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## The Bar Exam's Contribution to Systemic Inequalities in Access to Justice Around the World

Nicci Arete<sup>†</sup>

*Abstract:* Existing literature does not give adequate attention to if and how the bar exam impacts the legal profession's goals. Bar exam proponents say that the test separates competent candidates from incompetent ones, protecting the public from falling victim to inadequate legal services. But what constitutes a competent attorney? What are the goals of the profession? As legal systems become more complex and their impact on people's lives all-encompassing, the ideal of improving access to justice—equitable and fair justice—is increasingly the target for justice systems across the globe. Addressing access to justice cannot be done without acknowledging the disparate barriers based on race, ethnicities, sex, and class. This comment argues that any licensure system for legal professionals should prioritize the impact such a system has on access to justice for marginalized communities. This comment further argues that the bar exam as currently administered by the United States and in similar systems abroad does not measure any definition of competence the profession should uphold. The goal of this work is not to offer a well-developed plan for reform, but to place a spotlight on where the system is failing and what we can potentially learn from nations around the world. The paper then considers potential alternatives to license legal professionals and suggests various considerations to weigh in order to design an effective system.

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### INTRODUCTION

Existing literature does not give adequate attention to if and how the bar exam impacts the legal profession's goals. Bar exam proponents say that the test separates competent candidates from incompetent ones, protecting the public from falling victim to inadequate legal services.<sup>1</sup> But what constitutes a competent attorney? What are the profession's goals? As legal systems become more complex and their impact on people's lives all-encompassing, the ideal of improving access to justice—equitable and fair justice—is increasingly the target for these

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<sup>1</sup> See, e.g., George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. OF LEGAL ED. 103, 126 (2003).

systems across the globe.<sup>2</sup> Addressing access to justice cannot be done without acknowledging disparate barriers based on race, ethnicities, sex, and class. This article argues that any licensure system for legal professionals should prioritize the impact such a system has on access to justice for marginalized communities.<sup>3</sup> It further argues that the bar exam as currently administered in the United States and similar States abroad does not measure any definition of competence the profession should uphold. This work's goal is not to offer a well-developed plan for reform, but to place a spotlight on where the system is failing and what we can potentially learn from nations around the world. It then considers potential alternatives to license legal professionals and suggests various considerations to weigh in order to design an effective system.

This article begins in Section I by discussing why access to justice is an important consideration when evaluating a legal professional licensure system. The section consequently argues that when designing a legal licensure program, improving access to justice should be a top priority. Section II gives a very brief overview of the bar exam's history to provide context for the analysis that follows. It provides a background of the exam in the United States, then sets the groundwork to understand how the bar exam has evolved and is used in a small sampling of countries. Section III argues that the bar exam is a poor choice when prioritizing the promotion of access to justice and is counterproductive to efforts to improve access to justice. This conclusion is reached through a review of how the bar exam negatively impacts access to the legal profession for individuals from historically marginalized communities, and in turn how lack of diverse representation in the legal profession negatively impacts access to justice in those communities. Section IV discusses licensure alternatives that have been tried in the United States and in the sampling of countries, and similarly evaluates them through an access to justice lens. The article then concludes by calling for the

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<sup>2</sup> Discussed at length in Section I below. See also, Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, AM. B. ASS'N (Dec. 3, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/>; *Access to Justice*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited Oct. 23, 2020).

<sup>3</sup> Throughout this article, I use the words “marginalized,” “underprivileged,” and “underrepresented” to refer to communities whose racial, ethnic, religion, sex, and/or class demographics negatively impact their perceived status in a social hierarchy. Without diving into the important impact of intersectionality on oppression and marginalization, I acknowledge that this classification captures a wide range of communities, each having its own relationship with the legal systems it is subject to. For the purposes of this analysis, however, it is enough to acknowledge that there is a correlation between access to the legal profession and access to justice, that neither form of access is equitable among all communities, and that both are linked to the bar exam.

American Bar Association and the American Association of Law Schools to acknowledge the roles each has played in inhibiting access to justice by upholding and promoting archaic licensure systems, including use of the bar exam, in the United States and abroad. This acknowledgement must be the first step in proactive efforts to undo the harm these systems caused and build a new system that embraces and empowers communities equitably.

#### I. IMPROVING ACCESS TO JUSTICE SHOULD BE A TOP PRIORITY

The evolution of legal systems has outpaced accessibility mechanisms. As these systems' complexity increases, obtaining legal expertise has become increasingly necessary to navigate them. Without increased access to that expertise, communities that are deeply impacted by the law have little control over their engagement with it.

Over the centuries, legal systems have evolved to become more complex, resulting in the legal profession's expansion and the development of mechanisms to regulate it.<sup>4</sup> The purposes and ideals of the profession have also transformed.<sup>5</sup> In simpler legal systems, such as in ancient Rome or Greece, citizenry were assumed to be able to represent themselves in legal matters.<sup>6</sup> Legal systems today have expanded beyond the layman's understanding in many ways that harmfully stratify social dynamics.<sup>7</sup> Where simpler systems were limited to managing property, commerce, and governance, current systems influence nearly every part of peoples' lives, whether they are aware of it or not.<sup>8</sup> Despite the exponentially increased influence of legal systems today, many communities still feel as disconnected from legal professionals as did citizens of ancient Rome and Greece. While legal system growth has outpaced accessibility mechanisms, it is now more important than ever for every individual to have access to legal services and expertise as needed for health, family, tax, property, contract, criminal charges, or any other issues with a legal component. Each step of legal licensure can and should be carefully examined to address how the profession impacts the public's access to the services that help them address these issues. This article focuses only on the bar exam as the final gatekeeper to the profession. As the last step to licensure, the bar exam disproportionately excludes people of marginalized communities

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<sup>4</sup> *A Brief Guide to the History of Lawyers*, SMOKEBALL (May 8, 2018), <https://www.smokeball.com/blog/brief-guide-to-the-history-of-lawyers/#:~:text=But%20in%20ancient%20Rome%2C%20Emperor,made%20making%20a%20living%20tough.>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

from the profession, which in turn impacts the relationship those communities have with the justice system and their access to it. The bar exam is especially relevant as its role in systems of United States' legal licensure has been emulated in several nations around the world. Additionally, the impact of the exam on legal education and the licensure process sheds light on how to create a system conducive to the legal profession's ideals—or at least how to prevent perpetuating a system that actively undermines access to justice.<sup>9</sup>

The American Bar Association defines access to justice as the “ability of individuals to seek and obtain a remedy through formal or informal institutions of justice for grievances.”<sup>10</sup> Without access to justice, “people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.”<sup>11</sup> The World Justice Project led the first effort to measure access to justice on the global level. They found inequitable access to legal services ubiquitous worldwide.<sup>12</sup> The World Justice Project's study found that half of the people surveyed have experienced a legal problem in the preceding two years, but less than one third of those people sought any type of advice, and most of them sought advice from friends or family.<sup>13</sup> Reasons for this minimal engagement with legal services includes a lack of recognition that there could be a legal resolution to a problem or a simple lack of access to legal services.<sup>14</sup> The World Justice Project's report supports the notion that legal representation and a general understanding of local justice systems is unequal and inequitable in jurisdictions around the world.<sup>15</sup>

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<sup>9</sup> See Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1195 (1995) (providing a more thorough review of the bar exam's history and comparison to practices for admission to the bar in other common law countries). The analysis in this article adds insights from the last twenty-five years to Hansen's evaluation of arguments to retain the bar exam, then seeks to demonstrate that any reason for retaining the bar exam that does not consider the exam's impact on access to justice is superfluous.

<sup>10</sup> Wills, *supra* note 2.

<sup>11</sup> UNITED NATIONS AND THE RULE OF LAW, *supra* note 2.

<sup>12</sup> *Global Insights on Access to Justice*, WORLD JUSTICE PROJECT (2019), <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Similar to the author's experience growing up in the United States, a Brazilian alum of the University of Washington School of Law shared that she had neither met a lawyer until she was an adult, nor had she ever considered if or how she would engage with the justice system, even while actively involved in social movements in Brazil. As discussed in the *Global Insights on Access to Justice Report*, this relationship with justice systems, or lack thereof, is ubiquitous all over the world. *Id.*

<sup>15</sup> For an interactive look, visit *Global Insights on Access to Justice*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/accesstojustice/#/> (last visited Mar. 22, 2021).

There are a variety of situations in which people from all communities need access to legal professionals. If or how an individual seeks legal services to assist with an insurance claim,<sup>16</sup> an eviction notice,<sup>17</sup> or being injured by another person's negligence,<sup>18</sup> for example, depends on that person's socio-economic status. For instance, imagine the president of a major corporation in New York being notified that her employment visa is expiring. She does not need an attorney to complete the renewal application. Nevertheless, she will likely call her in-house counsel or personal attorney for assistance. The ease in which the corporation's president is able to attain legal aid, whether she really needs it or not, is in part because she is familiar with legal processes and has worked with attorneys in a variety of ways. In contrast, imagine a young Black teenager arrested for the death of a woman in a park, which he knows nothing about. He is beaten, questioned by law enforcement, and coerced into pleading guilty. Unlike the corporate president, this teen would certainly benefit from retaining an attorney he can trust as soon as possible. He may not do so if he does not have the resources, connections, or knowledge to invoke his right to counsel. This teen may never have met an attorney and may not know how to contact one—let alone one he is comfortable with—or may be wary of the expense of private attorneys and choose not to ask for one. Indeed, it would be understandable if he were resistant to trusting the system enough to trust someone trained by it.<sup>19</sup> The corporate president has the resources to make the justice system work in her favor; the young teen does not. She has access to justice; he does not.<sup>20</sup>

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<sup>16</sup> See, e.g., *Hailey v. Cal. Physicians' Serv.*, 158 Cal. App. 4th 452 (2007) (elderly woman inadvertently reported inaccurate information to her insurance company and had to hire an attorney to ensure provider took her claim despite error).

<sup>17</sup> See, e.g., *United States v. Lepore*, 816 F. Supp. 1011 (M.D. Pa. 1991) (family fighting eviction by landlord who falsely claimed family's child put household over state occupancy limits).

<sup>18</sup> See, e.g., Jacob Maslow, *The Merit of COVID-19 Injury Lawsuits*, LEGAL SCOOPS (Feb. 8, 2021), <https://www.legalscoops.com/the-merit-of-covid-19-injury-lawsuits/> (explaining how contracting COVID-19 when unavoidably in contact with an individual who refuses to take preventive measures cannot be avoided).

<sup>19</sup> See Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1288–1312 (2016) (giving detailed look into causes of distrust in the United States' justice system). [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6141&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6141&context=faculty_scholarship).

<sup>20</sup> The example of the president's use of an attorney to renew an employment visa comes from the author's personal experience. See, e.g., *The Central Park Five*, HISTORY, <https://www.history.com/topics/1980s/central-park-five> (last visited Mar. 22, 2020).

It is important to clarify that many people are likely to see and prefer solutions that do not involve an attorney.<sup>21</sup> However, as the examples above demonstrate, the exponential and complex growth of legal systems over the past century make it vital that these systems provide equal access to the services of capable experts who understand how to navigate the legal world. This is particularly true in areas of the law such as immigration, housing, health, and criminal law, which have disproportionate negative impacts on communities that currently have minimal access to legal services.<sup>22</sup> Modern legal systems entwine people from these communities, and the public at large, in complicated legal structures and systems whether they prefer legal solutions or not.<sup>23</sup>

The bar exam and legal licensure impacts who has access to legal services by impacting who has access to the legal profession. Data on who is most impacted by unequal access to justice in countries outside the United States is scarce, but a look at data from within the United States quickly shows that the communities with the least access to legal services are also the communities least represented in the legal profession. 75 percent of all civil cases in United States' courts proceed with at least one party unrepresented by a lawyer.<sup>24</sup> Broken down by class, "about 80 percent of the civil legal needs of those living in poverty," and 40 to 60 percent of the needs of middle-income Americans

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<sup>21</sup> For example, see the number of individuals in each country who reported to the World Justice Project that they sought help through friends, family, their community, or their religious leaders. *See generally Global Insights on Access to Justice, supra* note 12. Based on the data collected, it is easy to see that these high numbers are at least in part due to financial, social, and related barriers to their access to legal services, but it is difficult to imagine that these factors do not overlap with other options for conflict resolution. *See id.*; Steven K. Smith, Carol J. DeFrances, & Patrick A. Langan, *Tort Cases in Large Counties*, BUREAU OF JUSTICE STATISTICS BULLETIN, (1995), <https://www.bjs.gov/content/pub/asc/ii/TCILC.TXT> (finding that more than a quarter of defendants failed to file complaint in nearly 400,000 tort cases in 1995 meaning more than a quarter were uncontested).

<sup>22</sup> *See generally Global Insights on Access to Justice, supra* note 12 (discussing rates of legal need around the world). *See also* Ingrid Eagly & Steven Shafer, ACCESS TO COUNSEL IN IMMIGRATION COURT (Sept. 28, 2016) (immigration proceedings do not guarantee representation in the United States), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; *Justice Gap Report*, LEGAL SERVICES CORP. (2017), <https://www.lsc.gov/media-center/publications/2017-justice-gap-report> (discussing high rates of health, housing, and other civil legal problems among low-income households in the United States); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*; PRISON POLICY INITIATIVE (Mar. 24, 2020), [https://www.prisonpolicy.org/reports/pie2020.html?fbclid=IwAR0TOyts3-6MWb95ATJXz1GDVNR\\_aQjpheDGtLNdxYqn-bE4FGYpI7OC28](https://www.prisonpolicy.org/reports/pie2020.html?fbclid=IwAR0TOyts3-6MWb95ATJXz1GDVNR_aQjpheDGtLNdxYqn-bE4FGYpI7OC28) (analyzing data of mass incarceration in the United States, including by various demographics).

<sup>23</sup> *See* Eagly & Shafer, *supra* note 22.

<sup>24</sup> Rebecca Buckwalter-Poza, *Making Justice Equal*, CENTER FOR AMERICAN PROGRESS (Dec. 8, 2016), [https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf?\\_ga=2.253171081.1096819988.1615083502-934057054.1615083502](https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf?_ga=2.253171081.1096819988.1615083502-934057054.1615083502).

go unmet.<sup>25</sup> Unfortunately, these studies do not offer data on the basis of race or other factors.<sup>26</sup> However, according to the 2007–11 census, the demographics with the highest national poverty rates were Indigenous Americans and Alaskan natives (27 percent) and Black Americans (26 percent).<sup>27</sup> This means that Indigenous Americans, Alaskan Natives, and Black Americans, as the populations most likely to be living in poverty, also have the most limited access to justice. These patterns correlate with the number of minority legal professionals in the United States. In 2020, only 5 percent of active attorneys in the United States identify as Black, and less than one percent identify as Native American.<sup>28</sup> These demographics have been consistent since at least 2010.<sup>29</sup>

It is difficult to measure exactly how the lack of representation in the legal profession impacts different demographics and the accessibility of the justice system. Despite this difficulty, it is a logical deduction that an elitist profession with minimal presence from marginalized communities is not going to result in fair and equitable access to the services the profession provides. The reality is that many of the encounters between the justice system and marginalized communities are negative (police harassment, landlords suing lessees for unpaid rent, driving violations, etc.),<sup>30</sup> which warrants the further deduction that these communities are less likely to trust or rely on legal professionals. Finally, it is fair to assume that a child or youth who never encounters an individual who looks like them in a given profession is less likely to envision pursuing that profession themselves.<sup>31</sup> Within this context, it is easy to sense that the legal profession's lack of diversity

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<sup>25</sup> *Id.*

<sup>26</sup> Cf. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANNU. REV. SOCIOLOGY 339, 349–50 (2008) (discussing few existing studies that give insight into how race influences engagement with the judicial system). [https://www.researchgate.net/profile/Rebecca\\_Sandefur/publication/228225435\\_Access\\_to\\_Civil\\_Justice\\_and\\_Race\\_Class\\_and\\_Gender\\_Inequality/links/54c67e90cf256ed5a9e86ee/Access-to-Civil-Justice-and-Race-Class-and-Gender-Inequality.pdf](https://www.researchgate.net/profile/Rebecca_Sandefur/publication/228225435_Access_to_Civil_Justice_and_Race_Class_and_Gender_Inequality/links/54c67e90cf256ed5a9e86ee/Access-to-Civil-Justice-and-Race-Class-and-Gender-Inequality.pdf).

<sup>27</sup> Suzanne Macartney, Alemayehu Bishaw & Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011*, UNITED STATES CENSUS BUREAU (Feb. 2013), <https://www.census.gov/library/publications/2013/acs/acsbr11-17.html>.

<sup>28</sup> *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, AMERICAN BAR ASSOCIATION (2020), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-demographics-2010-2020.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> See Greene, *supra* note 19; Sandefur, *supra* note 26.

<sup>31</sup> See Jerome Crawford & David Morrow, *Lift as You Climb: The Men of Color Project*, 23 TYL 14, 16 (2019) (noting that 60% of incarcerated people are from a racial or ethnic minority background, so “a disproportionate number of minorities are interacting with the American legal system as criminals instead of attorneys.”)



“contribut[es] to an access to justice crisis in minority communities.”<sup>32</sup> Despite these logical conclusions, important analyses of the profession—such as the *Carnegie Report*—<sup>33</sup> often do not acknowledge racial disparities within the profession or the access-to-justice crisis facing marginalized communities.<sup>34</sup>

After a century of advocating for the bar exam and current legal education and licensure traditions, the American Bar Association (ABA) has recently acknowledged the failures of these approaches in the United States. The ABA’s Commission on the Future of Legal Education recently published a set of principles for reevaluating the modern approach to legal education and licensure.<sup>35</sup> In the short term, the Commission advises framing reforms around foundational principles, including access,<sup>36</sup> service,<sup>37</sup> and inclusivity.<sup>38</sup> Identifying these three concepts as fundamental priorities highlights the wide acceptance, at least in the 21<sup>st</sup> century, that the law must serve everyone equitably. To achieve that level of access to justice, the profession must be equally available to individuals from all communities.<sup>39</sup> While the ABA’s

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<sup>32</sup> Michelle Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1018 (2009), [https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1169&context=cl\\_pubs](https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1169&context=cl_pubs).

<sup>33</sup> William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (2007) (calling reform in legal education in North America), [http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary\\_pdf\\_632.pdf](http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf).

<sup>34</sup> Anderson, *supra* note 32.

<sup>35</sup> Many of these admissions come from a commission appointed by the ABA to evaluate the bar exam. *Principles for Legal Education and Licensure in the 21st Century*, AM. B. ASS’N (2020), <https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cfile-principles-and-commentary-feb-2020-final.pdf> [hereinafter *ABA Principles*] (many admissions come from a commission appointed by the ABA to evaluate the bar exam). See also *ABA Commission Offers Principles to Better Align Legal Education, Licensure to the 21st Century*, AM. B. ASS’N (Mar. 18, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/aba-commission-offers-principles-to-better-align-legal-education/> [hereinafter *ABA Commission*]. See also Stephanie Francis Ward, *A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice*, ABA JOURNAL (Jan. 8, 2020), <https://www.abajournal.com/web/article/building-a-better-bar-exam>.

<sup>36</sup> *ABA Principles*, *supra* note 35, at 6 (“We are committed to developing a legal system that provides affordable and effective legal assistance, guidance, and protection to all”).

<sup>37</sup> *Id.* (“We are a service profession and endeavor continually to better serve our clients, our institutions, and society as a whole.”)

<sup>38</sup> *Id.* (“We are committed to developing an inclusive profession that values diverse backgrounds, viewpoints, and roles.”)

<sup>39</sup> *Id.* (the Commission offered additional Operation Principles to help give shape to the Foundational Principles, relevantly including Value Focus, One Size Does Not Fit All, 21st Century Competencies, Valid Measures, and Mobility).

influence abroad has arguably had some questionable results, these principles are broad and adaptable enough for any legal system and community to embrace, and specific enough to give reform efforts direction. If or how the ABA will extend this guidance to countries that have adopted the current United States system remains to be seen.

In short, representation matters in addressing the disparities in access to justice. The bar exam is one key mechanism that maintains the legal profession's dismal demographics. As such, the bar exam perpetuates the disproportionate impact of unequal access to justice in marginalized communities.

## II. A BRIEF HISTORY OF THE BAR EXAM

Before looking at how the bar exam impacts the legal profession today, it is useful to understand its history—both in the United States and abroad. The United States has a well-documented history of the exam, and it has significantly influenced the exam's use in other countries. By understanding the history, we are better able to evaluate the exam's historic influence, and how alternative approaches to licensure differ.

### A. *Bar Exam History in the United States*

As is the case with many Western cultural, social, and political institutions, the legal profession as we know it today can be traced back to ancient Rome and Greece.<sup>40</sup> As previously discussed, legal services were not in high demand in the context of those societies' simpler legal systems.<sup>41</sup> Judges were the primary individuals known to have legal expertise, with additional experts in the law becoming more normalized as legal systems gained complexity.<sup>42</sup> Since then, the profession has evolved and spread into Europe, the Americas, and across the globe in the form of a largely elitist profession of skilled individuals with high social status. Legal experts began as highly educated individuals who found it pragmatic to possess an understanding of the law for the benefit of their network—with or without remuneration for legal services.<sup>43</sup> As the profession evolved, experts became formally educated, usually licensed professionals who must overcome a variety of hurdles to practice law. Legal profession regulation began in earnest in the late nineteenth and early twentieth centuries, when some countries created professional legal associations with power, in conjunction with

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<sup>40</sup> See William P. Alford & Henry L. Stimson, *Legal Profession*, BRITANNICA, <https://www.britannica.com/topic/legal-profession> (last visited Oct. 4, 2020).

<sup>41</sup> See, e.g., SMOKEBALL, *supra* note 4.

<sup>42</sup> See Alford & Stimson, *supra* note 40.

<sup>43</sup> See *id.*

government offices and the courts.<sup>44</sup> While many countries began with apprenticeship systems for legal training, most countries have since instituted formalized legal education in combination with a bar or other exam to license legal professionals for the practice of law.<sup>45</sup>

Even just within the United States, the bar exam has taken many forms.<sup>46</sup> Licensure requirements have evolved differently from one state to another due to the United States government's federalist structure.<sup>47</sup> To give relevant context in which we can evaluate the bar exam, the remainder of this section provides a general overview of the birth of the bar exam in the United States and how it came to be as it is, noting only some minor differences in the exam between states.

The first United States bar exam was administered in 1763 in the colony of Delaware.<sup>48</sup> The exam consisted of only an interview with a judge. It was up to the interviewing judge to determine whether the candidate was ready to practice law.<sup>49</sup> This judge-administered oral test was the gateway to the legal profession in the United States for a century.<sup>50</sup> Throughout the 1800s, as law schools began to proliferate, judges became overworked and wanted to delegate the task of administering the oral exam,<sup>51</sup> and thus diploma privilege was

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<sup>44</sup> See, e.g., *id.* (discussing the evolution of the legal profession from ancient Greece to European colonies in the Eighteenth and Nineteenth centuries); George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 UNIV. OF TOL. L. REV. 311, 324 (2015) (noting the creation of the American Bar Association in 1878 and the American Association of Law Schools in 1900); *History*, BAR COUNCIL, <https://web.archive.org/web/20090814193432/http://www.barcouncil.org.uk/about/history/> (last visited Feb. 23, 2021) (noting the establishment of the General Council of the Bar in England and Wales in 1894); *California Bar Examination: Information and History*, STATE BAR OF CALIFORNIA 3 (2009), <https://web.archive.org/web/20090510143850/http://www.calbar.ca.gov/calbar/pdfs/admissions/Bar-Exam-Info-History.pdf> [hereinafter "*California Bar Examination*"] (noting the transition from judges administering oral exams to a written exam for licensure in the United States); *The Evolution of the Bar Exam*, ADAPTIBAR (Feb. 3, 2015), <https://blog.adaptibar.com/the-evolution-of-the-bar-exam/>; Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 273 (2007) (giving greater detail of the evolution of the bar exam in the United States from 1763 onward).

<sup>45</sup> See Alford & Stimson, *supra* note 40.

<sup>46</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>47</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>48</sup> *California Bar Examination*, *supra* note 44.

<sup>49</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>50</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>51</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

introduced.<sup>52</sup> Diploma privilege granted graduates of an accredited law school access to the profession.<sup>53</sup> However, many people in the legal community still saw value in requiring passage of an exam post-graduation, which resulted in the first written bar exam.<sup>54</sup> The first written exam consisted of a series of essays, and was administered in Massachusetts in 1885.<sup>55</sup>

Shortly before the written exam was developed, American jurist and legal academic Christopher Columbus Langdell heavily influenced legal education by introducing the theory of legal positivism.<sup>56</sup> Langdell saw and taught law as a science, using judicial opinions as specimens to demonstrate how legal principles and doctrines apply to fact patterns; similar to how the laws of physics apply to corporeal material.<sup>57</sup> Legal positivism assumes that “what courts do [is] all that [is] needed [to understand] the law and that nothing more need be explored.”<sup>58</sup>

The increasing characterization of the law as an academic pursuit coupled with an understanding that it was to be studied as a science culminated in the birth of the American Association of Law Schools (AALS) in 1900.<sup>59</sup> Accessible legal education, especially affordable night schools taught by legal practitioners and judges, was disqualified for accreditation because it could not meet the rigid AALS requirements such as full-time faculty, physical facilities dedicated to teaching law, and courses that prepare students for the bar exam.<sup>60</sup> By undermining these forms of legal education, the AALS limited people’s ability to obtain legal licenses.<sup>61</sup>

In response to legal positivism, theories of legal realism began to develop and gain traction in the early twentieth century.<sup>62</sup> Quoting Justice Oliver Wendell Holmes, Jr., American legal philosopher Jerome N. Frank described legal realism as the acknowledgment that the law consists of “[t]he prophecies of what the courts will do in fact, and

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<sup>52</sup> Riebe, *supra* note 44.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; *The Evolution of the Bar Exam*, *supra* note 44.

<sup>55</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>56</sup> Bernard Schwartz, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 382–86 (1993).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 350.

<sup>59</sup> Critchlow, *supra* note 44, at 324–25.

<sup>60</sup> *Id.* at 327 n.96. Notably, one reason for instituting licensure and education reforms was to shrink the pool of people practicing law. *Id.* at 326 n.91.

<sup>61</sup> *Id.*

<sup>62</sup> For more insight into legal realism, see Bernard Schwartz, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 346, 347–48 (1993).

nothing more pretentious.”<sup>63</sup> While legal realism and legal positivism are directly at odds with each other, both characterize knowledge of the law as an understanding of judicial opinions. This fact no doubt shaped the bar exam’s requirements instituted by the ABA in the 1920s.<sup>64</sup> With the arguable exception of Wisconsin,<sup>65</sup> the ABA’s adoption of the bar exam influenced licensure requirements across the country and beyond, from the early twentieth century until the outbreak of a global pandemic one hundred years later.

Jurisdictions throughout the United States followed the early twentieth century ABA and AALS by reforming their requirements for legal practice.<sup>66</sup> These jurisdictions often include required attendance of an accredited school and passage of an approved bar exam.<sup>67</sup> Despite efforts by the Department of Justice to expose these developments as violations of antitrust laws, the ABA and AALS managed to continue with few material changes to their approach.<sup>68</sup> As such, legal education’s accessibility and subsequent legal services continued to diminish.<sup>69</sup> Law school rankings followed (based in part on bar passage rates),<sup>70</sup> along with the Law School Admissions Test (LSAT),<sup>71</sup> and the skyrocketing costs of legal education.<sup>72</sup> These requirements effectually preclude the legal profession’s accessibility from anyone who is not white, male, at

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<sup>63</sup> *Id.* at 482 (citation omitted).

<sup>64</sup> Riebe, *supra* note 44, at 273–74 (claiming the bar exam protects the American public from incompetent attorneys, and that the ABA supports the exam for encouraging candidates to review law school curriculum and understand all legal systems as an “interrelated whole”).

<sup>65</sup> Until the COVID-19 pandemic, Wisconsin was the only state in the United States to retain diploma privilege. *See, e.g., Diploma Privilege*, UNIVERSITY OF WISCONSIN-MADISON LAW SCHOOL, [https://law.wisc.edu/current/diploma\\_privilege/](https://law.wisc.edu/current/diploma_privilege/) (last visited Oct. 20, 2020).

<sup>66</sup> Critchlow, *supra* note 44, at 328.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 327 n.96, 328.

<sup>69</sup> *Id.*

<sup>70</sup> *See* Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L. J. 941, 965, 969 (2014) (discussing the birth of *U.S. News* law school rankings in the 1990s, and how they reflected law school hierarchies of the 1950s-70s).

<sup>71</sup> *See* Larry Velvel, *How the Current Situation in Legal Education Came to Pass: Part I*, HUFFPOST (June 19, 2012), [https://www.huffpost.com/entry/how-the-current-situation\\_b\\_1608364](https://www.huffpost.com/entry/how-the-current-situation_b_1608364) (stating that the LSAT was created in the 1940s).

<sup>72</sup> Law school tuition increases exceeded inflation rates around 1985, though private law schools were charging significantly higher tuition as early as the mid-1920s, soon after the AALS first began accrediting schools. *See Law School Costs*, LST, [https://data.lawschooltransparency.com/costs/tuition/#:~:text=Inflation%20has%20been%20a%20factor,was%20%2449%2C312%20\(2019%20dollars\)](https://data.lawschooltransparency.com/costs/tuition/#:~:text=Inflation%20has%20been%20a%20factor,was%20%2449%2C312%20(2019%20dollars)) (last visited Feb. 23, 2021) (comparing tuition from 1985 to 2019 as compared to inflation); *see also* Arewa et al., *supra* note 70, at 952 (comparing tuition rates of private and public schools in the 1920s).

least comfortably upper-middle class, and grew up in a community with a strong public education system or access to private schools.<sup>73</sup>

The next major mile marker in the exam's evolution came in 1972, when the multistate bar exam (MBE) was introduced. The MBE is a six-hour, six-topic multiple choice exam in addition to the essay-only written exam.<sup>74</sup> The change's purported purpose was to ease grading and improve fairness.<sup>75</sup> In the late 1990s, many states added the multistate performance test (MPT) in an attempt to extend the evaluation of prospective lawyers to include a review of their skills (rather than merely their knowledge).<sup>76</sup> This addition presents test-takers with a hypothetical case and gives them tools and resources needed to apply their legal skills to the information given in the hypothetical.<sup>77</sup>

Finally, the Universal Bar Exam (UBE), which consists of the MBE, a written examination, and two multistate performance tests, was adopted first in Missouri and North Dakota in 2011.<sup>78</sup> As of this writing, thirty-eight U.S. jurisdictions have adopted the UBE.<sup>79</sup> It is uniformly administered, graded, and scored, and results in a portable score that can be transferred to other UBE jurisdictions.

In the United States, the bar exam's birth and evolution has been enmeshed in the formalization and elitization of legal education. In the latter half of the 1800s, as formalized legal education and legal positivism took hold, the practice of law transformed from an informal and accessible profession with few barriers, to a more rigid and elitist career choice.<sup>80</sup> Legal education became an academic pursuit, and "bar examinations" transformed from informal exchanges with a current member of the bar, to comprehensive, rigid, written examinations.<sup>81</sup> Thus, the profession became meant for "young men who intend to devote themselves to . . . cultivating the estates they inherit from their fathers [and] . . . who [were thereafter] to control the mercantile and commercial interests of our country."<sup>82</sup>

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<sup>73</sup> *Law School Costs*, *supra* note 72, at 327 n.96. *See generally* Arewa et al., *supra* note 70.

<sup>74</sup> *The Evolution of the Bar Exam*, *supra* note 44.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Preparing for the MPT*, NATIONAL CONFERENCE OF BAR EXAMINERS, <https://www.ncbex.org/exams/mpt/preparing/> (last visited Oct. 16, 2020).

<sup>78</sup> *The Evolution of the Bar Exam*, *supra* note 44.

<sup>79</sup> *Jurisdictions That Have Adopted the UBE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <https://www.ncbex.org/exams/ube/> (last visited Oct. 16, 2020).

<sup>80</sup> ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 7, 99–100 (1983); Critchlow, *supra* note 44, at 322 (citing Stevens).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

### B. Examples of Bar Exam History from Around the Globe

Bar exam variations have been adopted in many countries, like Kyrgyzstan and Kenya,<sup>83</sup> and the United States system has been closely replicated in countries like Japan,<sup>84</sup> and South Korea.<sup>85</sup> The ABA is directly involved in reforming many foreign legal education and licensure systems.<sup>86</sup> Meanwhile, just in the last few years, it has gradually acknowledged problems with the bar exam and the American system of licensure, tying bar passage requirements for law school accreditation to excluding candidates from marginalized communities from the profession.<sup>87</sup> It further acknowledges the bar exam's inadequacy as a measure of competency, and has determined that the exam is outdated.<sup>88</sup> A brief review of how a few countries incorporate the bar exam into their licensure systems is helpful to highlight the impact the United States bar exam has beyond its borders. This history also sets the groundwork for a comparative analysis of alternative systems later in the article.

Until 2015, the legal profession in Kyrgyzstan had no consistent, country-wide regulation.<sup>89</sup> A new bar association, "Advokatura," was established in 2015 to set a unified standard for legal professionals that aligns with international standards.<sup>90</sup> Becoming a member of the Advokatura, and thus licensed to practice law, requires

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<sup>83</sup> INTERNATIONAL COMMISSION OF JURISTS, THE BIRTH OF A NEW ADVOKATURA IN THE KYRGYZ REPUBLIC, 6–7 (2016),

<https://www.refworld.org/pdfid/57ee88304.pdf>; *How to Become a Lawyer in Kenya*, COURSEBOOK (Feb. 2019), <https://coursebook.co.ke/how-to-become-a-lawyer-in-kenya/>.

<sup>84</sup> See Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 3 (2009); Luke Nottage & Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System Reform in Japan*, 13 ASIAN-PAC. L. & POL'Y J. 129 (2011).

<sup>85</sup> See Yeo Jun-suk, *Debate Grows Over Fate of Korea's Traditional Bar Exam*, KOREA HERALD (Sept. 8, 2015), <http://www.koreaherald.com/view.php?ud=20150908001142>; *Bar Exam Fades Into History In Korea*, ASIAONE (June 22, 2017), <https://www.asiaone.com/asia/bar-exam-fades-history-korea>.

<sup>86</sup> See *Governance and Justice System Strengthening*, AM. B. ASS'N, [https://www.americanbar.org/advocacy/rule\\_of\\_law/what-we-do/governance-justice-system-strengthening/](https://www.americanbar.org/advocacy/rule_of_law/what-we-do/governance-justice-system-strengthening/) (last visited Mar. 3, 2021) (showing how the ABA is involved in legal education and licensure outside the United States).

<sup>87</sup> Scott Jaschik, *ABA Rejects Plan to Toughen Law School Standards*, INSIDE HIGHER ED (Jan. 29, 2019), <https://www.insidehighered.com/news/2019/01/29/aba-rejects-plan-tougher-standards-law-schools>.

<sup>88</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>89</sup> INTERNATIONAL COMMISSION OF JURISTS, *supra* note 83. From the dissolution of the USSR until 2015, some states within Kyrgyzstan had structured lawyers' associations, and some did not. *Id.* at 5. For a more complete history of the evolution of lawyers' associations and the profession in Kyrgyzstan during that period, see *id.* at 6–9.

<sup>90</sup> *Id.*

passage of qualifying exams that are designed by the Council of Lawyers and implemented by the Qualification Commission.<sup>91</sup> To take the qualification exam, an applicant must be a Kyrgyz citizen, acquire a law school diploma, and complete at least one year of legal experience.<sup>92</sup> However, as mentioned above, Kyrgyzstan differentiates between advocates, who must be a member of Advokatura to practice, and lawyers, who have no licensure requirements.<sup>93</sup> Kyrgyz advocates are licensed to represent clients in criminal matters.<sup>94</sup> Kyrgyz lawyers are not licensed but have a law diploma.<sup>95</sup> Lawyers generally work in government, for corporations, or in their own practice.<sup>96</sup> Additionally, there are individuals who represent parties in civil actions, which requires no legal training in the State.<sup>97</sup> The evolution of Kyrgyzstan's regulation of the legal profession, including its use and administration of qualification exams for individuals entering the profession, has been consistently and often heavily influenced by international and domestic bodies.<sup>98</sup> As a result, these Kyrgyz institutions are evolving to look like western systems, as the formerly soviet country continues to transition towards a more democratic form of governance.

In Kenya, determining who becomes a legal professional currently begins with grade school evaluations, followed by earning high enough grades in specific high school classes, getting high scores on national exams, and gaining access (via these credentials and the ability

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<sup>91</sup> *Id.* at 12–13.

<sup>92</sup> *Id.* at 18 n.96.

<sup>93</sup> Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOBAL STUD. L. REV. 589, 619–20 (2019).

<sup>94</sup> *Id.* at 619. Note that judges and prosecutors are placed in a category outside of advocates, and even lawyers, and are consequently evaluated by a different system. *See, e.g.,* American Bar Association, *Legal Profession Reform Index for the Kyrgyz Republic, Volume II*, at ii.

<sup>95</sup> Levin & Mather, *supra* note 93, at 620.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See e.g., id.* (the American Bar Association (ABA) assisted with the creation of both Kyrgyzstan's Advokatura and its older voluntary Association of Attorneys, formed in 1995). Additionally, the ABA and the United States Agency for International Development (USAID) have played a significant role in the design and administration of legal education in Kyrgyzstan. *See Support to the Kyrgyzstan's Legal Defense Community*, USAID, <https://2012-2017.usaid.gov/kyrgyz-republic/fact-sheets/support-kyrgyzstans-legal-defense-community> (last visited Sept. 18, 2020). In 2015, as the Advokatura was being put into place, the ABA assisted Kyrgyzstan in conducting its first computerized qualification exam. *Kyrgyzstan Conducts its First Computerized Exam for Prospective Lawyers*, AM. B. ASS'N (Apr. 2015), [https://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/europe\\_eurasia/kyrgyzstan/news/news-kyrgyzstan-computerized-exam-for-prospective-lawyers-0415/](https://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/kyrgyzstan/news/news-kyrgyzstan-computerized-exam-for-prospective-lawyers-0415/). The exam is composed entirely of multiple-choice questions and was developed by a working group led by the ABA. *Id.*



to cover tuition) to a Bachelor of Laws (LLB) program.<sup>99</sup> Lawyer-hopefuls with grades too low to directly enter an LLB program can still pursue a legal career via a diploma in a relevant and approved discipline, likely with lower admission requirements.<sup>100</sup> An individual is free to practice any kind of law throughout Kenya once they obtain such a diploma or earn an LLB, with the exception of acting as an advocate.<sup>101</sup> Advocates are the only legal practitioners allowed to gain audience before a Kenyan magistrate (i.e. trial court), Kadhi (i.e. Muslim court), or appellate (i.e. the High Court of Kenya) court.<sup>102</sup> To become an advocate, candidates must complete their LLB, continue their formal education at the Kenya School of Law (KSL), complete six months of experiential learning through pupillage (similar to internships and externships in the United States), and “hold over,” or simply wait, up to a year before sitting for the bar exam.<sup>103</sup> Lawyers equipped with an LLB or a diploma work in areas such as advocacy organizations, commerce, banking, legal aid agencies, government departments, commercial firms, or independent consultancy—all without taking the bar exam.<sup>104</sup> Advocates, however, must pass the bar exam, before being able to do any of these jobs, and are permitted to represent clients in court as well.<sup>105</sup> To pass the Kenya bar, a candidate must complete group project work with a firm during their time at KSL, pass an oral exam with discretionary grading, and cumulatively pass nine written exams administered over nine days, one for each unit taught at KSL.<sup>106</sup>

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<sup>99</sup> *How to Become a Lawyer in Kenya*, *supra* note 83.

<sup>100</sup> *Id.* According to a Kenyan Magistrate interviewed for this piece, an LLB will allow someone to proceed to the Kenya School of Law (KSL), then sit the bar exam and eventually be licensed to practice in the courts. A Diploma in Law outside of the KSL, likely comparable to an associate’s degree in law in the United States, will only allow a candidate to assist lawyers and advocates in their duties. These professionals’ field of concentration is determined by what services their employer offers. Interview with Karen Njalale, Principal Magistrate of the Republic of Kenya and Sustainable Int’l Dev. LLM Graduate, Univ. of Wash. (Apr. 30, 2020).

<sup>101</sup> *How to Become a Lawyer in Kenya*, *supra* note 83. See also *Bachelor of Law (LL.B)*, COURSEBOOK (Dec. 2015), <https://coursebook.co.ke/faq-items/bachelor-of-law-ll-b/>.

<sup>102</sup> *How to Become a Lawyer in Kenya*, *supra* note 83.

<sup>103</sup> *Id.* See also interview with Karen Njalale, *supra* note 100.

<sup>104</sup> *Bachelor of Law*, *supra* note 101.

<sup>105</sup> Interview with Karen Njalale, *supra* note 100.

<sup>106</sup> See Craig Oyugi, *The Kenyan Guide to Becoming and Advocate*, YOUNG EAST AFRICAN ASPIRING LAWYERS NETWORK (July 30, 2018),

Before 2012, attorney-hopefuls in South Korea would obtain an LLB, take a judicial exam,<sup>107</sup> then if they passed, be paid to train at the Judicial Research and Training Institute (JRTI) for two years before joining the Korean bar.<sup>108</sup> Alternatively, individuals could bypass the LLB altogether and study for the judicial exam independently, often for years, theoretically making the exam available to anyone “regardless of academic, family or regional background.”<sup>109</sup> If they passed the exam, they could attend the JRTI without obtaining a lesser degree.<sup>110</sup> JRTI graduates could jump right into a role as an attorney, prosecutor, or judge, then go into private practice.<sup>111</sup> In 2007, South Korean legislation introduced an alternative system that allowed universities with undergraduate legal programs to apply to become graduate-level law schools.<sup>112</sup> Students of these schools would study for three years, culminating in a bar exam similar to those used in the United States.<sup>113</sup> While both options were available, some people who could not gain admission to a law school or afford the tuition would still opt for independent preparation for the traditional judicial exam and two years at the JRTI.<sup>114</sup> However, South Korea has since phased out both the judicial exam and the JRTI, with the last JRTI lawyer trainee beginning the program in 2019.<sup>115</sup> The system was modeled off the United States, using a similar bar exam that is now the only avenue for entering South Korea’s legal profession.

As this section demonstrates, efforts have been made to reform the bar exam and legal licensure for various reasons. Whether these

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*Training Program*, KENYA SCHOOL OF LAW (last viewed Sept. 23, 2020), <https://www.ksl.ac.ke/advocates-training-program/>.

<sup>107</sup> Two exams discussed with respect to South Korea are both often translated into English simply as the “bar” exam. To avoid confusion, I will refer to the exam from the old system, known in Korea as “sasi,” which is used to gain admission to the JRTI, as the “judicial” exam. Any reference to the “bar” exam will refer to the exam used in Korea’s current legal education and licensure system, which is similar to that of the United States.

<sup>108</sup> Chyung Eun-ju, *Korea’s Last Bar Exam Passes 55 People*, KOREA TIMES (Nov. 8, 2017), [https://www.koreatimes.co.kr/www/nation/2017/11/371\\_238970.htm](https://www.koreatimes.co.kr/www/nation/2017/11/371_238970.htm).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., *id.*; Park Sarah & Ser Myo-ja, *Law Student Is a Class to Himself*, KOREA JOONGANG DAILY (Mar. 8, 2019), <https://koreajoongangdaily.joins.com/2019/03/08/socialAffairs/Law-student-is-a-class-to-himself/3060317.html>; *Bar Exam*, KOREAN LII, [http://www.koreanlii.or.kr/w/index.php/Bar\\_exam?ckattempt=1](http://www.koreanlii.or.kr/w/index.php/Bar_exam?ckattempt=1) (last visited Sept. 27, 2020); Yeo, *supra* note 85; *Bar Exam Fades into History in Korea*, ASIA ONE (June 22, 2017), <https://www.asiaone.com/asia/bar-exam-fades-history-korea>.

<sup>114</sup> Indeed, even the country’s 16th President, Roh Moo-hyun, who advocated for and passed the reforms, was an example of the “rags to riches” opportunity presented by the old system. See Chyung, *supra* note 108.

<sup>115</sup> Park & Ser, *supra* note 113.

efforts have moved the legal profession forward in providing equitable access to both the profession and to quality legal services is explored below.

### III. THE BAR EXAM IS COUNTERPRODUCTIVE TO IMPROVING ACCESS TO JUSTICE

This section explores the simple but overlooked relationship between the bar exam and access to justice for marginalized communities everywhere the test is used. First, we see that the profession's accessibility directly correlates with access to justice. It then turns towards analyzing how the bar exam impacts who becomes a legal professional. As mentioned in the introduction, there are many factors that influence the profession's accessibility. Analyzing the bar exam specifically, as the legal profession's final obstacle that impacts—and is impacted—by each step that precedes it, is vital for understanding how the legal profession as we know it is failing our communities.

#### *A. Access to the Legal Profession Directly Correlates with Access to Justice*

There is extensive scholarship establishing the connection between the legal profession's accessibility and access to justice in marginalized communities. Many of these studies come from the United States,<sup>116</sup> and are reflected in access to justice efforts around the world.<sup>117</sup>

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<sup>116</sup> See, e.g., Cecil J. Hunt II, *Guests In Another's House: An Analysis Of Racially Disparate Bar Performance*, 23 FLA. ST. U.L. REV. 721, 792 (noting that underrepresentation in the legal profession negatively impacts marginalized groups' access to fair legal processes and legal representation); Thomas E. Perez, *Enhancing Access to Health Care and Eliminating Racial and Ethnic Disparities in Health Status: A Compelling Case for Health Professions Schools to Implement Race-Conscious Admissions Policies*, 9 J. HEALTH CARE L. & POL'Y 77 (2006); *IILP Review 2017: The State of Diversity and Inclusion in the Legal Profession*, INST. FOR INCLUSION IN THE L. PROF. (2017), [http://www.theiilp.com/resources/pictures/iilp\\_2016\\_final\\_lowres.pdf](http://www.theiilp.com/resources/pictures/iilp_2016_final_lowres.pdf) (discussing how a lack of diversity in the legal profession means a lack of lived experience and cultural competence in the legal profession).

<sup>117</sup> See, e.g., UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN ET AL., *A PRACTITIONER'S TOOLKIT ON WOMEN'S ACCESS TO JUSTICE PROGRAMMING*, (2018), [https://www.unodc.org/pdf/criminal\\_justice/WA2J\\_Con solidated.pdf](https://www.unodc.org/pdf/criminal_justice/WA2J_Con solidated.pdf) [hereinafter *PRACTITIONER'S TOOLKIT*] (giving examples in Sierra Leone, Ghana, and elsewhere of women-led legal programs increasing accessibility of legal services for the otherwise neglected needs of women and children); Gayane Makaryan, Armenia, in *BARRIERS, REMEDIES AND GOOD PRACTICES FOR WOMEN'S ACCESS TO JUSTICE IN FIVE EASTERN PARTNERSHIP COUNTRIES*, COUNCIL OF EUROPE at 9–33 (2016) (discussing how equal representation by gender in Armenia's legal profession can improve gender-responsiveness of courts); DR. SHAZIA CHOUDHRY, *WOMEN'S ACCESS TO JUSTICE: A GUIDE FOR LEGAL PRACTITIONERS, PARTNERSHIP FOR GOOD GOVERNANCE* (Oct. 2018), <https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e> (discussing in

To avoid regurgitating the quality scholarship already available on the subject, a few key points are summarized below.

First, attorneys from historically marginalized communities are more likely to serve (and understand) underrepresented communities.<sup>118</sup> Several studies show that attorneys from marginalized communities are much more likely to serve those communities in the course of their careers.<sup>119</sup> Second, as the pool of clients becomes increasingly multi-cultural and dynamic, attorneys from diverse backgrounds are needed to competently respond to and understand those clients legal needs and the contexts in which they arise.<sup>120</sup> Third, clients from various backgrounds, and especially clients from marginalized communities, are more likely to trust legal professionals who come from backgrounds similar to their own.<sup>121</sup> Finally, demographic imbalances in the legal profession impact access to equitable outcomes (e.g. racial and ethnic disparities in

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detail the negative impacts a male dominated legal system has on women's access to justice).

<sup>118</sup> See, e.g., Perez, *supra* note 116, at 100–01 (discussing survey findings that show minority alumni more often serve minority clients, provided pro bono work, serve on community boards, and serve in other community leadership roles; and highlighting that more research is needed); Eboni S. Nelson et al., *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2217 (finding that African-American students are more likely to serve underserved groups pro bono, and consequently suggesting that “[b]ecause law schools should want to do their part in closing the access-to-justice gap, they could appropriately weight the applications of applicants who provide documentation of uncompensated service to racial groups that the legal profession underserves”); Judith Welch Wegner, *Symposium 2009: A Legal Education Prospectus: Law Schools & Emerging Frontiers: Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1024 (2009) (“[D]iversity in the legal profession is most valuable because it will enhance the delivery of justice to disempowered communities . . . . The overwhelming whiteness of the profession contributes to a disparity in justice for the poor and disempowered.”)

<sup>119</sup> See Perez, *supra* note 116; Nelson et al., *supra* note 118; Wegner, *supra* note 118.

<sup>120</sup> *IILP Review 2017*, *supra* note 116 (“The lack of diversity in the profession deprives lawyers of access to diverse cultural experiences”); Edward T. Kang, *Diversity and Its Impact on the Legal Profession*, LAW PRAC. TODAY (Sept. 14, 2016), <https://www.lawpracticetoday.org/article/diversity-impact-legal-profession/> (as legal systems, economies, and social and political engagement become more globalized, “constant engagement with diverse populations is considered the norm for many of us . . . . People from all walks of life require legal assistance in some capacity. When dealing with matters serious enough to warrant counsel, potential clients want someone who they feel comfortable with and can relate to”).

<sup>121</sup> Ronald T. Y. Moon, Speech at the Hawaii State Bar Association's Young Lawyer's Division annual meeting, Hilton Hawaiian Village (Oct. 24, 2008) (“[T]he value and commitment we place on diversity can and will affect the public's trust and confidence in our profession and in our justice system as a whole”). See generally Troy J.H. Andrade, *Ke Kanawai Mamalahoe: Equality in Our Splintered Profession*, 33 HAWAII L. REV. 249 (2010).

criminal sentencing).<sup>122</sup> An attorney's background influences their ability to competently represent their clients and broader communities, a fact that is as relevant in the private sphere,<sup>123</sup> as it is in public interest,<sup>124</sup> and in advocacy work.<sup>125</sup>

All of these points are exemplified by access to justice initiatives around the world, particularly efforts to increase access to legal services for women. Especially in cultures with strong traditions of gender segregation, women providing legal services are more likely to represent women, and women seeking legal services are more likely to be comfortable working with an attorney of the same gender.<sup>126</sup> Additionally, women from similar backgrounds are more likely to understand each other's experiences and perspectives more so than a man.<sup>127</sup> Finally, women are more likely to secure legal outcomes equitable with those obtained by men when the judicial system is composed of both men and women.<sup>128</sup> It is widely accepted that women's increased presence in the profession improves multiple aspects of

<sup>122</sup> See Ryan D. King et al., *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 L. & SOC. R. 1 (2010).

<sup>123</sup> See, e.g., *ILP Review 2017*, *supra* note 116; Kang, *supra* note 120.

<sup>124</sup> See, e.g., Gerald P. Lopez, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2045 (2005); Alfredo Mirande, *Rascuache Lawyering*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 155, 155–67 (2011) (advocating for a similar lawyering style to Lopez's rebellious lawyering, but through an Aoki/Johnson-like LatCrit lens); Oscar "Zeta" Acosta, *Life in the Trenches*, in RICHARD DELGADO AND JEAN STEFANCIC, *THE LATINO/A CONDITION: A CRITICAL READER* 302 (2011) (2nd ed.).

<sup>125</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995) (Gary Peller, et al. eds.), 20–28 (exploring, among other things, the harmful consequences of the schools' desegregation that followed *Brown v. Board of Education*, 347 U.S. 483 (1954)); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law* in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995) (Gary Peller, et al. eds.) 103–23 (critiquing the influence of mainstream, white, liberal thinking on civil rights discourse and the impact that foundation has had on the civil rights vision).

<sup>126</sup> See, e.g., PRACTITIONER'S TOOLKIT, *supra* note 117, at 135 (giving additional examples in Sierra Leone, Ghana, and elsewhere of women-led legal programs advocating for the otherwise neglected legal needs of women and children). This concept is accepted so widely that United Nations General Assembly Resolution 67/187 provides that States take applicable and appropriate measures to ensure the right of women to access legal aid, including taking active steps to ensure that, where possible, female lawyers are available to represent female parties. *Id.* at 226.

<sup>127</sup> See Society for Neuroscience, *Less Empathy Toward Outsiders: Brain Differences Reinforce Preferences for Those in Same Social Group*, SCIENCE DAILY (July 1, 2009), <https://www.sciencedaily.com/releases/2009/06/090630173815.htm>; see also PRACTITIONER'S TOOLKIT, *supra* note 118, at 143 n.105, 226, 279, 290 (recommending female representation for female clients for other reasons as well, particularly for survivors of gender-based violence to avoid secondary victimization).

<sup>128</sup> See PRACTITIONER'S TOOLKIT, *supra* note 117; Makaryan, *supra* note 117; CHOUDHRY, *supra* note 117.

women's access to justice.<sup>129</sup> If increasing women's access to the legal profession leads to an improvement in access to justice for women, then it stands to reason that the same logic would hold for other groups that are historically underrepresented.

Legal systems around the globe also demonstrate how increasing access to the profession addresses gaps in access to justice. In fact, the United States' general practice of requiring an advanced degree and bar passage to provide any legal services is somewhat unique. Some countries operate by dividing the legal profession into levels that require varying degrees of expertise and experience, which helps increase accessibility to many of the legal services most commonly needed.<sup>130</sup> This approach is exemplified in Kyrgyzstan and Kenya, where only legal advocates who represent clients in court are required to pass a bar exam and undergo additional training.<sup>131</sup> In Kyrgyzstan and Kenya, where the bar exam for advocates is comparable to the United States' UBE, all other legal services can be conducted by individuals with different degrees of education and experience.<sup>132</sup> In Ghana and Sierra Leone, the women's access to justice programs benefit from similar licensure requirements and enable organizations to train paralegals to assist in expanding legal services in remote areas of the respective jurisdictions.<sup>133</sup> Even the United Kingdom has long allowed people to provide legal advice or draft legal documents without first obtaining a law degree or passing a bar exam, with little to no apparent impact on

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<sup>129</sup> *Women's Rights*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/topics/international/judicial-reform-around-the-world/home/womens-rights> (last visited Dec. 5, 2020) (noting that the ICJ defends women's human rights by providing, "training for female judges, magistrates, and lawyers, and NGO human rights activists, and publishing a thematic report on harmful gender stereotypes and assumptions"); Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 647 (2012) (exploring "the relationship between the paucity of women judges and the legitimacy of international courts and finding that 'under-representation of one sex affects the normative legitimacy of international courts because it endangers impartiality and introduces bias'"); Kuyang Logo, *A Male Dominated Bench: Making a Case for the Inclusion of Women in the Judiciary of South Sudan* 3 (June 3, 2014) (on file with author) (discussing the benefits of a judiciary that reflects the population, including "the wealth of experience that female judges would bring . . . and the overall improvement of the quality of justice and respect of the outcomes of cases").

<sup>130</sup> See, e.g., *Bachelor of Law (LL.B)*, COURSEBOOK (Dec. 2015), <https://coursebook.co.ke/faq-items/bachelor-of-law-ll-b/>; *Kyrgyzstan International Trade in Legal Services*, INT'L B. ASS'N, [https://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/ITILS\\_Kyrgyzstan.aspx](https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Kyrgyzstan.aspx) (last visited Dec. 22, 2020).

<sup>131</sup> See *Bachelor of Law (LL.B)*, *supra* note 130; *Kyrgyzstan International Trade in Legal Services*, *supra* note 130.

<sup>132</sup> See *Bachelor of Law (LL.B)*, *supra* note 130; *Kyrgyzstan International Trade in Legal Services*, *supra* note 130.

<sup>133</sup> PRACTITIONER'S TOOLKIT, *supra* note 117.

the competence of those providing legal services.<sup>134</sup> A 2011 study of the British legal system found that “wills written by unlicensed professionals had equal customer satisfaction” and are much more affordable than those written by licensed attorneys.<sup>135</sup> Nevertheless, the United States has maintained use of the bar exam for licensure of all legal professionals, with few exceptions, since the nineteenth century.<sup>136</sup> Some countries have even embraced the system currently used in the United States. Remember that South Korea transitioned to an United States-style system of legal education and licensure, even characterizing the transition as an effort to increase access to the profession.<sup>137</sup> The impact of these reforms on access to the profession is still unclear, but not promising.<sup>138</sup>

The COVID-19 global pandemic provided an excellent case study on how impeding access to the legal profession impacts access to justice. Candidates for the profession around the world were faced with seeking licensure at a time when in-person training, classes, and exams were a major health risk.<sup>139</sup> The resulting negative impact on the annual inflow of new attorneys coincided with increased need for public interest lawyers, especially in the areas of housing, employment, and domestic violence.<sup>140</sup> Just as the pandemic’s harm itself was most acutely felt in marginalized communities around the globe, those very communities were also most heavily impacted by this barrier to enter the profession.<sup>141</sup>

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<sup>134</sup> Greg Rosalsky, *Most People Can't Afford Legal Help. 1 Reformer Wants to Change That*, NPR (Sep. 29, 2020), <https://www.npr.org/sections/money/2020/09/29/917824026/most-people-cant-afford-legal-help-1-reformer-wants-to-change-that>.

<sup>135</sup> *Id.*

<sup>136</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44.

<sup>137</sup> See Yeo, *supra* note 85; *Bar Exam Fades Into History In Korea*, *supra* note 85.

<sup>138</sup> See Yeo, *supra* note 85; *Bar Exam Fades Into History In Korea*, *supra* note 85 (discussing the new system’s resulting burdens of law school expenses, difficulties gaining admission to an accredited school, and other factors as limiting, rather than expanding, access to the profession).

<sup>139</sup> See, e.g., *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, ABA (June 25, 2020), [https://www.americanbar.org/groups/young\\_lawyers/resource/s/webinars/impact-of-covid-19-on-recent-law-graduates-and-3ls/](https://www.americanbar.org/groups/young_lawyers/resource/s/webinars/impact-of-covid-19-on-recent-law-graduates-and-3ls/); Katherine Bishop, *Career Services Associate Dean on Prospects for New Law School Grads During COVID-19*, ATT’Y LAW MAG. (May 13, 2020), <https://attorneyatlawmagazine.com/prospects-new-grads-during-covid19>.

<sup>140</sup> See *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, *supra* note 139; Bishop, *supra* note 139.

<sup>141</sup> For information on how COVID-19 impacted law graduates in the United States, see *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, *supra* note 139; Mary A. Lynch, *Disparate Impact Magnified: Holding a Bar Exam During the COVID 19 Pandemic Year of 2020*, BEST PRACTICES FOR LEGAL EDUCATION (Apr. 8, 2020), <https://bestpracticeslegaled.com/2020/04/08/disparate-impact-magnified-holding->

### *B. The Bar Exam Works to Exclude Important Demographics from the Profession*

The bar exam excludes valuable would-be lawyers from practicing law in at least three ways. First, the bar exam has been used as a direct and intentional exclusionary tool historically. Second, it informs the substance of legal education, creating an inhospitable environment to diverse student bodies. And third, its administration as a standardized exam excludes capable candidates.

#### *1. The Bar Exam as an Exclusionary Tool in the United States.*

— By limiting legal practice to individuals who can pass a bar exam in its current form, the law is taught and the bar exam is administered as if the law is an autonomous, objective, detached system that regulates society, much as Langdell envisioned it.<sup>142</sup> A century after Langdell's career peaked, the Critical Legal Studies (CLS) movement gained traction along with Critical Race Theory (CRT), Critical Race Feminism (CRF), Latinx Critical Legal Theory (LatCrit), and other movements to follow (hereinafter collectively referred to as “the Crit Movements”).<sup>143</sup> The Crit Movements explore some of the many ways that the law is clearly not autonomous, objective, or detached, though the bar exam evaluates a student's understanding of it as such. While they were born in the United States, the Crit Movements soon extended their critiques to international law.<sup>144</sup> Arguably, the Crit Movements are not mere critical theories about the law and the legal profession, but truer characterizations of what the law is—what it means to practice it—rather than the objective fiction typically taught in law schools. Through the Crit lens, the use of an exam to measure the memorization of “objective” laws, as taught by law schools mandated for the sake of accreditation to

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a-bar-exam-during-the-covid-19-pandemic-year-of-2020/. Until early 2021, any law graduate in South Korea who tested positive for the virus was banned from taking the exam. See Yonhap, *Annual Bar Exam Starts After Govt. Lifts Ban on COVID-19 Patients*, KOREA HERALD (Jan. 5, 2021). Law students in the United Kingdom advocated for a response to the pandemic that considers how sitting for the bar exam would impact candidates with underlying health conditions and international students who had to leave the country. See Abby Young-Powell, *How Will Law Exams be Affected by Coronavirus?*, GUARDIAN (Apr. 3, 2020, 8:29 AM), <https://www.theguardian.com/law/2020/apr/03/how-will-law-exams-be-affected-by-coronavirus>.

<sup>142</sup> See Alford & Stimson, *supra* note 40; Critchlow, *supra* note 44; *History*, *supra* note 44; *California Bar Examination*, *supra* note 44; Riebe, *supra* note 44; Schwartz, *supra* note 56.

<sup>143</sup> See generally Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006) (describing the history and nature of these movements).

<sup>144</sup> See generally Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000) (exploring the expansion of these movements into the international sphere).



teach law accordingly, is naturally going to be exclusionary. Indeed, a look at the exam's history in the United States indicates that the exclusionary effect was intentional when the exam was first developed.

There are many critiques of legal education's current structure and teaching methods, from law school admission to licensure to continued legal education, especially in the United States. This analysis is limited to the bar exam's use, impact, and efficacy in the United States, and a sample of other countries that have adopted similar exams. In their evaluation of legal institutions, including the bar exam, the Crit Movements recognize that "[r]acism is not only historical slavery, Jim Crow laws and gerrymandered voting districts in the South; it is also . . . standardized tests based on standardized culture."<sup>145</sup> Consistent with the Crit Movements, critics of the United States' current licensure system accuse the country of using the bar exam as a mechanism for upholding institutional racism.<sup>146</sup> Nevertheless, the exam's proponents continue to argue that it ensures only capable candidates are licensed to practice law.<sup>147</sup>

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<sup>145</sup> Mutua, *supra* note 143, at 350–51.

<sup>146</sup> *Id.*; see also Andrews *supra* note 144.

<sup>147</sup> See, e.g., Shepherd, *supra* note 1, at 126. Possibly the most common argument made by proponents of the exam is that it protects the public from incompetent lawyers. See, e.g., *id.*; ABA Principles, *supra* note 35; Rosalsky *supra* note 134. However, even bar exam advocates have a hard time defining competence in the legal profession. American Bar Association Section of Legal Education and Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* 9 (Aug. 10, 1979), <https://thepractice.law.harvard.edu/assets/Lawyer-Competency-The-Role-of-the-Law-Schools.pdf> (defining competency as a capacity to perform fundamental skills, knowledge of the law and legal institutions, and the ability to apply the skills and knowledge proficiently). In any case, criticisms and doubts of the exam's ability to measure competence are far more common than proponents would like to think. See, e.g., Shepherd, *supra* note 1; ABA Principles, *supra* note 35; Rosalsky *supra* note 134; Hunt II, *supra* note 116, at 765–66 (citing criticisms of the bar exam from a wide variety of sources). See also Joe Patrice, *Veteran State Court Judge Rips Bar Exam, Says Test 'Does Not Function to Protect the Public'*, ABOVE THE LAW (July 8, 2020, 11:18 AM), <https://abovethelaw.com/2020/07/veteran-state-court-judge-rips-bar-exam-says-test-does-not-function-to-protect-the-public/>; Brit Benjamin, *Data Point: The Bar Exam Does Not Protect the Public*, RECORDER (Apr. 27, 2020, 11:11 AM), <https://www.law.com/therecorder/2020/04/27/the-bar-exam-debate/>; Beth Karp, *There Is No Ascertainable Proof that the Bar Exam and the MPRE Protect the Public*, JURIST (Aug. 28, 2020, 7:28 PM), <https://www.jurist.org/commentary/2020/08/beth-karp-bar-exam-mpre-data/>; William Wesley Patton, *A Rebuttal to Kinsler's and to Anderson and Muller's Studies on the Purported Relationship Between Bar Passage Rates and Attorney Discipline*, 93 ST. JOHN'S L. REV. 43, 83–85 (2019) (discussing study of Wisconsin attorney disciplinary cases that demonstrates no correlation between the use of diploma privilege and disciplinary rates); Donna Saadati-Soto et al., *Does the Bar Exam Measure Competence? The Answer: We Have No Idea*, JURIST (Apr. 21, 2020, 10:44 PM), <https://www.jurist.org/commentary/2020/04/saadati-soto-escontrias-sarkar-bar-exam/>.

In the United States, there is a well-documented history of higher bar passage rates for white students than Black students.<sup>148</sup> As mentioned earlier, legal education's formalization was intended to reserve the profession for property owners, which at the time meant male and middle to upper-class individuals.<sup>149</sup> During the decade when the ABA adopted the bar exam as a prerequisite to practicing law, the numbers of lawyers of color and from lower class communities increased quickly.<sup>150</sup> Introducing this barrier to the profession at such a time is one reason why some scholars theorize the bar exam has been used in the United States to intentionally prevent some individuals from practicing law.<sup>151</sup> The ABA's mandate of the bar exam for lawyer licensure, and subsequent efforts to make the bar exam more difficult to pass (especially without attending the most expensive and demanding schools in the country) resulted in plummeting bar passage rates and fewer admissions of would-be attorneys from underrepresented demographics to the bar.<sup>152</sup> The ABA's manipulation of licensure requirements came amidst the civil rights victories of the 1920s and 1930s,<sup>153</sup> and during a major increase in immigration.<sup>154</sup> Logically, such civil rights victories and the influx of immigrants would open the door to the profession for these groups. The ABA's regulatory efforts occurring at the same time suggests that these were intentional efforts to exclude minority groups. That inference is supported by the ABA's documented history of overtly keeping people of color out of the profession.<sup>155</sup>

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<sup>148</sup> See, e.g., Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63, 63–64 (2004–2005) (describing the observable difference in bar examination passage rates between Black law school graduates and white law school graduates).

<sup>149</sup> Alford & Stimson, *supra* note 40.

<sup>150</sup> Shepherd, *supra* note 1, at 110.

<sup>151</sup> See W. Bradley Wendel, "Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases, 65 L. & CONTEMP. PROBS. 33, 39 (2002) (noting that while applicants are denied permission to take the bar exam because of things like alcoholism, other applicants who engage in hatemongering and other reprehensible behavior are admitted to the exam and to the profession without issue).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Dan Subotnik, *Does Testing = Race Discrimination? Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 365 (2013).

<sup>155</sup> For example, in 1912 the ABA responded to the admission of three Black men to the bar by passing a resolution that denied African Americans entrance to the bar. See Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020, 5:45 PM), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html>; J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table"*, 71 FORDHAM L. REV. 1257, 1274–75 (2003).

The COVID-19 pandemic has provided another lens into how the bar exam excludes underrepresented candidates from the profession.<sup>156</sup> The exam's typical administration would force test-takers into rooms with each other, increasing their risk of contracting the dangerous virus.<sup>157</sup> This novel obstacle has law students and legal professionals everywhere revisiting the bar exam's purpose.<sup>158</sup> In the United States, their review shows that in the last 100 years, diverse representation in the legal profession has not come very far. In 2019, 85 percent of attorneys were white.<sup>159</sup> The pandemic disproportionately impacted the housing, food, and economic security of marginalized communities, making the uncertainty of whether law school graduates from these communities will be permitted to begin working—and receiving paychecks—even more harrowing.<sup>160</sup> For candidates with heightened health risks, who are living in environments not conducive to studying or test-taking, or who have limited internet availability, the pandemic has made the bar exam an even higher hurdle, thus magnifying the inequities already perpetuated by the exam.<sup>161</sup> In other words, this gateway to the United States' legal profession is still more accessible to white, middle to upper-class populations.<sup>162</sup> These privileged groups are not as concerned with where they will live and how they will afford food while they spend years in law school and months preparing for an exam which itself costs \$500-\$1,000 to take.<sup>163</sup>

Outside the United States, it appears that the exclusionary nature of the exam is not unique to the nation's history. Senior Lecturer at the International University of the Kyrgyz Republic and alumna of the University of Washington Sustainable International Development LLM program (UW SID), Mirbek Sydygaliev, attended the Kyrgyz National University's Law Faculty, the oldest law school in the country.<sup>164</sup> He earned his bachelor's degree in law there and completed a year of

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<sup>156</sup> See *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, *supra* note 139.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Escontrías, *supra* note 155.

<sup>160</sup> See generally Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, THE APPEAL (July 6, 2020), <https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/>.

<sup>161</sup> *Id.*

<sup>162</sup> See *id.*; Escontrías, *supra* note 155. See Lynch *supra* note 141 (discussing how COVID-19 has similarly impacted other countries where the bar exam is used, though less data is available regarding the pandemic's impact across race and class in these countries).

<sup>163</sup> See Escontrías, *supra* note 155.

<sup>164</sup> Interview with Mirbek Sydygaliev, Senior Lecturer, Int'l Univ. of the Kyrgyz Republic, Sustainable Int'l Dev. LLM Graduate, Univ. of Wash. (Oct. 11, 2020).

specialty training.<sup>165</sup> Sydygaliev sought a legal education for the improved career prospects and the opportunity to work for the government. Since he wanted to be a government lawyer, as opposed to an advocate or notary, he was not required to take a bar exam. He notes, however, that while lawyers who do not intend to practice as advocates or notaries are not required to pass the bar exam, they are still evaluated through ordinary exams in each legal course. Sydygaliev believes that, because these levels of practicing law do not require bar passage or legal licensure, one barrier is removed to working for governmental, legislative, and judicial bodies in managerial and leadership positions. Additionally, the limited number of legal practitioners who seek licensure means that legal education is not structured to simply improve bar-passage rate goals, as discussed in the next section.

Karen Njalale is a Principal Magistrate for the Republic in Kenya and also a UW SID alumna.<sup>166</sup> She completed her LLB at Moi University the same year Kenya's Council of Legal Education piloted a program allowing prospective advocates to bypass their years at the Kenya School of Law (KSL), and move directly towards the bar exam. Njalale explained that this experiment was conducted with the oppressive cost of attending KSL in mind, and the goal of creating a more affordable route to becoming an advocate. While information regarding this experiment's success is difficult to find, the pilot was not continued. Given later developments of legal education reform in the country, it is likely low bar exam pass rates played a role in ending the pilot.<sup>167</sup> If the

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<sup>165</sup> *Id.*

<sup>166</sup> Interview with Karen Njalale, *supra* note 100.

<sup>167</sup> Overall, Kenya's efforts to expand the profession's accessibility, and consequently access to justice throughout the country, have been mixed. In 2019, the Kenya School of Law (KSL) and the Kenya Institute for Public Policy Research and Analysis published a report analyzing Kenya's legal education system and theorizing reasons for its low bar pass rates. *Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions: Final Report*, KENYA SCH. L. & KENYA INST. FOR PUB. POL'Y RSCH & ANALYSIS (Sept. 2019), <https://www.ksl.ac.ke/wp-content/uploads/2019/10/KSL-KIPPRA-Bar-Examinations-Report-2019.pdf> [hereinafter *KSL Final Report*]. The analysis includes mention of economic, social, academic, and other influences on bar passage rates and compares Kenya's legal licensure processes to those of several other countries. *Id.* The report did not consider whether the exam is testing for the skills needed to enter the profession in the first place. It concludes by recommending additional testing and higher standards throughout the educational journey to increase the likelihood that students who are likely to pass the bar exam are the students who make it into the program. *Id.* Furthermore, a subsection of recommendations entitled "Examination," primarily look at ways to better prepare students to pass their exams, not what should be covered by the exam or what are the goals of its administration. *See id.* at 122–23. Developments after the pilot ended have created more barriers to joining the profession as an advocate. *See* Oyugi, *supra* note 106 (as of 2018, admission to KSL

goal was to increase access to the profession, it became clear that the bar exam was still a monumental barrier.<sup>168</sup>

Over the last five years, accusations of foul play in the evaluation of Kenyan test-takers have mounted, leading to the Kenyan Senate and the Law Society of Kenya opening an investigation.<sup>169</sup> Passage rates showed that even brilliant students were failing the exam and being forced to sit and pay to retake it.<sup>170</sup> While these accusations do not necessarily signify inherent inadequacies of the bar exam itself, they do raise the question of what the bar exam's intended purpose is: Is it good faith measurement of an individual's ability to effectively and responsibly practice law? Or is it a financial rite of passage?

Reviewing Kenya's need to make the advocacy profession more accessible—hence the pilot to eliminate the requirement to attend KSL—would be instructive both for countries like Kyrgyzstan, where access to the profession may be similarly impacted even by an exam only required for advocates, and for any country considering reforms, including the United States. Understanding clearly why Kenya's pilot was not integrated as a permanent part of Kenya's licensure system would be similarly informative. It seems likely, given the bar passage concerns described above, that passage rates influenced the decision to discontinue the pilot. After all, in addition to teaching tangible courtroom skills, KSL pedagogy is primarily designed around preparing students to take the exam.<sup>171</sup>

Korea's former legal education and licensure system, and its transition to a United States-style system is also informative. The former system allowed candidates to bypass all barriers except for the judicial exam before beginning paid training to become a legal professional.<sup>172</sup> Unfortunately, very few judicial exam takers who had not first acquired an LLB passed.<sup>173</sup> In fact, reforms were made with the aim of increasing

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requires passage of the Pre-Bar benchmark tests). These tests are intended to measure a KSL applicant's aptitude in the core areas of the law before beginning their training to become advocates. *Id.* This benchmark exam has received significant pushback from Kenyan law students. See *We Shall Not Allow Pre-Bar*, *supra* note 106.

<sup>168</sup> See Oyugi, *supra* note 106; *We Shall Not Allow Pre-Bar*, *supra* note 106.

<sup>169</sup> Josiah Odanga, *Kenya: Big Debate as Nearly All Students Fail Bar Exams*, ALL AFRICA (June 20, 2019), <https://allafrica.com/stories/201906210213.html>. See also Ramadhan Rajab, *LSK Launches Probe as Majority of Law Students Flop Bar Exam*, STAR (Feb. 8, 2019), <https://www.the-star.co.ke/news/2019-02-08-lsk-launches-probe-as-majority-of-law-students-flop-bar-exam/>; *At the Kenya School of Law, Sharp Students Are Forced to Fail*, BUS. TODAY (Apr. 27, 2017), <https://businesstoday.co.ke/kenya-school-law-sharp-students-forced-fail/>.

<sup>170</sup> See Odanga, *supra* note 169; Rajab, *supra* note 169; *At the Kenya School of Law, Sharp Students Are Forced to Fail*, *supra* note 169.

<sup>171</sup> Interview with Karen Njalale, *supra* note 100.

<sup>172</sup> See Chyung, *supra* note 108.

<sup>173</sup> See Yeo, *supra* note 85; *Bar Exam Fades into History in Korea*, *supra* note 85.

accessibility to the legal profession as the old system was thought to be too difficult to successfully navigate.<sup>174</sup> One JRTI graduate, Kim Seon-su, who was later confirmed to the Supreme Court, criticized the judicial exam/JRTI system, saying, “In studying for the [judicial] exam, perhaps we are so focused on interpreting positive law that we disregard the law’s social function, as well as the reasons and motivations for its enactment.”<sup>175</sup> The idea behind transitioning to a United States-style system was that it would result in more access to the profession as students would be better prepared for the required exam, and future lawyers would build legal analysis capabilities and other practical skills.<sup>176</sup> But it appears that the new system faces similar barriers as the legal education and licensure systems in the United States, as well as some challenges unique to Korea.<sup>177</sup> Just a decade after graduate-level law schools and the bar exam were introduced in Korea, reform was back on the table, though no solutions have yet been put forward.<sup>178</sup>

South Korea’s transition between the two legal education and licensure systems provides invaluable insight into what aspects of a licensure system are conducive to increasing accessibility of competent lawyers to the profession, and thus increasing access to justice for everyone. For example, graduates from the JRTI are generally thought to have entered the profession more prepared than graduates from the

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<sup>174</sup> See Yeo, *supra* note 85; *Bar Exam Fades into History in Korea*, *supra* note 85.

<sup>175</sup> Kim Nam-il, *New Candidate for Supreme Court Justice May Signal Shift in Court’s Composition*, HANKYOREH (July 3, 2018), [http://english.hani.co.kr/arti/english\\_e/edition/e\\_national/851745.html](http://english.hani.co.kr/arti/english_e/edition/e_national/851745.html) (Justice Kim Seon-su was confirmed to the Supreme Court and began his term in August of 2018). See also Kim Hak-tae, *jinboseonghyang pansadeul daebeob-won jin-ib, sabeobgaehyeog tanlyeogbadna* [*Progressive Judges Enter the Supreme Court, Are Judicial Reforms Resilient?*], LAB. TODAY (July 27, 2018) (S. Kor.), <http://www.labortoday.co.kr/news/articleView.html?idxno=152965>.

<sup>176</sup> See, e.g., Young-Cheol K. Jeong, *Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula*, 5 E. ASIA L. REV. 155, 156–58 (2010) (discussing the problems with the old system and what needs to be incorporated as legal education is reformed).

<sup>177</sup> See, e.g., Lee Jae-min, *After 10 Years, Legal Education Reform at Its Crossroads*, KOREA HERALD (Nov. 27, 2018), <http://www.koreaherald.com/view.php?ud=20181127000262> (discussing how the cap on passage rates for the new bar exam has resulted in law schools being hyper-focused on preparing students for the exam, undermining the purpose of the reforms to increase the professions “globalization, specialization and diversification”); Chyung, *supra* note 108 (noting that the new system is inaccessible to underprivileged communities and has developed a preference for graduates from the most elite schools for the legal profession); Rosa Kim, *The “Americanization” of Legal Education in South Korea: Challenges and Opportunities*, 38 BROOK. J. INT’L L. 49, 50 (2012) (acknowledging challenges presented by the reforms, including the required pedagogical methodology for the new system not being easily compatible with Korean culture).

<sup>178</sup> See Chyung, *supra* note 108; Lee, *supra* note 177; Kim, *supra* note 177.

new system who pass the bar exam.<sup>179</sup> This is evidenced in government agencies hiring graduates from the new system at a lower rank than they would hire graduates from the JRTI.<sup>180</sup> According to Inyoung Cheong, Deputy Director of Korea's Ministry of Culture, Sports, and Tourism, lawyers trained under the new system face more challenging employment prospects compared to JRTI graduates, who are deemed more competent attorneys after graduation.<sup>181</sup> Further inquiry into why the JRTI was so effective would assist in learning from Korea's experience. Perhaps the JRTI was more focused on practical skills. Or perhaps it was successful because candidates who attended had already demonstrated a degree of technical legal knowledge by passing the judicial exam.

These examples from around the world clearly demonstrate that the bar exam has the potential to exclude even capable candidates from the legal profession wherever licensure is required. As discussed in the section below, the bar exam, legal education, and the culture of practicing law are all intertwined. If the exam is racist, as the Crit Movements and critics argue, then the system as a whole, from legal education to practice, needs to be scrutinized as part of the effort to improve access to justice for marginalized communities. This logic applies wherever an exam with such faults is incorporated into the licensure system. If the exam disparately excludes marginalized groups in any country, the system that jurisdiction employs for licensure needs to be reevaluated as a whole. Alternatively, if the bar exam is a reliable mechanism for measuring competence, as posited by bar exam advocates, then its influence on the entire system's ability to ensure equitable access to justice should only be positive. But the evidence supports arguments made by the Crit Movements and others, indicating a need for a long hard look at the whole package anywhere the bar exam is used.

2. *The Bar Exam Makes Law School Less Hospitable to Individuals from Marginalized Communities.* — Any educational program that culminates in an exam to evaluate students' accomplishments and capabilities is going to be influenced by that exam. The bar exam's influence on legal education is no exception. In the United States, most jurisdictions that require passage of a bar exam require that prospective test-takers attend a law school approved by the

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<sup>179</sup> Interview with Inyoung Cheong, Deputy Director of the Ministry of Culture, Sports, and Tourism for the Republic of Korea and Univ. of Wash. PhD Candidate (Oct. 9, 2020).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

American Bar Association.<sup>182</sup> For approval, the ABA requires that “[a]t least 75 percent of a law school’s graduates [] must have passed a bar examination administered within two years of their date of graduation.”<sup>183</sup> Consequently, in order for a law school to effectively remain functional in the United States, it needs to ensure that at least three quarters of its students can pass the bar. This pressure to meet passage rates shifts the focus of legal education from preparing students for futures as legal professionals, to preparing students for passing the bar exam.<sup>184</sup> The accreditation requirements are not the only reason why schools focus their legal curriculum on bar exam preparation. Countries like Japan and South Korea have a similar challenge, instead caused by quotas limiting the number of annual admissions to the bar, forcing schools to be hyper-focused on giving their students any hope of passing the exam.<sup>185</sup> If the bar exam were an effective measure for whether a person will be a competent attorney, preparing students for legal careers and preparing them for the exam would be one and the same. However, many argue that there is no indication the bar exam accurately measures the skills and knowledge needed to be a good attorney.<sup>186</sup> If legal education is primarily about preparing law students for the bar exam rather than to be effective, ethical advocates, what is it that students are learning?

If nothing else, the bar exam, wherever it is administered, measures who has the time and money to commit themselves to expensive and demanding educational programs, followed by expensive and demanding bar exam preparation, followed by the expensive and demanding exam itself. The exam also measures who is able to

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<sup>182</sup> See, e.g., *Frequently Asked Questions*, AM. B. ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions/](https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/) (last visited Oct. 20, 2020).

<sup>183</sup> *2020-2021 Standards and Rules of Procedure for Approval of Law Schools, Program of Legal Education*, AM. B. ASS’N 25 (2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf).

<sup>184</sup> Lolita Buckner Inniss, “*Other Spaces*” in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 79 (2012).

<sup>185</sup> See Hoyoon Nam, *U.S.-Style Law School (“Law School”) System in Korea: Mistake or Accomplishment?*, 28 FORDHAM INT’L L.J. 879, 907–10 (2004) (discussing impact of Japan’s quotas on bar pass rates and success of licensure system, and the influence of that system on South Korea’s reforms). See also Riles & Uchida, *supra* note 84; Nottage & Green, *supra* note 84; Yeo, *supra* note 85; *Bar Exam Fades Into History In Korea*, *supra* note 85.

<sup>186</sup> See Shepherd, *supra* note 1, at 126; *ABA Principles*, *supra* note 35; Hunt II, *supra* note 116, at 765–66; Rosalsky, *supra* note 134; American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 147; Patrice, *supra* note 147; Benjamin, *supra* note 147; Karp, *supra* note 147; Patton, *supra* note 147; Saadati-Soto, *supra* note 147.



regurgitate memorized technical knowledge while sitting for hours on end.<sup>187</sup> Most law schools base a large portion of their curriculum entirely on pedagogy consistent with enabling students to accomplish this task.<sup>188</sup> Consequently, law school classes designed to prepare students for bar passage require rote memorization of rules and their application to decontextualized, hypothetical fact patterns, and, particularly in the United States, ignores the history behind such rules and cases and how they have played out over the decades.<sup>189</sup> Perhaps this reality makes it easy to see why Langdell's scientific approach to legal education has survived for so long: it simplifies legal systems into "black letter law" that can be memorized and applied in simplified hypotheticals given in the context of a standardized exam. Consequently, this approach to legal education reinforces the toxic conceptions of the law that has shaped the profession for over a century and requires students to ignore harmful impacts the law has had on their communities and families.<sup>190</sup> Anywhere the law is taught as color-blind and objective, "issues of race are typically unspoken or ignored in case analyses and class discussions; in many cases these issues are framed as irrelevant."<sup>191</sup> Arguably, one reason why the law is taught this way is because the bar exam and other licensure requirements, which generally do not test for understanding of the social impact of the law, give no incentive to expand classroom discussions into those difficult and complex topics. Students from marginalized communities who are forced to learn the law in this context, despite their

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<sup>187</sup> See Shepherd, *supra* note 1, at 126.

<sup>188</sup> Innis, *supra* note 184; *KSL Final Report*, *supra* note 167. For information on curriculum in law schools outside the United States, see, e.g., Lee, *supra* note 177.

<sup>189</sup> See, e.g., Kent D. Lollis, *Living, Working, and Achieving While Black*, LSAC (June 16, 2020), <https://www.lsc.org/blog/living-working-and-achieving-while-black> ("There were occasions where I had to read clearly racist court decisions, which are part of our long legal history.")

<sup>190</sup> A survey of women of color in law school (which notably excluded indigenous women, but still generated valuable information), found that women of color were significantly more likely to seriously consider dropping out of law school, the most common reason being because they "do not enjoy law school." *Women of Color: A Study of Law School Experiences*, NALP FOUND. & CTR. WOMEN L. at 32–34 (2020). While the survey did not collect additional information on what was not enjoyable, the survey also found that discriminatory and racist and/or sexist behavior is alarmingly commonplace in the law school context. *Id.* at 36–63. While students harmed by these circumstances can obviously best speak for themselves, one can imagine that the unpleasantness of this atmosphere is only exacerbated by having to read cases justifying discrimination or denying rights on the basis of race or sex without any critical analysis of the impact of those cases. For additional analysis of how the racialized impact of the law influences law classes (whether it is discussed explicitly or not), see generally Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J.L. ED. 780 (2018).

<sup>191</sup> Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 509–10 (2019).

lived experience of the law's non-objective impact, often face less favorable outcomes in their educational experience.<sup>192</sup> Understandably, these students are less likely to complete their law degree and/or pass the bar exam, and consequently are less likely to gain access to the profession.<sup>193</sup>

3. *The Bar Exam as a Standardized Test Has Further Exclusionary Impact.* — A general knowledge of standardized testing enables us to consider how the bar exam disproportionately bars candidates from marginalized communities from the profession through yet another lens.

Concern over standardized testing's impact and usefulness has grown for decades, even as its use has expanded to nearly all ages and educational institutions across the globe.<sup>194</sup> Proponents of standardized tests argue that they are a valuable educational tool because they are both a time efficient and cost effective way to measure student progress and knowledge.<sup>195</sup> However, critics argue that standardized tests assume all individuals learn and express knowledge in the same way.<sup>196</sup> They assert that standardized tests are too unidimensional to demonstrate how months and years of learning will impact an individual's knowledge and abilities in the future.<sup>197</sup> Additionally, standardized exams are widely criticized for their disproportionate impact and use to exclude on the

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<sup>192</sup> See *id.* (discussing a study that concluded that higher drop-out rates and lower GPAs for Black law students is due to legal education's design itself); see also Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMP. LEGAL STUD. 205, 245–46 (2016); Lain, *supra* note 190, at 786–88 (discussing how the law school atmosphere, including a lack of “acknowledgment of our history and stratification in our society,” impacts how safe minority students feel, and ultimately impacts their success).

<sup>193</sup> See Taylor, *supra* note 191; Lain, *supra* note 190, at 786–88.

<sup>194</sup> See, e.g., Cory Turner, *U.S. Tests Teens A Lot, But Worldwide, Exam Stakes Are Higher*, NPR (Apr. 30, 2014), <https://www.npr.org/2014/04/30/308057862/u-s-tests-teens-a-lot-but-worldwide-exam-stakes-are-higher>.

<sup>195</sup> See Blaine R. Worthen & Vicki Spandel, *Putting the Standardized Test Debate in Perspective*, ASS'N FOR SUPERVISION & CURRICULUM DEV. 65 (1991), [http://www.ascd.org/ASCD/pdf/journals/ed\\_lead/el\\_199102\\_worthen.pdf](http://www.ascd.org/ASCD/pdf/journals/ed_lead/el_199102_worthen.pdf) (suggesting ways to effectively use standardized tests).

<sup>196</sup> See generally David A. Goslin, *Criticism of Standardized Tests and Testing*, RUSSELL SAGE FOUND. (1967), <https://files.eric.ed.gov/fulltext/ED039392.pdf> (criticisms of standardized tests); Wayne Au, *Meritocracy 2.0: High-Stakes, Standardized Testing as a Racial Project of Neoliberal Multiculturalism*, 30 SAGE J. 39 (Nov. 26, 2015) (a scientific evaluation of standardized testing); Stephen C. Scogin et al., *Learning by Experience in a Standardized Testing Culture: Investigation of a Middle School Experiential Learning Program*, 40 SAGE J. 39 (Jan. 12, 2017); see also *Standardized Tests*, PROCON.ORG (Dec. 7, 2020), <https://standardizedtests.procon.org> (exploring pros and cons of standardized testing).

<sup>197</sup> See Worthen & Spandel, *supra* note 195; Goslin, *supra* note 196; *Standardized Tests*, *supra* note 196; Au, *supra* note 196; Scogin, et al., *supra* note 196.

basis of race.<sup>198</sup> Finally, critics of these exams note that standardized test requirements result in adjustments to curriculum aimed at teaching students to pass the test rather than preparing them for their future.<sup>199</sup>

While most analysis of standardized tests focuses on elementary education in the United States, the same findings apply to using standardized tests to certify teachers,<sup>200</sup> medical professionals,<sup>201</sup> and legal professionals everywhere.<sup>202</sup> In terms of the bar exam itself, there is no clear indication that the test measures law school graduates progress, skills, or knowledge.<sup>203</sup> The bar exam is subject to the same failure of any other standardized test in that it ignores the spectrum of styles of learning and knowledge expression.<sup>204</sup> We have already seen how the bar exam is historically linked to exclusion of marginalized groups, similar to other standardized exams. Finally, similar to any other standardized test, the bar exam influences the education that precedes it to conform to the demands of the test rather than the demands of the profession.

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<sup>198</sup> See Kimberle Williams Crenshaw, *Critical Race Theory: A Commemoration, in Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1337 (2011) (providing resources on how various standardized exams are used to exclude people based on race).

<sup>199</sup> *Id.*

<sup>200</sup> See, e.g., Lisa Borden-King et al., *Should Standardized Testing Define Our Profession?*, PHI DELTA KAPPAN (Feb. 24, 2020), <https://kappanonline.org/should-standardized-testing-define-our-professionborden-king-gamas-hintz-hultz/>.

<sup>201</sup> See, e.g., Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 132–39 (2012); see also Aadil Ahmed et al., *Balancing Standardized Testing with Personalized Training in Surgery*, ADVANCES IN MEDICAL EDUCATION AND PRACTICE (Dec. 28, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5207203/pdf/amep-8-025.pdf>.

<sup>202</sup> See, e.g., Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 UNIV. MD. L.J. RACE RELIG. GENDER & CLASS 31 (2018).

<sup>203</sup> See Shepherd, *supra* note 1 at 107 (“the bar exam may have caused malpractice and fraud to be more frequent in law than in other fields. Accreditation and the bar exam may lull the public into the dangerously false belief that any lawyer who has graduated from an accredited school and passed the bar exam is competent and trustworthy for any legal task”). See also Shepherd, *supra* note 1, at 126; *ABA Principles*, *supra* note 35; Hunt II, *supra* note 116, at 765–66; Rosalsky, *supra* note 134; American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 147; Patrice, *supra* note 147; Benjamin, *supra* note 147; Karp, *supra* note 147; Patton, *supra* note 147; Saadati-Soto, *supra* note 147.

<sup>204</sup> See generally Worthen & Spandel, *supra* note 195; Goslin, *supra* note 196; *Standardized Tests*, *supra* note 196; Au, *supra* note 196; Scogin, et al., *supra* note 196.

#### IV. BAR LICENSURE ALTERNATIVES TO PROMOTE A DIVERSE PROFESSION AND IMPROVE ACCESS TO JUSTICE

In considering how to proceed beyond the bar exam's limitations, common licensure alternatives and reforms can highlight best practices and approaches to avoid. First, this article considers the effect of lowering the score needed to pass the bar exam, as has been hotly debated in California. The article proceeds to discuss the potential for transitioning the bar exam to a solely online platform, a reform widely implemented during the COVID-19 pandemic. It then turns to programs that offer limited licenses, which are being tried in Washington, Utah, and Arizona, and are commonplace in countries outside the United States. Before concluding, the article touches on the well-established debate concerning diploma privilege, which may mean abolition of the bar exam entirely.

##### A. Lower Passing Scores

In response to various challenges with the bar exam in the United States, including the COVID-19 pandemic, several jurisdictions have experimented with lowering the score needed to pass.<sup>205</sup> California, with one of the highest “cut rates” in the country, has been wrestling with what an appropriate bar passage score is for years.<sup>206</sup> The California state bar hired an educational-assessment expert in 2017, to study and evaluate the cut score that year.<sup>207</sup> That study validated the state's high 2017 cut score, but law school deans from across the state persisted in arguing that the score is unfair because “the bar exam isn't a realistic measure of real-world law practice.”<sup>208</sup> Dean Gilbert Holmes of the University of La

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<sup>205</sup> See generally *State Bar Lowers Passing Score Necessary for Bar Exam*, CAL. DESERT TRIAL ACAD. COLL. LAW (Aug. 22, 2020), <https://cdtalaw.com/baby-bar-exam/state-bar-lowers-passing-score-necessary-for-bar-exam/> (discussing California's decision to permanently lower the passing bar score and noting several other states' similar actions).

<sup>206</sup> Maria Dinzeo, *California Inches Toward Lowering Bar-Exam Standards*, COURTHOUSE NEWS SERVICE (July 31, 2017), <https://www.courthousenews.com/california-inches-toward-lowering-bar-exam-standards/>; see also *Minimum Passing Uniform Bar Exam Scores by State*, JD ADVISING (June 2020), <https://www.jdadvising.com/minimum-passing-ube-score-by-state/>.

<sup>207</sup> Dinzeo, *supra* note 206. California also conducted a study on what the bar exam measures were in the 1980s. See Derek T. Muller, *Does the Bar Exam Adequately Test Prospective Lawyers' Minimum Competence?*, EXCESS OF DEMOCRACY BLOG (May 26, 2017), <https://excessofdemocracy.com/blog/2017/5/does-the-bar-exam-adequately-test-prospective-lawyers-minimum-competence>. See also Shepherd, *supra* note 1, at 126; ABA Principles, *supra* note 35; Hunt II, *supra* note 116, at 765–66; Rosalsky, *supra* note 134; American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 147; Patrice, *supra* note 147; Benjamin, *supra* note 147; Karp, *supra* note 147; Patton, *supra* note 147; Saadati-Soto, *supra* note 147.

<sup>208</sup> Dinzeo, *supra* note 206.

Verne College of Law argued that passing the bar is more a measure of prestige than it is of competence.<sup>209</sup> This year, in response to the resurfaced debate about the cut score, Dean Holmes said:

“What’s been missing in the conversation for me is the real question of access and diversity. The bar exam is a standardized test and it’s been shown over the years that standardized tests disfavor people of color and people with low socioeconomic backgrounds. The gap shows up in third grade. So why are we continuing to perpetuate that gap?”<sup>210</sup>

Missing from the California debate regarding the cut score is clear, persuasive evidence of how a cut score impacts who enters the legal profession, and if or how the score impacts access to justice. That is because evidence is not needed to determine the impact of high cut scores. Obviously, high cut rates result in lower passage rates, increasing the bar exam’s exclusionary effects.<sup>211</sup> Even advocates for high cut rates admit that “[b]y lowering the cut score, there would be more attorneys who would provide more legal services to the public and potentially increase access to justice and likely lower costs for consumers.”<sup>212</sup>

It is clear that high cut scores exacerbate the bar exam’s issues, but that does not mean lowering cut scores effectively addresses these issues. A lower cut score may lessen the bar exam’s negative impacts, but it does not change them. The failures and harms of systems that use the bar exam, as discussed throughout this article, will still be present and problematic.

### *B. Transitioning to an Online Exam*

Another consideration for bar reform discussions is how to adapt the exam for an increasingly globalized world centered around technology without disproportionately impacting candidates from underprivileged groups. The issue became particularly pertinent when exam administrators and stakeholders were deciding whether to require law school graduates to sit in a room together to take the bar exam during the COVID-19 pandemic. One alternative was to permit an online exam for the class of 2020. In the United States, at least twenty-two states and

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See, e.g., Mitchel Winick, *Highest Performers but Lowest Pass Rate, There Is Something Seriously Wrong in California*, CONTRA COSTA COUNTY BAR ASS’N (Feb. 2020), <https://www.cccbba.org/article/highest-performers-but-lowest-pass-rate-there-is-something-seriously-wrong-in-california/>.

<sup>212</sup> Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 322–23 (Summer 2019).

the District of Columbia either conducted the exam exclusively online or offered the online exam as an alternative to an in-person exam.<sup>213</sup> At first glance, an online exam seems like a good idea. What comes to mind is an open book, open internet exam allowing test-takers anywhere to consider questions posed to them in a way similar to a legal job: with numerous resources and their research skills available to them. Such a set-up would prevent physical and geographical bars to sitting for the exam, and better mimic work in legal practice. Of course, this idealistic picture was not reality.

Transitioning to a digital life is replete with challenges. Some people do not have access to reliable computers or internet connections.<sup>214</sup> Others face technical problems, security concerns, and identification, authentication, and monitoring issues.<sup>215</sup> Candidates from underrepresented communities are disproportionately impacted by these challenges.<sup>216</sup> For states that chose to publish an online exam, the National Conference of Bar Examiners provided an abbreviated version of the exam, with “100 MBE questions divided into two 50-question sets, three MEE questions, and one MPT item,” administered in four 90-minute testing sessions.<sup>217</sup> Each jurisdiction chose what portions offered by the National Conference of Bar Examiners (NCBE) they would use, and the jurisdictions were left to address accessibility issues, including availability of space, equipment, and internet.<sup>218</sup> Clearly, this option was not the same as the UBE, and thus UBE jurisdictions offering this online option were sacrificing the mobility of test-takers’ scores.<sup>219</sup>

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<sup>213</sup> See *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/> (last visited Oct. 17, 2020) (listing how each jurisdiction responded to the pandemic).

<sup>214</sup> For further reading on how these challenges impact an online bar exam, see, e.g., Khari Johnson, *ExamSoft’s Remote Bar Exam Sparks Privacy and Facial Recognition Concerns*, VENTURE BEAT (Sept. 20, 2020), <https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/>; Sam Skolnik, *October Online Bar Exams Spark Technology, Privacy Concerns*, BLOOMBERG LAW (Aug. 18, 2020), <https://news.bloomberglaw.com/us-law-week/october-online-bar-exams-spark-technology-privacy-concerns>; Maggie Miller, *Law School Graduates Worried About Security, Privacy of Online Bar Exam*, HILL (July 14, 2020), <https://thehill.com/policy/technology/507381-law-school-graduates-worried-about-security-privacy-of-online-bar-exam>.

<sup>215</sup> See Johnson, *supra* note 214; Skolnik, *supra* note 214; Miller, *supra* note 214.

<sup>216</sup> See Lynch, *supra* note 141.

<sup>217</sup> *NCBE COVID-19 FAQs*, NATIONAL CONFERENCE OF BAR EXAMINERS (last visited Oct. 17, 2020), <https://www.ncbex.org/ncbe-covid-19-updates/faqs/>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

While the NCBE ultimately declared the online exam an overall success,<sup>220</sup> many test-takers disagreed. In a survey of New York test-takers, 40 percent of respondents reported internet or software problems, with three in four categorizing the experience as negative.<sup>221</sup> Some of these issues arose from the facial recognition software used to secure the exams, which has a “well-documented history” of mis-identifying Black Americans’ faces.<sup>222</sup> No other evaluations of the exam appear to have been undertaken, and there does not appear to be a plan to determine the success of the exam other than calculating the percentage of test takers who were able to complete it.<sup>223</sup>

In addition to presenting these unique challenges, transitioning the exam to an online platform does not alleviate the exclusion of talented people from the profession. However, the idea of an individual sitting in a quiet space, with any accessibility concerns effectively addressed, and permitted to complete an exam in conditions similar to those encountered in the actual practice of law is attractive, though never attempted in the United States. An obvious concern raised by this proposition is that the wide diversity in legal jobs makes mimicking work conditions difficult. This thought experiment begs the question of whether a single exam could ever adequately evaluate individuals hoping to enter such a dynamic profession with so many varied and dissimilar ways to practice.

### C. Limited Licenses for Limited Practice

In countries like Kenya, Kyrgyzstan, and the United Kingdom, future lawyers can obtain legal credentials for practice outside of the courtroom without taking a bar exam, by attending any number of universities—public or private—giving candidates geographic and financial flexibility. In these countries, the bar exam is restricted to licensing specific kinds of legal professionals, while other providers can

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<sup>220</sup> 2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or October, NATIONAL CONFERENCE OF BAR EXAMINERS (Oct. 7, 2020), <https://www.ncbex.org/news/2020-bar-exam-process-comes-to-an-end-approximately-38000-applicants-took-bar-exam-in-july-september-or-october/>.

<sup>221</sup> Sam Skolnik, *N.Y. Bar Exam Takers Report ‘Negative’ Online Experience*, BLOOMBERG LAW (Oct. 16, 2020), <https://news.bloomberglaw.com/business-and-practice/n-y-bar-exam-takers-report-negative-online-experience>.

<sup>222</sup> See Johnson, *supra* note 214.

<sup>223</sup> See Joe Patrice, *NCBE Chief on Possibility of Serious Evaluation of Online Bar Debacle: “I Think So... I Don’t Know”*, ABOVE THE LAW (Oct. 9, 2020), <https://abovethelaw.com/2020/10/ncbe-chief-on-possibility-of-serious-evaluation-of-online-bar-debacle-i-think-so-i-dont-know/> (discussing interview with NCBE Chief after administration of the online bar exam).

practice law without taking the exam.<sup>224</sup> This approach undoubtedly opens the profession up to a much wider demographic, which some jurisdictions within the United States have attempted to emulate.

Beginning in 2012, Washington State pioneered a Limited License Legal Technician (LLLT) program, intended to improve access to legal services for people with low or moderate incomes.<sup>225</sup> While LLLTs were initially limited to assisting with family law matters, the goal was to expand the program to other legal services, including administrative proceedings, elder care, health law, and more.<sup>226</sup> While the program showed initial signs of success,<sup>227</sup> support from the Washington State Bar Association (WSBA) and Washington Supreme Court suddenly dissipated as the composition of two bodies changed.<sup>228</sup> During the COVID-19 pandemic, the LLLT board requested to expand the program to address growing needs for landlord/tenant and other legal services.<sup>229</sup> The WSBA and Washington Supreme Court not only rejected the request, but took the first steps leading towards a plan to end the program altogether.<sup>230</sup> The court primarily reasoned that the program's cost did not balance with its dismal growth—there just did not appear to be a lot of interest in the program.<sup>231</sup> Justice Barbara Madsen

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<sup>224</sup> See Bell, *supra* note 125; Crenshaw, *supra* note ; *Women's Rights*, *supra* note 129; Grossman, *supra* note 129; Logo, *supra* note 129.

<sup>225</sup> Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA JOURNAL (July 9, 2020), <https://www.abajournal.com/web/article/how-washingtons-limited-license-legal-technician-program-met-its-demise>; *Limited License Legal Technician Licensing and Admission*, WASHINGTON STATE BAR ASSOCIATION <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician> (last visited Oct. 17, 2020).

<sup>226</sup> *Limited License Legal Technician Licensing and Admission*, *supra* note 225.

<sup>227</sup> Bob Ambrogi, *Washington, State that Pioneered Licensed Legal Technicians, Cancels the Program*, LAW SITES (June 9, 2020), <https://www.lawsitesblog.com/2020/06/washington-state-that-pioneered-licensed-legal-technicians-cancels-the-program.html> (tracking the growing support for the program, with examples and links of support even from the bar associations, up until its demise); Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA JOURNAL (Jan. 1, 2015), [https://www.abajournal.com/magazine/article/washington\\_state\\_moves\\_around\\_upl\\_using\\_legal\\_technicians\\_to\\_help\\_close\\_the](https://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the); Thomas M. Clarke & Rebecca L. Sandefur, *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*, PUBLIC WELFARE FOUNDATION (Mar. 2017), [http://www.americanbarfoundation.org/uploads/cms/documents/preliminary\\_evaluation\\_of\\_the\\_washington\\_state\\_limited\\_license\\_legal\\_technician\\_program\\_032117.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf) (describing program as success).

<sup>228</sup> Moran, *supra* note 225.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> A June 2015 search of WSBA's legal directory found only thirty-nine active LLLTs listed. *Id.*



disagreed with the 2020 decision not to expand the program.<sup>232</sup> In her dissent, she argued that the program's potential for improving access to justice "across income and race" could not be measured without opening the program to additional areas of legal services.<sup>233</sup>

Michael Speck, an Oklahoma law professor, wrote a detailed analysis of Washington's LLLT program for the Oklahoma Bar Journal.<sup>234</sup> He notes that the program presented an attractive solution to address widespread access to justice challenges, but hypothesized that the program's complicated requirements would make it an underutilized option.<sup>235</sup> He had a good point. While the LLLT program appears to address barriers to the profession in the same way that countries with limited requirements for those who do not intend to work in a courtroom, it had very different requirements. To qualify for Washington's LLLT program, a candidate must (1) obtain an associate's degree or higher; (2) complete a minimum of forty-five credit hours of core curriculum through an ABA-approved legal program; (3) complete practice area courses; (4) complete 3,000 hours of substantive legal work in any practice area under the supervision of a lawyer; and (4) take and pass the Legal Technician Exam.<sup>236</sup> Compare these requirements with Kyrgyzstan, Kenya, or the United Kingdom, where individuals can provide limited legal services with little or no formal legal education.<sup>237</sup> Particularly, in Washington State, where attorney-hopefuls may take the

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<sup>232</sup> Letter from Justice Barbara Madsen, to Stephen R. Crossland, Chair, Limited License Legal Technician Board (June 5, 2020), [https://www.abajournal.com/files/Madsen\\_Dissent.pdf](https://www.abajournal.com/files/Madsen_Dissent.pdf).

<sup>233</sup> *Id.* Several criticisms of the court's decision postulate that the decision comes less as a result of financial viability, and more as a result of protecting the legal profession's elitist turf. *See, e.g.,* Moran, *supra* note 225; Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, ABA JOURNAL (June 8, 2020), <https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program>.

<sup>234</sup> *See* Michael Speck, *The L in Triple LTs: The Limited Nature of Licenses for Legal Technicians*, 88 OKLA. B.J. 749, 749 n.37 (2017).

<sup>235</sup> *Id.*

<sup>236</sup> *See* APR 28 Limited Practice Rule for Limited License Legal Technicians, WASHINGTON COURTS, [https://www.courts.wa.gov/court\\_rules/pdf/APR/GA\\_APR\\_28\\_00\\_00.pdf](https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_28_00_00.pdf) (last visited Mar. 25, 2020).

<sup>237</sup> *See How to Become a Lawyer in Kenya, supra* note (Kenya requires only an LLB or diploma to practice law outside the courtroom); Levin & Mather, *supra* note (Kyrgyzstan allows legal representation in civil cases by individuals with little or no formal legal education); Rosalsky, *supra* note 134 (the United Kingdom permits limited legal services to be provided by individuals without having a law degree or passing a bar exam).

bar exam without first obtaining a law degree,<sup>238</sup> it is understandable that people seeking legal careers would not see LLLT as a worthwhile option.

In 2018, Utah initiated a program very similar to Washington's LLLT program, calling it their Licensed Paralegal Practitioner (LPP) program.<sup>239</sup> The main distinction between the two programs is that, from the very beginning, LPPs can be certified to provide legal services for family, debt collection, and forcible entry or detainer matters.<sup>240</sup> While the fate of Utah's LPP program will take time to determine, the first signs show a similar prognosis as Washington's LLLT program.

Utah's LPP program requirements are as demanding as Washington's LLLT program, with educational options up to and including a degree in law from an accredited law school, a required 1,500 hours of substantive legal work related to the kind of law they wish to be certified in, a passing score on a professional ethics exam, an LPP exam for each practice area, and certification from an approved association.<sup>241</sup>

Arizona also made the decision in 2020 to create a similar "Legal Paraprofessional" program.<sup>242</sup> California, Colorado, and Oregon are considering moving forward with similar programs as well.<sup>243</sup> In determining these experiments' value, it will be helpful to thoroughly evaluate why Washington's program saw minimal interest. If the low

<sup>238</sup> See, e.g., *APR 6 Law Clerk Program*, WASHINGTON STATE BAR ASS'N (updated Oct. 2, 2020) (explaining Washington's legal apprenticeship program), <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/law-clerk>.

<sup>239</sup> See, e.g., *Licensed Paralegal Practitioner Program*, UTAH STATE BAR, <https://www.utahbar.org/licensed-paralegal-practitioner/> (last visited Oct. 20, 2020); see also Laura Bagby, *Utah to Become Second State to License Paralegals to Practice Law*, 2CIVILITY (Oct. 11, 2018), <https://www.2civility.org/utah-second-state-license-paralegals-practice-law/>.

<sup>240</sup> Rule 14-802, *Authorization to Practice Law*, UTAH COURTS (2005), <https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch14/08%20Special%20Practice/USB14-802.html>; see also *Licensed Paralegal Practitioner*, UTAH COURTS, <https://www.utcourts.gov/legal/lpp/index.html> (last visited Oct. 20, 2020).

<sup>241</sup> Rule 15-703, *Authorization to Practice Law*, UTAH COURTS (2018), <https://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch15/URGLPP%2015-0703.html>.

<sup>242</sup> Lyle Moran, *Arizona Approves Nonlawyer Ownership, Nonlawyer Licensees in Access-to-Justice Reforms*, ABA JOURNAL (Aug. 28, 2020), <https://www.abajournal.com/web/article/arizona-approves-alternative-business-structures-as-part-of-access-to-justice-reforms>.

<sup>243</sup> Steven Chung, *The California State Bar Is Considering Allowing Non-Lawyers (and Skynet) to Practice Law*, ABOVE THE LAW (July 3, 2019), <https://abovethelaw.com/2019/07/the-california-state-bar-is-considering-allowing-non-lawyers-and-skynet-to-practice-law/>; Avery Martinez, *What's the Future for Limited Legal Liability Technicians?*, LAW WEEK COLORADO (Sept. 10, 2020), <https://lawweekcolorado.com/2020/09/lllt-programs/>; Jason Tashea, *Oregon Bar Considering Paraprofessional Licensing and Bar-Takers Without JDs*, ABA JOURNAL (Oct. 7, 2019), <https://www.abajournal.com/news/article/oregon-bar-to-consider-paraprofessional-licensing-and-bar-takers-without-jds>.

numbers were due to a lack of familiarity with the option, rather than an actual absence of potential, perhaps programs in other states will give this career path a fighting chance in the United States. If the low numbers are due to an over-burdensome certification process, as Speck argues, then it is worth looking to places where similar systems have worked well. As noted above, similar systems have been very successful abroad.<sup>244</sup>

#### D. Diploma Privilege

Diploma privilege allows graduates from specific legal education programs to obtain a license to practice law without taking a bar exam.<sup>245</sup> After the ABA expressly endorsed the bar exam's use over diploma privilege in the 1920s, states quickly fell in line with their licensing requirements.<sup>246</sup> One state, Wisconsin, stands alone in its continued use of diploma privilege.<sup>247</sup> Diploma privilege can be either universal or more restricted. In a universal approach to diploma privilege, any law school graduate may obtain a license to practice law.<sup>248</sup> In a more restricted approach, the law school attended is required to be ABA accredited, or sometimes the privilege is limited to graduates of specific schools.<sup>249</sup> Wisconsin has stuck to the latter option, requiring candidates for diploma privilege to graduate from one of the state's two public law schools.<sup>250</sup> With this restriction, the state can maintain control over the education required for attorneys to practice within the state.<sup>251</sup>

Modest efforts have been made, primarily by law students in the United States, to advocate for diploma privilege over the years,<sup>252</sup> but nothing like the surge of support that was inspired by the COVID-19

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<sup>244</sup> See, e.g., PRACTITIONER'S TOOLKIT, *supra* note 117; Makaryan, *supra* note 117; CHOUDHRY, *supra* note 117; *Bachelor of Law (LL.B)*, *supra* note 101; *Kyrgyzstan International Trade in Legal Services*, *supra* note 130.

<sup>245</sup> Riebe, *supra* note 44.

<sup>246</sup> Critchlow, *supra* note 44 at 328.

<sup>247</sup> For a brief history on bar admission in Wisconsin and of diploma privilege itself, see Beverly Moran, *Faculty Perspectives: The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645–47 (2000).

<sup>248</sup> See, e.g., Reed Showalter, *Universal Diploma Privilege and Reciprocity: The Ethical Choice for 2020 Graduates*, JURIST (July 9, 2020), <https://www.jurist.org/commentary/2020/07/reed-showalter-diploma-privilege/> (describing two types of universal diploma privilege in the context of COVID-19); Brian L. Frye, *It's Time for Universal Diploma Privilege*, JURIST (Apr. 6, 2020), <https://www.jurist.org/commentary/2020/04/brian-frye-diploma-privilege/> (arguing for universal diploma privilege beyond the pandemic).

<sup>249</sup> Moran, *supra* note 247, at 646–47.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See, e.g., Andrade, *supra* note 121.

pandemic.<sup>253</sup> As COVID-19 spread around the world, bar examiners were forced to decide how to proceed. Graduating students were thrown into a state of uncertainty, not knowing when or if the exam would be held; whether they would have to risk their health to take it; if they would be able to start paying jobs without the exam; whether they should begin the bar preparation course they paid a huge tuition for; or where they would be able to study or take an online exam with libraries closed.<sup>254</sup> In addition to these difficult questions, a major and unforeseen rise in the need for legal services was brought on by the economic shutdown, the steep rise in unemployment, the loss of housing and food security, and health insurance.<sup>255</sup> Public interest organizations, students, and practicing legal professionals in the United States organized quickly to advocate for diploma privilege for law students graduating from an accredited law school.<sup>256</sup> Unsurprisingly, pushback in the form of

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<sup>253</sup> Editorial Board, *The Diploma Privilege Manifesto*, JURIST (July 9, 2020), <https://www.jurist.org/commentary/2020/07/jurist-eboard-diploma-privilege-manifesto/>; PRP Leads Coalition of Public Interest Organizations Advocating for Diploma Privilege Due to Public Health & Equity Concerns, PUBLIC RIGHTS PROJECT (Aug. 19, 2020), <https://www.publicrightspj.org/press/prp-leads-coalition-of-public-interest-organizations-advocating-for-diploma-privilege-due-to-public-health-equity/>; Stevie Glaberson, *Public Justice Calls On California Supreme Court to Instate Diploma Privilege*, PUBLIC JUSTICE (July 16, 2020), <https://www.publicjustice.net/public-justice-calls-on-california-supreme-court-to-instate-diploma-privilege/>; John E. Grant, *In Support of Diploma Privilege in Oregon*, AGILE ATTORNEY (July 1, 2020), <https://agileattorney.com/diploma-privilege-for-oregon/>; Public Rights Project, *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, MEDIUM (Aug. 11, 2020), <https://medium.com/@publicrightspj/an-open-letter-from-public-interest-legal-organizations-supporting-diploma-privilege-20390dd50a8e>; Valerie Strauss, *Why this Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASHINGTON POST (July 13, 2020), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/>.

<sup>254</sup> See *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, *supra* note 139; Lynch, *supra* note 141; Yonhap, *supra* note 141; Young-Powell, *supra* note 141.

<sup>255</sup> See *Impact of COVID-19 on Recent Law School Graduates and Rising 3Ls*, *supra* note 139; Bishop, *supra* note 139; Yonhap, *supra* note 141; Young-Powell, *supra* note 141. For impacts of the pandemic on other countries, see, e.g., *The Virus That Shut Down the World: Economic Meltdown*, UN NEWS (Dec. 30, 2020) (discussing rising global unemployment in the context of the COVID-19 pandemic), [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms\\_767028.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_767028.pdf); Efrat Shadmi et al., *Health Equity and COVID-19: Global Perspectives*, 19 INT'L J. EQUITY HEALTH (June 26, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7316580/> (analyzing how COVID-19 exposed health inequity issues around the world).

<sup>256</sup> See Editorial Board, *supra* note 253; PRP Leads Coalition of Public Interest Organizations Advocating for Diploma Privilege Due to Public Health & Equity Concerns, *supra* note 253; Glaberson, *supra* note 253; Grant, *supra* note 253; Public Rights Project, *supra* note 253; Strauss, *supra* note 253.

antiquated arguments resurfaced: testing is needed to preserve the integrity of the profession, protect the public, and maintain consistency in legal practice standards.<sup>257</sup> As has been discussed at length by scholars and practitioners,<sup>258</sup> there is no evidence that these arguments in support of the bar exam are valid.<sup>259</sup> The arguments from advocates for diploma privilege, however, are intriguing.

Diploma privilege advocates point to inequities in the legal profession already buttressed by the bar exam, and argue that COVID-19 compounded these inequities.<sup>260</sup> They harness arguments made against the bar exam's use to advocate for diploma privilege in the context of a health emergency.<sup>261</sup> Separately, advocates argue that allowing the bar exam to prevent law school graduates from practicing law harms vulnerable communities during their greatest time of need for legal services.<sup>262</sup> With the advocates' attention understandably focused on the emergency at hand, few make the leap to say the bar exam itself directly impedes access to justice, and should be abolished, or reformed, altogether.<sup>263</sup>

In the United States, many states either granted diploma privilege for 2020 graduates, instated a temporary or otherwise limited version of the privilege, or sided with bar exam proponents and found a way to move forward with the exam.<sup>264</sup> For example, the California Supreme court lowered their bar passing score, and directed the State bar to institute a kind of diploma privilege in response to the pandemic.<sup>265</sup> This allowed law school graduates to practice under supervision until they pass the bar exam no later than June 2022.<sup>266</sup> New Jersey considered a similar option, but determined that the trend of declining bar passage

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<sup>257</sup> Editorial Board, *supra* note 253; *PRP Leads Coalition of Public Interest Organizations Advocating for Diploma Privilege Due to Public Health & Equity Concerns*, *supra* note 253; Glaberson, *supra* note 253; Grant, *supra* note 253; Public Rights Project, *supra* note 253; Strauss, *supra* note 253; *see also* Michael Miller, *Diploma Privilege Proposal is "Deeply Flawed"*, N.Y.L.J. ONLINE (July 21, 2020) (archived on Lexis).

<sup>258</sup> *See* Shepherd, *supra* note 1, at 126; *ABA Principles*, *supra* note 35; Hunt II, *supra* note 116, at 765-66; Rosalsky, *supra* note 134; American Bar Association Section of Legal Education and Admissions to the Bar, *supra* note 147; Patrice, *supra* note 147; Benjamin, *supra* note 147; Karp, *supra* note 147; Patton, *supra* note 147; Saadati-Soto, *supra* note 147.

<sup>259</sup> For a closer critique of these arguments, and specifically an analysis of studies done to support them, *see* Patton, *supra* note 147.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*; *but see* Frye, *supra* note 248.

<sup>264</sup> *See Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 213.

<sup>265</sup> *See State Bar Lowers Passing Score Necessary for Bar Exam*, *supra* note 205.

<sup>266</sup> *Id.*

rates in the state meant that law school graduates were not adequately prepared to practice law without demonstrating their competence through an exam.<sup>267</sup>

### CONCLUSION

The bar exam in the United States evolved from an orally administered judicial test to a hazing mechanism that does not conclusively advance the ABA's stated interest in increasing access to justice. Even arguments advocating for the bar exam are centered around keeping "incompetence" *out* of the profession, without defining incompetence or considering the harm done by this method of exclusion. The rigid AALS requirements for law schools and the bar exam create a system where alternative forms of education and licensure are shunned. This stubborn adherence to an antiquated system originally built to privilege property owners makes obtaining a legal degree financially unaffordable or impractical for many from underrepresented communities. Taking into consideration the long history of Crit Movements that have shed light on the legal profession's historically discriminatory nature, it does not serve the ABA well to continue pressing for a standardized exam—in the United States or abroad. Especially when standardized exams have been shown to unfairly exclude people from marginalized communities, and when the bar exam has not demonstrated any additional protection from incompetent attorneys. The American Bar Association has taken the first step by reviewing the bar exam and publishing its new Operational Principles,<sup>268</sup> but it must take proactive measures to undo the harm it has sustained for so long both within the United States and elsewhere.

This article shed light on a variety of fair alternatives, including diploma privilege or tiered legal systems where the requirements to practice differ at different levels. It looked at the diploma privilege success in Wisconsin, the legal licensure systems in Kenya, Kyrgyzstan, and the United Kingdom, and legal reform happening in countries such as South Korea. The alternative options are there, available, and able to be studied and adapted. It is time for the American Bar Association and the American Association of Law Schools to address the systematic inequities that the bar exam perpetuates.

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<sup>267</sup> Young Lawyers Advisory Board, *The Bar Exam Debacle: A Crisis Revealed by COVID*, N.J.L.J. (Aug. 31, 2020), <https://www.law.com/njlawjournal/2020/08/31/the-bar-exam-debacle-a-crisis-revealed-by-covid/>.

<sup>268</sup> See *ABA Principles*, *supra* note 35; *ABA Commission* *supra* note 35; Ward, *supra* note 35.