professor: Oh no. I haven't looked at the exam in years. Some nutty bar folks at my law school keep pushing us to look at the exam. But why do that? It's arbitrary.

Socrates: Again, we are, I fear, lost, having to go back to before we began. How do you know it's arbitrary if you have not looked at the exam in years?

Professor: It's just not my sort of gig.

Socrates: I heard that word recently. I'm still not quite sure what it means. But go on, please.

Professor: I'm an academic—a professor. I teach students to think like a lawyer, to evaluate, to criticize, to question, to hypothesize, and to predict.

Socrates: That sounds very much like philosophy to me. Perhaps we are all philosophers to some degree or another? But have you no time to evaluate the bar exam—an exam which I understand is quite worrisome and costly for your students?

Professor: Oh, I have the time. And I have. I've thought it through. I know that the bar exam is arbitrary because the results are all over the place. Never consistent. Some years our bar takers do quite well. Others not so well. It's just about line drawing. Keeping the competition out. Stuff like that.

Socrates: That's not what your officials say.

Professor: What do they say?

Socrates: Now we are beginning to learn because we are beginning to ask questions. That's always the start of learning… So, in response to your question, they say that their bar exams are valid because bar exam scores line up with your grades. In other words, your exams seem to be producing the same sort of rankings that the bar exams produce. Perhaps you share much more with the bar examiners than you think?

Professor: Not at all. I don't require my students to memorize lots of rules and regurgitate mechanical solutions. I require my students to demonstrate judgment, analyze ambiguity, communicate precisely.

Socrates: No memorization at all.

Professor: Well, no. My exams are open book. Notes permitted. But I suppose that it helps to have some general principles in mind because my exams are timed.

Socrates: I see. Did you know that the bar exam instructions indicate that the exam is testing general principles of law? Perhaps you do test memorization after all.

Professor: I'm not sure where this is going. And I don't have time for this. I've got to get to class now. You know, the Socratic method and all. It's been very good talking to you, Socrates.

Socrates: And you, too. Good day.

4. Socrates Meets a Bar Taker

Socrates: You look very worried. What worries you?

Bar Taker: Nothing really at all, and everything at all.

Socrates: Tell me more.

Bar Taker: Why should I tell you more? I don't even know you. And you look awful weird in that garb. Where do you come from?

Socrates: I just came from that hall down there, talking with that professor.

Bar Taker: That's not what I meant. But I had heard that someone crazy was walking around campus looking like Socrates? That's you, isn't it?

Socrates: It is as you say. Shall you humor me? What is it that worries your soul so much? Perhaps I can help.

Bar Taker: Well, I guess it's worth the try. I've got just three more weeks to the big bar exam. I'm mighty worried. Most of this stuff I never learned in law school, things like the Fair Housing Act, the contracts clause, mortgages, and third-party beneficiaries. I've been trying to pound them into my head, but my practice test scores are horrible. Just awful.

Socrates: Perhaps I can help? How did you learn in law school?

Bar Taker: I don't know. I just sort of read the materials, outlined my notes, and took tests. We really didn't talk about learning at all. We were too busy, really, to learn.

Socrates: I'm not sure that makes sense. Let me try another angle. How did you learn to walk? Or ride that contraption over there, which I think they call a bicycle?

Bar Taker: That is a bicycle. That happens to be mine. I feel freest when I'm riding my bike with the air blowing in my face. Let me see if I can recall the details. It's a bit foggy. I was quite young, you know.

Socrates: I know very little except that I know very little. That I know. Go on please.

Bar Taker: I recall it took a lot of practice. It sure was difficult. I fell lots. I ran off the curb of the street and got quite a scrap up. I recall having some training wheels on my bike and people pushing me and steadying

me along the way. All of the sudden, I just got it. My balance came and I've been riding my bike ever since. If only the bar exam were that easy?

Socrates: Perhaps it is . . . and isn't. Tell me, what are you doing to learn for your bar exam?

Bar Taker: Oh, I am reading everything assigned, watching lots of lectures, taking lots of notes, and testing myself in lots of timed practice sessions, without my notes, of course, because the bar exam is closed book.

Socrates: That sounds a lot like how you studied in law school, doesn't it?

Bar Taker: I suppose so.

Socrates: Perhaps that's why you are concerned. Perhaps you are having to learn to ride your bike again, so to speak. Perhaps you never learned in law school?

Bar Taker: I think I see where you are going.

Socrates: It's not my job to direct traffic; only to follow where the questions and answers lead. Please, tell me more. How do you learn?

Bar Taker: I suppose it's by having lots of help and practicing lots of problems, slowly, just like when I learned to ride my bike.

Socrates: Perhaps so. Now we are getting somewhere. What else have you learned?

Bar Taker: I've learned that worry is sort of like an itch; it's got to be scratched and investigated, so to speak, to discover what's the bother of it all.

Socrates: Well said.

Bar Taker: Well, I've got to go. Much to study, I mean, learn now. I think I've seen the point, Socrates, practice much; question much.

Socrates: Good luck on your bar exam and thank you for your conversation.

Bar Taker: Thank you for your lesson, Socrates.

5. Socrates Meets a Practicing Attorney

Attorney: Socrates, you are the talk of town. I'm glad to bump into you, especially because I hear you've been talking about the bar exam. I took that exam a long time ago, last century to be precise. Piece of cake, if you ask me, except for one problem.

Socrates: It's good to meet you, too. Finally, a real practicing attorney. Say, what area of practice are you in?

Attorney: I'm a criminal defense attorney. Been practicing law for years, almost all in criminal court except for a few small gigs in family law and wills and trusts.

Socrates: There's that word again, "gig." It keeps cropping up. Tell me, why do you say that the bar exam was a piece of cake except for one problem?

Attorney: Well, when I took the bar exam it was no big deal. Everyone passed, or at least most everyone. Put in the work. No problem at all.

Socrates: What do you mean by work?

Attorney: Well, I paid for a commercial bar course. Went to a handful of morning lectures. Took notes. We were all pretty much the same back then, mostly male, mostly white, mostly fresh out of college; no kids or anything like that. About three weeks before the bar exam, I started to get serious. Let me see, I think it was just about after the July Fourth holiday weekend. I took all the weekends off, most of the afternoons too. But not after July Fourth. I still wasn't too worried. I made outlines of the subjects, took a few practice problems, took the exam, and passed, just like most of us. The only ones that didn't pass just didn't do the work, like I said. Or had something else come up. Family problems, medical emergencies, et cetera.

Socrates: Then tell me, why do you say "except for one problem"?

Attorney: Well, just recently, some crazed academic sort got the idea to run some sort of experiment about the bar exam. I volunteered. It's really bothered me ever since.

Socrates: What was the experiment?

Attorney: It involved taking a practice exam, let's see, really a mini-bar exam. Three hours of multiple-choice questions. No notes. No prep. The professor told me that the questions were just like those used on the bar exam today. I was glad to participate. I knew I wouldn't do very well on some of the subjects, contracts, and torts, for example, because I haven't studied those subjects in years. But the exam had a handful of criminal law questions too, right up my alley, or so I thought.

Socrates: It's our thoughts that often get us in trouble. It's the questions that lead us out of that mire.

Attorney: Well, to continue, I did horrible. Really all of us. I realize it was a bunch of attorneys taking the exam (not bar studiers), but we all are licensed to practice law. None of us have ever had any whiff of suggestions towards us that we are incompetent in what we do as practicing attorneys. No complaints, no grievances, no problems at all. I would have thought that at least some of the newer attorneys would have passed. But not one of us passed? Not one. And, to make matters worse, I did especially poor on the criminal law questions. I still can't make sense of it.

Socrates: What do you mean?

Attorney: Well, the bar exam is supposed to test the practice of law. You know, competency to serve as an attorney and all that.

Socrates: I know very little but I'm learning that your culture seems to think they know very much. I'm starting to wonder about that. But please continue. What is the problem, precisely, as you see it?

Attorney: Based on those exam results, I shouldn't be a criminal defense attorney. I know that I shouldn't practice contracts law or torts law, unless I put in a great deal of study. But criminal law? That can't be. I'm good at what I do.

Socrates: How do you know that you are good at what you do if the test results say otherwise?

Attorney: Come on Socrates. The test doesn't really test the practice of law. It's just a hurdle that all of us must pass. I suppose it just tests whether you have what it takes to be an attorney, the money, the resources, the time to put in to preparing to take that darned exam. And, after I failed the professor's little exam, I went back to look at my bar exam. It was a lot easier back then. Short essays. Not complex at all. That's not the case anymore. Lots more reading with no more time to digest the exam at all. It seems like they keep moving the goal posts.

Socrates: How do you know that you are good at what you do, I ask again?

Attorney: I've never received any complaints, none whatsoever. I teach criminal law continuing legal education classes for our bar association. I keep up with what's happening in the courts and in the news. I'm all in and all ears when it comes to criminal law. It's all so embarrassing. If the professor ever leaks the names of those who took that professor's little experiment, I'm doomed. The laughingstock of the bar.

Socrates: Maybe not?

Attorney: What do you mean?

Socrates: Well, if the facts are as you say, then maybe it's the bar examiners and their exam that is so embarrassing?

Attorney: Perhaps so, perhaps so Socrates. Thank you for our conversation. You've given me much to think.

Socrates: That's not my gift at all; it's your gift to yourself, but only if you do something about it.

Attorney: What do you mean?

Socrates: What do you think?

Attorney: Hmm. Let me see. I suppose your saying that I must do something, say something, speak up, or something like that.

Socrates: I'm not saying anything at all, merely asking questions.

Attorney: But the questions themselves, often lead to the answers, so that the questions are often the sayings.

Socrates: I think you've become a very good philosopher of sorts.

Attorney: I've never thought about that. Yes, I think so. Goodbye, Socrates. I hope we meet again. Oh, and there's one of those academic success professors—the type who brainstormed this sort of crazy experiment.

Socrates: We will indeed meet again (and often) whenever you question yourself or others. Good day, my friend.

6. Socrates Meets an Academic Support Professional

Pro: Hello Socrates. I was hoping to bump into you. I've heard so much about your conversations on campus and in Franklin. I'm a law school academic support professional and I wanted to get your advice.

Socrates: I don't have any advice. Only questions. Perhaps that will suffice?

Pro: Well, here's a question. I can't understand why we can't improve legal education. I mean, it's so arcane.

Socrates: What do you mean by arcane?

Pro: Well, we are still using your method, the Socratic method, to teach our law students.

Socrates: Tell me, there must be something more. Just because something is old, does that make it outdated too? Beyond usefulness? Only to be thrown out and discarded? Or, is it possible to reuse the old, much like I see with your trash cans recycling the old?

Pro: Ok, it's not just because our method is old. There's something else. I can't quite put my finger on it. Maybe it's not the Socratic method itself but rather that we don't tend to test our students throughout their studies. Maybe we don't do enough Socratic questioning?

Socrates: Let me ask. What seems to work? Why do you think some students succeed in learning and others don't succeed? And how do you know whether a student was successful?

Pro: Oh, I've been doing some research. But it's complicated. There are lots of views.

Socrates: Well, what do you think?

Pro: I think back to how I learned to ride a bicycle. To ride a bike, I fell, a lot. It took many tries before I got the hang of it. And there was often at my side someone supporting me, running alongside encouraging me, pacing me, and rescuing me when I fell off balance. Helping me belong. I also got hurt too, lots of times. But I kept at it because I really wanted to ride a bike, like others, and because people supported me and believed in me. And then, it happened. I began to ride, by myself, first slowly and then with more confidence. The more I rode, the more confident I got, and the better I got, too. I suppose that learning is a bit like that, too. It takes

encouragement from others. A vision. And lots of just jumping into it and trying it. And lots of failure too.

Socrates: So you think that practice leads to learning?

Pro: Oh yes, but not just any practice. Purposeful practice. Under guidance too. I think that our learning experts call these sorts of things distributed practice, retrieval practice, et cetera. But I think there's more to it than just practice.

Socrates: Why do you say that?

Pro: Because I've practiced a lot of Spanish and can't speak much more than a word of it.

Socrates: Why do you think that is?

Pro: Well to be honest, I didn't really try. I was scared too. Embarrassed to make a mistake. I felt like I was graded all of the time; too much pressure. I suppose I wasn't really taking Spanish to use Spanish but rather to merely get my required language proficiency credits as a college student. Come to think of it, I got my credits but not the proficiency. I know that I was tested all the time with lots of quizzes and lots of time being on call in the classroom. But I suppose I didn't see (or learn) how what I was doing in the classroom would make life better for me or others. I went through the motions without moving.

Socrates: So, is there more to learning than just practicing?

Pro: I think so. Some sort of belief or confidence. A willingness to fail, to be wrong, to be tested and tried and to learn from the experience. To see how what one learns connects with the future in a tangible practical useful way.

Socrates: Anything else?

Pro: Come to think of it, I didn't really feel like I belonged in languages. I knew that I wasn't a "natural" at language. As I said, I went through the motions of learning without learning. My heart was so afraid that my mind couldn't learn, couldn't soak it in. I realized, a few years back when I was in your ancient city of Athens working with another attorney volunteering with Syrians seeking refuge in Europe, that I was really scared to learn language. Off we'd go in a taxi and my attorney friend would ask questions of the driver, "how do you say this or that, is this the right way to pronounce this or that, what does that mean?" My colleague wasn't afraid to mispronounce the Greek words. She was courageous in learning the language, even informally. I, on the other hand, was timid and afraid. I often feel like that at faculty meetings, unable and unwilling to share my thoughts for fear of rejection.

Socrates: Why do you think that was? What made her courageous?

Pro: I think I see what you are getting at . . .

Socrates: I'm not getting at anything. I'm here to learn, which means that the questions are more important than the answers, for it's in the questions that we learn to answer.

Pro: Okay. Back to courage. Hmm. What made her courageous? I suppose that she wanted to learn. She felt like she belonged as a learner. She wasn't afraid to admit that she didn't know and that she needed to rely on others for correction and instruction. I think it had much to do with a feeling that she was in a safe place to learn, to experience, to try, a place in which she belonged as though it was as proper as breathing to try something new, to ask questions about the Greek language, to try her hand at speaking in Greek. Sometimes I think our students don't know that we were once novices. That we started, just like they are, knowing nothing or very little about the law. That we often felt like we didn't belong in the law school classroom. That the law was like a foreign language, but it was a language that we wanted to learn to speak and to participate in its culture and its growth and its development. In sum, I think learning requires both purposeful practice and a sense of place, of belonging, in a community of learning.

Socrates: Then maybe that's what you should focus your life's work on in legal education- belonging, purpose, meaning?

Pro: Precisely so. Well, I'm off to another meeting. Thanks for the answers, I mean, questions, Socrates. I know that I'm not a very good philosopher, but I sure enjoyed our little chat. I learned much, especially about asking questions.

Socrates: Well then you are indeed a very good philosopher. In some ways, we are all philosophers, some better than others.

II: THE STORIES TOLD

Most of us, if not all of us, are storytellers. That's because, as indicated previously, data is always partial. Reality and human interactions in the world are necessarily complex in ways that data cannot always measure. Data is always a subset of information about the world around us.

Nevertheless, data can be quite helpful for it allows us to *tentatively* order the world around us; it allows us to "see" things that might evade our glimpses if we don't look closely. That doesn't mean, however, that we can't misuse data to tell a tale, so to speak, even innocently. Thus, there tends to be numbers of stories told about relationships between the bar exam and its competency to protect the public. For example, one law school dean asserts that "[t]here is absolutely no evidence that shows

having a higher score makes for better lawyers."[56] In contrast, other academics suggest that there is empirical evidence that lowering bar exam cut scores negatively impacts the public good.[57]

Not surprisingly as the producer of the bulk of bar exam materials used by most jurisdictions, the NCBE claims that the bar exam fairly assesses competency to practice law, and, as justification, the NCBE cites to outside research to support its claim, for example, recent research in a Georgetown Journal of Legal Ethics article, which I will refer to as the "academic claim."[58] Consequently, in this section, we examine the NCBE's claim and the academic claim in the Georgetown article. In short, let's examine the stories that people tell about the bar exam.

A. The NCBE Claim

As suggested by the diagram below, the NCBE asserts what appears to be a rather circular argument, namely, that bar exam scores are trustworthy because they are related to law school grades, which are then related to Law School Admission Test (LSAT) admission scores. For example, in a recent article summarizing bar exam research results, the NCBE indicated that bar exams scores are consistent with "background" characteristics to include LSAT scores and law school grade point average (LGPA) data.[59] The premise, of course, behind this argument is that LGPA assesses attorney competency. That's a doubtful premise given that most law schools grade on a curve, a curve that is unmoored to measures of competency.[60] Without that supporting evidence, the NCBE's claim runs

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56. Maura Dolan, *California Is Easing Its Bar Exam Score, Which Critics Argue Fails to Measure Ability*, L.A. TIMES (July 26, 2020), https://www.latimes.com/california/story/2020-07-26/california-lowers-bar-exam-score-coronavirus [https://perma.cc/C7TY-LZ8C] (quoting in part UCLA School of Law Dean Jennifer Mnookin).

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

58. *See, e.g.*, Mark R. Raymond, April Southwick & Mengyao Zhao, *The Testing Column: Ensuring Fairness in Assessment*, BAR EXAM'R, Spring 2021, at 73. *See generally* Anderson & Muller, *supra* note 57.

59. *See generally* Andrew A. Mroch & Mark A. Albanese, *The Testing Column: Did UBE Adoption in New York Have an Impact on Bar Exam Performance*?, BAR EXAM'R, Winter 2019–2020, at 34.

60.

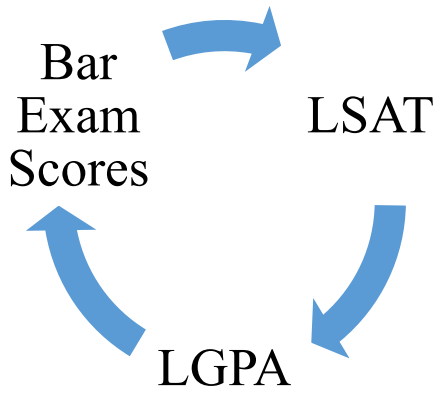
> Curves effectively put students in competition with one another, making a fellow student's success zero-sum against one's own, and there is little incentive to push one's peers' learning. Hence, curving de-emphasizes collaboration among students and is at odds with the practice experience of most attorneys, who must cooperate within and beyond their firm on a regular basis.

SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 468 (2012); *see also* Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 241 (2008) (summarizing symposium views suggesting of various scholars that the emphasis on "rampant competition in law school and

aground. That doesn't seem to stop the NCBE from pushing this story. Indeed, the NCBE recently articulated that:

> Studies of the bar exam are consistent with the interpretation that score differences among groups are not necessarily indicative of test bias. Research on the Multistate Bar Examination (MBE) and the California Bar Examination indicate that minority group differences in bar exam scores are similar in magnitude to the minority group differences observed in law school grades and on the LSAT. The authors of the California study concluded that "[t]he bar exam itself is not the source of the differences. It merely reflects the disparities that were present when the students graduated from law school."[61]

Exhibit 9: Bar Exam Scores, LSAT, and LGPA



In other words, the NCBE ascribes the impact of the bar exam in producing disparate bar exam results on causal agents unrelated to the bar exam itself, with the bar exam merely replicating societal inequities. As suggested earlier, that raises an empirical question, namely, whether law school grades and LSAT scores correlate with competency to practice law because the NCBE asserts that the bar exam is designed to measure attorney competence. That's a substantial question. And not just that. Rather, the NCBE seems to affirmatively assert that it holds the key, so to speak, to properly divine incompetent law school graduates from the

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most law schools' adherence to rigid grading curves instead of competency-based grading" produces dehumanizing injustice). The sense is that law school grades are not correlated to measures of competency but rather serve to stratify law school classes based on subjective evaluations because of the lack of widespread competency-based grading practices.

61. Raymond, Southwick & Zhao, *supra* note 58 (internal footnotes omitted).

competent law school graduates because bar exam scores correlate with law school grades and LSAT scores.[62]

Now, there's certainly plenty of data to suggest that relationship.[63] In my own work, I have found that to be true.[64] That's not surprising because bar exams, albeit different in some ways, from law school exams, are substantially alike many law school assessments. They test law school subjects; they use common assessment tools also used by law schools to include writing essays and completing multiple-choice questions; and they also use the common trade of legal education, hypothetical legal problems.[65] However, such associations do not demonstrate that the bar exam is related to attorney competency because, for example, the articles that the NCBE cites, do not analyze whether LSAT scores and LGPA are associated with attorney competency.

In other words, the NCBE's argument is circular in nature because it does not press the issue to establish that LSAT scores and LGPA are indeed measures of attorney competency. And, if the NCBE were able to find such relationship, it might suggest that the bar exam itself is merely redundant, because, for example, licensure authorities could make admission decisions based on the strength of one's academic record and

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62. *See, e.g.*, Mroch & Albanese, *supra* note 59 (asserting that "the purpose of licensure is to protect the public by identifying individuals who are not adequately prepared for entry-level practice. Licensure exams are used to determine whether candidates have attained a minimum threshold of essential knowledge, skills, and abilities for entry-level practice"); Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer Comes Under Fire*, N.Y. TIMES (Mar. 19, 2015), https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html [https://perma.cc/3ML2-QTAD] (quoting the NCBE president as saying: "The [bar] exam is an indispensable safeguard against unqualified practitioners . . . ."); Raymond, Southwick & Zhao, *supra* note 58 (indicating that there are "moderate to strong relationships" especially between UBE scores and LGPA, thus suggesting that bar exam scores are valid because bar exam scores share patterns with other academic indicators (UGPA, LSAT, and LGPA)).

63. *See, e.g.*, Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam? Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753 (2016) (finding positive relationships among LSAT scores, LGPA, and bar exam scores on the Texas bar exam); Nicholas L. Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews* 7–8, 10 (Ind. Univ. Robert H. McKinney Sch. of L. Working Paper, Paper No. 2013-30, 2013), http://ssrn.com/abstract=2308341 [https://perma.cc/E3C2-3L2K] (suggesting that LGPA has "extraordinary" power to predict bar exam scores).

64. Scott Johns, *Empirical Reflections: A Statistical Evaluation of Bar Exam Program Interventions*, 54 U. LOUISVILLE L. REV. 35 (2016) (using regression analysis to explore the relationship among a number of variables including UGPA, LSAT scores, LGPA, and various bar passage initiatives).

65. *But see* Austin, Christopher & Dickerson, *supra* note 63 (although finding positive associations among LSAT scores and LGPA with respect to bar exam scores, not finding a positive relationship between most law school courses and bar exam scores except for civil procedure and legal writing).

law school institution without resorting to a laborious post-graduate bar exam apparatus.

As such, of course, the NCBE's claim is overbroad for the NCBE, as the author of the UBE, is not claiming that licensure authorities can rely on academic credentials solely. Rather, the NCBE asserts that the bar exam is, in a way, a superior method to assess attorney competence,[66] notwithstanding that some states, such as Wisconsin, and a handful of other states in light of the ongoing pandemic, permitted licensure without examinations.[67]

In making this claim, the NCBE, in part, relies not just on associations between LSAT scores, LGPA, and bar exam scores but also on the research, for example, of two academics trying to relate academic performance and bar exam scores to attorney competency and a couple of studies with respect to medical licensure exams.[68] I will not discuss the

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66. *See* Olson, *supra* note 62 (quoting the NCBE president as saying that "[t]he exam is an indispensable safeguard against unqualified practitioners, she said in a telephone interview, noting that 'it is a basic test of fundamentals' that has 'no justification other than protecting the consumer'").

67. Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege Are Going Back to Bar Exam Admissions*, A.B.A. J. (Dec. 10, 2020), https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions [https://perma.cc/J2JH-6V5K] (highlighting jurisdictions that implemented diploma licensure due to the pandemic); *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS. (Feb. 13, 2022), https://www.wicourts.gov/services/attorney/bar.htm [https://perma.cc/4YPL-HEKZ] (providing for diploma licensure of graduates of the two Wisconsin law schools based on law school certification of legal competence with the bar conducting character and fitness evaluations).

68. To buttress its claim that the bar exam is not biased and, rather, realistically assesses legal competence without regard to race and ethnicity or any other impermissible grounds, the NCBE writes:

> Despite these limitations [in that validity studies can only study individuals who were successful on medical admission exams and bar exams], there are instances of predictive validity studies demonstrating that physicians with lower test scores on a licensure examination are at greater risk for patient complaints and disciplinary action, and studies in the legal profession showing higher rates of disciplinary action in jurisdictions that formerly granted diploma privilege in lieu of a licensure test.

Raymond, Southwick & Zhao, *supra* note 58 (citing Monica M. Cuddy, Aaron Young, Andrew Gelman, David B. Swanson, David A. Johnson, Gerard Dillon & Brian E. Clauser, *Exploring the Relationships Between USMLE Performance and Disciplinary Action in Practice: A Validity Study of Score Inferences from a Licensure Examination*, 92 *ACAD. MED.* 1780 (2017); then citing Robyn Tamblyn, Michal Abrahamowicz, Dale Dauphinee, Elizabeth Wenghofer, André Jacques, Daniel Klass, Sydney Smee, David Blackmore, Nancy Winslade, Nadyne Girard, Roxane Du Berger, Ilona Bartman, David L. Buckeridge & James A. Hanley, *Physician Scores on a National Clinical Skills Examination as Predictors of Complaints to Medical Regulatory Authorities*, 298 *J. AM. MED. ASS'N* 993 (2007); then citing Anderson & Muller, *supra* note 57; then citing Kyle Rozema, *Does the Bar Exam Protect the Public?*, SSRN (Sept. 20, 2021), https://ssrn.com/abstract=3612481 [https://perma.cc/T9CR-VQBU]; then citing Stephen P. Klein & Roger Bolus, *The Size and Source of Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAM'R, Nov. 1997, at 8; then citing Georgakopoulos, *supra* note 63; then citing Mroch & Albanese, *supra* note 59; then citing LINDA F. WIGHTMAN & HENRY RAMSEY, JR., LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998); then citing Amy N. Farley, Christopher M. Swodoba, Joel Chanvisanuruk, Keanen M. McKinley,

cited research related to medical licensure exams because medical practice (a scientific field) is far different from legal practice (a social field). However, I will look in detail at the NCBE's reliance on the claim promoted by two law professors, which the NCBE, in my opinion, fails to sufficiently scrutinize. Indeed, before I move onto that discussion, I note that the NCBE fails to point out any limits to that research despite the authors' own recitation of limits. With that background, I turn to consider the merits of the academic claim, purporting to show that bar exam scores are related to attorney competency.

B. The Academic Claim

The NCBE cites to research published by the Georgetown Journal of Legal Ethics, in an article written by two law professors, for the proposition that the bar exam validly assesses legal competency.[69] Let's take a closer look at that research, its interpretation, and interpretative limitations if any.

In their article, the authors explore whether bar exam scores are related to attorney discipline complaints.[70] To pursue this analysis, the authors harness discipline records for just over 240,000 licensed California attorneys for the period of 1976 to 2016.[71] The authors then associated those records with information about the law schools that the attorneys graduated from, the median LSAT scores for those law schools, and the median California bar exam scores for those institutions (based on publicly available data and based on institutional bar exam data unusually released by California authorities in 2016).[72] Because the authors did not have access to individualized LSAT data or bar exam scores, the authors used median institutional data to connect that data to individualized disciplinary records.[73]

Based on the premise that LSAT scores correlate with bar exam scores, the authors suggest that bar exam scores are inversely associated with the likelihood of discipline complaints with fewer complaints filed against those who graduated from higher tiered law schools (and thus with

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Alicia Boards & Courtney Gilday, *A Deeper Look at Bar Success: The Relationship Between Law Student Success, Academic Performance, and Student Characteristics*, 16 J. EMPIRICAL LEGAL STUD. 605 (2019); and then citing Cynthia A. Searcy, Keith W. Dowd, Michael G. Hughes, Sean Baldwin & Trey Pigg, *Association of MCAT Scores Obtained with Standard vs Extra Administration Time with Medical School Admission, Medical Student Performance, and Time to Graduation*, 313 J. AM. MED. ASS'N 2253 (2015)).

69. Raymond, Southwick & Zhao, *supra* note 58 (first citing Anderson & Muller, *supra* note 57; and then citing Rozema, *supra* note 68).

70. Anderson & Muller, *supra* note 57, at 310.

71. *Id.* at 312.

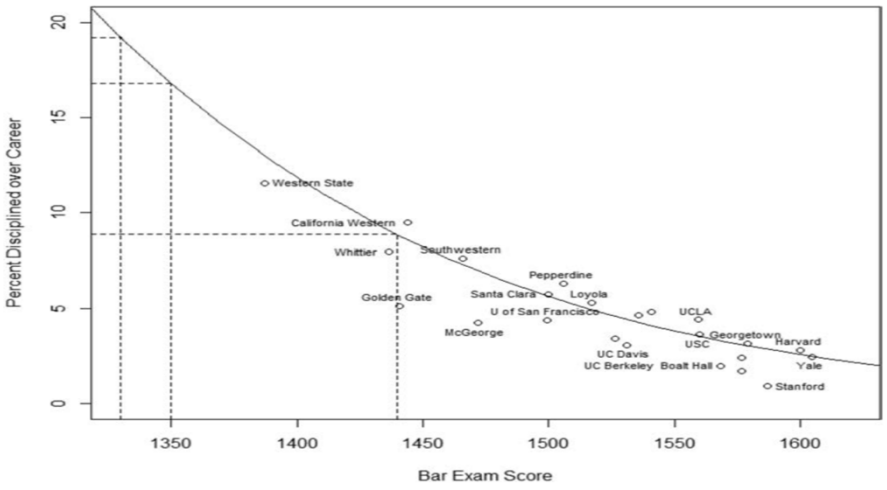
72. *Id.* at 313–14.

73. *Id.* at 313.

higher LSAT and predicated bar exam scores) than lower tiered law schools.[74] In short, the authors try to uncover the missing link between LSAT scores and bar exam scores, suggesting that LSAT scores are indeed proxies associated with attorney competency. Nevertheless, as the authors indicate, their research does not establish causal connections between bar exam scores and attorney discipline. The authors identify several other factors that might be at play in addition to recognizing data limitations due to the lack of individualized bar exam scores.[75] Let's take a closer look at some of those issues because, if bar exam scores are highly related to attorney competency, then my argument does not hold water.

In the figure below, created by the research authors, we see estimated median bar exam scores for various California law schools cross-referenced to career rates of attorney discipline by law schools. The figure suggests that higher tiered law schools, with higher bar exam scores overall, have lower incidences of disciplinary complaints than compared to lower tiered law schools, with lower bar exam scores overall. But, as the authors suggest, there are a substantial number of reasons that might explain those differences that are unrelated to attorney competency issues.[76]

Exhibit 10: Bar Exam Score vs. Percent Disciplined over Career[77]



For example, it may very well be that attorneys graduating from lower tiered schools serve in more solo practices or small-sized law firms

74. *Id.* at 320.
75. *Id.* at 320–21.
76. *Id.*
77. *Id.* at 316.

than attorneys who graduated from higher tiered law schools.[78] From a practitioner perspective, solo practitioners and small-sized law firm attorneys might very well have more client interactions than those attorneys working in bigger law firm settings or in legal disciplines tending not to generate as many disciplinary complaints.[79] In other words, practice environments and opportunities, which vary significantly from school to school, might increase the odds that one will face disciplinary complaints because of the increased client interactions. In addition, the authors posit that graduates from higher tiered law schools might have more opportunities to conceal misconduct due to more available institutional resources than lower tiered law school graduates.[80] In short, while the figure suggests a relationship between bar exam scores and competency, reliance on this data is misplaced, as the authors seem to suggest, by asking jurisdictions, which have the internal data necessary to rule out confounding variables, to verify the conclusions that the authors try to make.[81]

Realizing the data limitations, the authors try to explore whether there are differential disciplinary rates between California attorneys who pass bar exams on the first attempt versus ultimate passers (repeaters who subsequently pass bar exams).[82] As illustrated in the figure below, created by the researchers, there are very few disciplinary complaints filed against attorneys within the first ten years of legal practice, regardless of whether an attorney was a first-time passer or an ultimate passer.[83] However, starting around year eighteen or so, the figure suggests, that while both groups start experiencing an increase in disciplinary filings, the "first-time passer rates" of attorney complaints are not rising as fast as the "ultimate passers rates" of disciplinary complaints.[84]

However, this picture suffers from similar interpretative limitations. First, it is possible, indeed probably very likely, that attorneys who did not pass on the first bar exam attempt are employed in legal environments, such as solo-firm or small-firm practices, in which one might experience greater disciplinary complaints due to greater client interactions. Moreover, if anything, the data suggests, to the extent that passing the bar exam reduces disciplinary complaints, the states, instead of requiring

78. *Id.* at 320–21.

79. *Id.* at 321 ("Indeed, many graduates of elite law schools working at elite law firms likely never handle billing, whereas solo practitioners are much more likely to handle clients' money and engage in behavior likely to lead to comingling of funds.").

80. *Id.*

81. *Id.* at 319–20.

82. *Id.* at 310.

83. *Id.* at 316–17.

84. *See id.* at 317.

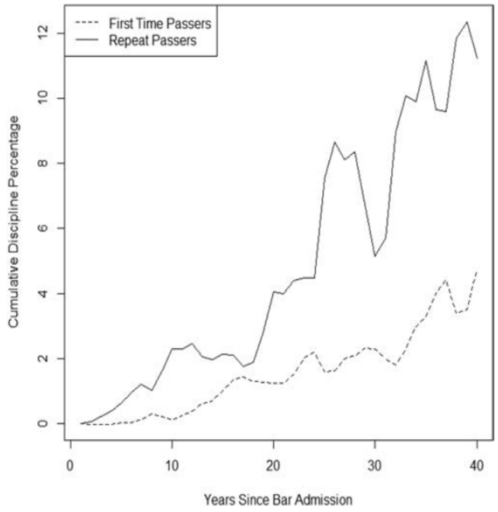
continuing legal education, might alternatively require practicing attorneys to retake bar exams throughout the career arch, particularly for those with the most longevity.

Courts and practitioners would likely defeat such a suggestion as too costly an imposition and too unrelated to the practice of law and, as I'll explain in the next section, the true nature of the complaints filed against practicing attorneys. In other words, the association between first-time versus ultimate bar passers, LSAT scores, institutional qualities, and bar exam scores are too attenuated to tell the one story that the authors (and the NCBE) would like to tell, namely, that the bar exam tests practitioner competency.

Below is a graph suggesting a relationship between attorney discipline and years of attorney practice. Overall, the graph illustrates a general relationship between an increase in years since bar admission and an increase in cumulative disciplinary complaints over time.[85] However, note that for about the first seventeen years of practice, the increased disciplinary rates seem to be notably small. However, around about seventeen years of practice, the slope rises most dramatically for those repeaters who ultimately passed the California bar exam.[86] The authors suggest that this is evidence that repeaters, who on whole scored lower than first-time passers because they were repeaters prior to passing, are responsible for an increasingly higher share of disciplinary complaints over the lifetime course of practice.[87] However, the graph also suggests that both groups (first-time passers and ultimate passers), as they remained in practice, were seen to have accumulated more complaints than in about the first seventeen years of practice.[88] At best, this graph suggests—at least to me—that continuing legal education and other sorts of educational interventions to protect the public and keep attorneys abreast of the latest developments might be insufficient to curb complaints. Alternatively, it suggests that state bar examiners ought to not permit bar takers to take the bar exam beyond the first attempt, something that would seem to go against the grain of giving people second chances.

85. *See id.*
86. *Id.*
87. *Id.*
88. *See id.*

Exhibit 11: The High Cost of Lowering the Bar[89]



In sum, it might seem as though the most competent attorneys are those with the highest LSAT scores, the higher LGPA scores, and the highest bar exam scores, but that is a repolishing of a circular argument moving us no closer to demonstrating reality. It's a story, perhaps true, but one, as the research authors indicate, that needs much more evaluation and evidence before we really accept it. Nevertheless, the authors argue against lower cut scores, despite significant costs to aspiring attorneys and the public good, presumably concluding that the evidence is good enough.[90] In the next Part, I will explore alternative narratives that might caution against the authors' conservatism.

III. STORIES EXPOSED

This Part provides analysis of possible alternative views, suggesting that there is little to no meaningful relationship between bar exam scores and attorney competence.

89. *Id.*

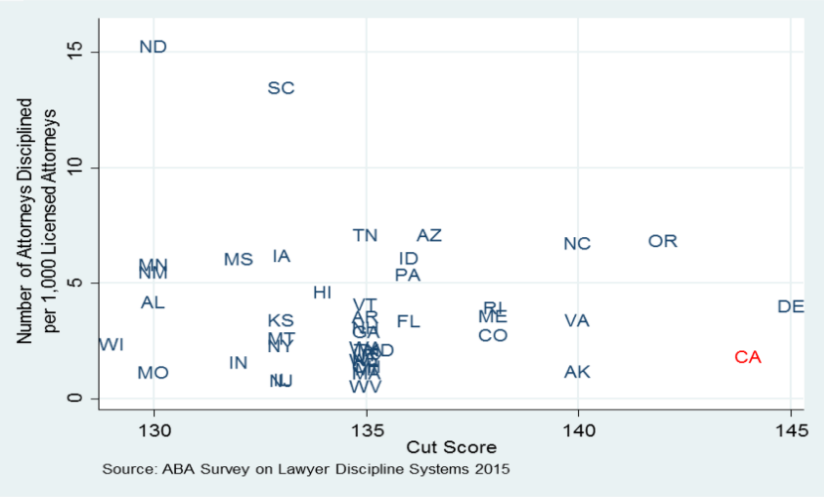
90. There is very little direct evidence of a linkage between bar exam scores and attorney competency. That's because there's a dearth of concrete evidence to tie LSAT scores and LGPA to attorney competency. Indeed, there is countervailing evidence, as explained in Part III, that suggests otherwise.

A. The 2017 California Bar Report: An Alternative View

The first study I look to is a 2017 California research report.[91] As mentioned previously, on July 16, 2020, the Supreme Court of California issued a letter directing an amendment of the California bar exam cut score from 1440 to 1390 based in part on research studies conducted by the state and its agencies.[92] The Supreme Court of California seemed to rely in part on data from a California study produced in this 2017 study.[93] That study included analysis on whether differential cut scores had any empirical impact on discipline rates to try to ascertain the appropriate relationship between cut scores and attorney competence.[94] Let's look closer at this relationship.

In the California report, California turned to a 2015 ABA survey on attorney discipline, in which the ABA published disciplinary rates across jurisdictions, which was then used by California to crate the chart below.[95]

Exhibit 12: Relationship between Cut Score and Attorney Discipline[96]



91. THE STATE BAR OF CAL., FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES (2017), https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf [https://perma.cc/FF53-QCH2].

92. Navarrete, *supra* note 40.

93. THE STATE BAR OF CAL., *supra* note 91.

94. *See id.* app. A. As explored in the Section II.B, some academics argued against California lowering its cut score, suggesting that there was empirical evidence that lowering bar exam scores would negatively impact the public good by increasing disciplinary complaints. *See generally* Anderson & Muller, *supra* note 57. In that section, we explored some of the limits of that research, namely, some fields most likely tend to have more complaints than others and different practice areas tend to more likely have more or less professional guidance and mentorship opportunities.

95. *See* THE STATE BAR OF CAL., *supra* note 91.

96. THE STATE BAR OF CAL., *supra* note 91, app. A.

In the chart, the California researchers plot ABA source data from 2015 regarding attorney discipline rates (based on number of attorneys disciplined per one thousand attorneys) against minimum passing cut scores for jurisdictions.[97] As observed, there seems to be no meaningful relationship between bar exam cut scores and rates of attorney discipline by jurisdictions. For example, Wisconsin, with the lowest cut score and with diploma licensure for its in-state law school graduates, appears to have one of the lowest rates of disciplinary complaints despite its low cut score.[98] Strikingly, the Wisconsin rate of discipline seems to be similar to California, a state that does not permit diploma licensure, and a state with a much higher cut score. In short, the link between cut scores and discipline rates is tenuous at best, as the California researchers explain:

> What the scatter plot shows is that attorney discipline – as measured by private and public discipline per thousand attorneys – appears to have no relationship to the cut score. With so many states using 135 for their cut score, the details of the Figure can be somewhat difficult to tease out. The big picture, however, is clear. At a cut score of 135 the rate of attorney discipline ranges from a low of 1.9 per thousand in West Virginia to 7.9 per thousand in Tennessee. Looking across the entire range of cut scores we see strikingly similar rates of attorney discipline in states with cut scores from 130 – Alabama – all the way to 145 – Delaware. California's rate of discipline (2.6 per thousand) is just over one-half (55 percent) the rate of discipline in Delaware (4.7 per thousand).
>
> Given the vast differences in the operation of different states' attorney discipline systems, these discipline numbers should be read with caution. But based on the data available, it raises doubts as to whether changing the cut score would have any impact on the incidence of attorney misconduct. As with the research conducted by professors Anderson and Muller, this measure of "misconduct" is admittedly limited to cases where misconduct is detected, reported, and sanctioned. There is however currently no better measure of the actual incidence of attorney misconduct or, more importantly, of public protection.[99]

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97. NAT'L ASS'N OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 33 (2019), https://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf [https://perma.cc/BFK8-SN4U] (chart 10). To standardize the presentation of the data among jurisdictions, the figure superimposes the data onto a scale corresponding to MBE scores ranging from 129 at the lower end of the scale (Wisconsin) to 145 at the higher end of the scale (Delaware).

98. For cut scores comparisons across jurisdictions, see *id.*

99. THE STATE BAR OF CAL., *supra* note 91.

At best, the data is mixed regarding the relationship between cut scores and competency as measured by disciplinary rates. Consequently, it's likely that the Supreme Court of California's decision to lower cut scores effective with the July 2020 bar exam will have no negative impacts on the public good as measured by disciplinary rates, a metric that bar examiners look at for analyzing bar data. Rather, the evidence not only suggests that the public will not be harmed by California's decision but that the public will benefit because of increased diversity into the profession.

B. The Oklahoma Experiment

The next study I consider is a recent social science experiment involving licensed attorneys in good standing taking mini-bar exams.[100] The experiment involved administering—under bar exam test conditions—a 100-set sample MBE test to sixteen licensed attorneys.[101] According to the research results, the author indicates that none of the sixteen currently licensed attorneys earned passing simulated MBE scores despite being licensed as practitioners in good standing in Oklahoma.[102] The results suggest that the MBE has little empirical association with attorney competency as practicing attorneys.[103] Below is a chart illustrating the connections, if any, between the years of practice an attorney has and performance on the mini-bar.

Exhibit 13: Connections Between an Attorney's Years of Practice and Performance on the Mini-Bar[104]

Years of Practice	**Number of Takers**	**Average Score in Primary Area of Practice**	**Amount Who Passed**
15 or more	5	34%	1
10–14	0	0%	0
5–9	5	51%	3
0–4	6	40%	1

Interestingly, the article also analyzes experimental results based on self-reported practice areas to identify whether subject matter expertise might be associated with MBE scores within those practice areas.[105] The researcher finds that very few attorneys earned passing scores on MBE

100. Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. ONLINE 31 (2021).

101. *Id.* at 37.

102. *Id.* at 37–38.

103. *Id.* at 38–39.

104. *Id.* at 40.

105. *Id.* at 39–41.

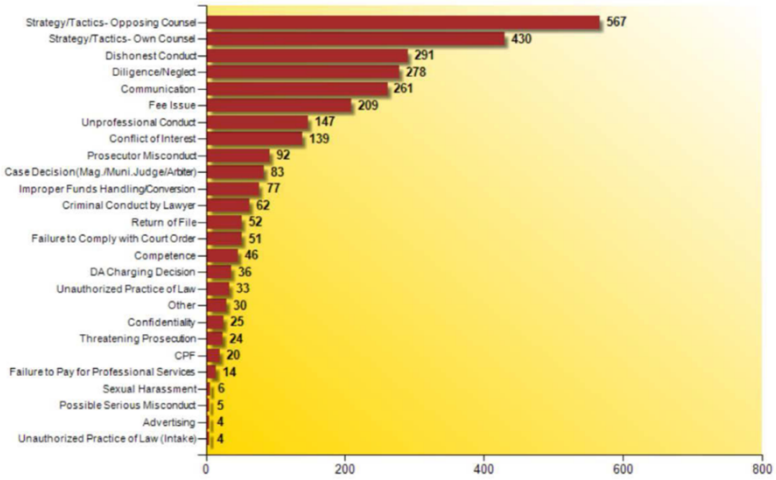
questions even within their practice fields.[106] For example, according to the research article: "Prosecutors and criminal defense lawyers fared the worst: no one who identified criminal law as a primary practice area passed the criminal law questions on the exam—although two of them did pass the evidence questions on the exam."[107] In sum, this research suggests that the nexus between the MBE and practitioner competency is weak.

C. The Colorado Disciplinary Report

The next report to look at is an official state report providing data about the nature of attorney disciplinary complaints. As we will see, the bar exam, even if associated with disciplinary complaints overall, seems to have little relationship with core subject matter competency issues and problem-solving, which is the point of the bar exam. Rather, as the figure below illustrates, the greatest public policy issues facing the bar relate to well-being and belonging, generosity and respect towards others, and honesty and integrity, among others (and not skills competency or subject matter competency).

Let's look closer at this data. The Colorado Supreme Court's Office of Attorney Regulation Counsel (OARC) provides the following chart and shows the number of reported complaints in several different complaint categories.

Exhibit 14: Nature of Complaint[108]



106. *Id.* at 41.

107. *Id.* at 40.

108. THE OFF. OF ATT'Y REGUL. COUNS., 2020 ANNUAL REPORT 70 (2020), https://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2020%20Annual%20Report.pdf [https://perma.cc/RY8E-5QEY].

In its 2020 annual report, the OARC indicates that it received 3,424 attorney misconduct complaints.[109] Out of those complaints, the OARC indicates just forty-six disciplinary complaints identified as competency issues.[110] In other words, the bulk of the disciplinary complaints in 2020, as categorized by the OARC, revolve around character and fitness issues rather than practitioner competency issues.[111]

Granted, lowering the cut score, or abolishing the bar exam through incorporation of a diploma licensure provision, might mean that the ratio of competency complaints increases. However, according to the OARC's own data, the public faces much more serious harms due to issues of professionalism and character rather than competency harms.[112] In sum, attorneys don't seem to get in trouble due to failure to be competent but rather for matters of the heart. Consequently, I next explore research as to whether the abolition of diploma privilege, retained currently by only one state, Wisconsin, might harm the public by leading to increased competency issues overall.

D. Lessons Learned - Diploma Licensure

A 2021 article entitled *Does the Bar Exam Protect the Public?* assesses whether diploma licensure in lieu of bar exams is associated with increases in attorney misconduct as revealed by official sanctions records.[113]

As background, the author looks at four jurisdictions, which abolished diploma licensure for law school graduates of their flagship universities in the 1980s, to compare sanction rates both *before* implementation of a bar exam requirement and *after* implementation of a bar exam requirement (Mississippi, South Dakota, Montana, and West Virginia).[114] In summary, the author reports: "I find that lawyers admitted without a bar passage requirement receive public sanctions at similar rates to lawyers admitted after passing a bar exam for the first decade of their careers, but small differences begin to emerge after a decade, and larger but modest differences emerge after two decades."[115] In other words, there appears to be little evidence that the bar exam is associated with protecting the public based on public sanction records within these four jurisdictions.

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109. *Id.* at 36.
110. *Id.* at 70.
111. *Id.*
112. *Id.*
113. Rozema, *supra* note 68.
114. *Id.* at 1–2.
115. *Id.* (quote found in the abstract).

Exhibit 15: Bar Passage Rate vs. Percentage of Sanctions[116]

	Lawyers with Public Sanctions After Years of Experience (%)			Bar Passage	Number of Lawyers	
	Year 5	Year 15	Year 25	Rate (%)	Per Cohort	Total
Treatment Group						
Pre-Period	0.4	2.8	5.1		91	1452
Post-Period	0.5	2.6	4.4	78	67	1078
Control Group						
Pre-Period	0.4	1.9	3.5	73	287	13786
Post-Period	0.4	2.2	4.0	73	295	14182

Notes: The treatment group contains lawyers who graduated from the University of Mississippi, the University of Montana, the University of South Dakota, or West Virginia University and who obtained a law license in the state the law school is located. The control group contains lawyers from the control states for each event shown in Table 1. The pre-period contains the four cohorts of lawyers admitted in the years immediately before the diploma privilege was abolished. The post-period contains the four cohorts of lawyers admitted in the years after the diploma privilege was abolished after the initial cohort (the initial cohort is excluded because it does not contain lawyers who passed the bar exam after failing it–see Section 3.A. for details).

The table above, produced by the author, indicates the percentage of lawyers publicly sanctioned both before the bar exam was required for licensure (identified in the treatment category as "pre-period") and after the bar exam was required for licensure (identified in the treatment category as "post-period") in comparison to control states (nearby states sharing similarities that maintained a bar exam requirement throughout the period of inquiry).[117] For each of the states identified as treatment states (Mississippi, Montana, South Dakota, and West Virginia), the author compares public sanctions against states identified as control states.[118] For Mississippi, the control group is Louisiana, North Carolina, and Tennessee.[119] For Montana, the control group is Colorado, Oregon, and Washington.[120] For South Dakota, the control group is Iowa, Michigan, and Minnesota.[121] For West Virginia, the control group is North Carolina, Pennsylvania, and Tennessee.[122] As indicated in the table, the author also explored sanction rates for similar situated attorneys in similar time periods in neighboring jurisdictions to verify whether there might be outlier anomalies in interpreting the evidence.[123]

As illustrated, in the first five years of practice, there appears to be virtually no difference in sanction rates between diploma licensed

116. *Id.* at 36 tbl.2.
117. *Id.* at 35 tbl.1.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

attorneys and bar exam licensed attorneys in the four jurisdictions that abolished diploma licensure in the 1980s. In addition, the public sanction rates appear similar to the control group sanction rates, consisting entirely of bar exam licensure attorneys practicing in adjacent states, suggesting that changing licensure rules did not impact these findings.[124]

The author describes the descriptive data as follows:

> First, regardless of whether lawyers were admitted without a bar passage requirement or after passing the bar exam, few lawyers receive public sanctions in the first 10 years of their career. Until year 8, less than 1 percent of lawyers receive a public sanction in both groups. Second, there is evidence that both groups receive public sanctions at similar rates during the first decade after obtaining a law license. The confidence intervals suggest there are not big differences between the groups. For example, 5 years after obtaining a law license, between 0.2 and 0.7 percent of lawyers admitted without a bar passage requirement had received public sanctions, compared to 0.5 percent of lawyers admitted after passing the bar exam; 10 years after obtaining a law license, between 1.3 and 2.4 percent of lawyers admitted without a bar passage requirement had received public sanctions, compared to 1.5 percent of lawyers admitted after passing the bar exam. Third, differences begin to emerge in the second decade after obtaining a law license. Those differences become statistically different at the 10 percent level after 23 years. By 25 years after obtaining a law license, the estimates suggest that 5.6 percent of lawyers admitted without a bar passage requirement were publicly sanctioned, compared with 4.4 percent of lawyers admitted after passing the bar exam. These estimates are only marginally significant at the 10 percent level. The 90 percent confidence interval suggests that between 4.6 and 6.5 percent of lawyers admitted without a bar passage requirement were publicly sanctioned within 25 years.[125]

Overall, the research, including research exploring possible increased risks of attorney sanctions due to diploma licensure opportunities, suggests little-to-no association between the use of bar exams and protecting the public. Indeed:

> [T]he impact of the bar passage requirement on public sanctions is not the only or even the primary consideration in this debate. The bar passage requirement can decrease access to legal services, increase the cost of legal services, decrease interstate mobility of lawyers, and

124. *Id.* at 36 tbl.2.
125. *Id.* at 15.

> disparately impact groups of aspiring lawyers and client populations.[126]

To paraphrase, the bar exam is not cost free; it's not cost free to law students, graduates, or the public—the ones in which the bar exam is supposed to protect.

Moreover, "[t]he literature typically finds the following characteristics to be associated with higher risk factors for sanctions: old age, incorporated law practice, men, law practice in rural areas, solo and small law practice, trust account authority, and failed the bar exam on the first attempt."[127] There is even some research to suggest that lowering bar exam cut scores might "actually increase[] the quality of young lawyers."[128]

In summary, there seems to be little to no relationship between bar exams and attorney competence, especially since most misconduct complaints relate to matters of character and fitness rather than competency matters.

That leads me to next consider whether the lack of empirical support for bar exams as instruments to assess competency might indicate that the bar exam is constitutionally suspect.

IV. TORTS, DIGNITY, AND A CONSTITUTIONAL CHALLENGE

In this Part, I raise a potential constitutional challenge to bar examiners' overreliance on bar exams for licensure decisions despite

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126. *Id.* at 4.

127. *Id.* at 5 n.9 (first citing Jon J. Lee, Double Standards: An Empirical Study of Patent and Trademark Discipline, 61 B.C. L. REV. 1613 (2020); then citing Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883 (2017); then citing Leslie C. Levin, Christine Zozula & Peter Siegelman, *A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline*, L. SCH. ADMISSION COUNCIL (2013), https://www.lsac.org/data-research/research/study-relationship-between-bar-admissions-data-and-subsequent-lawyer; then citing Peter A. Joy, *The Relationship between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L. A. L. REV. 765 (2004); then citing Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers - An Empirical Study*, 31 FLA. ST. U. L. REV. 785 (2004); then citing Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1998-2002*, 28 NOVA L. REV. 669 (2004); then citing Mark R. Davies, Solicitors, Dishonesty and the Solicitors Disciplinary Tribunal, 6 INT'L J. LEGAL PROF. 141 (1999); then citing Carl Baer & Peg Corneille, *Character and Fitness Inquiry: From Bar Admission to Professional Discipline*, 61 BAR EXAM'R 5 (1992); then citing Bruce L. Arnold & John Hagan, *Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers*, 57 AM. SOCIO. REV. 771 (1992); then citing Frances Kahn Zemans & Victor G. Rosenblum, *The Making of a Public Profession*, AM. BAR FOUND. (1981); and then citing Jerome Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (1966)).

128. *Id.* n.8 (citing Mark J. Ramseyer & Eric B. Rasmusen, *Lowering the Bar to Raise the Bar: Licensing Difficulty and Attorney Quality in Japan*, 41 J. JAPANESE STUD. 113 (2015)).

evidence of persistent racial and ethnic impacts and a dearth of evidence for an association between bar exams and competency.

A. The Crux Revisited

As articulated previously in this article, several public and quasi-public sources to include some state bar examiners, the ABA, and the NCBE report that bar exam instrument leads to persistent racial and ethnic disparities, particularly for Black and Hispanic bar applicants.[129]

Nevertheless, the NCBE, as the lead drafter and administrator of most bar exams, argues that bar exams are not to blame for these disparate impacts.[130] Rather, the NCBE states:

> Regarding disproportionate impact, it is true that differences in average performance on the bar exam tend to be observed across racial/ethnic groups. However, the same or greater differences in average performance across racial/ethnic groups also tend to be observed in performance in law school (law school GPAs), on the LSAT, and in undergraduate GPAs.[131]

In other words, the NCBE says, "[bar exam impacts] are the result of deeply rooted societal problems that create unequal educational (and other) experiences and opportunities."[132] Of course, that justification fails to acknowledge the lack of evidence to support the NCBE's claim that the bar exam successfully measures attorney competency. That, of course, is the missing link.

That raises a possible constitutional issue. In short, according to the NCBE, there's no problem with the continued use of the bar exam as the preeminent gatekeeping instrument in its ostensible role to protect the public. However, because most state government supreme courts and government bar exam entities use NCBE exams to bestow or withhold benefits (licensure to practice law), the use of the bar exam is accordingly subject to constitutional strictures, particularly the Fourteenth Amendment

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129. *See, e.g.*, Stephanie Francis Ward, *New ABA Data Parses out Bar Exam Pass Rates by Race and Ethnicity*, A.B.A. J. (June 22, 2021, 4:34 PM), https://www.abajournal.com/news/article/new-aba-data-parses-out-bar-exam-pass-rates-by-ethnicity [https://perma.cc/BWB7-RCDJ].

130. NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 7 (2020), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F239 [https://perma.cc/M5YJ-V6NT] ("These differences are not eliminated, nor are they exacerbated, by the bar exam. They are the result of deeply rooted societal problems that create unequal educational (and other) experiences and opportunities. NCBE cannot erase the problems that contribute to the performance gap, but we are committed to contributing to solutions, such as through our partnership with the Council on Legal Education Opportunity, Inc. (CLEO), and taking every measure to ensure the bar exam is free from bias.").

131. *Id.* at 6.

132. *Id.* at 7.

obligation to ensure that such decisions are not violative of the equal protection of the law.

B. The Fairness Principle

That leads us to reflection about a possible constitutional challenge considering overwhelming evidence that the use of bar exams produces persistent disparate racial and ethnic impacts.

First, as a starting point, the Fourteenth Amendment's Equal Protection Clause, which prohibits denying persons the equal protection of the laws, requires government actors to treat similar groups similarly.[133] To cut to the heart, it's a fairness mandate, a nondiscrimination mandate, a mandate to not preference one group over another without some sort of meaningful grounds. That's because the purpose of the Equal Protection Clause, broadly stated, is to mandate that government respects people as persons of equal worth and dignity. Consequently, the Equal Protection Clause requires strict scrutiny justifications in the face of evidence of intentional racial and ethnic discrimination, the highest level of scrutiny

133. U.S. CONST. amend. XIV, § 1. ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Consequently, the Fourteenth Amendment provides for birthright citizenship, privileges and immunities of citizenship, due process, and equal protection. *See id.* This article looks at issues related to equal protection because of the demonstrative impacts against particular racial and ethnic groups. That said, it is possible to evaluate the imposition of bar exams based on privileges and immunities as well as due process issues. At its core, substantive due process requires fair and reasonable justifications for government actions depriving persons of life, liberty, or property interests, while procedural due process requires government actors to provide sufficient notice and opportunity for impacted persons to fairly contest the proffered reasons for government actions attempted to deprive persons of life, liberty, or property interests. The privileges and immunities clause, largely a dead letter, might serve, some argue, as a more proper basis to protect liberties and rights from governmental interference or invasions. William J. Aceves, *A Distinction with a Difference: Rights, Privileges, and the Fourteenth* Amendment, 98 TEX. L. REV. ONLINE 1, 3 (2019) (discussing Justice Thomas's view that the Privileges and Immunities clause is the better constitutional mechanism for assessing fundamental rights). As some scholars have suggested, the conservative right does not tend to look too favorably on this ground because this clause might open the grounds to expansive views on social liberties. The liberal left, likewise, appears to be cautious about interpreting privileges and immunities because it might open the door to more expansive protection of economic rights and interests. In other words, a robust constitutional interpretation of the Constitution might jeopardize the political goals of both the right and left. Tunku Varadarajan, Opinion, *The Amendment That Remade America*, WALL ST. J. (Oct. 29, 2021), https://www.wsj.com/articles/fourteenth-amendment-states-civil-rights-federalism-originalism-abortion-dobbs-jackson-11635535364 [https://perma.cc/L2NW-7B5A] ("The Amendment That Remade America: The First? The Second? No, the 14th—the basis for every claim against a state government for violating individual rights. Randy Barnett and Evan Bernick say it's time to assert its original meaning.").

that the courts use, to ensure that no impermissible biases are at work in producing discriminatory treatments.[134]

1. *Yick Wo v. Hopkins*

Historically the Court did not always use strict scrutiny review.[135] But the Fourteenth Amendment wasn't necessarily a dead letter either. Indeed, as early as 1886, the U.S. Supreme Court invalidated a facially neutral city ordinance as violative of equal protection rights in the case of *Yick Wo v. Hopkins*.[136] In that case, the Court considered whether a facially neutral city ordinance that, in its application, resulted in an overwhelming disparate impact against Chinese laundry owners versus white laundry owners, violated the Fourteenth Amendment Equal Protection Clause.[137] According to the record, previously, for twenty-two years, Yick Wo had safely operated a wooden laundry in San Francisco, receiving permit after permit by the city fire inspector, confirming that his laundry facilities were up to snuff.[138] Nevertheless, San Francisco adopted a city law requiring that all wooden laundry facilities be re-permitted, ostensibly to guard against fire hazards.[139] As enacted, albeit appearing to be facially neutral, the new ordinance, however, vested this authority in a city bureaucrat rather than the fire inspector as in the past.[140] At this time, in the late 1800s in San Francisco, about two-thirds of the laundries were owned by Chinese while about one-third of the laundries were owned by whites.[141] If the law

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134. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973).

135. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (where the Supreme Court explained: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). The Supreme Court nevertheless held that a presidential order impacting one was met that standard. *Id.* at 223–24; *see also*, Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989), 121, 132 n.42 (explaining that "[t]he first case using the equal protection clause to strike down a classification disfavoring [B]lacks was Strauder v. West Virginia, 100 U.S. 303 (1879), which held unconstitutional a statute restricting eligibility for jury service to whites").

136. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 1069 (1886).

137. *Id.*

138. *Id.* at 1065–66.

139. The text of the ordinance reads as follows:

> It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry, within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

Id. at 1065.

140. *Id.*

141. *See id.* at 1073 ("No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese

were truly neutral, permit denials ought to be statistically similar for both groups. However, out of all the permits approved and denied, all Chinese owners were denied permits save one while all white owners were granted permits save one.[142] The Court questioned whether this constituted "invidious discrimination."[143] The illustrations below capture the thrust of the case of *Yick Wo*, in which the Supreme Court explained:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[144]

subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.").

142. *Id.*

143. *Id.* at 1069.

144. *Id.* at 1072–73.

Exhibit 16: Quimbee's *Yick Wo v. Hopkins* Image[145]

"…it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." *Yick Wo*, 118 U.S. 356, 358 (1886).

Faced with this evidence of discriminatory impacts, the court refused to ignore the city's argument that the law was constitutional because it was neutral on its face.[146] Instead, because of the stark evidence of discriminatory impact, the Court took closer look at the operation of the law and its purported justifications, finding that the city ordinance had no relationship at all with fire safety.[147] After all, Yick Wo had never had any fire safety issues throughout his twenty-two years of seasoned operation of his San Francisco business.[148]

145. Quimbee, *Yick Wo v. Hopkins Case Brief Summary*, YOUTUBE (Oct. 22, 2020), https://www.youtube.com/watch?v=nj3M1CDCqvE [https://perma.cc/VX7L-5HED].

146. *Yick Wo*, 6 S. Ct. at 1072–73.

147. *Id.* at 1073 ("The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.").

148. *Id.* at 1065–66 (stating that the record establishes "[t]hat petitioner is a native of China, and came to California in 1861, and is still a subject of the emperor of China; that he has been engaged in the laundry business in the same premises and building for 22 years last past; that he had a license from the board of fire-wardens, dated March 3, 1884, from which it appeared 'that the above-described premises have been inspected by the board of fire-wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing- irons, are in good condition, and that their use is not

As such, the Court found that the city ordinance violated the Equal Protection Clause of the Fourteenth Amendment, and the Court ordered the San Francisco sheriff to release Yick Wo from custody, remarking:

> [I]t divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.[149]

From this case, we learn that, if the government's proffered reason is not valid for its actions in producing stark disparate racial and ethnic impacts, the Court should not simply ignore the apparent facial neutrality of the law. Rather, evidence of a gross disparate impact ought to trigger courts to dig below the surface of the facially neutral law, deep, if necessary, to uncover if the government practice was based on factors other than race and ethnicity. So far so good, it would seem, for taking aim at bar exams due to documented and widespread racial and ethnic disparate impacts.

2. *Washington v. Davis*

Nevertheless, in a much later court decision nearly a century later, in *Washington v. Davis*, the Court refused to look past the facial neutrality of a government practice, finding no equal protection violation despite significant disparate impacts based on race.[150] In that case, the city of Washington, D.C. administered a "race-neutral" written exam to applicants seeking to serve on the City's police force. As illustrated below, the case involved a civil service exam which was used in part to make employment decisions.[151]

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dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions . . . .").

149. *Id.* at 1070.

150. Washington v. Davis, 426 U.S. 229, 245–46 (1976).

151. *Id.*

Exhibit 16: Quimbee's *Washington v. Davis* Image[152]

According to the case record, one of the questions concerned date fruit.[153] The trial court recognized that the test resulted in a gross disparity in pass rates on the exam between white applicants and Black applicants; however, the trial court accepted the City's justifications, saying in part that the City had taken positive steps to increase representation on the police force and that the test was related to the job qualifications as a test of communication abilities.[154] In other words, at least in the employment context with public safety in mind, the trial court didn't question the basis of the questions asked on the employment test.

Before the U.S. Supreme Court, although acknowledging gross racial disparities, the Court refused to look behind the City's justifications,

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152. Quimbee, *Washington v. Davis Case Brief Summary*, YOUTUBE, https://www.youtube.com/watch?v=cdI5nDNwJXY [https://perma.cc/57XQ-WWD8].

153. The text of the civil service exam includes a reading question about dates, which states as follows:

> Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."
>
> The quotation best supports the statement that date palms
>
> A) are the chief source of wealth in many countries
>
> B) have long been valued as a source of food
>
> C) were first grown in the Canary Islands and Africa
>
> D) were not prized for their fruit in early times
>
> E) cannot be grown in other than tropical climates

Appendix at 967, Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

154. The trial court wrote at the outset of its decision in glowing terms:

> It should be pointed out at the outset that there is absolutely no proof nor is it even contended that defendants in any way knowingly discriminated. Indeed, it is apparent from the entire record that the MPD has sought to encourage black recruitment and advancement and has one of the best records of effort and success of any police department in the nation.

Davis v. Washington, 352 F. Supp 187, 189 (D.D.C. 1972). Later, the court found "[t]he testing process and its weighting in the ultimate promotional decision have been carefully and thoroughly developed by these defendants and demonstrate that this use of the test is highly relevant to the sergeant's job." *Id.* at 191–92.

accepting the evidentiary conclusions from the trial court that the test was appropriately related to police qualification.[155] As such, the Court suggested that the government's awareness or knowledge that testing materials will likely result in disparate impact is insufficient to cast constitutional doubt on the government practice.[156] More must be shown.[157] The person harmed by the government practice must show intentional discrimination based on the face of the statute or intentional discrimination based on a disparate impact against one group versus another with some record of motive to produce the disparate impact.[158]

In *Davis*, because there was no evidence at the trial level uncovered that the City had a motive to discriminate based on race, the Black police applicant lost his equal protection challenge.[159] From this decision, we learn that the evidentiary record is key. One must show more than a disparate impact against one group in comparison to another group. One

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155. *Washington*, 426 U.S. at 246 ("As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.'" (quoting *Davis*, 348 F. Supp. at 18).

156. *Id.* at 245 ("As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.").

157. *Id.* at 242 ("Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)).

158. *Id.* at 244–45 (indicating that "the substantially disproportionate racial impact" is insufficient alone to merit the Court's scrutiny "simply because" one group fails a government employment test at a "greater proportion" than others). Later, the Court remarked:

> As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."

Id. at 246 (quoting *Davis*, 348 F. Supp. at 18). In short, the Court's decision suggests that challengers must provide some evidence to create an inference of a discriminatory purpose behind the government's actions that result in differential impacts.

159. *Id.* at 251–52 ("The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record and we are not convinced that this conclusion was erroneous.").

must also show that the reasons given are pretextual, i.e., not based on reality. That leads us to figure out what intentional discrimination ought to truly mean for purposes of meaningful equal protection and analysis.

C. Torts, Dignity, and Un-Constitutional Intent

Before we move into the specifics of what intent means for equal protection cases, let's step back to look at principles that might be relevant to ascertaining an understanding of the contours of intent. As a beginning observation, because the Equal Protection Clause is, at its core, an accountability mandate (to command governments to respect persons as persons), we can turn to tort law (and specifically the field of intentional torts) because tort law is also concerned about providing meaningful accountability protections for violations of human dignity.[160] That leads me to suggest that courts should look to tort law to define constitutional intent because both claims are about protecting human dignity from unwarranted invasions that violate human rights. Consequently, let us look at a famous case studied by most law students concerning intentional torts and human dignity, *Fisher v. Carrousel Motor Hotel*.[161]

1. *Fisher v. Carrousel Motor Hotel*

In *Fisher,* which involved a National Aeronautics and Space Agency (NASA) mathematician attending a conference at a local Houston, Texas hotel, the plaintiff was in the lunch buffet line with the rest of his colleagues when an employee snatched the plate from his hands, hurling a racial epithet.[162] As pictured below in a postcard from circa 1969, the conference host site, the Carrousel Motor Hotel, was not a welcoming place for conference invitee Emmitt Fisher. Mr. Fisher sued for battery despite having suffered no physical injuries with one of his witnesses, a graduate student from Rice University standing in the buffet line with Mr. Fisher.

160. *See, e.g.*, Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).
161. *Id.*
162. *Id.* at 628–29.

Exhibit 17: Image of the Carrousel Motor Inn[163]

"Personal indignity is the essence of an action for battery"

In this case, the Texas Supreme Court had no problem finding that an intentional tort, a battery and an assault, had been committed despite no bodily injury to the NASA mathematician, reasoning that the purpose behind intentional torts is much bigger than just bodily injuries.[164] Rather, intentional torts recognize the person as a person with right to be free from offensive invasions that interfere with the integrity of the person to control his own personhood.[165] In short, it's about human dignity, with the court indicating that "[p]ersonal indignity is the essence of an action for battery."[166] In other words, people are more than bodies because as people with equal dignity we have the right to control our own bodies against unconsented and unwarranted contact. Like the purposes behind protections against intentional torts, constitutional rights are also about protecting people from invasions, constitutional torts if you will, that interfere with human dignity due to invasions by government actors.[167]

163. Ronda Gibson, *1969 Carrousel Motor Hotel Houston Tx*, FLICKR (Feb. 6, 2010) https://www.flickr.com/photos/scavengerart/4335348275/in/photolist-7B6N14-2mGVjMr-2mH4Xgk [perma.cc/UVW8-FWAU]. This is a postcard showing the Carrousel Motor Hotel and its surreal surroundings as pictured in 1969, which was, for NASA mathematician Emmitt Fisher, not such a warm and hospitable location.

164. *Fisher*, 424 S.W.2d at 629.

165. *Id.*

166. *Id.* at 630.

167. *See, e.g.*, *id.* ("Personal indignity is the essence of an action for battery . . . .").

Accordingly, that brings us to consider borrowing directly from tort law to help define intent for constitutional purposes to more fully protect persons from denial of the equal protection of the laws. In other words, to help prevent governments from committing constitutional "torts," so to speak, against persons in violation of the Fourteenth Amendment. As learned during the first year of law school, under intentional tort principles, intent is identified in two ways, either by showing that the defendant had the purpose to make contact against another person, for example in a battery case, or that the defendant acted with knowledge to substantial certainty that contact would likely result.[168] One of the leading cases is *Garratt v. Dailey*.[169]

2. *Garratt v. Dailey*

In *Garratt*, a little five-year-old boy pulled out a chair, without the purpose of causing contact to an older adult, as the evidence showed that the boy had tried to push the chair back in time to prevent injury to the older adult who was trying to sit down.[170] Nevertheless, the Supreme Court of Washington sent the case back to the trial court because, even though the boy didn't have the purpose to tort the older adult, there was sufficient evidence to show that the boy knew to substantial certainty that—when he moved the chair—the older adult was going to try to sit in that chair too.[171] As illustrated in the definition below, the finding that little Brian Dailey had no purpose to cause contact or injury was not the end of the story. Rather, intent is much broader, including mere knowledge to substantial certainty that contact will result, which is question of fact for the jury to determine.

In other words, *Garratt* instructs us that an innocent contact, even if made for presumptively unharmful purposes, can still establish the necessary intent for a battery because human dignity is violated regardless of ill motives, even if sincerely held.[172] Ill will is irrelevant for intentional tort actions.[173] What counts—in my reading of the case—is the protection of human dignity from invasions of bodily integrity irrespective of the improper motive of the tortfeasor. From the perspective of intentional torts, intent includes actors acting with the purpose to create unwarranted contacts or with knowledge to substantial certainty that such contacts will occur.[174]

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168. Garratt v. Dailey, 279 P.2d 1091, 1093–94 (1955).
169. *Id.* at 1092.
170. *Id.* at 1092.
171. *Id.* at 1094.
172. *See id.* at 1093–94.
173. *Id.* at 1094.
174. *Id.* at 1093.

Because constitutional protections are also about protecting persons from violations of human dignity, we ought to liberally consider tort law principles to determine whether the persistent use of the bar exam for licensure assessment ought to be subject stricter scrutiny when there's unwavering evidence that bar examiners and states know beyond substantial certainty that the exam will produce disparate impacts. In short, for constitutional purposes, similar to intentional tort principles, intent is satisfied if government actors have the purpose to violate equal protection principles or know to substantial certainty that government actions fail to treat similar groups alike in the face of evidence, such as in *Yick Wo*, of no relational reason for the discriminatory treatment.

3. *United States v. Carolene Products Co.*

To buttress this proposition (that courts ought to more fully scrutinize disparate impact claims based on the Equal Protection Clause by freely borrowing from intentional tort principles), we can turn to the so-called famous footnote 4, which counsels courts to engage in "more searching judicial inquiry" whenever there is "prejudice" against "discrete and insular minorities" which might tend "seriously to curtail" the political processes.[175] As illustrated below, this famous case—*United States v. Carolene Products Co*.—involved the federal government seeking sanctions against a milk producer—Carolene Products—for violating a federal statute that made selling adulterated milk (milk mixed with non-milk products) illegal.[176]

175. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
176. *Id.* at 145–45.

Exhibit 18: Carolene Products Can[177]

More Searching Judicial Scrutiny:

- **Prejudice**
- **Discrete & Insular Minorites**
- **That seriously curtail political processes**

In this case, the U.S. Supreme Court held that the federal statute restricting economic activities was permissible.[178] But, in the famous footnote, the decision also adds that there might be times when the Court ought to engage in greater scrutiny of political acts,[179] which ought to include the bar exam, a political act. That suggests that a cramped view of unconstitutional intent—limited to overt purposes of discrimination or just improper motives—ought to be reevaluated to provide more genuine and robust protection for personhood.

Let me explain. In application of the famous footnote 4 with respect to the bar exam, as an initial matter, there is very rarely political oversight or accountability over bar exam decisions because bar exam applicants have limited-to-no recourse rights and indeed, a major portion of the bar exam, the all-day multiple-choice exam, is not accessible to outside political actors or the public at-large for oversight. The lack of

177. Josh Blackman, *Constitutional Cans: The New Carolene,* JOSH BLACKMAN (Jan. 2, 2017) https://joshblackman.com/blog/2017/01/02/constitutional-cans-the-new-carolene/ [perma.cc/6SDG-XBWU] (reprinted with permission of source).

178. *Carolene Prods. Co.*, 304 U.S. at 154.

179. *Id.* at 152 n.4.

transparency screams for judicial accountability from the federal courts, given that state courts seem unwilling.

Second, the word prejudice suggests a blind predetermined allegiance by political actors to the bar exam, without evidentiary support, as the preeminent determinant of competency to practice of law. As underscored in *Yick Wo*, the equal protection clause at a minimum requires courts to look behind the pretextual actions of government actors whenever there is stark evidence of disparate racial or ethnic impacts. Of course, as the diploma licensure rule in Wisconsin[180] (and implemented albeit briefly in other states) indicate, there are other methods to determine competency, especially when all those who take the bar exam have already proven themselves to be academically competent and credentialed as law school graduates.[181]

Finally, the phrase "discrete and insular" minority suggests that the group disadvantaged by a particular law lacks political voice, living characteristically separate and powerless from those who bestow state government benefits—in this case, law licenses—and thus are dependent on the graces of those officials to act in their best interests.

In sum, under *Carolene Products*, the Supreme Court suggests that courts ought to engage in searching judicial scrutiny of the unbending allegiance of state governments to use bar exams to make life-impacting governmental decisions because the government will not do its job to justify its decisions.[182] That's because, as in *Yick Wo*, there is a lack of empirical evidence that such exams are indeed necessary to protect the public. In short, it's time for the courts to step in (and federal courts in particular).

Synthesizing these principles, courts ought to define intent broadly, for purposes of equal protection analysis, as either purposeful discrimination or as knowledge to substantial certainty that the government practice producing disparate impact lacks empirical justification. That said, there seems to be a tension between intent for purposes of intentional-tort analysis to include footnote 4's mandate about more searching judicial inquiry and the Supreme Court's decision in *Davis* suggesting that one must show more, namely, one must show invidious discrimination demonstrated by a motive and a disparate impact in favor

180. *Admission to the Practice of Law in Wisconsin*, *supra* note 67.

181. *See* Joe Patrice, *NCBE Trashes Diploma Privilege, Sprinkles in Some Racist and Sexist Comments*, ABOVE THE L., (Apr. 14, 2020), https://abovethelaw.com/2020/04/ncbe-trashes-diploma-privilege-sprinkles-in-some-racist-and-sexist-conclusions [https://perma.cc/VV9B-Y8D4].

182. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (famously indicating that courts should conduct more searching inquires when faced with prejudice, which I define as irrational allegiances, against discrete and insular minorities lacking access to political forces to obtain protections against those prejudices).

or against a group.[183] However, I think that there is a path out of this doctrinal mire.

First, let's explore the meaning of motive. Motive suggests uncovering the mechanisms that put a governmental law or practice in motion (or, for purpose of the bar exam, keep it in motion). That suggests that we ought to borrow from intentional torts to reframe motive to include, like tort principles, when government actors know with substantial certainty that the practice favors one group or opposes one group without empirical support. In short, motive for constitutional purposes need not connote ill will. Rather, it ought to include much more, namely government actions that are willfully blind to the harms it is committing.

That said, I would discard motive altogether and instead move more ambitiously to define intent for constitutional purposes as intent is defined for intentional tort principles. Nevertheless, because courts are reluctant to discard notions of the past, even if broken, I reluctantly retain, as indicated below, the language from Supreme Court jurisprudence about motive, necessarily broadening motive to incorporate intent from intentional tort principles so as to be faithful to the *Carolene Products* mandate.

In sum, if the government action continually produces disparate impact discrimination against a group and the government has knowledge to substantial certainty that there is no good-faith basis for the action that creates discriminatory contacts, at some point, the government ought to be held to account for its willful indifference and willful blindness to the lack of a justifiable rationale for continuing down the path of propagating discrimination.

Anything short distorts human dignity, or, in the words of Dr. Martin Luther King, it creates "a false sense of superiority" in one group and "a false sense of inferiority" in another group, distorting souls and damaging personalities of those it harms.[184] Such government acts without justification are inhumane and therefore raise equal protection concerns, concerns that must be addressed by the courts and particularly by the federal judiciary. That's particularly calling when one considers the history of bar exams, a history that suggests exclusionary policies.[185]

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183. *See supra* notes 143–149 and accompanying text.

184. Martin Luther King, Jr., *Letter from the Birmingham Jail*, LETTERFROMJAIL.COM , (Apr. 16, 1963), https://letterfromjail.com [https://perma.cc/496K-RTJX].

185. For example, a recent news interview quoted a law school dean suggesting that the bar exam—as an assessment protocol—does not evaluate minimum competency but is, rather, rooted in historical exclusionary practices from the 1920's era:

> "When we started seeing diversity increase or people from underrepresented communities—mostly people of color and recent immigrants, trying to become lawyers—then all of a sudden the ABA (The American Bar Association) and other bar organizations

Thus, the burden with respect to bar exams, under this argument, is for the states to support their use of bar exams with strict scrutiny justifications rather than merely provide post hoc rationalizations for the continued use of bar exams to the detriment of bar exam applicants, the bar, and the public that the legal community serves. In sum, bar examiners and state supreme courts are now on constitutional notice, effective with this Article, that their continued adherence to the bar exam is constitutionally suspect.

CONCLUSION

The purpose of this Article serves to explore, first, the impact of the bar exam on race and ethnicity, second, analyze evidence put forth in support of the bar exam's continued use in assessing attorney competency, and, finally, whether, in light of the best available evidence, bar examiners ought no longer to be given constitutional passes. In answer, this Article suggests that our continuing reliance on the bar exam as an assessment mechanism lacks sufficient evidence to justify its claim of measuring attorney competence.

At best, there is minimum support for an association between bar exam scores and attorney complaints. Consequently, this Article shares alternative stories about the data. Indeed, as early as 2017, California bar authorities identified several "socially-complex" areas needing additional investigation, such as the following:

> The connection between the bar exam and public protection . . . [indicate that] current efforts have focused on correlating exam performance with attorney discipline. This correlation is challenged by both a lack of data and potentially a lack of relevance, given that most attorney discipline occurs well into an attorney's career (and thus discipline is not a meaningful proxy for an entrance exam).[186]

That's the sort of story that suggests that the bar exam ought to be called to account for its disparate impacts based on race and ethnicity.

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were doing whatever they can to keep them from being lawyers," Niedwiecki explained. "The written bar exam became a requirement of the ABA at that time. So that's when we started seeing all these written bar exams. Before that there were oral exams . . . apprenticeships, there were other ways to become licensed. I think we have to go back to those days knowing that the bar exam really kind of was back in the '20s rooted in exclusion."

Heidi Wigdahl, *Why Mitchell Hamline's Dean Is Calling for an End to the Bar Exam*, KARE-11 TV (Sept. 30, 2021), https://www.kare11.com/article/news/education/why-mitchell-hamlines-dean-is-calling-for-an-end-to-the-bar-exam/89-7f102929-d047-4c18-a5f1-4f9d715e47d2 [https://perma.cc/GKV9-8EEG].

186. THE STATE BAR OF CAL., *supra* note 91.

Admittedly, the NCBE has devoted significant good-faith research to the bar exam. Indeed, as indicated by recent research published by the NCBE, the NCBE consistently realizes the negative impacts that the bar exam places upon various racial and ethnic groups.[187] I have no doubts about the good faith of the NCBE, its research, and its materials. But I have this question.

To the extent that LSAT scores and LGPAs correlate with bar exam scores, it is not clear that either measurement, as explored throughout this Article, are related to competency to practice law. It's like saying that the bar exam system works because it's based on the law school assessment system. But, the research, at best, suggests little-to-no association between bar exam cut scores and competency.

Now, it's up to you to make up your own mind. But, if the evidence of meaningfulness is missing, it's important to share that information with bar examiners, jurists, and the public. As the fictional "Socratic" conversation suggests, asking questions with the goal of truly learning might open the door to positive action.[188] That's all I ask, dear reader.

187. *See, e.g.*, Raymond, Southwick & Zhao, *supra* note 58.

188. *See* Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea Anne Curcio, Andrea Marsha Griggs, Joan W. Howarth, Eileen R. Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith W. Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio St. Pub. L. Working Paper, Paper No. 537, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060 [https://perma.cc/2G5K-J3FQ] (providing a discussion of possible alternative licensure mechanisms).