Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination

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EXAMINING THE BAR EXAM: AN EMPIRICAL ANALYSIS OF RACIAL BIAS IN THE UNIFORM BAR EXAMINATION

Scott Devito, Kelsey Hample & Erin Lain*

ABSTRACT

The legal profession is among the least diverse in the United States. Given continuing issues of systemic racism, the central position that the justice system occupies in society, and the vital role that lawyers play in that system, it is incumbent upon legal professionals to identify and remedy the causes of this lack of diversity. This Article seeks to understand how the bar examination—the final hurdle to entering the profession—contributes to this dearth of diversity. Using publicly available data, we analyze whether the ethnic makeup of a law school’s entering class correlates to the school’s first-time bar passage rates on the Uniform Bar Examination (UBE). We find that higher proportions of Black and Hispanic students in a law school’s entering class are associated with lower first-time bar passage rates for that school in its reported UBE jurisdictions three years later. This effect persists after controlling for other potentially causal factors like undergraduate grade-point average (UGPA), law school admission test (LSAT) score, geographic region, or law school tier. Moreover, the results are statistically robust at a p-value of 0.01 (indicating just a 1% chance that the results are due to random variation in the data). Because these are school-level results, they may not fully account for relevant factors identifiable only in student-level data. As a result, we argue that follow-up study using data relating to individual students is necessary to fully understand why the UBE produces racially and ethnically disparate results.

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I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.

Ralph Ellison, Invisible Man

INTRODUCTION: THE UNEXAMINED EXAM

This Article is written with two purposes. First, we seek to sound the alarm that the bar exam is racially and ethnically biased. For many, such an alarm will seem absurd. They will argue that the bar examination is difficult, but it is also fair; passing is a function of ability, work ethic, writing skill, and knowledge of the law—not race or ethnicity. Unfortunately, such a belief is unsupported by the evidence.

Second, we write this Article as a call to action. Philosophers have, for millennia, warned us of the dangers of accepting beliefs without adequately testing them. Yet that is precisely what the legal community

1. RALPH ELLISON, INVISIBLE MAN I (1947).
2. All reliable evidence demonstrates that White examinees outperform examinees from communities of color with similar academic indicators. See discussion infra Part III (discussing empirical studies of the interaction between race/ethnicity and the bar examination). Additionally, this Article capitalizes all terms that refer to socially-constructed race and ethnic categories.
3. See id.
4. Over 2,000 years ago, Socrates argued that the good life was one in which we investigate and challenge our beliefs to determine whether what we think we know, we know. See PLATO, APOLOGY, in 1 PLATO IN TWELVE VOLUMES 382 (Harold North Fowler trans., Harvard University Press 1966) (contending that death is a better outcome than living an unexamined life). In the twentieth centu-
has done with regard to the “objectivity” of the bar examination. The profession simply proceeds as if race and ethnicity are irrelevant to the probability that a bar-taker will pass the bar examination, or white-washes the evidence of disparate outcomes and deems those differences inconsequential. Given empirical evidence to the contrary, we contend that the legal community must demand in-depth analysis of the bar examination’s questions, administration, and grading to determine why race and ethnicity appear to impact bar passage rates.

This Article engages in statistical analysis of first-time bar passage rates, at the school-jurisdiction level, for schools in Uniform Bar Examination (UBE) jurisdictions. The analysis reveals a highly significant, negative correlation between a school’s proportion of Black or Hispanic students and the first-time pass rate for that school-jurisdiction. In essence, as a school’s proportion of Black or Hispanic students increases, the school’s first-time bar passage rates decline three years later (when the enrollees are expected to graduate). This result is statistically significant to a p-value of .01. Such a result should greatly concern the legal profession as it provides clear evidence of disproportionate bar examination outcomes based on race and ethnicity.

5. See id.; see also infra Part III (discussing empirical studies of the bar exam).

6. See discussion infra Section V.A (describing the results of our analysis of the UBE).

7. See id. (noting that the correlations found in our study are statistically significant at the ninety-nine percent confidence interval). All measures of statistical significance discussed in this Article relate to the p-value of a statistical hypothesis. We will consider a result to be statistically significant if its corresponding p-value is less than or equal to 0.01. This means that there is no more than a 1 in 100 chance that our result is due to random variation. DAVID HENSHER, JOHN M. ROSE & WILLIAM H. GREENE, APPLIED CHOICE ANALYSIS: A PRIMER 46–47 (2005) (explaining p-values and statistical significance). Normally, in social science, a p-value of 0.05 (the result has a 1 in 20 chance of being due to random variation) is used as a measure of statistical significance. See, e.g., id.; SCOTT E. MAXWELL & HAROLD D. DELANTY, DESIGNING EXPERIMENTS AND ANALYZING DATA: A MODEL COMPARISON PERSPECTIVE 47 (Wadsworth Publishing Company, 2d ed. 2004). That our results are statistically significant at a more stringent p-value of 0.01 (the result has a 1 in 100 chance of being due to random variation) demonstrates the robustness of those results.
and suggests that such disproportionality may result from the exam itself. It should also prompt the legal community to further study the bar exam, using student-specific data, to better understand why bar passage rates decline as a school’s proportion of Black or Hispanic students increases.

This Article proceeds in multiple stages. Part I provides a short history of the bar exam and its racist roots. Part II then discusses the current, long-standing racial and ethnic imbalance in the legal field and two possible explanations for the profession’s ignorance of this imbalance. We then turn, in Part III, to review and analyze previous empirical studies of race/ethnicity and the bar examination. These studies can be divided into three categories: (1) those that cannot reach a conclusion due to insufficient information, (2) those that whitenwash their empirical findings of disparate outcomes to ultimately support the conclusion that the bar is neither racially nor ethnically biased, and (3) surveys conducted by government actors showing racially and ethnically disparate results. Part IV then discusses some factors that may cause these disparate outcomes. This Article’s original study and results are presented in Part V. In this study, we empirically examine the relationship between a school’s bar passage rate and the percentage of its class that is comprised of different racial and ethnic groups (American Indian/Alaska Native, Asian, Black, Hispanic, Native Hawaiian/Pacific Islander, and two or more races), the school’s median LSAT, its geographic location, and the school tier. Our study finds a highly significant correlation between the percentage of a law school’s student body that is comprised of Black or Hispanic students and the school’s bar passage rate, under the UBE, at the time those students are expected to graduate. Finally, Part VI argues that student-level study is required to fully understand the results of this research and to make policy decisions aimed at improving bar outcomes for students from communities of color.

I. THE BAR EXAM: A HISTORY OF RACIAL GATEKEEPING

Admission to the bar has not always been as uniform or academic as the procedures utilized today. For much of the nineteenth century, the bar consisted of an oral examination administered by an official acting on behalf of a particular jurisdiction constrained by few formal guidelines. Toward the latter half of the nineteenth century, these relaxed standards were challenged. Beginning in 1880, states created central-
ized bar examiners that gradually introduced state-wide written examinations for bar admission. 12

The process of formalization and standardization continued into the first half of the twentieth century. By 1931, all states—except for Indiana—had formalized and centralized boards of bar examiners. 13 That same year, the American Association of Law Schools assembled a committee to explore creating a national organization for bar examiners— and the National Conference of Bar Examiners (NCBE) was subsequently formed. 14 Initially, the NCBE sought to help state bars improve their approach to the bar exam. 15 Before the NCBE’s formation, states focused exam questions on black-letter law, including asking applicants to, for example, “[l]ist the kinds” of evidence or to “[d]efine the term substantial compliance.” 16 The NCBE worked with states to transition from this form of question to one based on a hypothetical fact pattern—a type of questioning quite familiar to current lawyers and bar examinees. 17

Scholars have argued that this change in the bar examination served to restrict immigrants and non-White applicants from becoming lawyers. For example, employment discrimination scholar Subotnik draws the connection between testing and anti-immigrant status, explaining that the profession expressed concern over the quality of immigrants and applicants of color. 18 At the end of the nineteenth century and into the beginning of the twentieth, critical race theorist Roithmayr argues, leaders in the legal profession were troubled by the possibility of immigrants and non-Whites entering the field. 19 At the same time, the American Bar Association (ABA) became instrumental in the push for limiting which applicants to the bar would actually be accepted, with anti-immigrant and racist sentiments shaping the measures proposed and supported by the ABA. 20 Law and society scholar Friedman, in describing the origin of the ABA and its motivations for developing formal bar admission requirements, emphasizes the pervasiveness of exclusionary beliefs among ABA members and leaders, pointing to the

12. See id. at 3–4 (discussing admission to the bar during the nineteenth Century).
13. Id. at 4.
14. Id. (discussing the development of the NCBE).
15. Id.
16. Id.
17. Id.
20. See id. at 393–94 (discussing reports of Alfred Z. Reed).
role that such beliefs played in discussions surrounding the prospect of a formal bar. 21

Throughout this period, the ABA was an all-White organization that actively excluded persons who were not “White” from membership. 22 For example, in 1912, the ABA mistakenly admitted three Black lawyers to the association and justified revoking their admission by explaining that they wanted to keep “pure the Anglo-Saxon race.” 23 The ABA was not alone in its efforts to marginalize lawyers from communities of color and maintain an all-White profession. For example, in 1925, Texas passed a law limiting law school admission to only White students. 24 The first Black student to be admitted to the University of Texas Law School, Heman Marion Sweatt, was permitted enrollment only after the U.S. Supreme Court found that the school’s refusal to admit Mr. Sweatt violated his “constitutional right: legal education equivalent to that offered by the State [of Texas] to students of other races.” 25 Additionally, “[a]s late as 1938, the University of Missouri Law School continued to formally exclude Black applicants on the grounds that it was contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.” 26 Thus, throughout the first half of the twentieth century, there was widespread sentiment that the profession should be limited to Whites. Raising admission standards, including through use of the bar exam, was a mechanism for achieving this goal.

The modern bar exam came about in the 1970s. 27 The NCBE, through a grant from the ABA, developed the six-hour, multiple-choice exam that would be known as the Multistate Bar Examination (MBE). 28 This exam could be administered by all examining jurisdictions, could be machine-graded, and provided a uniform test, while leaving control of passing scores up to individual jurisdictions. 29 The idea of a uniform bar exam had been discussed since the 1940s, and a multistate bar exam was ultimately created because most professions already had national-

22. See Roithmayr, supra note 19, at 398 (discussing the ABA’s accidental admission, and subsequent revocation, of membership to three Black attorneys).
23. Id.
25. Id. at 635–36 (finding that the University of Texas Law School’s denial of admission to Mr. Sweatt violated his right to equal protection under the Fourteenth Amendment).
27. Id. at 398 (discussing the history of the bar exam).
28. Id.
29. Id.
ized standards that applicants were required to meet.\textsuperscript{30} Like other bar exam unification initiatives, the MBE was an attempt to raise standards for entering the practice of law.\textsuperscript{31}

States adopted the MBE into their bar exam practices because it relieved some of the burden of creating and grading their own exams.\textsuperscript{32} Further pressure to adopt the bar exam arose as, starting in the 1970s, the number of bar examinees increased significantly.\textsuperscript{33} In 1963, 20,776 students entered law school.\textsuperscript{34} Just ten years later, in 1973, that number reached over 37,000.\textsuperscript{35} Law school enrollment continued to increase each decade, peaking at enrollment of 52,400 students starting law school in 2010.\textsuperscript{36} This increase has played an essential role in state adoption of the MBE as a means of testing applicants for admission to the bar.\textsuperscript{37}

The modern history of the bar examination has been a steady march toward a national test; the MBE was introduced in 1972, followed by the Multistate Professional Responsibility Examination (MPRE) in 1980, the Multistate Essay Examination (MEE) in 1988, and the Multistate Performance Test (MPT) in 1997.\textsuperscript{38} Then the NCBE first offered the UBE, which "is composed of the MEE, the MPT, and the MBE," in February 2011.\textsuperscript{39} One of the stated benefits of the UBE is that its adoption will "help ensure the consistency and quality of the bar exam."\textsuperscript{40} The UBE is currently offered in thirty-nine jurisdictions.\textsuperscript{41}

While this shift to exam uniformity (and portability of score in the case of the UBE\textsuperscript{42}) is laudable, uniformity alone does not guarantee neutrality as to race or ethnicity.\textsuperscript{43} In the 1970s (after the MBE's initial in-

\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{35} See id.
\textsuperscript{36} See id.
\textsuperscript{37} Melli, supra note 11, at 4 (discussing the history of the bar exam).
\textsuperscript{39} See id. at 3 (describing the UBE).
\textsuperscript{40} Id. at 6 (discussing benefits of UBE adoption).
\textsuperscript{41} See Jurisdictions That Have Adopted the UBE, NAT’L CONF. BAR EXAM’RS, https://www.ncbex.org/exams/ube/ [perma.cc/GD4S-FPB3].
\textsuperscript{42} See id. ("The UBE results in a portable score that can be used to apply for admission in other UBE jurisdictions.").
\textsuperscript{43} For example, algorithmic systems designed to assess risk “bring uniformity, transparency, and accountability to the task,” yet nonetheless are subject to bias. Sandra G. Mayson, Bias in, Bias out, 128 YALE L.J. 2218, 2248, 2280 (2019) ("An algorithm can be designed to achieve any one of the [discussed] metrics of output equality, but not all of them together."). Similarly, as we saw in
Introduction), a string of lawsuits across the country alleged discrimination in the bar exam. Most notably, in Tyler v. Vickery—a class action suit filed on behalf of Black bar examinees who failed the Georgia exam—the plaintiffs alleged outright discrimination, disparate impact, and lack of due process in Georgia’s practices. The court rejected all three claims, finding that the bar examinees failed to establish intentional discrimination by the Georgia Bar Examiners. Two years later, Black and Puerto Rican examinees who failed the bar in Pennsylvania also sued based on the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause. They alleged that changes in the passing score requirements were arbitrary and intentionally discriminated against Black and Puerto Rican examinees. These examinees achieved scores on the bar exam that would have passed in years prior, but due to Pennsylvania’s increased score requirements for passing, the petitioners failed. Additionally, as noted in Section II.B infra, in the 1980s and 90s, state bars and judiciaries were sufficiently concerned about racial and ethnic bias in the judicial system (including in the bar exam) that they formed committees to study the issue; those committees conclud-

the case of the different sentencing guidelines for crack cocaine and powder cocaine, even though Congress sought to create a uniform system, and therefore limit bias, the very law itself created racially disparate and unfair outcomes. See Dorsey v. United States, 567 U.S. 260, 264 (2012) (noting that the objectives of the Federal Sentencing Guidelines include “uniformity and proportionality in sentencing”); cf. id. at 268 (“[T]he Commission and others in the law enforcement community strongly criticized Congress’ decision to set the crack-to-powder mandatory minimum ration at 100-to-1 . . . . because the public had come to understand sentences embodying the 100-to-1 ration as reflecting unjustified race-based differences.”).

44. See, e.g., Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Parrish v. Bd. of Comm’rs of Ala. State Bar, 505 F.2d 12 (5th Cir. 1974), opinion withdrawn, 509 F.2d 546 (5th Cir. 1975), and on reh’g sub nom. Parrish v. Bd. of Comm’rs of Alabama State Bar, 514 F.2d 98 (5th Cir. 1975); Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976), on reh’g, 553 F.2d 1100 (4th Cir. 1977); Pettr v. Gingerich, 427 F. Supp. 282 (D. Md. 1977), aff’d 582 F.2d 869 (4th Cir. 1978); Delgado v. McTighe, 442 F. Supp. 725 (E.D. Pa. 1977).

45. The appellants argued

1) that the examinees have used the bar examination to purposefully discriminate against black applicants on the basis of race; 2) that the bar examination inherently violates the fourteenth amendment’s equal protection clause because of the highly disparate passing rates of black and white applicants; and 3) that the examination violates due process because there is no procedure for review of a failing grade.

Tyler, 517 F.2d at 1093. The court rejected all three of these claims. See id. at 1093–1095 (discussing appellants’ arguments).

46. Id. at 1093 (“Appellants’ . . . contention is that the bar examinees utilize the [bar] examination as a device to purposefully discriminate against prospective black attorneys on the basis of race.”).

47. Delgado, 442 F. Supp. at 726 (outlining the cause of action).

48. Id.

49. Id.
ed that the bar produced disparate outcomes based on the examinees’ race and ethnicity.50

II. Invisible People

In recent years, the oppression faced by Black, Indigenous, and people of color (BIPOC) in the United States has been pushed to the forefront of American life.51 As this Article was written, people across the world protested the deaths of George Floyd, Breonna Taylor, Philando Castile, Eric Garner, Michael Brown, Tamir Rice, and many other victims52 of racist police brutality53 and racism endemic to the U.S. criminal justice system.54 In a sense, what was always visible but unseen, and often ignored by White Americans, has now, to some extent, become visible to them. Yet this transition from invisible to visible appears to have stalled in the legal field, which remains one of the least diverse professions in the United States.55 Moreover, as Table 1 demon-

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50. See infra text accompanying notes 76–90 (discussing formation of committees to study disparate outcomes on the bar exam).
52. See, e.g., Code Switch, supra note 51 (discussing the then current Black Lives Matter protests).
54. Rasheena Latham, Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between Institutional Racism in the Criminal Justice System and Trayvon Martin’s Death, 9 S.J. POLY & JUST. 80, 81–82 (2014). Institutional racism is particularly pernicious as “[i]t is discrimination permeated in our society from healthcare, education, law enforcement and virtually every institution or organization in America.” Id. at 82–83. “Institutional racism occurs where an institution adopts a policy, practice, or procedure that, although it appears neutral, has a disproportionately negative impact on members of a racial or ethnic minority group.” Vernellia R. Randall, The Misuses of the LSAT: Discriminating Against Blacks and Other Minorities in Law School Admissions, 80 ST. JOHN’S L. REV. 107, 107 (2006).
strates, the percentage of active lawyers who are Asian, Black, or Hispanic continues to trail core U.S. demographic categories: in the percentage of persons admitted to law school, in the total U.S. population, and in the percent of the U.S. population aged 18–29 with a bachelor's degree. This places people of color at risk, as they are forced to rely on attorneys who are not from their communities and are thereby prone to implicit bias against people of color.56

### Table 1. Lawyer Demographics

<table>
<thead>
<tr>
<th>Race</th>
<th>Active Lawyers&lt;sup&gt;57&lt;/sup&gt;</th>
<th>ABA Law School Admissions&lt;sup&gt;58&lt;/sup&gt;</th>
<th>% U.S. ABA Population&lt;sup&gt;59&lt;/sup&gt;</th>
<th>U.S. Total Population&lt;sup&gt;60&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian/</td>
<td>&lt;1%</td>
<td>0.5%</td>
<td>0.3%</td>
<td>1.28%</td>
</tr>
<tr>
<td>Alaska Native</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asian</td>
<td>2%</td>
<td>6.3%</td>
<td>13.1%</td>
<td>5.9%</td>
</tr>
<tr>
<td>Black</td>
<td>5%</td>
<td>7.6%</td>
<td>8.9%</td>
<td>13.4%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>5%</td>
<td>12.7%</td>
<td>11.4%</td>
<td>18.4%</td>
</tr>
<tr>
<td>Native Hawaiian/</td>
<td>&lt;1%</td>
<td>0.1%</td>
<td>0.2%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Pacific Islander</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>85%</td>
<td>62.1%</td>
<td>64.4%</td>
<td>76.3%</td>
</tr>
</tbody>
</table>

Some may argue that the true cause of the racial and ethnic imbalance in the legal profession is that there are not enough qualified BIPOC candidates. But as Eugene K. Pettis notes:

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57. The Authors have found that data relating to race and ethnicity is often sorted so that the data for Whites comes first and then the data for persons from various communities of color follows in a variety of orders. We suspect that this ordering arises from implicit bias in the computer systems designed to encode this information many years ago. We reject this ordering. Throughout this Article, we list information in alphabetical order (A to Z) by the designation used to identify each community of color/race and ethnicity.


59. See Section of Legal Education – ABA Required Disclosures, AM. BAR ASS’N SECTION LEGAL EDUC. & ADMISSIONS TO BAR, [http://www.abarequireddisclosures.org/](http://www.abarequireddisclosures.org/) (last visited Feb. 20, 2022) (choose “2020” from the dropdown relating to “Compilation – All Schools Data”; then click “ID Enrollment and Ethnicity” to download the relevant Excel file).

60. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS), [https://data.census.gov/](https://data.census.gov/) (providing educational attainment data for the year 2019) (To find the number of persons by race and age, in the “Select Dataset” dropdown, choose “ACS 1-Year Estimates – Puerto Rico Public Use Microdata Sample”; in the “Select Vintage” dropdown, choose “2019” and then select “NEXT”; in the “filter by Topic” search box, select “Race and Ethnicity”; then check the boxes next to “American Indian and Alaska Native recode,” “Asian recode,” “Black or African American recode,” “White recode,” “Native Hawaiian recode,” and “Other Pacific Islander recode”; then click on “VIEW TABLE”; click on the plus sign next to “On Rows”; then click the box next to “Educational attainment”; then click “VIEW TABLE.” This will provide the number of persons in each race/ethnic category who have achieved various levels of educational attainment in 2019).

61. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APRIL 1, 2010 TO JULY 1, 2019 (June 2020), [https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-estrh.xlsx](https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-estrh.xlsx) (listing estimates of populations for the years following the 2010 decennial census) (data in Table 1 selected from the year 2019).

62. See, e.g., George B. Shepherd, No African Lawyers Allowed: The Inefficient Racism of the ABA’s Accredited Schools, 53 J. LEGAL EDUC. 103, 104–05 (discussing how the American Bar Association’s accreditation system’s focus on “qualifications” excludes Black people from law school); Sandra S.
That argument is baseless. Somehow recruiters find a way to enroll a disproportionately higher percentage of African-American football and basketball players to Division 1 schools across the country in comparison to their overall numbers in higher education. A “shallow pool of college attendees” never gets in the way of that recruitment effort.\(^6\)

Similarly, if the legal profession wanted more BIPOC attorneys, it could find a way to fill more slots in law schools with students from communities of color and ensure that those law graduates enter the profession at a higher rate. Those raising this “shallow pool problem” to explain the lack of attorneys and law students from communities of color are falling prey to implicit bias when they assume that the current system is fair (does not unjustly burden or benefit any racial or ethnic group) and accurate (uses the correct predictors of future success in law school and in the practice of law)—it is neither.\(^6\) The legal profession’s racial and ethnic imbalance is all the more problematic considering its longstanding history. As Table 2 shows, for the last ten years, the proportion of lawyers who are American Indian/Alaska Native and Black have seen small declines; Native Hawaiian/Pacific Islander lawyers have seen no measurable change; Asian and Hispanic lawyers have seen small increases; and lawyers who self-identify as Two or More Races have seen the largest, but still small, increase.

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\(^6\) Yamate, *Quest for the ‘Qualified’ Minority*, Or. State Bar Bull. 9, 9 (2002) (discussing the problems with law firms seeking to recruit “qualified” candidates from law schools).


TABLE 2. TEN-YEAR TRENDS IN LAWYER DEMOGRAPHICS

<table>
<thead>
<tr>
<th>Race</th>
<th>Percentage Point Change from 2011 to 2021</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian/Alaska Native</td>
<td>-0.6</td>
</tr>
<tr>
<td>Asian</td>
<td>+0.8</td>
</tr>
<tr>
<td>Black</td>
<td>-0.2</td>
</tr>
<tr>
<td>Hispanic</td>
<td>+0.9</td>
</tr>
<tr>
<td>Native Hawaiian/Pacific Islander</td>
<td>0.0</td>
</tr>
<tr>
<td>Two or More Races</td>
<td>+2.0</td>
</tr>
</tbody>
</table>

A. Maybe No One Will Notice the Problem

Well-known racial and ethnic imbalances in the legal profession beg a preliminary question: Why do the legal profession66 and the public67 largely ignore the issue of the bar exam as a factor in creating this imbalance?68 We believe that two key factors produce this result. First,

66. While debate over potential changes to the bar exam can be hotly contended at the time they are proposed, once the change is made, the legal profession is effectively walled out from knowing whether the change to the bar exam caused any (negative or positive) changes. For example, when the Florida Supreme Court raised the score required to pass the bar exam in 2003, three years later, the then-chair of the Florida Board of Bar Examiners refused to provide information as to the impact of that change on the pass rates of BIPOC test-takers stating: “This is a question that the board is studying and will forward its findings to the court.” Jan Pudlow, Has Raising the Pass/Fail Lines on the Bar Exam Had a Disparate Impact on Minority Applicants?, FLA. BAR NEWS (Dec. 1, 2006), https://www.floridabar.org/the-florida-bar-news/examining-the-exam/ [https://perma.cc/W3UW-BB8Y]. This lack of information may lead members of the profession to assume that “no news is good news”—when that may not be the case.
67. The public seems to ignore the fact of racial/ethnic disparity in bar results even when that data is made known. For example, the ABA has just begun releasing bar data by race. See Stephanie Francis Ward, New ABA Data Parses out Bar Exam Pass Rates by Race and Ethnicity (June 22, 2021), https://www.abajournal.com/news/article/new-aba-data-parses-out-bar-exam-pass-rates-by-ethnicity [https://perma.cc/JEC8-5DNQ]. When we look at that data, we see that BIPOC test-takers underperform against White test takers. See Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf. Public response to this data has been effectively non-existent. The Authors have searched major news media outlets and could not find discussion of these results. Similarly, while a search using Google produces hits on the article, only one moderately well-known news source mentions the article. See Sam Skolnik, Bar Exam Race Gap Shown in New Passage Rate Data for Law Grads, BLOOMBERG L. (June 22, 2021), https://news.bloomberglaw.com/daily-labor-report/bar-exam-race-gap-shown-in-new-passage-rate-data-for-law-grads [https://perma.cc/4PDM-AJPL]. All other search results are for niche law professor blogs like Taxprof.blog and law news aggregators/websites.
68. Despite the fact that the issue of racial and ethnic disparity in bar results is not in the public eye, there are a number of people working on the problem. See, e.g., Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andra A. Curecio, Marsha Griggs, Joan W. Howarth,
there is effectively no publicly available data regarding bar passage rates by race or ethnicity.\textsuperscript{69} California is the only U.S. jurisdiction that provides pass rates by race and ethnicity in its reported statistics each year.\textsuperscript{70} Information from the July 2004 administration of the Texas bar exam is also available, as a result of the legislature directing the Texas Board of Law Examiners to produce such data.\textsuperscript{71} Given this state of affairs, people of good intentions simply lack concrete proof that a problem exists.

Nonetheless, the data from California and Texas are clear: BIPOC examinees pass the bar exam at much lower rates than White examinees. For example, Table 3 shows the July first-time bar passage rates in California from 2010 to 2019, highlighting a striking difference in pass rates—with Asian, Black, and Hispanic examinees passing at lower rates than White examinees.

\textsuperscript{69} See infra Appendix (providing the results of our review of publicly available jurisdiction-specific data on race and bar passage rates). As noted infra, in Section II.B, the second factor is that, due to historical efforts to address diversity in law, many in the legal profession believe the issue has already been remediated to the degree possible.

\textsuperscript{70} See STATE BAR OF CAL., GENERAL STATISTICS REPORT: JULY 2019 CALIFORNIA BAR EXAMINATION (2019), https://www.calbar.ca.gov/Portals/0/documents/July2019-CBX-Statistics.pdf [https://perma.cc/Z83X-T54C] (providing bar passage results by race/ethnic group). Comparing July 2018 to July 2019, we see a major shift in the racial and ethnic categories with fewer examinees now categorized as “White,” “Black,” “Hispanic,” or “Asian,” while the vast majority are recorded as “Other.” Id. at 2. The vast majority of test takers did not provide their racial or ethnic background, and so these test takers were categorized as “Other.” Compare id., with STATE BAR OF CAL., GENERAL STATISTICS REPORT: JULY 2018 CALIFORNIA BAR EXAMINATION (2018), https://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [https://perma.cc/G6DA-HWSH]. It is unclear why this change occurred. We also undertook a review of State Bar reporting sites to confirm that California was the only state currently reporting results by race and ethnicity. See infra Appendix (finding only one state, California, reporting aggregate bar passage results by race and ethnicity); see also Pudlow, supra note 66 (noting that the California Bar publicly provides data on bar passage by race and ethnicity).

\textsuperscript{71} TEX. GOV’T CODE ANN. § 82.029 (West 2021) (“The Board of Law Examiners shall compile a report indicating the number of applicants who fail the July 2004 bar examination. The data shall be aggregated by gender, ethnicity, and race. The report shall also include an analysis of the identifiable causes of failure and recommendations, if any, to address the causes of failure. The board shall deliver the report to the legislature not later than December 31, 2004.”).
This data shows that for the last decade, on average, compared to White examinees, Asian examinees’ pass rates are 8.4 percentage points lower, Black examinees’ pass rates are 22.9 percentage points lower, and Hispanic examinees’ pass rates are 15.5 percentage points lower, on the annual July administration of the California bar exam. In addition, the minimum difference between White and Asian examinees is 3.1 percentage points, for Black examinees is 16.7 percentage points, and for Hispanic examinees is 10.2 percentage points. Furthermore, the maximum difference between Asian examinees and White examinees is 16 percentage points, for Black examinees is 27 percentage points, and for Hispanic examinees is 27.6 percentage points. Finally, at no point is the pass rate of Black, Hispanic, or Asian examinees higher than that of White examinees.

We find similar results in the Texas data. Pursuant to legislation, the Texas Board of Law Examiners collected pass rates from the July 2004 Texas Bar Exam for Asian, Black, Hispanic, and White Texas bar examinees. As Table 3 shows, the first-time pass rates for Black, Hispanic, and Asian examinees were below those of White examinees. Asian examinees’ pass rates were 9 percentage points lower, Black ex-

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73. TEX. GOV’T CODE ANN § 82.029.
aminees’ pass rates were 33 percentage points lower, and Hispanic examinees’ pass rates were 16 percentage points lower. Over the next two years (from 2004 to 2006), pass rates increased as those who failed the exam retook it. This closed the gap, but White examinees’ two-year pass rate was still higher than Asian examinees by 2 percentage points, Black examinees by 17 percentage points lower, and Hispanic examinees by 5 percentage points.

**Table 3. July Texas Pass Rate—Graduates of ABA-Accredited Law Schools, 2004-2006**

<table>
<thead>
<tr>
<th>Race</th>
<th>First-Time Pass Rate</th>
<th>Pass Rate Within Two Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asian</td>
<td>75%</td>
<td>92%</td>
</tr>
<tr>
<td>Black</td>
<td>51%</td>
<td>77%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>68%</td>
<td>89%</td>
</tr>
<tr>
<td>White</td>
<td>84%</td>
<td>94%</td>
</tr>
</tbody>
</table>

While limited, the data support only one conclusion: BIPOC examinees underperform on the bar examination compared to their White peers. Moreover, the fact that only two states provide such data, and only one of those states does so regularly, further supports our contention that there is a vital need for data and research in this area.

**B. Didn’t We Already Fix This?**

Along with the lack of publicly available data, this Article urges a second explanation for the profession’s failure to take clear and decisive action: the profession previously acted to address the problem and thereby concluded that the issue is fixed or being addressed by someone else.  

In 1988, the Conference of Chief Justices adopted a resolution “encouraging all chief justices to establish task forces devoted to the study of gender bias and minority concerns as they relate to the judicial system.” At the time, there were already four such task forces examining

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75. In addition, as noted above, because the data have been withheld from public view, the profession has limitedvisibility into the problem and therefore has difficulty seeing that the problem has not been fixed. See supra Section III.A (discussing the lack of publicly available data).

issues of racial and ethnic bias (in New Jersey, Michigan, New York, and Washington) and subsequent to the conference resolution, over twenty other states created task forces to examine issues of racial and ethnic bias in the judicial system.77

For example, in 1989, Chief Justice Raymond Ehrlich of the Florida Supreme Court ordered that the Racial and Ethnic Bias Study Commission be created “to address the question of whether racial or ethnic considerations adversely affect the dispensation of justice to minority Floridians.”78 The Commission found a “stark disparity” in bar passage rates of Black examinees as compared to White examinees.79 For the February 1991 bar administration, only 39% of Black examinees passed compared to 74% of White examinees.80 That July, only 46% of Black examinees passed compared to 76% of White examinees.81 Based on the results of its study, the Commission recommended that the Florida Board of Bar Examiners take eight separate actions, including monitoring performance by race, reviewing questions on which Black and White test takers perform differently, reviewing questions for cultural bias, and including “minorities among those individuals who develop . . . questions for use in the Florida Bar Exam,” to remedy the problem.82

Similarly, in 1991, the New York Judicial Commission on Minorities published the results of their study on the interaction between race and bar passage.83 The Commission found, for the July administration of the state’s bar examination between 1985 and 1988, that examinees from communities of color had lower first-time bar passage rates as compared to White first-time takers.84 The Commission found that, on average, Asian examinees passed at a 62.9% rate, Black examinees at 31.0%, Hispanic examinees at 40.9%, and Native American examinees at 33.3%, while White examinees passed at a rate of 73.1%.85 The New York Commission found, as a matter of fact, that: (1) examinees from communities of color have “exceedingly low” pass rates, (2) the legal community as a whole “has a stake in increasing minority pass rates,” (3) the

77. See id. at 1169–70 (discussing the formation of task forces examining racial and gender bias in the judicial system).
79. See id. at 20–21.
80. Id.
81. Id. at 21.
82. Id. at 21–22.
84. See id. at 263 (describing bar passage rates by race and ethnicity).
85. See id.
bar examination “has not been evaluated for cultural/economic bias and job-relatedness,” and (4) “[m]inorities are not adequately represented among contract graders and staff of the New York State Board of Law Examiners.”86 In light of these findings, the Commission made a number of recommendations, including monitoring performance by race and reviewing questions for cultural bias.87

The Minnesota Supreme Court Task Force on Racial Bias in the Judicial System also found racial and ethnic bias throughout the Minnesota judicial system, including in the bar exam.88 A number of factors were isolated as potential causes of the racial and ethnic bias in bar exam outcomes, including:

English as a second language; unequal quality of education received prior to law school; financial status (i.e. needing to work during law school and during preparation for the bar); availability and/or efficacy of minority-focused tutoring programs; possible bias in some elements of law school curricula; possible bias in private bar preparation program curricula; the impact of poverty; the particular law school attended, LSAT scores, law school rank, etc.89

In response to these concerns, the Minnesota State Bar Association and Board of Law Examiners implemented several interventions, including “ensur[ing] that all law examination questions are reviewed for bias and that at least 25% of graders are people of color.”90

As we can see, many state bars and judiciaries took seriously the problem of bias and proposed clear, common-sense solutions. Particularly in light of the lack of publicly-available data to the contrary, the average lawyer or judge aware of this history could conclude that the problem has been solved (or is being addressed), and that any difference in bar outcomes along racial and ethnic lines is either minimal or due to differences in entering credentials—not bias in the exam.91

86. Id. at 269.
87. See id.
89. See id. at 29.
90. See id.
91. In addition, some may argue that any negative correlation between bar passage rates and the percentage of BIPOC graduates (i.e., as the percentage of BIPOC graduates increases, the school’s pass rate decreases) is due to some percentage of those students being admitted to schools whose median credentials are well above that of those students. This mismatch theory contends
III. EMPIRICAL STUDIES OF RACE AND THE BAR EXAMINATION: DATA DESERT, WHITENESS, AND HEADS BURIED IN THE SAND

Research into the relationship between race/ethnicity and bar passage rates is difficult to undertake. Individual examinee bar passage data is confidential92 and, as a result, primarily in the hands of the State Bar, State Bar examiners, and the individuals themselves. At the same time, data about examinees that could be used to understand bar passage results (like law school GPA and LSAT score) are confidential under federal law93 and remain in the hands of the law schools that gathered the information and the individual examinees from whom the data were collected. These organizations are also reluctant or unable to share even anonymized data.94 In addition, seeking this information directly from individual bar examinees would be cost prohibitive.


93. See, e.g., Family Educational Rights and Privacy Act (FERPA), 34 C.F.R. § 99.2 (2008) (“The purpose of this part is to set out requirements for the protection of privacy of parents and students under . . . the General Education Provisions Act.”); FERPA, 34 C.F.R. § 30(a) (2004)(“[P]arent[s] or eligible student[s] shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student’s education records.”); FERPA, 34 C.F.R. § 99.3 (2011) (“Education records . . . [a]re (i) [d]irectly related to a student; and (2) [m]aintained by an education agency or institution or by a party acting for the agency or institution.”); cf. FERPA, 34 C.F.R. § 99.31 (2011) (permitting the disclosure of directory information); FERPA, 34 C.F.R. § 99.3 (2011) (“Directory information [to] include[] . . . the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status . . . ; dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.”).

94. The Authors reached out to law schools in an attempt to gather this data. This produced three results: (1) the dean of the law school ignored the request for a call to discuss the data; (2) the dean of the law school expressed interest but ultimately did not share the data; and (3) in the minority of cases, the dean of the law school agreed to share the data. One of our goals in publishing
Despite these difficulties, several empirical studies have been undertaken. These studies can be divided into three categories based on their conclusions: (1) one study that cannot draw a conclusion due to lack of data,\(^9\) (2) studies that find disparate outcomes along racial and ethnic lines but then attempt to whitewash (obscure or explain) the results,\(^9\) and (3) studies conducted by state-level actors finding racial and ethnic disparities in bar passage outcomes.\(^9\) As we discuss below, all of these studies (other than that which failed for lack of data) support the conclusion that race and ethnicity are factors in bar passage.

A. No Data, No Result

The earliest large-scale, empirical study of race/ethnicity-related differences in bar passage rates that we could find was conducted in 1969, by George Neff Stevens—professor at the Texas Tech University School of Law and former Dean of the University of Washington School of Law—when “the deans of 133 law schools approved by the [AALS and ABA]” received a questionnaire on bar passage rates.\(^9^\) This study requested information regarding the total number of graduates, the number who passed, the number who failed, and the number for whom the pass rate was unknown.\(^9^\) This information was also “elicited with

\(^9^5\). See George Neff Stevens, Bar Examinations and Minority Group Applicants, 56 ABA J. 969, 969–70 (1970) (discussing failure to record information as to race/ethnicity and bar passage in 1969 survey of law school deans).

\(^9^6\). See Stephen P. Klein & Anthony McDermott, An Examination of Possible Item, Test, and Grader Bias in the California Bar Examination, 4 BLACK L.J. 553, 557 (1975) (claiming that even though their study found evidence of disparate outcomes, those outcomes were not the result of bias in the exam); LINDA F. WHITEHART, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 52 (1998), http://files.eric.ed.gov/fulltext/ED469370.pdf [https://perma.cc/HWS7-SL5K] (arguing that while race and ethnicity are a statistically relevant factor for bar passage, the effect of their addition to a model including LSAT and GPA is minimal); see also TEX. GOVT. CODE ANN. § 82.0231 (West 2004) (expired 2005) (directing the Texas Board of Law Examiners to report on bar passage rates for the July 2004 bar exam by gender, ethnicity, and race).


\(^9^8\). Stevens, supra note 95, at 969, 971 (outlining the study and providing Professor Stevens' biographical sketch).

\(^9^9\). Id. at 969.
respect to [Black], [Native American], Mexican-American, [Hispanic] and [Asian]-American students." The ninety-eight questionnaires completed and returned demonstrated that "very few [Black], [Native American], Mexican-American[, [Hispanic] and [Asian]-American[ students] [] graduated from approved law schools during the period of 1964–1968." Unfortunately, many deans simply had no data as to pass rates. But, given the paucity of graduates from communities of color, some deans were able to provide a “recollection” report and

along these lines, a substantial number of deans stated that all their minority group graduates had passed a bar examination somewhere [or] . . . had done better than their white counterparts on the bar examinations . . . or at least as well . . . or that they compared favorably, or showed about the same ratio of pass-fail in each quartile. Several Deans stressed the point that, because they had so few minority group graduates, any attempt at comparison would be inappropriate.

The study concluded that the lack of data made it “virtually impossible” to determine if the bar exam produced racially or ethnically disparate results and recommended the creation of a national data bank to track such information. Thus, the first empirical effort to understand whether the bar exam was racially or ethnically biased failed for lack of data.

B. Whitewashing Racially Disparate Outcomes

In 1975, Professors Stephen Klein and Anthony McDermott published the results of a study “to determine if there was cultural bias in the California Bar Examination.” Using a “predictor score” computed based on undergraduate grade point average (UGPA), law school admission test (LSAT) score, and law school grade point average (LGPA), this study found that Anglo (White) examinees received higher scores

100. Id. In this Article, when describing the results of a survey or study, we have replaced outdated terms for racial and ethnic groups that are no longer used and that may be offensive to readers today. You will find the replaced terms in brackets instead of the original terms used. We chose to change the terms because of the harm that historical language can cause. Please reach out to the authors if you would like the original categorizations.
101. Id.
102. Id.
103. Id. at 969–70.
104. Id. at 970.
105. Klein & McDermott, supra note 96, at 553.
106. See id. at 555 (discussing the regression equation for the study).
on the bar exam than Black or “Chicano”\textsuperscript{107} examinees with the same predictor score.\textsuperscript{108} Having established that there were racially/ethnically disparate outcomes on the bar exam, Klein and McDermott conducted further analysis that, they claim, shows that the exam itself is not actually biased.\textsuperscript{109} They use two methods to estimate how many Black and Chicano students would have passed the bar if there was no bias as to scores.\textsuperscript{110} They conclude from these analyses that there was “no significant difference between the percentage of minority group members who actually passed versus those who would have been expected to pass had no bias existed.”\textsuperscript{111} In essence, they claim that while there is bias in exam scores, it is inconsequential because no significant difference in pass rates could be expected even if the test was not biased. They conclude that:

the major implication of this [sic] findings for the present study is that it further reduces the likelihood that the bar examination itself is biased. In other words, what differences in performance that are observed between Anglo and minority candidates appear to be primarily due to differences in ability rather than some inherent bias in the test as a whole.\textsuperscript{112}

So, paradoxically, even though Klein and McDermott found clear evidence of racial and ethnic bias in bar exam scores, they conclude that the test itself is not racially or ethnically biased.\textsuperscript{113}

There are, at least, three problems with this conclusion. First, Klein and McDermott provided unequivocal evidence that the California bar


\textsuperscript{108} See Klein & McDermott, supra note 96, at 555. Another problem we find in interpreting studies over time is the changing language used to name various ethnic groups. Thus far (with only two studies discussed) we have already seen examinees who likely would be called “Hispanic” divided into three categories “Mexican-American,” “Spanish-American,” and “Chicano.” Moreover, while our first study included Asian examinees, they are not included in this study.

\textsuperscript{109} See id. at 555–56 (describing two methods for determining if Black or Chicano students would have passed the bar had the exam not been biased against them).

\textsuperscript{110} See id.

\textsuperscript{111} Id. at 556 (emphasis in original).

\textsuperscript{112} Id. at 557.

\textsuperscript{113} See id. (“On the basis of the foregoing discussion and findings, it seems reasonable to conclude that there is no statistical evidence that the predictors of Bar performance are biased against minority group members.”).
produced racially and ethnically disparate outcomes: they found that Anglo examinees outperformed Black and Chicano examinees who had the same predictor scores.\footnote{114} Moreover, they note that students with the same LSAT scores who differ in race or ethnicity can expect different scores on the bar exam.\footnote{115} These results are the very essence of bias.

Second, the reported difference in bar scores between Anglo and Black or Chicano examinees is considerable. For example, Klein and McDermott report that “a Black candidate with an LSAT score of 541 would be expected to score 1547 on the Bar, whereas an Anglo with a 541 LSAT would be expected to score 1600.”\footnote{116} That 53-point difference is 3.3% of the Anglo examinee’s score. That difference does not seem to be "insignificant," as characterized. But we have no way of understanding this difference because, rather than fully explaining the disparity, Klein and McDermott merely tell us that “the magnitude of the bias is not the same throughout the distribution of predictor scores, for example the bias appears greatest for Black examinees with low LSAT scores while the bias against Chicano examinees is greatest for those with high LSAT scores.”\footnote{117} Thus, we do not know if the example score difference is low, high, or near the average.

Third, Klein and McDermott’s predictor includes the examinees’ LSAT score. They note that “[t]he assumption underlying the analysis of test bias is that [LSAT is itself] unbiased with respect to assessing a candidate’s ability.”\footnote{118} They then contend “that the LSAT may be biased in favor of minority groups in the sense that compared to Anglos, it overestimates minority group performance levels.”\footnote{119} The conclusion that the LSAT is not biased against examinees from communities of color is not justified by the more recent record. As seen in Table 4, the average LSAT score is different depending on the examinees’ race or ethnicity:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Race/Ethnicity & Average LSAT Score & Median LSAT Score \\
\hline
Anglo & 1600 & 1575 \\
Black & 1400 & 1375 \\
Chicano & 1300 & 1275 \\
\hline
\end{tabular}
\caption{Average LSAT Scores by Race/Ethnicity}
\end{table}
These substantial differences demonstrate that the LSAT does, in fact, produce disparate results based on race and ethnicity.

In addition, there is evidence that the difference in outcomes does not dissipate when controlling for factors such as college attended, UGPA, or major. For example, William Kidder “matched African American, Chicano/Latino, Native American, and Asian Pacific American applicants with White applicants who possessed equivalent [UGPAs] from the same colleges during the same time period” (1996 to 1998). Kidder then looked to see if there were racial and ethnic differences in their LSAT scores. He found “that among law school applicants with essentially the same performance in college, students of color encounter a substantial performance difference on the LSAT compared to their White classmates. These gaps are most severe for African American and Chicano/Latino applicants.” These outcomes did not change even when Kidder matched by major within the same school.

The LSAT has also been determined to be a “speeded” exam that tests examinees’ reasoning ability and test-taking speed. Studies show that minority students are disparately impacted by time limits in
the context of exams where test-taking speed is relevant. Thus, the speeded nature of the exam could explain the differential outcomes based on an examinees’ race/ethnicity. That difference would not be due to the examinees reasoning ability, but rather the speed with which they completed the test.

In this context, Klein and McDermott’s reliance on the race- and ethnic-neutrality of the LSAT to support their conclusion that the bar is not racially/ethnically biased—combined with their finding a large difference in bar score based on race and ethnicity—makes their conclusion that the bar exam is not biased highly unreliable.

In 1991, Dr. Linda Wightman, Law School Admission Council (LSAC) Vice President for Test Development and Research, undertook for LSAC a five-year national study of bar passage rates. This study of 23,103 subjects is the largest and most comprehensive empirical study on the issue of bias in the bar exam that we have identified to date. The study found statistically significant differences in first-time passage rates between White examinees and examinees from communities of color.

**Table 5. LSAC National Study of Bar Passage Rates**

<table>
<thead>
<tr>
<th>Race</th>
<th>Pass Rate</th>
<th>% of Examinees</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian</td>
<td>66.36%</td>
<td>0.46%</td>
</tr>
<tr>
<td>Asian</td>
<td>80.75%</td>
<td>4.16%</td>
</tr>
<tr>
<td>Black</td>
<td>61.40%</td>
<td>5.93%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>74.81%</td>
<td>2.25%</td>
</tr>
<tr>
<td>Mexican American</td>
<td>75.88%</td>
<td>1.72%</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td>69.53%</td>
<td>0.55%</td>
</tr>
<tr>
<td>White</td>
<td>91.93%</td>
<td>83.54%</td>
</tr>
<tr>
<td>Other</td>
<td>83.07%</td>
<td>1.38%</td>
</tr>
</tbody>
</table>

Dr. Wightman also divided the data into six clusters based on “law school group,” where each school was placed into a group with schools

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125. See Franklin R. Evans & Richard R. Reilly, *A Study of Speededness as a Source of Test Bias*, 9 J. Educ. Measurement 124, 127 (1972) (finding that Black examinees, at historically Black colleges/universities, gained thirty-three points on an unspeeded reading comprehension section compared to Black examinees who took a speeded exam at the same location, while White examinees gained only twenty-two points compared to speeded test takers at the same location); see also id. at 196 (noting that Black female examinees improved more than White female examinees when ten minutes were added to a reading comprehension section, while Black men also improved but not as much relative to White male examinees).

126. Wightman, supra note 96, at vi, 12.

127. See id. at 6.

128. Id. at 32.

129. Id. at 27 (providing listing passage rates by race and ethnicity).
“most like themselves.” Even when examinees were clustered in this manner, there remained a statistically significant negative correlation between race/ethnicity and bar passage rate. The results of this analysis are provided in Table 6.

**Table 6. Bar Passage Rates Among Law School Clusters**

<table>
<thead>
<tr>
<th>Race</th>
<th>Cluster</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian</td>
<td></td>
<td>66.67%</td>
<td>72.22%</td>
<td>62.79%</td>
<td>70.59%</td>
<td>76.92%</td>
<td>33.33%</td>
</tr>
<tr>
<td>Asian American</td>
<td></td>
<td>89.17%</td>
<td>81.75%</td>
<td>81.19%</td>
<td>79.78%</td>
<td>58.62%</td>
<td>31.25%</td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td>81.06%</td>
<td>64.14%</td>
<td>65.82%</td>
<td>52.35%</td>
<td>45.16%</td>
<td>56.50%</td>
</tr>
<tr>
<td>Hispanic</td>
<td></td>
<td>89.23%</td>
<td>80.34%</td>
<td>72.97%</td>
<td>67.26%</td>
<td>80.00%</td>
<td>57.89%</td>
</tr>
<tr>
<td>Mexican American</td>
<td></td>
<td>82.22%</td>
<td>82.80%</td>
<td>77.39%</td>
<td>69.15%</td>
<td>87.50%</td>
<td>61.90%</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td></td>
<td>84.00%</td>
<td>80.77%</td>
<td>50.00%</td>
<td>64.58%</td>
<td>57.14%</td>
<td>75.00%</td>
</tr>
<tr>
<td>White</td>
<td></td>
<td>96.44%</td>
<td>92.98%</td>
<td>94.44%</td>
<td>91.26%</td>
<td>82.73%</td>
<td>78.78%</td>
</tr>
</tbody>
</table>

The difference becomes starker when comparing the results between each racial/ethnic group and White examinees. In every single case, examinees from communities of color underperform White examinees.

**Table 7. Results of Racial/Ethnic Groups as Compared to White Examinees (Values in Percentage Points)**

<table>
<thead>
<tr>
<th>Race</th>
<th>Cluster</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian</td>
<td></td>
<td>-29.77%</td>
<td>-20.76%</td>
<td>-31.65%</td>
<td>-20.67%</td>
<td>-5.81%</td>
<td>-45.45%</td>
</tr>
<tr>
<td>Asian American</td>
<td></td>
<td>-7.27%</td>
<td>-11.23%</td>
<td>-13.25%</td>
<td>-11.48%</td>
<td>-24.11%</td>
<td>-47.53%</td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td>-15.38%</td>
<td>-28.84%</td>
<td>-28.62%</td>
<td>-38.91%</td>
<td>-37.57%</td>
<td>-22.28%</td>
</tr>
<tr>
<td>Hispanic</td>
<td></td>
<td>-7.21%</td>
<td>-12.64%</td>
<td>-21.47%</td>
<td>-24.00%</td>
<td>-2.73%</td>
<td>-20.89%</td>
</tr>
<tr>
<td>Mexican American</td>
<td></td>
<td>-14.22%</td>
<td>-10.18%</td>
<td>-17.05%</td>
<td>-22.11%</td>
<td>4.77%</td>
<td>-16.88%</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td></td>
<td>-12.44%</td>
<td>-12.21%</td>
<td>-44.44%</td>
<td>-26.68%</td>
<td>-25.59%</td>
<td>-3.78%</td>
</tr>
</tbody>
</table>

---

130. Id. at 28. Cluster analysis was used to place the schools into clusters based on seven factors: size, cost, selectivity, faculty/student ratio, percent minority, median LSAT, and median UGPA. See id. at 8–9. “The cluster analysis identified six naturally occurring clusters or groups of law schools.” Id. at 9.
131. Id. at 29.
132. Id. at 28 tbl.7 (“Number and percentage of study participants who passed the bar on the first attempt, by ethnic group and law school cluster”).
133. See id. at 28 tbl.7.
Dr. Wightman also found that adding ethnicity to a model of bar passage rates based on just LGPA and LSAT “showed a modest but statistically significant improvement over the LGPA and LSAT score model.” The implication of the study’s conclusion, that “[t]he data . . . demonstrate that LGPA and LSAT score explain more of the variation in bar passage outcomes than do any of the other variables [including race/ethnicity] examined,” is that race and ethnicity are not important factors for bar passage. Rather, the study posits, the difference is explained by the lower entering credentials and weaker law school performance of students from communities of color (compared to White students).

There are two problems with this result. First, it is worrisome that the primary investigator, Dr. Wightman, is an employee of LSAC, which develops and administers the LSAT. As such, her analysis may have been influenced by her position in the organization.

Second, as noted above, LSAT scores themselves correlate with race and ethnicity. In essence, because LSAT scores are correlated with both some aspect of academic ability and race/ethnicity, a model based on LSAT and LGPA is really a model based on some measure of academic ability, race, ethnicity, and LGPA (success in law school). Adding a second variable that accounts for race or ethnicity should be expected to improve predictability only marginally, as that new variable accounts only for aspects of race and ethnicity not already captured by the LSAT. The fact that the addition of race and ethnicity improves the model only underscores the vital importance of race and ethnicity to bar passage rates. Furthermore, Dr. Wightman presents regression results showing negative and statistically significant relationships between Black, Hispanic, and Asian American students’ race/ethnicity and the probability of passing the bar, after controlling for LSAT and LGPA scores. And,

134. See id. at 52 (discussing models of first-time bar passage based on study data).
135. See id. at 48.
136. See id. at 80.
137. See WIGHTMAN, supra note 96, at vi, viii–ix; About the Law School Admission Council (LSAC), L. SCH. ADMISSION COUNCIL, https://www.lsac.org/about [perma.cc/MXR3-SJB6] (discussing services that LSAC provides including administering the LSAT).
138. While we seek to cast no aspersions on the character of Dr. Wightman, the dangers associated with research conducted by those with a pecuniary interest in the outcome are well-known and long-established. See, e.g., Mark Barnes & Patrick S. Florencio, Financial Conflicts of Interest in Human Subjects Research: The Problem of Institutional Conflicts, 30 J L. MED. & ETHICS 390, 391–92 (2002) (discussing how financial incentives can affect professional judgment); Bryan K. Church & Xi (Jason) Kuang, Conflicts of Interest, Disclosure, and (Costly) Sanctions: Experimental Evidence, 38 J. LEGAL STUD. 529, 505–06 (2009) (discussing the problem of financial conflicts of interest); Pilar N. Osorio, Pills, Bills and Skills: Physician-Researcher’s Conflicts of Interest, 8 WIDENER L. SYMP. J. 75, 88 (2001) (“One reason that conflicts of interest create the probability that physician-researchers’ obligations will go unfulfilled is because conflicts may undermine judgment.”).
139. See WIGHTMAN, supra note 96, at 52 n.85 (“The data in the table above show that, for study participants who had the same LGPA and LSAT score, being Hispanic or Asian American instead of
as we will see, when we remove LSAT measures from our own analysis, leaving only race/ethnicity in the model, there is merely a small change in the predictivity of the model. 140

C. Heads Buried in the Sand

In 1992, the New York Court of Appeals commissioned a study of the New York bar exam. 141 The study found that on the July 1992 bar exam, pass rates differed significantly based on the examinees’ race and ethnicity. 142

<table>
<thead>
<tr>
<th>Race</th>
<th>Pass Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asian</td>
<td>53.0%</td>
</tr>
<tr>
<td>Black</td>
<td>37.4%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>48.6%</td>
</tr>
<tr>
<td>White</td>
<td>81.6%</td>
</tr>
</tbody>
</table>

Nearly a decade later, “[i]n August 2001, the Florida Supreme Court ordered the Board of Bar Examiners to release racial data for first-time test takers on the February 2000 and July 2000 Florida bar exam.” 143 That study noted that “with a cutoff score of 131, 79.7% of . . . whites passed, compared to 65.6% of . . . people of color.” 144 The study further estimated what effect an increased cutoff score would have on pass rates, concluding that under a higher cutoff score, “68.5% of whites would pass, compared with 53.2% [of] people of color.” 145 Interestingly, “the Florida Board of Bar Examiners refused to release racial/ethnic data on the Florida bar exam in 2000.” 146

More recently, the Texas Board of Law Examiners was directed to “report to the legislature” on the passage rates for the July 2004 bar ex-

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140. See infra Section V.B (discussing the LSAT Model and Lagged LSAT Model compared, respectively, to the Race & Ethnicity Model and the Lagged Race & Ethnicity Model).
141. See Booth Glen, supra note 97, at 346–349, 503 (discussing the study conducted by the Commission on Legal Education and Admission to the Bar, Association of the Bar of the City of New York and the Commission’s Report on Admission to the Bar in New York in the twenty-first century).
142. See id. at 508–10.
143. Id. at 509 (listing pass rates by race and ethnicity).
144. Kidder, supra note 97, at 570.
145. Id.
146. Id.
147. Id. at 569 (discussing disparate impact of higher bar standards).
amination with “[t]he data to be aggregated by gender, ethnicity, and race.”\textsuperscript{148} This study found that the percentage of examinees passing was lower among communities of color as compared to White examinees.\textsuperscript{149}

**Table 9. Texas July 2004 Bar Passage Rates\textsuperscript{150}**

<table>
<thead>
<tr>
<th>Race</th>
<th>First-Time Pass Rate</th>
<th>Pass Rate for $\geq 2$ Attempts</th>
<th>Total Pass Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asian</td>
<td>75%</td>
<td>17%</td>
<td>92%</td>
</tr>
<tr>
<td>Black</td>
<td>51%</td>
<td>26%</td>
<td>77%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>68%</td>
<td>21%</td>
<td>89%</td>
</tr>
<tr>
<td>White</td>
<td>84%</td>
<td>10%</td>
<td>94%</td>
</tr>
</tbody>
</table>

The Texas Board of Bar Examiners attributed these disparities to differences in entering credentials for law students.\textsuperscript{151} The Board supported its conclusion in two ways. First, it noted:

that the 8-point difference in mean LGPA between Whites and Blacks was equivalent to 0.78 standard deviation units. This was nearly identical to the difference (in standard deviation units) between these groups’ mean total scale scores. The size of the difference between Whites and Hispanics on LGPA also was very similar to the difference (in standard deviation units) between these groups in total scale scores. Asians were the only group that did not do quite as well on the bar exam as would be predicted on the basis of their LGPAs.\textsuperscript{152}

Second, the Board created two models of bar passage rates accounting for the “applicant’s admissions credentials and law school grades.”\textsuperscript{153} The first model included UGPA, LSAT, and LGPA, while the second model included those factors plus the applicant’s gender and racial/ethnic group.\textsuperscript{154} The addition of gender and race/ethnicity improved the amount of variation explained by the first model by 0.6 percentage points (from 37.2% to 37.8%).\textsuperscript{155}

There are several issues with the Board’s explanation of the results. First, it is problematic to connect pass rate to LGPA because it does not

\textsuperscript{148} Tex. Gov’t Code Ann. § 82.0291 (West 2021).
\textsuperscript{149} TX Passing Rates Report, supra note 74, at 5; see also Gender & Racial/Ethnic Group Analysis, supra note 74.
\textsuperscript{150} TX Passing Rates Report, supra note 74, at 5.
\textsuperscript{151} See Gender & Racial/Ethnic Group Analysis, supra note 74.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. (describing regression models used).
account for the fact that different law schools may have different grade curves.\textsuperscript{156} A 3.0 LGPA at School A may be an average LGPA (because the school's grade curve mean is set to 3.0) while that same 3.0 at School B may be above average (because School B's mean is set to 2.7). Thus, simply using LGPA is problematic because we do not know what that LGPA means in the context of that school.

Furthermore, in using its two models to whitewash the results, Texas misunderstands what an LSAT score represents—both an examinee's academic ability and their race/ethnicity.\textsuperscript{157} In essence, the model already includes a variable that captures an examinee's race and ethnicity: the LSAT. Thus, the small improvement in the model by the addition of race or ethnicity is not an indication of the relative low importance of those factors, but rather an indication that race and ethnicity are related to both LSAT score and pass rate.

In 2019, the New York State Board of Law Examiners requested that researchers at the NCBE conduct a study to “investigate the impact of adoption of the Uniform Bar Examination in New York.”\textsuperscript{158} The study found that scores for all racial/ethnic groups tended to improve within two years of New York’s adoption of the UBE.\textsuperscript{159} Nonetheless, the “White group tended to have the highest average scores on the bar exam, followed by the Asian/Pacific Islander group or the Hispanic/Latino group . . . , and then the Black/African American group.”\textsuperscript{160} These score differences persisted even when “predictive” background characteristics, such as UGPA or LSAT score, improved or remained the same for examinees who identified as Asian/Pacific Islander, Black, and Hispanic, while those same characteristics remained constant or decreased for White examinees.\textsuperscript{161} Thus, the gap in bar scores between White and non-White students grew even as the gaps in background characteristics shrank.

Finally, in 2020, California released a simulation report analyzing what would happen to pass rates for racial/ethnic groups (among other

\begin{footnotesize}
\begin{itemize}
\item[157.] See, e.g., Kidder, supra note 121, at 1074 & tbl.1 (2001) (finding that students of different races/ethnicities with equal academic accomplishments at the college-level have different LSAT scores).
\item[159.] See NAT’L CONF. OF BAR EXAM’RS, supra note 97, at 1, 4 (discussing how pass rates for racial groups changed after adoption of the UBE); see also NAT’L. CONF. OF BAR EXAM’RS, Racial. DEPT, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK, 1, 83, https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf [https://perma.cc/9NZM-6F9U] (discussing pass rates for racial and ethnic groups).
\item[160.] NAT’L CONF. OF BAR EXAM’RS, supra note 97, at 4.
\item[161.] See id. at 3 (discussing changes in background characteristics).
\end{itemize}
\end{footnotesize}
groups) were the score necessary to pass the bar (the “cut score”) decreased.\textsuperscript{162} Currently a score of 1440 is required to pass.\textsuperscript{163} The report analyzed more than 85,000 examinees that collectively took the bar exam more than 140,000 times between 2009 and 2019.\textsuperscript{164} At the current cut score, the study shows that 52% of White examinees achieve the requisite 1440 on the exam, while 24% of Black examinees, 36% of Latino examinees, and 40% of Asian examinees meet that same threshold.\textsuperscript{165} The study, reproduced as Table 10, concluded that pass rates for examinees of color would substantially increase were the score required to pass the bar exam reduced.\textsuperscript{166}

**Table 10. California 2020 Report Assessing Impact of Cut Score\textsuperscript{167}**

<table>
<thead>
<tr>
<th>Race</th>
<th>Percentage Point Increase in Passage Rate at Cut Score</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1300</td>
</tr>
<tr>
<td>Asian</td>
<td>30</td>
</tr>
<tr>
<td>African American</td>
<td>33</td>
</tr>
<tr>
<td>Latino</td>
<td>34</td>
</tr>
<tr>
<td>White</td>
<td>31</td>
</tr>
<tr>
<td>Other</td>
<td>34</td>
</tr>
</tbody>
</table>

**D. Avoiding the Obvious Conclusion**

Our analysis of the empirical studies of the bar examination shows that of the studies undertaken, few demonstrate that an examinee’s probability of passing the bar examination is related to their race and ethnicity. Rachel Gregory has argued that, considering the history of minority exclusion from the bar, it is not a coincidence that modern academic selectivity in the bar exam excludes people of color.\textsuperscript{168} Furthermore, Cecil Hunt has argued that the relative lack of investigation into racial disparities in the bar has been intentional, both because the remedy would be complex and difficult to implement, and because institu-
tions do not want to appear to be engaging in discriminatory behavior.169

IV. POTENTIAL CAUSES OF DIFFERENTIAL BAR PASSAGE RATES

Several scholars have investigated the racial and ethnic disparities in bar passage rates and have speculated that cultural bias within the exam is a factor in such differences. This bias might manifest in the form of language barriers and interpretations, promotion of dominant values, equal experience assumptions, and subjective or flawed item selection.170 For example, a test taker may encounter a description of what seems to be a universal norm, but the concept is grounded in dominate White culture, such as who counts as a relative, or certain holiday traditions. Understanding that cultural norm is critical to answering the bar question correctly. Other scholars have noted that environmental factors may impact BIPOC students studying for the bar exam, including issues of isolation, self-efficacy, and access to resources.171

The environment experienced by a BIPOC test taker can substantially impact their ability to prepare for the exam.172 For example, throughout the test taker’s law school experience, they may have been bombarded by microaggressions about their ability to succeed in law school and beyond, and this environmental factor may have significantly impaired their self-efficacy.173 Subjective grading may be another significant factor.174 Bar exam graders inevitably bring their own lens to the grading process.175 The way in which essays are graded, grammar

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171. Erin Lain, I Think I Can: How Self-Efficacy and Self-Regulation Impacts Black and Latinx Bar Examinees, 10 IND. J.L. & SOC. EQUAL. 113 (2022), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1134&context=ijlse [https://perma.cc/N5EE-QDTN]. This qualitative study examined attorneys of color who passed the bar exam on the first attempt versus on the second attempt. Id. For those who failed their first attempt, themes of isolation during studying and experiencing outside distractions played a significant role in their perceptions of why they did not pass. Id.


and syntax are evaluated, and words are analyzed is inevitably infused with the grader’s cultural positioning.\footnote{Id.}

In 1996, Hunt wrote a detailed analysis of possible factors contributing to disparities in bar exam pass rates.\footnote{Hunt, supra note 169.} While this article is nearly thirty years old, the factors may still be contributors to disparate pass rates.\footnote{Id. at 769.} Hunt notes that many speculate that differences in pass rates are due to a lack of academic preparation and ability, specifically as a result of poor schooling in the K-12 and undergraduate pipeline.\footnote{Id. at 770.}

Yet this does not explain why those with similar predictive indicators—such as UGPA, LGPA, and LSAT scores—may still fail the bar exam.\footnote{See Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance, 45 Hofstra L. Rev. 753, 765–79 (2017) (finding that undergraduate GPA is not predictive of bar exam success, LSAT scores explained thirteen percent of bar exam performance, and first year and final law school GPA predict fifty-two percent of an individual’s bar exam performance).} Hunt suggests that environmental factors within law school contribute to the disparities.\footnote{Id. at 770–86.} Specifically, low expectations for students of color, a hostile environment where students of color are stigmatized and isolated, and a lack of academic support may all contribute to lower pass rates.\footnote{Id.}

Although academic support programs are more prevalent in law schools today,\footnote{See, e.g., id. at 22 (Standard 359) (listing standards requiring law schools to provide academic support in order to obtain a law degree, but silent on law schools providing support for passing the bar exam); Stephanie Francis Ward, More Law Schools Are Covering Bar Review Costs: Is it Improving Pass Rates?, Am. Bar Ass’n J. (Oct. 20, 2016, 8:30 AM), https://www.abajournal.com/news/article/more_law_schools_covering_bar_review_costs_is_it_improving_pass_rates [https://perma.cc/DQJ6-C64D]; see also Taking the Bar Exam, Harvard L. Sch., https://hls.harvard.edu/dept/dos/taking-the-bar-exam/ [https://perma.cc/27BR-8ARL]}. extended programs that assist with bar exam preparation are not yet standard.\footnote{These factors, coupled with the way in which the bar exam is written and graded as well as larger systemic issues of oppression,\footnote{Cheng, supra note 170, at 44–54.} may be the primary causes of the bar passage gap.
V. OUR STATISTICAL ANALYSIS

This study relies on publicly available data reported by ABA-accredited law schools as part of the ABA’s Standard 509 Required Disclosures between 2012 and 2019. Data as to bar passage by jurisdiction, entering class credentials, race, ethnicity, geographic location, and law school rank were combined to form the research dataset. Using this dataset, we examined the relationships between these factors and first-time bar passage rates. To ensure both a large enough dataset and uniformity as to the meaning of the bar pass rate, we limited the data to schools from UBE jurisdictions during periods where that jurisdiction tested using the UBE.

The statistical analysis demonstrates that even after controlling for school characteristics—such as tier, entering class credentials, and median LSAT scores—higher proportions of students who identify as Black or Hispanic are significantly associated with lower bar pass rates. This decrease in pass rates cannot fully be explained by LSAT or UGPA quartiles for the entering class.

A. The Model

We utilize a fractional logistic regression analysis to understand the relationship between a school’s first-time bar pass rates in a particular jurisdiction and the proportion of students who identified as American Indian/Alaskan Native, Asian, Black, Hispanic, Native Hawaiian/Pacific Islander, Two or More Races, and White.


187. To merge and append all the data together, inconsistencies in school names and the type of data reported had to be corrected. Incorrect data, such as percentages larger than 100, were corrected or removed from the dataset as appropriate.

188. See discussion infra Section V.B.

189. Moreover, as noted infra, LSAT score is itself a variable that accounts for examinee race and ethnicity. See infra Section V.B (discussing the LSAT Model and Lagged LSAT Model compared, respectively, to the Race & Ethnicity Model and the Lagged Race & Ethnicity Model).

190. Fractional logistic models provide a good fit to data, like the bar passage rates, where the dependent variable must fall within the unit interval (between 0 and 1). See JEFFREY M. WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA 661–62 (2002) (discussing fractional logit regression).

191. The analysis was run in STATA using a generalized linear model (“glm”) with a logit link to incorporate a curve. Our pass rate data has a binomial distribution because it is the number of successes divided by the number of trials.
Regression analysis identifies a curve of best fit that describes the relationship between the independent and dependent variables. This curve does not intersect with each data point, meaning that the relationship described by our curve of best fit—in this case between student characteristics and first-time bar pass rates—is not perfect. When the curve of best fit does not touch a specific data point, we measure the error between the pass rate predicted by our curve (or model) and the actual pass rate for that school, jurisdiction, and year. Measuring those errors results in an “R-squared” value and indicates how well the line of best fit performs in describing the relationship. The following regression models permit such errors to be correlated to each other if they stem from the same school. For example, if the model predicts a pass rate for School X in 2016 that is much lower than its actual pass rate from 2016, it assumes that its 2017 prediction is likely to be too low as well. Standard errors are clustered at the level of the school. Our full empirical model is defined in Equation 1 below.

**Equation 1. Our Empirical Model**

\[
\text{Pass Rate}_{ijt} = \alpha + \text{Percent Minorities}_{itj} \cdot \beta + \text{Class Credentials}_{itj} \cdot \Delta + \text{School Characteristics}_{itj} \cdot \varphi + \nu_t + \varepsilon_{ijt}
\]

Where \(i\) indicates a specific school, \(j\) indicates a specific UBE jurisdiction, and \(t\) indicates the exam year.

\(\alpha\) is the intercept and is the predicted pass rate for any school-jurisdiction in 2012 if all the other variables here had a value of 0.

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193. See, e.g., Daniel J. McGarvey & Brett Marshall, Making Sense of Scientists and “Sound Science”: Truth and Consequences for Endangered Species in the Klamath Basin and Beyond, 32 ECOLOGY L. Q. 73, 90 n.81 (2005) (discussing how data points will lie above and below the regression line).

194. See id.


196. See id.

197. While that interpretation is not relevant here with variables that take on non-zero values, including it in the regression is the least restrictive option; removing the intercept would force our regression line through the origin, while retaining the intercept allows the regression line to lie as close to the data as possible.
Pass Rate is a school’s first-time bar pass rate in a UBE jurisdiction in a specified year where the school reported at least 70% of its graduates that year.\textsuperscript{198}

Percent Minority is a set of variables representing the percent of a specified school’s entering class who have self-identified as members of a specific race or ethnicity in that year. We also include a control, the percent of the entering class identified as Non-Resident Aliens. Though this is not a race or ethnicity, it is important to control for this group of students so that regression results can be compared to White students exclusively.

$\beta$ is a set of regression coefficients that tells us what happens to the pass rate when increasing the proportion of enrolled students who identify with various races or ethnicities. $\beta$ also includes a regression coefficient for the proportion of Non-Resident Aliens.

Class Credentials includes the entering class’s median LSAT for each school-year observation.

$\Delta$ is a set of regression coefficients that tells us how pass rate changes when any median LSAT increases by one point.

School Characteristics includes the school’s region and tier.

$\phi$ is a set of regression coefficients that tells us how pass rate changes with changes to region and increases in tier.

$u_t$ is a time-fixed effect that controls for any significant changes in pass rate in a given year that affected all law schools and jurisdictions. For example, this would account for any years that had unusually high or low pass rates across the sample. These

results are suppressed from the table and available from authors upon request.

$\epsilon_{itj}$ is the error term described above. This is the difference between the jurisdiction-level pass rate for a specific school in a specific year and the model’s prediction of that value.

Our analysis is based on several models, of increasing sophistication, examining the relationship between race/ethnicity and first-time pass rate. 199 In our first model (the “Base Model”), first-time bar passage rates 200 for a school-jurisdiction in a given year are regressed on school characteristics (geographic region and tier) from that same year. 201 The Base Model does not account for the variables we seek to understand—race, ethnic identity, and entering credentials—but it does provide a baseline to which we can compare other models that include the desired variables.

Our second model (the “LSAT Model”) adds a variable for median LSAT to the Base Model to better understand the effect of entering credentials on bar exam pass rates. Our third model (the “Race & Ethnicity Model”) instead adds to the Base Model the proportion of students who identify with various racial, ethnic, and non-resident alien categories to better understand the relationship between the proportion of minority students and the pass rate. Finally, our fourth model (the “Full Model”) includes all variables studied thus far (race, ethnicity, non-resident alien, median LSAT, geographic region, and law school tier).

These four models (Base Model, LSAT Model, Race & Ethnicity Model, and Full Model) compare first-time pass rates from each reported jurisdiction in a specified year to school characteristics (race, ethnicity, LSAT, geographic region, and tier) from that same year. Because school-level characteristics like entering credentials and racial/ethnic makeup may change over time, we performed regressions on a second set of models (Lagged Base Model, Lagged LSAT Model, Lagged Race &

199. For the remainder of this section, “first-time pass rate” should be understood to refer to school-jurisdiction level pass rates in a given year. “School-jurisdiction level” means that the first-time bar passage rate is the rate reported by an ABA accredited law school in a UBE jurisdiction. For example, the reported first-time pass rate for University of Connecticut School of Law alumni taking the bar in New York in 2017 is a school-jurisdiction level pass rate for 2017.

200. Section of Legal Education – ABA Required Disclosures, 509 Required Disclosures, supra note 186 (providing data for first-time bar passage rates for accredited law schools from 2014 to 2016); Statistics, supra note 186 (providing data from 2017 to 2019). Data was restricted to jurisdictions that used the UBE. If a jurisdiction started (or stopped) using the UBE, data was included only for those years that the jurisdiction used the UBE. The same logic applies to schools that opened or closed and gained or lost ABA accreditation. Law schools reported these first-time pass rates to the ABA for each of the jurisdictions where the largest number of their graduates took the exam, up until each school had accounted for at least 70% of its graduates from that year. See supra note 198.

201. See infra Table 11.
Ethnicity Model, and Lagged Full Model) that compare a school’s characteristics in a given year to the pass rate three years later.\textsuperscript{202} For example, the enrollment characteristics in year 2013 were compared to the first-time bar passage rate in 2016.

Because the ABA-required disclosures report data in the aggregate (at the level of a school in a given year),\textsuperscript{203} their data are insufficient to follow individual students over time. As a result, our model assumes that most exam-takers in a given year (e.g., 2016) graduated from the same law school at which they enrolled three years earlier (e.g., in 2013). Though this method is not perfect, it may offer an improvement over the models in Table 11, infra, which ignore possible changes in student demographics over time. The results of the lagged analysis are in Table 12, infra.

B. Results: Race Is a Statistically Significant Factor in UBE Bar Passage Rates

Table 11 presents the exponentiated coefficients\textsuperscript{204} from our regression analysis from each of the models. Certain coefficients have asterisks next to them. A single asterisk (*) means that the model is 90% confident that the relationship between that independent variable and pass rate exists and is therefore different from 0; two asterisks (**) indicate that the model is 95% confident that the relationship exists; and three asterisks (***) indicate that the model is 99% confident. We draw conclusions only from coefficients marked with asterisks because of these very high levels of confidence.

The Base Model looks at the relationship between a school-jurisdiction pass rate in a given year and the school's geographic location (Midwest, Northeast, or West) and Tier (1, 2, or 3) in the same year. Regressing on the Base Model finds that being in Tier 1, 2, or 3 is positively correlated with bar passage rates at a 99% confidence level.\textsuperscript{205} The Base Model accounts for 34.6% of the variation in school-jurisdiction bar passage rates.\textsuperscript{206}

The LSAT Model adds the median LSAT score\textsuperscript{207} for the entering class to the Base Model. The coefficient from the median LSAT indi-
cates that a one-point increase in an entering class’s median LSAT, keeping all other school characteristics unchanged, is associated with a 9.27 percentage point increase in the pass rates. This result is significant at the 99% confidence level. Additionally, adding a measure of median entering credentials increases the explanatory power of the model. Explanatory power is indicated by a Coefficient of Determination statistic, which measures how much of the variation in the dependent variable is explained by the regression analysis. Because the dependent variable in this case—pass rate—requires fractional logistic regression analysis, the Coefficient of Determination used here is McFadden’s Pseudo R-square. A value near 1 means that the model explains nearly 100% of the changes in pass rate across school-jurisdictions-years, and a value near 0 means that the model cannot explain any of the variation in pass rates. The bottom row of Table 11 shows that adding median LSAT to the Base Model increases the Pseudo R-square from 34.6% to 35.5%, an increase of 2.54% in explaining a school-jurisdiction’s pass rate in a year.

The Race & Ethnicity Model adds the percent of the entering class that identified with each racial or ethnic category to the Base Model instead of median LSAT. This model examines the relationship between race/ethnicity and first-time bar passage results by jurisdiction, using the portion of White students as the omitted reference category. The analysis reveals a negative relationship between first-time pass rate and the proportion of students who identify as Black, Hispanic, Two or More Races, or Unknown Race. For example, as the proportion of students who identify as Black increases by 1 percentage point, all school characteristics held equal, the pass rate for that school-

48,000. Though there is no theoretically derived threshold value for VIF, a common approach is to remove variables that have a VIF larger than 10. The very high VIF values here indicate that entering LSAT quartiles are highly correlated with each other. Similarly, entering LSAT quartiles are highly correlated with entering GPA quartiles, which is why entering GPA quartiles are excluded in models here. See Jeffrey M. Wooldridge, Introductory Econometrics: A Modern Approach 98 (5th ed. 2012) (discussing the variance inflation factor). Models using first- or third-quartile LSAT score, using all three quartiles, and models including entering GPA quartiles all lead to similar results. These other specifications are available from the authors upon request.

208. See infra Table 11.

209. Social scientists ordinarily use a p-value of 0.05 (i.e., a result has a one in twenty chance of being due to random variation and is used as a measure of statistical significance). See, e.g., Maxwell & Delany, supra note 10, at 47. That our results are statistically significant at a more stringent p-value demonstrates the robustness of those results.

210. See infra Table 11.

211. In regression analysis, with categories like race, one category must be excluded. It is common practice to exclude the largest category. An independent variable cannot be included in regression if it can be perfectly predicted from others, which is the case when all percentages add to 100%, because the estimation strategy cannot separate the effect of one from the others. See Wooldridge, supra note 207, at 84–86 (discussing the requirement that multilinear regression analysis lack perfect collinearity).

212. See infra Table 11.
jurisdiction-year is predicted to be only 98.41% of what it would have been without that increase in Black students, a 1.59 percentage point reduction. This relationship is statistically significant at the 99% level of confidence. The explanatory power of the Race & Ethnicity Model, as measured by McFadden’s Pseudo R², increased by 2.17% compared to the Base Model. 213 This is similar in size to the improvement that resulted from adding median LSAT to the Base Model (2.54%). 214

Finally, the Full Model adds both entering credentials, as measured by median LSAT, and the proportion of students identifying with each racial or ethnic group. For the first time, this model reveals the relationship between pass rate and the proportion of minority students after controlling for median LSAT. This is especially important if the LSAT is correlated with racial or ethnic identity, as previous research indicates. 215 If they are correlated, both must be included in the regression to avoid omitted variable bias, and thus to estimate accurate coefficients. Consider the context here. LSAT scores tend to be lower for Black students. 216 If we try to explain pass rates using the proportion of Black students and do not include LSAT, the coefficient for the proportion of Black students would capture both possible effects: a negative impact on pass rates due to lower LSAT scores and any racial or ethnic bias that exists in the bar exam after controlling for the LSAT. In this case, the coefficient would be overstated because both possible effects work to lower pass rates. Similarly, a model that includes the LSAT but excludes the proportion of Black students will have a biased coefficient for the LSAT.

The Full Model controls for both effects. A one-point increase in median LSAT score is associated with a 9.5 percentage point increase in bar passage rates. 217 A one percentage point increase in the proportion of students who identify as Black is associated with a 1.06 percentage point decrease in bar passage rates after controlling for median LSAT score. 218 The Full Model also reveals negative relationships for the proportion of students who identify as Two or More Races and Unknown

213. See id.
214. See infra Table 11.
215. See, e.g., Kidder, supra note 121, 1074 & tbl.1 (2001) (finding that students of different races/ethnicities with equal academic accomplishments at the college-level have different LSAT scores).
216. See, e.g., Summary Bar Pass Data: Race, Ethnicity, and Gender: 2020 and 2021 Bar Passage Questionnaire, supra note 67 (providing national summary statistics on bar passage rates by race and ethnicity).
217. See infra Table 11 (listing the coefficient for LSAT 50th Percentile under the full model as 1.0951).
218. See infra Table 11 (listing the coefficient for percentage Black under the full model as 0.9894—where 1 + 0.9894 = 0.0106 or 1.06%).
Race.\textsuperscript{219} The Full Model provides a 4.16% increase in explanatory power compared to the Base Model.\textsuperscript{220}

The Full Model indicates a negative relationship between a school-jurisdiction’s pass rate in a year and the proportion of several minority student groups, even after controlling for entering credentials. Comparing the Pseudo $R^2$ values from the Race & Ethnicity Model and the Full Model shows that adding the LSAT into a model of school characteristics and racial and ethnic proportions increased the explanatory power by 1.95%.\textsuperscript{221} Comparing the LSAT Model to the Full Model shows that adding racial and ethnic proportions to a model including school characteristics and the LSAT increases the explanatory power by 1.58%.\textsuperscript{222} Thus, this sample indicates that it is nearly equally important to include both a measure of entering credentials and measures of minority student proportions.

\textsuperscript{219} See infra Table 11 (listing the coefficients for percentage Two or More Races, percentage Non-Resident Alien, and percentage Unknown Race as, respectively, 0.9858, 0.9680, and 0.9890—where coefficients below 1.0 correspond to decreases in pass rates as the related variable increases).

\textsuperscript{220} See infra Table 11 (listing the Full Model’s McFadden’s Pseudo $R^2$ as 0.3606).

\textsuperscript{221} See infra Table 11 (listing the Race & Ethnicity Model’s McFadden’s Pseudo $R^2$ as 0.3537 and the Full Model’s McFadden’s Psuedo $R^2$ as 0.3606, and thus seeing an increase of 1.95% ($0.3606/0.3537$) by adding LSAT into the Full Model).

\textsuperscript{222} See infra Table 11 (listing the LSAT Model’s McFadden’s Psuedo $R^2$ as 0.3550 and the Full Model’s McFadden’s Psuedo $R^2$ as 0.3606, and thus seeing an increase of 1.58% ($0.3606/0.3550$) by adding LSAT into the Full Model).
<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Base Model</th>
<th>LSAT Model</th>
<th>Race &amp; Ethnicity Model</th>
<th>Full Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>% American Indian/AK Native</td>
<td></td>
<td>0.9792</td>
<td>0.9968</td>
<td></td>
</tr>
<tr>
<td>% Asian</td>
<td></td>
<td>1.0227***</td>
<td>1.0036</td>
<td></td>
</tr>
<tr>
<td>% Black</td>
<td></td>
<td>0.9841***</td>
<td>0.9894***</td>
<td></td>
</tr>
<tr>
<td>% Hispanic</td>
<td></td>
<td>0.9896***</td>
<td>0.9969</td>
<td></td>
</tr>
<tr>
<td>% Native HI/ Pacific Islander</td>
<td></td>
<td>1.0226</td>
<td>1.0207</td>
<td></td>
</tr>
<tr>
<td>% Two or More Races</td>
<td></td>
<td>0.9806**</td>
<td>0.9858**</td>
<td></td>
</tr>
<tr>
<td>% Unknown Race</td>
<td></td>
<td>0.9909**</td>
<td>0.9890***</td>
<td></td>
</tr>
<tr>
<td>% Non-Resident Alien</td>
<td></td>
<td>0.9787***</td>
<td>0.9680***</td>
<td></td>
</tr>
<tr>
<td>LSAT 50th Percentile</td>
<td></td>
<td>1.0927***</td>
<td>1.0951***</td>
<td></td>
</tr>
<tr>
<td>Midwest</td>
<td>1.0088</td>
<td>1.0407</td>
<td>0.9266</td>
<td>1.0693</td>
</tr>
<tr>
<td>Northeast</td>
<td>1.1154</td>
<td>1.0486</td>
<td>0.9635</td>
<td>1.0193</td>
</tr>
<tr>
<td>West</td>
<td>1.073</td>
<td>1.0269</td>
<td>0.8779</td>
<td>0.9511</td>
</tr>
<tr>
<td>Tier 1</td>
<td>3.5486***</td>
<td>0.7977</td>
<td>2.8398***</td>
<td>0.7252*</td>
</tr>
<tr>
<td>Tier 2</td>
<td>2.1866***</td>
<td>0.9629</td>
<td>1.8151***</td>
<td>0.8492</td>
</tr>
<tr>
<td>Tier 3</td>
<td>1.6061***</td>
<td>1.076</td>
<td>1.4572***</td>
<td>0.9813</td>
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<tr>
<td>Constant</td>
<td>2.6810***</td>
<td>0.0000***</td>
<td>4.2346***</td>
<td>0.0000***</td>
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<td>2614</td>
<td>2614</td>
<td>2614</td>
</tr>
<tr>
<td>McFadden's Pseudo R²</td>
<td>0.3462</td>
<td>0.355</td>
<td>0.3537</td>
<td>0.3606</td>
</tr>
</tbody>
</table>

The models in Table 12, infra, are more realistic predictors of a school’s bar passage rates because they compare a school’s first-time pass rate in a jurisdiction to the entering class most likely to have taken that bar examination.\(^{223}\) In these models, the Pseudo R-squared has increased to reflect that they explain nearly half the variation in pass rates. As noted by the increases in the Pseudo R-squared values, this realism is evident in models that capture more of the variation in first-time pass rates.

\(^{223}\) See infra Table 12. The initial models described in Table 11 compare first-time bar passage outcomes in a given year with school characteristics from the same year, while the models described in Table 12 compare first-time bar passage outcomes in a given year to the school characteristics from the year of admission. See supra Table 11; infra Table 12.
Table 12. School-Jurisdiction Pass Rate, Enrollment Data Lagged

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Lagged Base Model</th>
<th>Lagged LSAT Model</th>
<th>Lagged Race Model</th>
<th>Lagged Full Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>% American Indian/AK Native</td>
<td></td>
<td>0.9863</td>
<td>0.9916</td>
<td></td>
</tr>
<tr>
<td>% Asian</td>
<td></td>
<td>1.0075</td>
<td>0.9788**</td>
<td></td>
</tr>
<tr>
<td>% Black</td>
<td></td>
<td>0.9868***</td>
<td>0.9929***</td>
<td></td>
</tr>
<tr>
<td>% Hispanic</td>
<td></td>
<td>0.9884***</td>
<td>0.9987</td>
<td></td>
</tr>
<tr>
<td>% Native HI/Pacific Islander</td>
<td></td>
<td>0.9629</td>
<td>0.9843</td>
<td></td>
</tr>
<tr>
<td>% Two or More Races</td>
<td></td>
<td>0.9913</td>
<td>1.0003</td>
<td></td>
</tr>
<tr>
<td>% Unknown Race</td>
<td></td>
<td>0.9947</td>
<td>0.9865***</td>
<td></td>
</tr>
<tr>
<td>% Non-Resident Alien</td>
<td></td>
<td>0.9905</td>
<td>0.9783**</td>
<td></td>
</tr>
<tr>
<td>LSAT 50th Percentile</td>
<td>1.1134***</td>
<td></td>
<td></td>
<td>1.1293***</td>
</tr>
<tr>
<td>Midwest</td>
<td>0.9764</td>
<td>1.0102</td>
<td>0.8754</td>
<td>1.0270</td>
</tr>
<tr>
<td>Northeast</td>
<td>1.1586</td>
<td>1.0781</td>
<td>1.0264</td>
<td>1.0912</td>
</tr>
<tr>
<td>West</td>
<td>0.9648</td>
<td>0.8624*</td>
<td>0.8663</td>
<td>0.9329</td>
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<tr>
<td>Tier 1</td>
<td>4.3670***</td>
<td>0.7388*</td>
<td>3.7423***</td>
<td>0.6366***</td>
</tr>
<tr>
<td>Tier 2</td>
<td>2.3591***</td>
<td>0.9171</td>
<td>2.0613***</td>
<td>0.7921*</td>
</tr>
<tr>
<td>Tier 3</td>
<td>1.7453***</td>
<td>1.1262</td>
<td>1.5996***</td>
<td>1.0163</td>
</tr>
<tr>
<td>Constant</td>
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<td>0.0000***</td>
<td>2.8972***</td>
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<td># of Observations</td>
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<td>1943</td>
<td>1943</td>
<td>1943</td>
</tr>
<tr>
<td>McFadden's Pseudo R²</td>
<td>0.4885</td>
<td>0.5000</td>
<td>0.4923</td>
<td>0.5031</td>
</tr>
</tbody>
</table>

Table 12 presents results from the lagged analyses that correspond to the models described in Table 11. The important difference is that the models in Table 12 include independent variables (e.g., race and ethnicity) with values collected three years before the relevant pass rate. In the first model (the “Lagged Base Model”), first-time bar passage rates for a school-jurisdiction in a given year are regressed on school

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224. First-time bar passage rates for accredited law schools were collected from the ABA's Standard 509 Required Disclosures from 2014 to 2016 and from the ABA’s Statistics from 2017 to 2019. See Section of Legal Education – ABA Required Disclosures, Am. Bar Ass’n, https://www.abarequireddisclosures.org/509.htm (last visited Feb. 21, 2022) (to access 509 required disclosures click on “509 Required Disclosures” and then input a year and school to receive school/year specific data or year and section to receive year-level data). Data was restricted to jurisdictions that used the UBE. If a jurisdiction started (or stopped) using the UBE, data was included only for those
characteristics (geographic region and tier) from three years before. The Lagged Base Model does not account for the variables we seek to understand—race, ethnic identity, and entering credentials—but it does provide a baseline to which we can compare other models that include the desired variables.

The Lagged Base Model, which includes only school characteristics and the exam year, explains 48.85% of the variation in pass rates throughout the sample, as noted by the Pseudo R-squared value. This explanatory power is improved when median entering LSAT from the entering class three years before is added (in the Lagged LSAT Model). Controlling for median LSAT increases the model’s explanatory power by 2.35% (from 48.85% to 50% of the variability in pass rates explained). Again, a one-point increase in median LSAT score is associated with an increase in pass rates at the 99% level of confidence. While the Lagged LSAT Model adds median LSAT score for the class that entered three years before the bar exam to the Lagged Base Model, the Lagged Race & Ethnicity Model instead adds the proportions of students who identify with each racial and ethnic category as well as the proportion of non-resident alien students, also using the entering class three years before the bar exam. Adding the racial and ethnic category proportions increase the explanatory power by 0.78% (from 48.85% to 49.63% of the variation explained). Both the Lagged LSAT Model and the Lagged Race & Ethnicity Model suffer from omitted variable bias because they do not control for the relationship between median LSAT and the proportion of minority students. Moreover, in contrast to the models in Table 11, comparing these lagged models indicates that controlling for entering credentials is more important to increasing the Pseudo R-squared than controlling for racial and ethnic identities.

The Lagged Full Model includes both LSAT and racial and ethnic proportions. This Model is, unsurprisingly, an improvement from the Lagged Base Model with a 2.99% increase in explanatory power (from 48.85% to 50.31% of the variability in pass rates explained). Importantly, the Lagged Full Model removes the bias generated by omitting either

years that the jurisdiction used the UBE. The same logic applies to schools that opened or closed and gained or lost ABA accreditation. Law schools reported these first-time pass rates to the ABA for each of the jurisdictions where the largest number of their graduates took the exam, up until each school had accounted for at least 70% of its graduates from that year.

225. See supra Table 12 (listing the Lagged Full Model’s McFadden’s Pseudo R² as 0.4885).

226. See id. (listing the Lagged Base Model’s McFadden’s Pseudo R² as 0.4885 and the Lagged LSAT Model’s McFadden’s Pseudo R² as 0.5000, and thus seeing an increase of 1.95% (0.3606/0.3537) by adding LSAT into the Full Model).

227. See id.

228. See id. (listing the Lagged LSAT Model’s coefficient for LSAT 50th Percentile as 1.1154, where coefficients above 1.0 entail that increases in the related variable result in an increase in the bar passage rate).

229. See WOOLDRIDGE, supra note 190, at 61–63 (discussing omitted variable bias).
LSAT or the racial and ethnic categories. After controlling for entering credentials, the Lagged Full Model indicates that increasing the proportion of Black students by one percentage point, holding median LSAT and other school characteristics constant, is associated with a 0.71 percentage point decrease in the pass rate.230 This is significant at the 99% level of confidence. Similarly, the Lagged Full Model shows negative relationships between pass rates and the proportions of students who identified as Asian and Race Unknown in schools with similar characteristics and the same median LSAT scores.231

Unlike previous empirical work examining pass rates, our analysis reproduces statistical results for the reader and provides comparisons between models that do and do not control for race/ethnicity in addition to background characteristics such as LSAT. Additionally, our work highlights the statistical significance of the relationship between pass rates and race/ethnicity after controlling for LSAT. This stands in contrast to previous studies that find statistical significance but then ignore these findings when arguing that the effect is not large in size. One of the advantages of careful statistical analysis is the ability to uncover even small effects with a stated level of confidence.

While the focus on statistical significance and reproduction of results is a clear improvement on existing empirical work, it is insufficient to determine whether the bar exam contributes to the lower pass rates associated with larger proportions of students from communities of color. The ideal analysis must be performed at the level of a test taker. Instead of gathering data about an incoming class, a single examinee must be considered. That level of analysis will be able to determine the probability that a particular test taker will pass the bar, given their own LSAT, race and ethnicity, and other characteristics. Such analysis, then, will reveal whether race and ethnicity have a statistically significant effect on the probability of passing the bar.

V. DISCUSSION: THE NEED FOR DATA

The legal profession is one of the least diverse professions in the United States.232 As we demonstrate above, potential bias in the bar ex-

230. See supra Table 12 (listing the coefficient for percentage Black in the Lagged Full Model as 0.9929).
231. See supra Table 12 (listing the coefficient for percentage Asian, percentage Non-Resident Alien, and percentage Race Unknown as, respectively, 0.9788, 0.9685, and 0.9890).
am may be a factor contributing to this lack of diversity. While students of color face obstacles throughout their tenure in primary and secondary education, our analysis shows that those who have made it through law school may be weeded out from the profession at the last possible moment. At the same time, young people from communities of color watch as their friends, siblings, parents, and mentors accumulate colossal debt to attend law school and then struggle to pass the bar exam. In that context, a legal career becomes too risky a venture to undertake, and students who would otherwise seek such a career focus their educational and professional efforts elsewhere.

Additionally, bar examiners’ characterizations of the bar exam as a test of minimum competence perpetuates racial and ethnic stereotypes given the lower pass rates of BIPOC examinees that stem from potential exam biases. Calling the bar exam a test of “minimum” competence, when there are evidenced disparities and so many BIPOC test takers fail, exacerbates an already fraught situation. While the exam is supposedly a minimally invasive final hurdle to becoming a lawyer, it instead, as noted above, disenfranchises racial and ethnic groups. By reinforcing the legal profession’s lack of racial and ethnic representation through a bar exam that exposes greater percentages of BIPOC examinees than White examinees to the stigma and costs of failing, the bar exam feeds the racial and ethnic disparities prevalent in our society today.


235. See Legal Skills Prof, Is Law School a Riskier Investment for Minority Students?, LEGAL SKILLS PROF BLOG (July 5, 2012), https://lawprofessors.typepad.com/legal_skills/2012/07/is-law-school-a-riskier-investment-for-minority-students.html [https://perma.cc/UY9V-AAA2] (discussing Professor Deborah Jones Merritt’s analysis indicating that BIPOC law graduates experience worse outcomes than White law graduates in terms of carrying more debt and passing the bar at lower rates).

So, what should we do? First, as we have noted, our study can only demonstrate that the UBE may be racially and ethnically biased. While we have accounted for relevant factors that could mask the true relationship between race/ethnicity and bar passage, our analysis is still at too high a level of data (the level of the school, not the student) to precisely determine whether, and to what extent, race and ethnicity matter for bar passage rates. Determining the relationship between race/ethnicity and bar passage with certainty would require examining data at the individual student level. Our next step as a profession and as researchers must be to analyze individual student bar passage rates (both first-time and ultimate). We must take into account the factors we have seen, and expect to see, influencing bar passage rates—where those factors are properly normalized such that we compare apples to apples.\footnote{For example, we expected UGPA to be a relevant predictor of bar passage. But examinees come from a wide range of schools with differing grade curves and exclusivity. Moreover, one’s major at a university also likely matters—a UGPA of 3.8 with a Chemical Engineering major likely provides different information than a UGPA of 3.8 with an English major.} Doing so will enable us to determine whether the difference we see at the school level is due to differences “unrelated” to race and ethnicity or whether the UBE is genuinely biased against students from communities of color.

Once the true relationship between bar passage rates and race and ethnicity is established, we can begin to develop policies that will support and foster the success of BIPOC students. For example, we can better understand the impact that test configuration, grading, programming, demographics, and outside law school support may have in positively impacting racial and ethnic disparities. In so doing, we will move closer to our goal of having a legal profession that truly represents the people in our country.

To this end, we propose a wide-scale study that examines bar passage rates of students who take the bar examination in UBE jurisdictions. We have already received Institutional Review Board approval for this study. In the future study, we will ask schools to provide five years of data on student bar passage information, student entering credentials, and markers of student success in law school (e.g., LGPA and rank). The information provided by each school will be blinded so that the data cannot identify the students. In addition, the study will be blinded as to the schools that participate; results will be shared in a way that does not indicate which schools took part in the study.

We have begun reaching out to law schools to participate in this study and are also working to find institutional sponsors (like the ABA, LSAC, National Association for Law Placement, Society for American Law Teachers). We are encouraged by the fact that the law school deans we have spoken with have universally agreed that this study is im-
important and needed. Simultaneously, we are discouraged that, despite the recognition of the need for and importance of the study, very few deans have been willing, thus far, to provide the data. We hope that, through continued discussion and negotiation with law school deans, we will be able to acquire sufficient data to continue our work, although this is not guaranteed.

Conducting empirical research on this issue is imperative to narrowing the bar pass gap amongst racial and ethnic groups. And in support of that research and the public interest, we call on states to begin regularly releasing bar passage data by race and ethnicity. This type of scientific exploration into the bar passage disparities is essential to improving access and representation in the legal profession. Without this type of in-depth analysis, the legal profession is consciously ignoring a significant ethical problem that continues to perpetuate inequalities—a problem that the legal system is in place to protect against. The current study, and proposed future study, will aid in our efforts of making the legal profession accessible to all.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Bar Statistics Link</th>
<th>Statistics on Race?</th>
</tr>
</thead>
<tbody>
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<td><a href="https://admissions.alab.org/exam-statistics">https://admissions.alab.org/exam-statistics</a></td>
<td>No</td>
</tr>
<tr>
<td>Alaska</td>
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<td>Arizona</td>
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<td>Arkansas</td>
<td><a href="https://www.arcourts.gov/content/february-2020-bar-exam-results">https://www.arcourts.gov/content/february-2020-bar-exam-results</a></td>
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<td>California</td>
<td><a href="https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics">https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics</a></td>
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<td>Colorado</td>
<td><a href="https://coloradosupremecourt.com/Future%20Lawyers/BarExaminationResults.asp">https://coloradosupremecourt.com/Future%20Lawyers/BarExaminationResults.asp</a></td>
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<td>Connecticut</td>
<td><a href="https://www.jud.ct.gov/cbec/stats.htm">https://www.jud.ct.gov/cbec/stats.htm</a></td>
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<td>Delaware</td>
<td><a href="https://www.courts.delaware.gov/bbe/2019barresults.aspx/">https://www.courts.delaware.gov/bbe/2019barresults.aspx/</a></td>
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<td>Florida</td>
<td><a href="https://www.floridasupremecourt.org/Bar-Scores/Florida-Bar-Exam-Results-Comparisons">https://www.floridasupremecourt.org/Bar-Scores/Florida-Bar-Exam-Results-Comparisons</a></td>
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<td>Georgia</td>
<td><a href="https://www.gabaradmissions.org/georgia-bar-examination-statistics">https://www.gabaradmissions.org/georgia-bar-examination-statistics</a></td>
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<td>Hawaii</td>
<td><a href="https://www.courts.state.hi.us/legal_references/attorneys/attorneys">https://www.courts.state.hi.us/legal_references/attorneys/attorneys</a> (Under “Successful Bar Applicants)</td>
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<td>Illinois</td>
<td>Illinois does not appear to publicly release summary data relating to the bar examination passage rate.</td>
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<td>Indiana</td>
<td><a href="https://www.in.gov/courts/ace/admissions/results/">https://www.in.gov/courts/ace/admissions/results/</a></td>
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<td>Louisiana</td>
<td><a href="https://www.lasc.org/Bar_Exam_Results">https://www.lasc.org/Bar_Exam_Results</a></td>
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<td>Mississippi</td>
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<td>Montana appears to have ceased publicly releasing summary data relating to the bar examination rate.</td>
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<td>Nebraska</td>
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<td><a href="https://www.nbar.org/exam-results/">https://www.nbar.org/exam-results/</a></td>
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<td>New Hampshire</td>
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<td>New Jersey</td>
<td><a href="https://www.njbarexams.org/news.action?id=1921">https://www.njbarexams.org/news.action?id=1921</a></td>
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<td>New Mexico</td>
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<td>New York</td>
<td><a href="https://www.nybarexam.org/examstats/estats.htm">https://www.nybarexam.org/examstats/estats.htm</a></td>
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<td>Ohio</td>
<td><a href="https://www.supremecourt.ohio.gov/AttySvcs/admissions/announcement/113020.asp">https://www.supremecourt.ohio.gov/AttySvcs/admissions/announcement/113020.asp</a></td>
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<td><a href="http://www.okbarexams.org/Bar-Exam-Statistics/default.aspx">http://www.okbarexams.org/Bar-Exam-Statistics/default.aspx</a></td>
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<td>Oregon</td>
<td><a href="https://www.osbar.org/admissions/examresults.html">https://www.osbar.org/admissions/examresults.html</a></td>
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<td>Rhode Island</td>
<td>e.g., <a href="https://www.courts.ri.gov/PDF/BarExam-July2019-InfoResults.pdf">https://www.courts.ri.gov/PDF/BarExam-July2019-InfoResults.pdf</a></td>
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<td><a href="https://barapplication.scourts.org/">https://barapplication.scourts.org/</a></td>
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<td>Tennessee</td>
<td><a href="https://www.tnble.org/?p=1007">https://www.tnble.org/?p=1007</a></td>
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<td>Texas</td>
<td><a href="https://ble.texas.gov/statistics">https://ble.texas.gov/statistics</a></td>
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<td>Utah</td>
<td>Utah appears to have ceased publicly releasing summary data relating to the bar examination rate.</td>
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<td>Vermont</td>
<td><a href="https://www.vermontjudiciary.org/attorneys/admission-vermont-bar">https://www.vermontjudiciary.org/attorneys/admission-vermont-bar</a></td>
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<td>Virginia</td>
<td><a href="https://barexam.virginia.gov/bar/barstats.html">https://barexam.virginia.gov/bar/barstats.html</a></td>
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<td>Wisconsin</td>
<td>Wisconsin does not appear to publicly release summary data relating to the bar examination passage rate.</td>
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<td>Wyoming</td>
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**Federal Districts**

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**U.S. Territories**

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<td>American Samoa</td>
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<td>Guam</td>
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<td>Northern Marian Islands</td>
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<td>Puerto Rico</td>
<td><a href="https://ecf.prd.uscourts.gov/barresults/default.aspx">https://ecf.prd.uscourts.gov/barresults/default.aspx</a></td>
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<td>U.S. Virgin Islands</td>
<td>The U.S. Virgin Islands do not appear to publicly release summary data relating to the bar examination pass rate.</td>
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