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NextGen Licensure & Accreditation

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Nachman N. Gutowski

NextGen Licensure & Accreditation

22 U.N.H. L. Rev. 311 (2024)

ABSTRACT. The Bar Exam is changing. The National Conference of Bar Examiners is pushing full steam ahead with a replacement for the current elements that make up the Uniform Bar Exam (UBE). This new exam, called the NextGen Bar Exam (NextGen), is scheduled to launch in Summer 2026. Current American Bar Association (ABA) accreditation standards do not consider the coming changes. A full picture of what the adjustments will look like is hazy and very much in the trial stages still. These shifts impact current law students, the legal education practices of law schools, and accreditation standards. There is a near-universal agreement that changes are overdue to the current legal licensure format. Simultaneously, alternatives to the NextGen, and even to the “need” for any summative licensure exam, are being actively explored.

Performance on the Bar Exam is used as a measurement tool by the American Bar Association for law schools to maintain accreditation. Standard 316, commonly referred to as Ultimate Bar Passage, has undergone several changes over its short life; yet, even in its current iteration, it fails to meaningfully consider what is just around the corner. There is no question that the Bar Exam continues to have racially discriminatory, disparate outcomes and impacts. Making matters worse, the use of aggregate limited durational performance data on post-graduation individual licensure exams as a meaningful metric by which accreditation is affected is inconsistent with accepted practices in similarly situated professions. Rectifying some baseline injustices can start with acknowledging how changes starting in 2026 are unaccounted for in the current standard. Adjusting or removing current prelicensure requirements and standards, either in ABA accreditation requirements for law schools or in educational prerequisites on examinees placed before the exam itself, would go a long way to align stated accreditation goals with licensure outcomes.

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INTRODUCTION

The Bar Exam continues to be held out as a reliable method of ensuring minimal competence in new attorneys.¹ Causing considerable complications is the reality that this exam, which is relied upon to be a beacon of reliability for competence, has been deemed so ineffective by even the organization that created it that it is slated to be replaced by NextGen as soon as 2026.² To make matters worse, the ability of law school graduates in nearly all jurisdictions to even attempt the licensing exam is limited.³ Having a requirement to graduate from an ABA-accredited school does not make sense.⁴ Much of this is made worse by the inconsistent methods of public data publication on performance across the country.⁵

Jurisdictions should remove the need for ABA accreditation, which does not seem to be adding anything of substance to the current scheme of creating new attorneys. The Bar Exam has shown time and again, despite what many continue to believe, that it is *not* the ultimate indicator of competence. It makes no difference which educational organization examinees graduate from. The Bar Exam is touted as being so effective that there should not even be the need for an educational component. Of course, all of this is taking the argument to the extremes to show the absurdity of holding onto the need for, and the importance of, a single exam as the ultimate barrier to the practice of law. Using aggregate data of individual alumni

¹ E.g., Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PRO. 67, 67 (2008) (“The primary purpose of the bar exam is to ensure the minimum competence of persons admitted to the practice of law.”); see also Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. U. L. REV. 675, 684–90 (2016).

² See *Final Report of the Testing Task Force*, NAT’L CONF. OF BAR EXAM’RS (Apr. 2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf> [<https://perma.cc/9FXM-5NL3>]; see also *Implementing the Next Generation of the Bar Exam, 2021–2026*, NAT’L CONF. OF BAR EXAM’RS (Dec. 2022), <https://nextgenbarexam.ncbex.org/about/implementation-timeline/> [<https://perma.cc/7WLY-VCUX>].

³ Forty-six states have a requirement of graduation from an ABA-approved law school as a prerequisite to sit for the Bar Exam. *About Us*, A.B.A., https://www.americanbar.org/groups/legal_education/about_us/ [<https://perma.cc/6XAN-2GNY>] (last visited Jan. 9, 2024). Similarly, the ABA accreditation stamp is accepted and recognized as being sufficient even in other jurisdictions that are not ABA-approved school applicants only. See *id.* This makes the ABA’s influence and power incredibly outsized. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 434 n.16 (2001).

⁴ See David M. Leonard, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL’Y 537 (1993), for additional context and history of the American Bar Association. There are 199 ABA-accredited law schools nationally, by far the primary accreditation method. See *List of ABA-Approved Law Schools—In Alphabetical Order*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ [<https://perma.cc/E3N6-NKCP>] (last visited Jan. 9, 2024).

⁵ See Nachman N. Gutowski, *Stop the Count: The Historically Discriminatory Nature of the Bar Exam Requires Adjustments in How Bar Passage Rates Are Reported, if at All*, 21 SEATTLE J. SOC. JUST. 589, 592–93 (2023).

performance on the Bar Exam to evaluate and ultimately penalize institutions by holding their accreditation hostage is absurd.

One of the most contentious ABA standards for accreditation to exist in the last decade is Standard 316, relating to ultimate bar passage rates.⁶ This ever-evolving standard is relatively new and has undergone considerable debate and infighting amongst ABA members, the council, and law schools.⁷ The first time a version of this standard made its appearance was in the 2013–2014 ABA Standards and Rules of Procedure for Approval of Law Schools under Standard 301.⁸ This standard, by

⁶ See *Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, A.B.A. (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf [<https://perma.cc/QWA3-BHH9>] [hereinafter *Standards*] (“At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”).

⁷ The most recent changes occurred in 2019, having significant implications and adjustments in time and calculation format to maintain compliance. See Nicola A. Boothe, *Black and Barred: The Bar Examination’s History of Exclusivity and the Threat of Further Exclusion Posed by ABA Standard 316*, 74 S.C. L. REV. 179, 187–88 (2022). Despite widespread pushback, and proposed changes to the standard being sent back to the Council twice for reconsideration, the ABA moved ahead. See *id.*

⁸ *ABA Standards and Rules of Procedure for Approval of Law Schools 2013–2014*, A.B.A. 20–21 (2013), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf [<https://perma.cc/DP5C-EGY4>]. The ABA laid out bar passage requirements as follows:

Interpretation 301-6 [For further guidance regarding compliance with 301-6 and for the explanation of the application of 301-6 for provisionally approved schools, see Appendix 3.]

A. A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

- 1) That for students who graduated from the law school within the five most recently completed calendar years:
 - (a) 75 percent or more of these graduates who sat for the bar passed a bar examination, or
 - (b) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(a) and (b), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70% of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

- 2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted

the ABA’s own reported data, shows a significant negative disparate impact based on race, for examinees.⁹ The ABA should at the very least suspend the standard. More than fifty other standards are still in place for compliance to ensure educational standards in legal accreditation.¹⁰ Alternatively, they could decide to revert to the previous standard from before the changes of 2019, allowing five years and multiple formats to meet the standard.¹¹ The best option would be to eliminate

average of the results in each of the reported jurisdictions shall be used to determine compliance.

B. A school shall be out of compliance with the bar passage portion of 301(a) if it is unable to demonstrate that it meets the requirements of paragraph A (1) or (2).

C. A school found out of compliance under paragraph B and that has not been able to come into compliance within the two year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the school has to demonstrate compliance by submitting evidence of:

(i) The school’s trend in bar passage rates for both first-time and subsequent takers: a clear trend of improvement will be considered in the school’s favor, a declining or flat trend against it.

(ii) The length of time the school’s bar passage rates have been below the first-time and ultimate rates established in paragraph A: a shorter time period will be considered in the school’s favor, a longer period against it.

(iii) Actions by the school to address bar passage, particularly the school’s academic rigor and the demonstrated value and effectiveness of the school’s academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the school’s favor; ineffective or only marginally effective programs or limited action by the school against it . . .

(viii) Other factors, consistent with a school’s demonstrated and sustained mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school’s efforts to improve them.

⁹ See *Summary Bar Pass Data: Race, Ethnicity, and Gender 2022 and 2023 Bar Passage Questionnaire*, A.B.A. (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/2023-bpq-national-summary-data-race-ethnicity-gender.pdf [<https://perma.cc/4TL3-X59D>]; *Summary Bar Pass Data: Race, Ethnicity, and Gender 2021 and 2022 Bar Passage Questionnaire*, A.B.A. (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2022/2022-bpq-national-summary-data-race-ethnicity-gender-fin.pdf [<https://perma.cc/TFJ4-UUPQ>]; *Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire*, A.B.A. (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf [<https://perma.cc/3BNT-687A>]. See generally *Profile of the Legal Profession 2022*, A.B.A. (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf> [<https://perma.cc/WQH2-AJRG>]; *Profile of the Legal Profession 2021*, A.B.A. (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/TE78-2X46>].

¹⁰ *Standards, supra* note 6.

¹¹ See *Standard 316 and Reporting of Bar Exam Outcomes*, A.B.A. (June 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/316-guidance-memo-june-2019.pdf [<https://perma.cc/LSV4-HALW>].

it.

A factor that plays a major role in the impact of Standard 316 is the many changes being promised in the NextGen exam. Many things about NextGen invite concern. One of the foundational concerns is that these changes and the adjusted format are being created and proposed by the National Conference of Bar Examiners (NCBE), rather than at the jurisdictional level.¹² Unfortunately, this group is composed of otherwise unaccountable and unelected parties with significant financial interests in the Bar Exam.¹³ They hold unreasonable levels of influence over the exam and, as a result, over the licensure of new attorneys and the accreditation of the law schools they graduated from.¹⁴ Seemingly corresponding with the 2013–2014 date of implementation of ultimate bar passage standards by the ABA, the NCBE launched the new Uniform Bar Exam (UBE) format in 2011.¹⁵ Forty-one jurisdictions currently utilize the UBE.¹⁶ Additionally, while some of the changes being explored by the NCBE in the NextGen have the potential to be a welcome shift in the Bar Exam format, promising a renewed focus on practical skills, it is far from clear what will ultimately be delivered.

Options for what to do about changes to the bar, alternative licensure approaches, and the impact they have on the accreditation of schools are fairly robust and plentiful.¹⁷ One possible solution would be to create a dual track to

¹² Marsha Griggs, *Outsourcing Self-Regulation* 42 (St. Louis Univ. Sch. of L., Legal Studies Research Paper No. 2023-09, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4524181 [<https://perma.cc/U2WH-KGS5>].

¹³ See generally Joe Patrice, *NCBE President Gives Trainwreck of an Interview*, ABOVE THE L. (Aug. 14, 2020), <https://abovethelaw.com/2020/08/ncbe-president-gives-trainwreck-of-an-interview/> [<https://perma.cc/R4HR-J2X8>]; see also *Nonprofit Explorer: National Conference of Bar Examiners*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/362472009> [<https://perma.cc/LQ3M-GRUP>] (last visited Jan. 9, 2024). The NCBE is sitting on well over \$100,000,000 in assets and brings in \$25,000,000+ in revenue yearly. Patrice, *supra*; PROPUBLICA, *supra*. It brought in an astounding \$39,284,236 of revenue and \$17,288,671 in net income in 2020, at the height of the pandemic! PROPUBLICA, *supra*. It should be clarified, however, that the NCBE is not alone in benefitting from the existence of, and changes to, a Bar Exam and an ever-changing landscape. There are more bar review companies, spending and earning millions of dollars focusing on preparing students for these exams, entering the market seemingly yearly. An entire economic ecosystem benefits from the continuity of a post-graduation legal licensure examination.

¹⁴ See Griggs, *Outsourcing Self-Regulation*, *supra* note 12, at 28, 45.

¹⁵ See *The Uniform Bar Examination (UBE)*, THE BAR EXAM’R, <https://thebarexaminer.ncbex.org/2022-statistics/the-uniform-bar-examination-ube/> [<https://perma.cc/6U9T-Y2LW>] (last visited Jan. 10, 2024).

¹⁶ *Id.*

¹⁷ See Terra Nevitt, *Examining the Bar Exam: Exploring Alternative Models for Licensing*, WASH. ST. BAR NEWS, June 2021, at 10, 10–11 (discussing the need to address the disproportionate impact of the Bar on underrepresented groups); see also Stephanie Francis Ward, *As Some Jurisdictions Consider Bar Exam Alternatives, ABA Legal Ed Section Again Looks at Bar Pass Standard*, A.B.A. J. (Aug. 19, 2022, 2:54 PM), <https://www.abajournal.com/web/article/as-some-jurisdictions->

licensure after graduating from law school. Graduates would have the option to take the NextGen, and it is safe to presume there would still be twenty to twenty-five percent of law graduates who historically fail on their first attempt.¹⁸ There could be a choice to utilize a supervised practice track to ensure additional support and competency.¹⁹ Those who pass in the traditional exam setting would not be required to take on the additional supervision, though it is something that should be seriously considered and scaled for all new attorneys.²⁰ Presumably, there will still be large groups of people who choose to use NextGen; but particularly in the first few years of its implementation, there needs to be a parallel licensure path. Similarly, this will allow those jurisdictions who do sign up to use this new format some flexibility and the ability to decide how to proceed as they work out any concerns with the NextGen, scoring, and any supervised licensure path moving forward.²¹

Finally, adjustments need to be made in many jurisdictions that only permit students, and not graduates, to engage in supervised practice. For these jurisdictions that do not simultaneously have an alternate licensure path, taking this position makes little sense. It is inconsistent to say that law students who have not yet taken or passed the Bar Exam are permitted to practice under the supervision of a licensed attorney for clinics and externships,²² yet upon graduation, if they fail the exam, they cannot practice under supervision.²³ It does not follow logically that

consider-bar-exam-alternatives-legal-ed-again-looks-at-bar-pass-standard [https://perma.cc/L45Z-W8ZR]; Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 963–67 (2020); Carol L. Chomsky et al., *A Merit-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883 *passim* (2021).

¹⁸ See generally *Various Statistics on ABA Approved Law Schools*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/statistics/ [https://perma.cc/Z5GR-HAP6] (last visited Jan. 10, 2024) (providing data on bar passage rates for the years 2018, 2019, and 2020, the three most recent graduating classes (for which data is available) who have met the two-year window for Ultimate Bar Passage under the amended two-year timeframe of Standard 316). First-time bar passage nationally for students who graduated in 2018, 2019, and 2020 was 74.8%, 79.64%, and 82.83%, respectively.

¹⁹ See, e.g., Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. SOC. JUST. 287, 307–08 (2021).

²⁰ There is talk in states, like Nevada, to implement a component to licensure that includes supervised practice for all new attorneys, regardless of bar exam passage. It is a smart and meaningful approach.

²¹ At the time of writing this, only thirteen jurisdictions have publicly announced their intent to adopt NextGen. See *New Mexico Adopts NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/new-mexico-adopts-nextgen/> [https://perma.cc/CV44-3ZDP] (last visited Feb. 19, 2024).

²² A Certified Legal Intern is a law student who is approved by the state Supreme Court to represent clients in court under the supervision of a licensed attorney. See e.g., RULES REGULATING THE FLA. BAR ch. 11 (Sup. Ct. Fla. 1992); see also SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO rule II (Sup. Ct. Ohio 1972).

²³ SUP. CT. OHIO, *supra* note 22 (“I have already graduated from law school. Can I apply for a legal

supervision is somehow more robust for a student than a graduate. For those concerned about the timing and impact of deviating to alternative paths of licensure, such as supervised practice, the truth is there is never a good time to implement and figure out concerns for such a departure from standardized licensure. However, because the NCBE is mandating the shift in these UBE jurisdictions, which will affect more than seventy percent of the country, a significant departure from the established norm is the only reasonable solution.²⁴ If we seek to remedy what otherwise is little more than a laboratory experiment on law school graduates seeking admission to practice law, new and alternative methods of licensure must be considered.

I. DEPARTMENT OF EDUCATION AND THE AMERICAN BAR ASSOCIATION

The Department of Education (DOE), acting in line with its mandate from the Secretary of Education, provides recognition to organizations as approved accrediting bodies.²⁵ For legal education, the American Bar Association Council of the Section of Legal Education and Admission to the Bar (Council) is the only recognized authority.²⁶ The Section of Legal Education and Admission to the Bar (Section) was the first section created by the ABA in 1893.²⁷ While accreditation is publicly referred to as “ABA-Approved,” the Council acts independently from the larger body of the ABA and does so by regulations set by the DOE.²⁸ The ABA

intern certificate? No. Applicants must be currently enrolled in an ABA-approved law school to apply.”); *see also* Marsha Griggs, *Sorry, Not Sorry: Temporary Practice in a Pandemic*, Nw. U. L. REV.: NULR OF NOTE (May 11, 2020), <https://blog.northwesternlaw.review/?p=1399> [<https://perma.cc/J9AN-H5B9>].

²⁴ *See FAQs about Recommendations*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/faqs/> [<https://perma.cc/7B52-6DEM>] (last visited Jan. 10, 2024); *Uniform Bar Examination*, *supra* note 15 (showing that 41 out of 56 jurisdictions administer the UBE).

²⁵ *See generally* Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663 (1952) [hereinafter GI Bill of 1952]; *see also* Antoinette Flores, *The Unwatched Watchdogs: How the Department of Education Fails to Properly Monitor College Accreditation Agencies*, CTR. FOR AM. PROGRESS (Sept. 19, 2019), <https://www.americanprogress.org/article/the-unwatched-watchdogs/> [<https://perma.cc/56Y8-6BN8>].

²⁶ *Cf.* List of Agencies, DATABASE OF ACCREDITED POSTSECONDARY INSTITUTIONS AND PROGRAMS, <https://ope.ed.gov/dapip/#/agency-list> (granting the Section accrediting power in 1952). *See generally* Judith S. Eaton, *An Overview of U.S. Accreditation* (2015); *see also* Robert K. Walsh, *American Bar Association's Standards for the Accreditation of Law Schools*, 43 S. TEX. L. REV. 697 (2002) (“The Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association (the ‘Section’) is recognized by the U.S. Department of Education as the ‘nationally recognized accrediting agency for schools of law.’”).

²⁷ *About Us*, A.B.A., https://www.americanbar.org/groups/legal_education/about_us/ [<https://perma.cc/6XAN-2GNY>] (last visited Jan. 13, 2024).

²⁸ *Standards*, *supra* note 6. The Council acts with such independence, that despite getting

adopted the Standards for Approval of Law Schools (Standards) in 1973. The Standards have undergone several changes, but schools must adhere to them to receive or retain accreditation from the ABA.²⁹

In 2016, there was serious concern on behalf of the DOE that the Section was not fulfilling its requirements for standard enforcement, and they threatened to suspend this ability to act as an approved accrediting agency.³⁰ The DOE determined that the Section was not acting in compliance with the Higher Education Act, and as a result, was in danger of not having its authority renewed.³¹ The Section, through its managing director, put out a report downplaying the interaction, stating rather that they needed to “respond to some technical deficiencies that were noted and report-back on our corrective action in a year. That is all within the ordinary and typical flow of an accreditation process.”³² The Section ultimately did not lose its ability to provide accreditation for law schools.³³ However, it is interesting to note the timing of this and what has happened in terms of enforcement and tightening of rules since.³⁴

The NCBE was created by the Section and founded in 1931.³⁵ It acts as a semi-autonomous and non-profit organization.³⁶ Though technically independent from the ABA, their reliance on fee-generating exam administration should call into question whether they are truly acting as either an autonomous or a non-profit entity. The NCBE works closely with the state jurisdictions, through their locally

feedback from the larger House and members, they hold the ultimate decision. Perhaps never was this more clearly seen than in the recent changes to ABA Standard 316. Twice the body of the ABA rejected changes to reduce the time window from five to two years as well as other amendments for Ultimate Bar Passage. Yet, the Council, acting within its authority but out of line with the will of the rest of the association, pushed ahead with changes that were effective immediately. See Boothe, *supra* note 7, at 187–88.

²⁹ *Id.*

³⁰ James S. Heller & Simon F. Zagata, *Back to the Future: ABA Law School Accreditation in the 21st Century and America’s First Law School’s Battle to Survive in the 1970s*, 111 LAW LIBR. J. 509, 515, 516–517 (2019); Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1487–90 (2011).

³¹ Stephanie Francis Ward, *Accreditation Question: ABA Responds to Panel’s Threat to Suspend Its Role*, ABA J., Sept. 2016, at 67.

³² Barry Currier, *Report on the Status of the Accreditation Project*, 47 A.B.A. SYLLABUS (July 1, 2016), https://www.americanbar.org/groups/legal_education/publications/syllabus_home/volume-47-2015-2016/syllabus-summer-2016--47-4-/from-the-managing-director/ [<https://perma.cc/M7Y4-REEE>].

³³ List of Agencies, *supra* note 26.

³⁴ See generally Judith Welch Wegner, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don’t Know, and What We Should Do Next*, 67 J. LEGAL EDUC. 412, 412 n.3 (2018).

³⁵ Michel Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1033 n.153 (1994).

³⁶ *About NCBE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/about> [<https://perma.cc/BK3J-3WW4>] (last visited Jan. 27, 2024).

appointed agencies, primarily the board of bar examiners or similarly situated bodies.³⁷ It should also be noted that “several former NCBE Board of Trustees chairs have served as chair of the Council,” which should raise all kinds of red flags.³⁸

A. Contentious ABA Standard and Disparate Impact

The DOE has come down on the ABA in the past,³⁹ including for violating the Sherman Act.⁴⁰ Ultimately, the DOE entered into a consent decree mandating changes in the process the ABA used for accreditation.⁴¹ One of the big adjustments the ABA was forced to make was to vest final authority and power in the Council, which before this was only acting in an advisory role.⁴² This was to adhere to the “separate and independent” requirement from the DOE.⁴³ They view an inherent conflict to exist when an association of a profession is accrediting itself.⁴⁴

The ABA has a long history of discrimination and an inability to apply standards uniformly.⁴⁵ It is reasonable to presume that to meet standards set by the DOE, the ABA may be coming down harshly and more regularly, particularly against institutions whose populations are more diverse than the profession at large. Yet the students from many of these now-closed institutions were still “taught out” elsewhere, and the professors are transferring to teaching at other schools.⁴⁶ The only thing that is being accomplished is that the physical buildings are now closed, and it makes it harder for future similarly situated students to have an opportunity to practice law.

This is not a new rebuke of the ABA. This line of thinking goes back to the very early 1920s when the ABA first began its crusade against diploma privilege: “In

³⁷ See generally Jurisdictions, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/jurisdictions> [https://perma.cc/DE6V-9D5E] (last visited Feb. 6, 2024).

³⁸ *New to Bar Admissions? What you Might Like to Know About: The ABA's Connections to Bar Admissions*, THE BAR EXAM'R, Spring 2021, at 86, <https://thebarexaminer.ncbex.org/article/spring-2021/new-bar-admissions-aba-connections/> [https://perma.cc/K3LZ-L3SU].

³⁹ See Areen, *supra* note 30, at 1487–91.

⁴⁰ See, e.g., Complaint at 12, *United States v. A.B.A.*, 934 F. Supp. 435 (D.D.C. 1996); *United States v. A.B.A.*, Civ. No. 95-1211 (CRR) (D.D.C.); Response of the United States to Public Comments, 60 Fed. Reg. 63766 (Dec. 12, 1995).

⁴¹ See *United States v. A.B.A.*, 934 F. Supp. 435, 436 (D.D.C. 1996).

⁴² Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Expose on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 12 (2003); Steven A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, N.Y. TIMES, June 28, 1995, at A1.

⁴³ Staver & Staver, *supra* note 42, at 22.

⁴⁴ *Id.* at 8 n.34.

⁴⁵ See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 110 (2003).

⁴⁶ *Standards and Rules of Procedure for Approval of Law Schools 2023–2024*, A.B.A. (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf [https://perma.cc/F975-6VUQ].

case[s] of institutions whose high reputation has become established through years of competent performance, there would be little or no danger to the profession if their graduates were to be admitted to the bar without further examination.”⁴⁷ It would make great sense to say that any school that has met its high standard and lofty oversight by the ABA is of high reputation since there are no differences between ABA-approved schools. Either the ABA is needed to accredit law schools to provide sufficient levels of protection in education, in which case they should be able to practice after graduation, or the need for an exam is a direct response to the inability of the ABA to enforce and adhere to its own unrealistic and arbitrary standards. It cannot be that the ABA accreditation needs to be pervasive and so authoritative, yet still need a summative exam. It is at best one or the other.

B. American Bar Association Standard 316

ABA Standard 316 is a compilation and aggregation of individualized results on the bar.⁴⁸ They are not a reliable, accurate, or meaningful reflection of the school the examinees graduate from. Imagine for a moment a situation comprised of the worst students at the best-ranked law school, and the best students at the worst-ranked school. One grouping fails, and the other passes, respectively. Neither is an indictment or reflection of anything other than their individualized performance in studies pertaining particularly to approach, and maybe even utilization of third-party Bar Exam study aids. The ABA even considers diploma privilege (where it exists) as sufficient for meeting the standard!⁴⁹ For schools in a jurisdiction with alternative pathways where their students are taking advantage of these licensure paths, Standard 316 is effectively moot. If it’s moot for them, it must be moot for everyone else.

If the Bar Exam in any jurisdiction itself is a test that is valid and worthwhile and the ultimate example of whether someone is competent, then we should not care about ABA accreditation as a precursor to attempting the test. If the Bar Exam is truly a test of competence, then it would be sufficient that someone could pass it regardless of what school they attended. Additionally, since performance on the Bar Exam is correlative to law school performance, it is redundant in its replication of the already-stated educational requirement of law school.⁵⁰ Furthermore, the lack of a need for using the Bar Exam for practicing attorneys to be able to continue practicing law as a regular test of competency is, by every definition of the term,

⁴⁷ Herbert F. Goodrich, *Law Schools and Bar Examiners*, 18 A.B.A. J. 101, 101 (1932).

⁴⁸ See *Standards*, *supra* note 6.

⁴⁹ *Bar Passage Questionnaire Instructions*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2024/2024-bar-passage-instructions.pdf [<https://perma.cc/49P5-YG6Q>] (last visited Feb. 7, 2024).

⁵⁰ Katherine A. Austin et al., *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 758 (2017); Susan M. Case, *The Testing Column: Identifying and Helping At-Risk Students*, 80 BAR EXAM’R 30, 31 (2011).

granting what can only be called a Bar Exam privilege.⁵¹

II. NEXTGEN BAR EXAM

A. *How Did We Get Here?*

The NCBE manufactures the Bar Exam that is administered in forty-one jurisdictions, as well as some components for all but two jurisdictions.⁵² The NCBE purports to “promote[s] fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public” and “serve admission authorities, courts, the legal education community, and candidates by providing high quality assessment products, services, and research; character investigations; and informational and educational resources and programs.”⁵³ Concurrently, the NCBE relies heavily on the administration of the UBE, which a staggering 42,101 people took in 2022.⁵⁴

When law schools in the United States were first created, there was talk of two divergent theories of how education should be approached, mainly the Case Method and the more lecture and practical based.⁵⁵ The format we currently know, with the Socratic method and teaching heavily from case review, ultimately won out.⁵⁶ However, there was another approach that we should give serious consideration to reintroducing. While abandoning the classic education format for lawyers may be difficult to accept, there must be, at a minimum, a shifting of its focus and licensing element to be more in line with the practical performance of the profession. The Bar Exam is now in the process of shifting to testing more technical skills under the new NextGen format, and this has the potential to be a good thing.⁵⁷

⁵¹ David A. Friedman, *Do We Need a Bar Exam . . . for Experienced Lawyers?*, 12 U.C. IRVINE L. REV. 1161, 1208 (2022).

⁵² See *The Uniform Bar Examination (UBE)*, NAT'L CONF. OF BAR EXAM'RS, <https://thebarexaminer.ncbex.org/2022-statistics/the-uniform-bar-examination-ube/> [https://perma.cc/6U9T-Y2LW] (last visited Jan. 10, 2024); *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpr> [https://perma.cc/6DM5-5QRZ] (last visited Feb. 2, 2024).

⁵³ *About NCBE*, NAT'L CONF. OF BAR EXAM'RS, <https://ncbex.org/about> [https://perma.cc/74FK-KTKT] (last visited Jan. 13, 2024).

⁵⁴ *The Uniform Bar Examination (UBE)*, *supra* note 15.

⁵⁵ ROBERT STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 51–53 (G. Edward White ed., Univ. of N.C. Press 1983); see also, e.g., Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 552–53 (2018).

⁵⁶ Dean Christopher Langdell at Harvard University was one the first and primary proponents of this case and classroom interactive method, professor-student engagement, to be completed over a three-year period, as being the proper way to distinguish lawyering as a profession and not just a trade capable of being learned through an apprenticeship. See 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 374 (N.Y. Lewis Publ'g Co. 1908).

⁵⁷ See generally *NextGen Bar Exam Content Scope and Sample Questions*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/> [https://perma.cc/CGD2-TFFB] (last visited Feb. 1, 2024).

There is historical context at every step of the way that indicates that becoming an attorney in the United States has a lot to do with keeping out of the profession certain groups of people while providing control to those already admitted.⁵⁸ There is an avalanche of data showing that the performance on this licensure exam is not representative or consistent amongst racial and gender groups.⁵⁹ The idea that providing public safety and protection by having an exam that ensures minimum competency is only a relatively recent justification for the Bar which is not based in reality.⁶⁰

Having the Bar Exam as the guard standing at the door of the profession does not protect the public and it does not ensure competency. Instead, it serves to continue a tradition of exclusion, bias, and disparate impacts all while hiding behind the false flag of consumer protection.⁶¹ There is an uncontested existence of negative racial impacts of the Bar Exam.⁶² This has been attributed to a range of reasons, including implicated test bias and hostile learning environments.⁶³ During the COVID-19 pandemic, the issues that arose in creating, administering, and grading the bar exam were so rampant that it is difficult to even begin grasping its long-term impact.⁶⁴ Substantive, well-reasoned pushback against the exam, about

⁵⁸ See JOAN HOWARTH, *SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING* 7–9, 23–24 (Stanford Univ. Press 2023). See also Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 *GEO. J. LEGAL ETHICS* 163, 172–73 (2022); Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 *FIU L. REV.* 489, 489–91 (2019); J. Cunyon Gordon, *Painting by Numbers: And, um, Let's Have a Black Lawyer Sit at Our Table*, 71 *FORDHAM L. REV.* 1257, 1269 (2003); Timothy T. Clydesdale, *A Forked River Runs through Law School: Toward Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage*, 29 *LAW & SOC. INQUIRY* 711, 712–13, 752–53 (2004).

⁵⁹ Clydesdale, *surpa* note 58, at 712–713; see also Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 *NAT'L BLACK L.J.* 63, 67–68 (2004); Katherine L. Vaughns, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities between Racial and Ethnic Groups*, 16 *T. MARSHALL L. REV.* 425, 425–26 (1991).

⁶⁰ See Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 *GEO. J. LEGAL ETHICS* 307, 312 (2019). See also Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 *GEO. J. LEGAL ETHICS* 163, 173 (2022).

⁶¹ See generally, e.g., Marsha Griggs, *An Epic Fail*, 64 *HOW. L.J.* 1, 47–48 (2020); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 *GEO. J. LEGAL ETHICS* 931, 963–64 (2020); Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 *UMKC L. REV.* 565, 609 (2015); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 *LAW & SOC. INQUIRY* 547, 556 (2004); Andrea A. Curcio, *A Better Bar Exam: Why and How the Existing Bar Exam Should Change*, 81 *NEB. L. REV.* 363, 369–70 (2002).

⁶² *Summary Bar Pass Data*, *supra* note 9.

⁶³ Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 *U. MD. L.J. RACE RELIGION GENDER & CLASS* 31, 44–45 (2018); Kidder, *supra* note 61, at 577–78.

⁶⁴ Eura Chang, Note, *Barring Entry to the Legal Profession: How the Law Condone Willful*

the futility and lack of utility of the Bar Exam in its current format exists.⁶⁵ Unfortunately, the NCBE decided to double down on its position that the exam has been confirmed to measure minimum competence many times and that positions contrary to theirs must be based on preconceived notions or personal vendettas rather than merit.⁶⁶ Following independently funded, multi-year research, the Institute for the Advancement of the American Legal System (IAALS) produced the 12 building blocks of minimum competence.⁶⁷ These consist of interlocking components, or “building blocks.”⁶⁸ With the upcoming launch of NextGen, the

Blindness to the Bar Exam’s Racially Disparate Impacts, 106 MINN. L. REV. 1017, 1068 (2021); Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 125–28 (2021).

⁶⁵ See Deborah Jones Merritt, *Raising the Bar: Limiting Entry to the Legal Profession*, 70 THE BAR EXAM’R (Nov. 2011), <https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/700401-KaneMerrittKleinBahlsCorneille.pdf> [<https://perma.cc/33PE-KLVT>]. See also *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [<https://perma.cc/33PE-KLVT>] (evaluating the Daniel Webster Scholar Honors Program to analyze the program’s outcomes). In 2015, IAALS conducted an evaluation of the Daniel Webster Scholar Honors Program to analyze the program’s outcomes. Through focus groups and interviews, we learned that: members of the profession and alumni believe that students who graduate from the program are a step ahead of new law school graduates; when evaluated based on standardized client interviews, students in the program outperformed lawyers who had been admitted to practice within the last two years; and the only significant predictor of standardized client interview performance was whether or not the interviewer participated in the Daniel Webster Scholar Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance. This innovative combination of formative and reflective assessment in a practice-based content—with a focus on collaboration between the academy and the profession—is why IAALS believes other jurisdictions should look to the Daniel Webster Scholar Honors Program as an example of preparing new lawyers to venture into the profession with the skills they actually need to succeed in today’s legal marketplace. The Institute for the Advancement of the American Legal System last year called for a new approach to determining who’s qualified to practice law. It said the skills new lawyers need and use cannot be identified through closed-book exams with time limits and multiple-choice questions.

⁶⁶ Allie Yang, *Law Grads Faced Financial, Medical Challenges to Take the Bar this Year*, ABC NEWS (Dec. 4, 2020, 2:02 PM), <https://abcnews.go.com/US/law-grads-faced-financial-medical-challenges-bar-year/story?id=74511388> [<https://perma.cc/7G3R-S46Y>]; *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020*, NAT’L CONF. OF BAR EXAM’RS (Apr. 9, 2020), https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf [<https://perma.cc/H7WH-4P5G>].

⁶⁷ Logan Cornett & Zachariah DeMeola, *No Small Measures: We Must Radically Reconsider Lawyer Licensure and the Bar Exam*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Feb. 24, 2021), <https://iaals.du.edu/blog/no-small-measures-we-must-radically-reconsider-lawyer-licensure-and-bar-exam> [<https://perma.cc/HK29-XBCG>].

⁶⁸ *Id.* “The ability to act professionally and in accordance with the rules of professional conduct. An understanding of legal processes and sources of law. An understanding of threshold concepts

scope of what the ABA, and in particular the NCBE, claims to be measuring and setting standards for is not what is being taught in law school currently.⁶⁹

B. Proposed Elements of the New Exam

The NCBE created a Testing Task Force (TTF) in 2018 to explore alternatives to the current format of the exam.⁷⁰ The creation of the TTF is “to ensure that the next generation of the bar exam continues to test the knowledge, skills, and abilities required for competent entry-level legal practice”⁷¹ After conducting some initial surveying of members of the profession, the TTF recommends creating a new Bar Exam to replace many of the elements of the current UBE.⁷² These elements consist of the Multistate Essay Exam (MEE), Multistate Performance Test (MPTE), and the Multistate Bar Exam (MBE).⁷³ According to the NCBE, this new exam is intended to test less broadly or deeply within subjects, allowing for less rote law memorization to be required.⁷⁴ This would certainly be an improvement.

Overreliance on memorization continues to be a significant concern for critics of the Bar Exam as an area that needs change.⁷⁵ However, no one can seriously take the position that the NCBE is living up to this promise. Additionally, they would still test legal topics that they think are important in a format of their choosing. It is not entirely clear what it is exactly about these selected topics, and not others, that make them so necessary for testing competence.⁷⁶ Still problematic in choosing

in many subjects. The ability to interpret legal materials. The ability to interact effectively with clients. The ability to identify legal issues. The ability to conduct research. The ability to communicate as a lawyer. The ability to see the “big picture” of client matters. The ability to manage a law-related workload responsibly. The ability to cope with the stresses of legal practice. The ability to pursue self-directed learning.”

⁶⁹ Jaylin K. Johnson, *In Response to Professor, Please Help Me Pass the Bar Exam*, 125 W. VA. L. REV. 913 (2023) (Perhaps, it looks like they are trying to continue consolidating power and close ranks against any dissension.).

⁷⁰ *NCBE Testing Milestones*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/wp-content/uploads/NCBE-Testing-Program-Timeline.pdf> [<https://perma.cc/QT6A-E5WR>] (last visited Feb. 2, 2024).

⁷¹ *NextGen Bar Exam Content Scope and Sample Questions*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/> [<https://perma.cc/CGD2-TFFB>] (last visited Feb. 1, 2024).

⁷² Nat'l Conf. Bar Exam'rs Testing Task Force, *OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION (2021)*, <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [<https://perma.cc/8BX6-H2SR>].

⁷³ Nat'l Conf. Bar Exam'rs Testing Task Force, *supra* note 72.

⁷⁴ *See Final Report of the Testing Task Force*, NAT'L CONF. OF BAR EXAM'RS (Apr. 2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> [<https://perma.cc/3K3C-4KPU>].

⁷⁵ Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam July 2002*, 52 J. LEGAL EDUC. 446, 447–48 (2002).

⁷⁶ For example, take the practice of immigration law, a topic that is not tested or included on

topics is that the exam would continue to be testing the “law of nowhere.”⁷⁷ Based on the available public information, there are those in the legal community who feel the new exam format is a simplification, dumbing down, and synthesizing of materials.⁷⁸ The decision to recycle memorization-focused multiple choice questions and only tweak MPT style questions means that the “new” elements of the NexGen are just more of the same.⁷⁹

C. NCBE “Recommendations”

There is a growing list of recommendations and notes by the NCBE that, for the most part, are surface-level and not followed by real examples. The lack of information and materials to help law schools prepare for the seemingly mandatory shift to this new exam is unacceptable. The NCBE recommends that there should be a greater emphasis on lawyering skills.⁸⁰ This is right on the money and absolutely what many proponents of change have been saying for a long time.⁸¹ However, saying these skills need to be tested and doing that testing are two very different things. They have not yet shown how lawyering skills can be tested utilizing a standardized exam format in any kind of convincing way. Using a standardized

any bar exam. A law school graduate could take the bar exam, pass, and go into practice for something they never took a class in, never were tested on for the Bar; yet the argument is they are somehow competent. How can they say one area is important but not another? Unless we want to consider—and perhaps we should—specialized licensure, such as exists for specializations in medicine, accounting, and engineering.

⁷⁷ Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 196 (2022). The law of nowhere denotes these fictional legal doctrines that are not based in reality or connected to any jurisdiction.

⁷⁸ See Paul Caron, *Blackman: NCBE Dumbs Down Bar Exam By Testing Only The 1 in IRAC; If States Adopt NextGen, They Should Raise The Cut Score*, TAXPROF BLOG (July 13, 2023) https://taxprof.typepad.com/taxprof_blog/2023/07/ncbe-dumbs-down-bar-exam-if-states-adopt-nextgen-they-should-raise-the-cut-score.html [<https://perma.cc/6V77-3L2M>] (last visited Feb. 19, 2024); see also *NCBE Publishes First Sample Questions for NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (2022), <https://nextgenbarexam.ncbex.org/ncbe-publishes-first-sample-questions-for-nextgen-bar-exam/> [<https://perma.cc/CZ25-JVDB>]. This is already visible in the first round of released questions from July 2023, which seem to be a far cry in terms of quality and the change promised. There doesn't seem to be as much change as they promised, as they are keeping a huge chunk of the questions in multiple-choice format. This is problematic and not in line with the radical shift that is necessary. Additionally, other elements of the new exam seem to be simply slight tweaks of the current format. So much for a focus on change and skills.

⁷⁹ It is frankly embarrassing how little in the way of innovation and changes are being presented after all these years of ‘work’ on the next ‘generation’ of the exam. If a plane (the current Bar Exam) crashed and burned due to incompetence on the part of the pilot (NCBE), to expect everyone (the legal community) to just get on board a new plane (NextGen) and not worry when the same pilots are the ones in charge still, is negligent at best.

⁸⁰ See *supra* note 79.

⁸¹ See Curcio, *supra* note 75, at 452.

exam is littered with problems in general.⁸² It can be a nightmare when it comes to testing skills.⁸³ Many of the problems that are appearing, in theory, could be worked out with a thoughtful approach and commitment to the process. However, it is inconceivable that this is going to be done with a focus on the best outcomes when the development and testing of this new format is proceeding with an immovable ticking clock hanging over the process.

Another recommendation is the need to focus on fairness and accessibility.⁸⁴ This is something that should be a given for any examination and needs follow through. Yet the reality is that there are too many unanswered questions—particularly surrounding the decision to shift to a strictly computer-based exam in NextGen.⁸⁵ These computer-based exams are still going to be administered outside of testing centers and organized and executed through the local jurisdictions.⁸⁶ There could also be continuing implications relating to barriers to access for the visually impaired and other applicants who require accommodations.⁸⁷

The existing benefit of score portability should be maintained.⁸⁸ The shift to NextGen is intended to replace the UBE.⁸⁹ However, the details of scoring for the new exam are not yet flushed out. There will likely need to be some resemblance to the current system of cut scores, despite the many adjustments that have

⁸² See Michael Couch II et al., *Rethinking Standardized Testing from An Access, Equity and Achievement Perspective: Has Anything Changed for African American Students?*, 5 J. OF RSCH. INITIATIVES 3, 1 (2021); see also PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 218 (Da Capo Press, 1999); see also Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799, 799 (2020).

⁸³ See NEW YORK STATE BAR ASS'N, *THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION*, (2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/2UNJ-W8ZP>].

Exclusive use of computer-based examinations may be unfair to persons with cognitive disabilities; indeed, aspects of a computer test, particularly performance questions, may be daunting for anyone (including non-disabled persons) to answer on a computer, without access to physical copies of test material. Ironically, the NCBE is proposing to increase the portion of the examination that consists of performance questions—thus emphasizing the aspect of the examination that may be the most challenging to deal with solely in digital form. Moreover, unless applicants are to be given standardized computer equipment to use during a digital examination, applicants with better, more up-to-date computers may have advantages over applicants with older, slower, and less efficient computers. The timed examination could become more of a test of one's computer skills than of one's legal knowledge.

⁸⁴ Nat'l Conf. Bar Exam'rs Testing Task Force, *supra* note 72.

⁸⁵ *Id.*

⁸⁶ See *FAQs about Recommendations*, *supra* note 24.

⁸⁷ See, e.g., Consent Decree at 4–9, *Stanley v. Barbri, Inc.*, No. 16-01113 (N.D. Tex. Jan. 22, 2018) (requiring Barbri to take measures to ensure accessibility for “individuals with visual disabilities” in response to a lawsuit which alleged that Barbri lacked sufficient “auxiliary aids and services”).

⁸⁸ Nat'l Conf. Bar Exam'rs Testing Task Force, *supra* note 72.

⁸⁹ *Id.* The NCBE says it as to ‘remain’ affordable. To call the current exam affordable is laughable.

occurred, and concerns that will undoubtedly reappear.⁹⁰ How these scores will be transposed on a new exam while still maintaining the relative scores to other jurisdictions is one of the most unclear repercussions of the NextGen.⁹¹ There has been a recent trend of jurisdictions that utilize the UBE lowering their cut scores.⁹² A reasonable understanding of this trend is that whatever the scoring model will be for NextGen, it will be applied in the same interrelated way as the current UBE. This is incredibly important since the portability of scores and reciprocity of status undoubtedly had a large impact on the initial attractiveness and adoption of the UBE and can be one of the main reasons why it grew so quickly.⁹³ A single exam, available in forty-one jurisdictions with a transferable score, in theory, allows for much greater portability and mobility than ever before. However, the exact details cannot be worked out until a reliable test is fully functional. It is a little bit of a chicken and egg problem.

It should go without saying that the exam should be affordable.⁹⁴ This should be seen as non-controversial. Yet, there are serious and considerable concerns that the current exam is not living up to this, and many other basic standards.⁹⁵ One example of this is by jurisdictions continuing to be limited in their administration to twice per year and by maintaining the local jurisdictions as the administering location.⁹⁶ This leads to problems and costs related to travel, hotels, and other

⁹⁰ See Scott Johns, *Putting the Bar Exam on Constitutional Notice: Cut Scores, Race & Ethnicity, and the Public Good*, 45 SEATTLE U. L. REV. 853, 853 (2022); Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PROF. 69, 83 (2017); Gary S. Rosin, *Unpacking the Bar: Of Cut Score and Competence*, 32 J. LEGAL PROF. 67, 67 (2008).

⁹¹ *Implementing the Next Generation of the Bar Exam, 2022–2026*, NAT'L CONF. OF BAR EXAM'RS (2022), <https://nextgenbarexam.ncbex.org/about/implementation-timeline/> [<https://perma.cc/7WLY-VCUX>] (“Performance standard-setting exercise” is not slated until Q2 in 2025.).

⁹² *Compare Chart 5: Uniform Bar Examination Jurisdictions—Admission by Examination or by Transferred UBE Score*, NAT'L CONF. OF BAR EXAM'RS, <https://reports.ncbex.org/comp-guide/charts/chart-5/> [<https://perma.cc/FFN3-75P2>] (last visited Apr. 23, 2024) with *UBE Minimum Scores*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/ube-minimum-scores> [<https://perma.cc/2GL8-VX7M>] (last visited Jan. 22, 2024). Alaska reduced its score from 280 to 270. Colorado reduced its score from 276 to 270. Arizona reduced its score from 273 to 270. Idaho reduced its score from 272 to 270. Additionally, North Carolina, Oregon, and Washington temporarily lowered their minimum passing scores from 270 for the July 2020 exam, down to 268, 266, and 266, respectively, due to the COVID-19 pandemic.

⁹³ Suzanne Darrow-Kleinhaus, *Portability of the UBE: Where Is It When You Need It and Do You Need It at all?*, 37 TOURO L. REV. 665 (2021).

⁹⁴ Nat'l Conf. Bar Exam'rs Testing Task Force, *supra* note 72.

⁹⁵ See Canché et al., *The Effect of the Uniform Bar Examination on Admissions, Diversity, Affordability, and Employment Across Law Schools in the United States* (Aug. 10, 2022) (accepted at *Educational Evaluation and Policy Analysis*).

⁹⁶ Maria Florencia Cornu Laport, *Break It Up, Florida Bar Exam – Break It Up*, LINKEDIN (Mar. 5, 2023), [linkedin.com/pulse/florida-bar-exam-break-up-m-florencia-cornu-laport%3FtrackingId](https://www.linkedin.com/pulse/florida-bar-exam-break-up-m-florencia-cornu-laport%3FtrackingId)

economically impactful effects.⁹⁷ Certainly, there will still be the need for students to purchase and utilize a commercial bar preparation program to assist. The costs associated with studying for, taking time off work for, and traveling to an exam that is limited in availability do not seem to be getting the attention they should with NextGen.⁹⁸

D. Pilot Testing & Field Testing

Initial pilot testing for the NextGen format began on November 9, 2022 and has included a large participant pool.⁹⁹ This pilot testing involved current law students, recent examinees and graduates, and a handful of the associated professors from the schools.¹⁰⁰ The next step is the Field Testing took place in late January 2024.¹⁰¹ There are going to be seven Foundational Skills.¹⁰² Significant questions remain about how to implement a test of these skills on a computer-based exam. There is

=xNHCJpvyQz6Fla1cRfn8w%253D%253D/?trackingId=%2BNaxaWGxT2%2BzuuDc6Sxi1Q%3D%3D [https://perma.cc/F7PZ-UEU7].

⁹⁷ *Id.*

⁹⁸ Kayleigh McNiell, *Hidden Hurdles: The True Cost of the Bar Exam*, WASH. J.L. TECH. & ARTS (April 24, 2023), <https://wjlt.com/2023/04/24/hidden-hurdles-the-true-cost-of-the-bar-exam/> [https://perma.cc/9UX8-USL4].

⁹⁹ Marilyn Wellington, *The Next Generation of the Bar Exam: Quarterly Update*, THE BAR EXAM'RS THE BAR ADMISSIONS INFO. SOURCE, Winter 2022-2023; see Adam Balinski, *NextGen Bar Exam: Major Changes!*, CRUSHENDO (Oct. 25, 2023), <https://crushendo.com/nextgen-bar-exam-new-changes/> [https://perma.cc/9NXA-DVUN].

¹⁰⁰ Wellington, *supra* note 99. Without violating the non-disclosure, they required everyone to sign, including promising to not sit for the actual NextGen for several years post its launch, this author can safely say they were nothing short of disappointed and that the pilot testing was simply underwhelming. With the release of examples of questions in July 2023, it became public just how short of the mark they came in the first attempt. To be clear, the issue is not in the lack of quality or range of potential questions in the changing exam. Rather, one of the biggest problems is the insistence of the NCBE to be rigid in their adherence to 2026 as the implementation date. This places educators, schools, and jurisdictions under pressure to decide how to respond, whether to adopt and what the next steps are, all before having all the problems worked out. It is quite simply irresponsible and unethical.

¹⁰¹ Email from Sophie Martin, Dir. of Communications, Educ., and Outreach, NCBE, to Nachman Gutowski, Dir. of Acad. Success Program, William S. Boyd Sch. of L., regarding NextGen Field Testing: “**About NextGen Field Testing:** The NextGen bar exam, which is scheduled to launch in July 2026, will test a broad range of foundational lawyering skills, utilizing a focused set of clearly identified fundamental legal concepts and principles needed in today’s practice of law. Field testing is a critical component of NCBE’s research to solidify the structure of the NextGen exam, which will include long-answer, short-answer, and multiple-choice questions. **During this phase, our researchers will be pretesting questions that may be included in the live exam.** Participating 3L/4L students and recent grads (2022–2023) will be bound to confidentiality and will receive a \$350 payment from NCBE for completing the test” (Aug. 14, 2023) (on file with author).

¹⁰² Nat’l Conf. Bar Exam’rs Testing Task Force, *supra* note 72. These include 1. Legal Research 2. Legal Writing 3. Issue Spotting and Analysis 4. Investigation and Evaluation 5. Client Counseling and Advising 6. Negotiation and Dispute Resolution, and 7. Client Relationship and Management.

nothing to indicate that examinees would have access to search databases. Additionally, there are accessibility and disability requirements to consider. This has the hallmarks and potential for where what is really being tested is computer literacy and access to the best and, incidentally, most expensive technology instead of lawyering skills.

These skills will be tested through eight Foundational Concepts and Principles.¹⁰³ Regarding the depth of knowledge, in the new format of the exam, there are supposed to be two levels.¹⁰⁴ They will be either general familiarity or detailed knowledge.¹⁰⁵ What that distinction means and how students will both prepare and be tested on them, is another element of the NextGen that is also as of yet still unclear. An initial release of sample questions went out in the middle of July 2023.¹⁰⁶ However, they were hardly representative of the changes and caliber that were promised. With a sustained and overly heavy focus on multiple-choice, and even reintegration of previously released MBE questions, the old concerns about the impact of standardized exams focused on in this format will resurface.¹⁰⁷ Overall, there is supposed to be a reduction in topic coverage, as well as a decrease in the scope of topics that remain.¹⁰⁸ Some people fear this will mean a reduction of standards as well.¹⁰⁹

The NCBE is also undoubtedly looking at timing.¹¹⁰ It seeks to understand exactly how much time is needed for each question type. The initial pilot testing and the subsequent field testing were designed to be completed within two hours.

¹⁰³ *Id.* They include the same topics currently found on the MBE, with the addition of Business Associations. These are Civil Procedure, Contract law, Evidence, Torts, Constitutional law, Criminal Law and Constitutional Protections Impacting Criminal Proceedings, and Real Property.

¹⁰⁴ *Final Report of the Testing Task Force*, NAT'L CONF. OF BAR EXAM'RS (2021) [hereinafter *Final Report*], <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> [<https://perma.cc/BYS8-8EZP>].

¹⁰⁵ *See id.*

¹⁰⁶ *NCBE Publishes First Sample Questions for NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (2023) [hereinafter *Sample Questions*], <https://nextgenbarexam.ncbex.org/ncbe-publishes-first-sample-questions-for-nextgen-bar-exam/> [<https://perma.cc/QZX5-LRZV>].

¹⁰⁷ *Id.* They included in the questions releases examples of several previously released MBE questions. It appears based on the released information that at least, approximately, fifty percent of the NextGen Bar Exam will be in some kind of multiple-choice format; see Press Release, AASE Raises Serious Concerns About NextGen Prototype Questions (Sept. 6, 2023).

¹⁰⁸ *Final Report*, *supra* note 104.

¹⁰⁹ Josh Blackman, *Justice Mitchell (Alabama): "The New Bar Exam Puts DEI Over Competence."* REASON (May 5, 2023, 12:55 AM), <https://reason.com/volokh/2023/05/20/justice-mitchell-alabama-the-new-bar-exam-puts-dei-over-competence/> [<https://perma.cc/427D-93S9>]. Of course, this is another instance of the public and members of the legal community equating the current exam and its purpose as one of testing and ensuring competency. Nothing could be further from the truth. Moreover, this judge is (respectfully) absolutely wrong about the focus on DEI.

¹¹⁰ Wellington, *supra* note 99.

However, access does not close until four hours have passed to consider what those with accommodations and other test takers may need.¹¹¹ Presumably, having this more open approach in testing allows for deviation and ultimately a better understanding of the time necessary for each task completion element. The NCBE has announced that the new format will consist of nine hours of testing in a day and a half rather than the current UBE twelve hours over two days.¹¹² This reduction in time can allow for jurisdictions with local components to try and fit them into the missing three-hour timeframe. Simultaneously, the NCBE declared all components of the old exam will sunset after the July 2027 exam.¹¹³ On brand and consistent with announcing unilateral decisions, this date was changed, and another topic was added not even two full months after that declaration.¹¹⁴

A great deal is still undecided, or at least not publicly known yet about the questions and logistics for NextGen. Only recently has there been a glimpse into information such as how many of each question format will appear and how much time will be allotted.¹¹⁵ The NCBE states that the question focuses will be less on the predictive measure of outcome to a question prompt, and keener on how the examinee, in the shoes of the lawyer, would work on a resolution.¹¹⁶ This, like much already discussed, does not provide a clear explanation of what that means or how it would be replicated, tested, graded, or scaled. Based on the released questions

¹¹¹ Marilyn Wellington, *Pilot Testing, Field Testing, and Prototype Testing: A Look at the Interconnected Research Phases for the New Bar Exam*, THE BAR EXAM'R (Winter 2022-2023), <https://thebarexaminer.ncbex.org/article/winter-2022-2023/the-next-generation-winter-22/> [<https://perma.cc/P5ZU-AYQD>].

¹¹² *NCBE Announces Next-Gen Exam Structure, Sunset of Current Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (Aug. 28, 2023), <https://www.ncbex.org/news-resources/ncbe-announces-nextgen-exam-structure-sunset-current-bar-exam> [<https://perma.cc/P22C-HJ5G>].

¹¹³ *Id.* This means in February 2028; no jurisdiction will have access to utilize any current element making up the UBE.

Jurisdictions may elect to adopt the NextGen bar exam starting in July 2026. The July 2027 bar exam will be the last for which the current NCBE-developed bar exam components will be administered. These components are the Multistate Bar Examination (MBE), Multistate Essay Examination (MEE), and Multistate Performance Test (MPT).

¹¹⁴ *NCBE Announces Update to NextGen Exam Content, Extends Availability of the Current Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (2022), <https://nextgenbarexam.ncbex.org/update-nextgen-exam-content-extends-availability-current-bar-exam/> [<https://perma.cc/JT3L-2CK2>]; see also *Some Subjects to be Removed from MEE in 2026*, NAT'L CONF. OF BAR EXAM'RS (Jul. 27, 2023), <https://ncbex.org/news-resources/some-subjects-be-removed-mee-2026> [<https://perma.cc/Z7YK-67JX>]. Now the UBE exam will be available through the February 2028 examination. Presumptively its components will also be available to utilize, even if the jurisdictions are not full UBE states. Additionally, family law is not being added to the NextGen exam, despite a statement saying otherwise previously.

¹¹⁵ See generally *NCBE Announces Next-Gen Exam Structure*, *supra* note 112.

The NextGen bar exam will be divided into three sessions of three hours each, with each session containing two integrated question sets, one performance task, and approximately 40 multiple-choice questions. These three-hour sessions will be administered over one and a half days, with six hours of testing time on day one and three hours on day two.

¹¹⁶ See generally *Final Report*, *supra* note 104.

and the pilot testing, it seems that there will be short answer prompted questions, some variation or evolution of the current performance tests.¹¹⁷ Multiple choice prompts could include more than four options and the examinee will likely have to choose multiple answers to achieve a full score allocation.¹¹⁸

E. Additional Concerns

We have already seen examples of the significant problems with transferability, portability, and score setting for competence with the UBE.¹¹⁹ Some of these problems directly impact the requirements for reporting to the ABA related to Standard 316.¹²⁰ These problems are additionally exacerbated by differing standards of “competence” on the same exam, nationally.¹²¹ Further complicating this is that there will be a period where both the NextGen and the current version of the UBE will be offered concurrently.¹²² This has serious implications for schools whose students traditionally take the Bar Exam in one of the jurisdictions that are early adopters.

Regardless of the ultimate percentage used, a reworking of multiple-choice questions will be needed for essay scaling purposes, as well as to ensure general reliability.¹²³ They have not yet made it public knowledge how that will be completed likely due to the newer multi-answer format. Essays are currently utilized only on a singular basis, presumably since they are released and available

¹¹⁷ *Sample Questions, supra* note 106.

¹¹⁸ *See, e.g., Sample NextGen Bar Exam Multiple-Choice Questions*, NAT'L CONF. OF BAR EXAM'RS <https://nextgenbarexam.ncbex.org/multiple-choice-questions/> [<https://perma.cc/UHA8-47R2>] (last visited Feb. 19, 2024).

¹¹⁹ *See Darrow-Kleinhaus, supra* note 93, at 684–685. Among the problems associated with a range of acceptable ‘cut scores’ is that there seems to be an arbitrary appointment of value and meaning to the percentage-based performance. Many of the cut scores assigned to jurisdiction-specific exams have been adjusted on multiple occasions already. There is no reason to think that jurisdictions will somehow pick the correct correlating score on the NextGen, the first time out.

¹²⁰ Gutowski, *Stop the Count, supra* note 5, at 593.

¹²¹ *Id.* at 604.

¹²² *NCBE Announces Update to NextGen Exam Content, Extends Availability of Current Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (Oct. 25, 2023), <https://www.ncbex.org/news-resources/update-nextgen-exam-content-extends-availability#:~:text=The%20current%20exam%20and%20the,%E2%80%94available%20through%20February%202028> [<https://perma.cc/43KG-VDVC>] (“The current exam and the NextGen exam will be offered concurrently for two full years, making the current UBE and its components—the Multistate Bar Exam (MBE), Multistate Essay Exam (MEE), and Multistate Performance Test (MPT)—available through February 2028.”).

¹²³ *See generally* J.A. KROSNICK, *Improving Question Design to Maximize Reliability and Validity*, in THE PALGRAVE HANDBOOK OF SURV. RSCH. 95, 100 (David L. Vannette & Jon A. Krosnick eds., 2018); *see also* Ronald K. Hambleton et al., *A Comparison of the Reliability and Validity of Two Methods for Assessing Partial Knowledge on a Multiple-Choice Test*, 7 J. OF EDUC. MEASUREMENT 75, 75 (1970).

after each exam.¹²⁴ Therefore, to ensure the accuracy of scores and that the test is of the same or substantially similar difficulty in each administration, it needs to be scaled to some static measurement, like the multiple choice.¹²⁵ There is a hope that the item sets are similar in creation and utilization as a mini-MPT would be and, as such, should be able to be somewhat reusable. However, this has the problem of conceding that changes are not as meaningful as promised. The adjustment would need to come against these item sets instead of the current MBE, for scaling and reliability conformity.

In terms of who will adopt this new format and unproven test, there is currently a high-stakes game of chicken happening.¹²⁶ The NCBE is actively advocating and lobbying for jurisdictions and decision-makers across the country to come on board. This is being done despite the continuous pushback and concerns of the Academic Success community which is being unheard in their warnings.¹²⁷ There is a lack of uniformity on when jurisdictions that have committed to adopting NextGen will first administer the test.¹²⁸ The first fourteen jurisdictions to publicly confirm their

¹²⁴ *Preparing for the MEE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mee/preparing-mee> [<https://perma.cc/KC5E-GSB4>] (last visited Feb. 10, 2024) (One can access free MEE questions and analyses from older administrations on NCBE's website. Similarly, more recent ones are available for a fee through the NCBE Study Aids.).

¹²⁵ *See The Testing Column: Scaling, Revisited*, THE BAR EXAM'R (2020), <https://thebarexaminer.ncbex.org/article/fall-2020/the-testing-column-3/> [<https://perma.cc/997M-8ETC>]. This is only a partially true statement, as at a smaller sample it is possible to not scale essays to a multiple-choice reference. Nevada has such a process, but it requires substantially more interaction from the graders, having multiple reviews, an initial calibration, after reviewing for scores close to the cut-off, a holistic review, as well as deferring to the writer of the prompt in instances of conflict. Nevada has barely 400 examinees during a large administration, this is not scalable to 50,000+ examinees nationally.

¹²⁶ *See generally* Anatol Rapoport & Albert M. Chammah, *The Game of Chicken*, THE AMERICAN BEHAV. SCIENTIST 10, 10 (1966); *see also* MICHAEL MASCHLER, EILON SOLAN, SHMUEL ZAMIR, *GAME THEORY* (Mike Borns ed., 2nd ed. 2020).

¹²⁷ AASE, *supra* note 107. The July 11, 2023, and August 18, 2023, releases create additional uncertainty regarding the exam. In the July release, the multiple-choice section of NextGen Bar was described as follows: “[i]nitially, many of these questions will closely resemble Multistate Bar Examination (MBE) questions; this will ensure stability between scores for the current and NextGen bar exams. In future administrations, the variety of multiple-choice question types will increase.” The statement raises a significant concern. Graduates will be preparing for an exam that is quite literally a moving target. The NCBE provided no information about how the “variety of multiple-choice question types will increase.” They only provided fourteen questions to represent countless rules and skills. Graduates and law schools do not know what that variety looks like, how significant is the increase in variety, and how it will impact studying. In the August press release, the exam structure once again changed from previous announcements clearly illustrating the moving target. For a high-stakes licensure exam, a moving target with so few examples released in advance is inappropriate. Graduates have the right to know the exact make-up and nature of the exam they will take and have access to ample practice questions produced by the licensing authority.

¹²⁸ *NextGen (July 2026)*, NAT'L CONF. OF BAR EXAM'RS (2024),

adoption of the NextGen are Arizona, Connecticut, Guam, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, Oregon, Utah, Vermont, and Wyoming.¹²⁹ Localities, led by schools and education professionals, are right to be wary of being the first group to adopt this exam. Predicting what will happen and how to interpret what is coming is a fool's errand.¹³⁰

F. Thoughts

The attempt to execute a wholesale change to the Bar Exam, with a new focus on lawyering skills and similar alternative metric measuring items, runs into problems, not least of which is that practically no stakeholders know what any of this means. The NCBE uses a lot of fancy terms and colorful graphs in their public-facing reports, but boots on the ground, what it is, why it is better, and how it will work are all yet to be determined. A unified, coherent, and, most of all, simple explanation of the most basic elements of the new exam have yet to be relayed to the academy and the public in a consistent, meaningful manner.

It is necessary to allow law schools to prepare the already admitted class of 2026 for the new format. Ultimately, the only way many elements of NextGen will be found to be effective or not is after exam day in 2026. This will be when real law school graduates place their licensure future at risk. Schools have to trust the outcome of their students on this exam and, by extension, their accreditation, to the decisions of unelected, unaccountable, private entity corporation psychometricians.

Local jurisdictions need to have alternatives and break free from the monolithic NCBE.¹³¹ Certainly, writing and creating a licensure exam is difficult and costly; this is undoubtedly one of the main reasons so many jurisdictions have farmed this task out.¹³² However, the duty they owe is to their examinees, applicants, and jurisdictional public, not to ease. While it may not be feasible to create unique exams for each jurisdiction nationally, and maybe doing so would even harm the transferability and movement of attorneys, it must at least be considered. It would be a response to what appears to be a unilateral decision by an organization that seems to have serious conflicts of interest. The NCBE, in its attempt to either revolutionize or tighten its already strong grip on the lucrative market of bar exams, is not giving current UBE jurisdictions much choice.

All need not be doom and gloom. There is potential here for a rethinking of what the licensing exam for new attorneys can look like. Focusing on skills and

<https://www.ncbex.org/exams/nextgen> [<https://perma.cc/JD7L-MD2Z>]. These include July 2026, July 2027, and July 2028.

¹²⁹ *Id.*; see also First Jurisdictions Announce Plans to Adopt NextGen Bar Exam, NAT'L CONF. OF BAR EXAM'RS (2022), <https://nextgenbarexam.ncbex.org/first-jurisdictions-announce-plans/> [<https://perma.cc/SF8E-UGTE>].

¹³⁰ Yet here I find myself.

¹³¹ See generally Marsha Griggs, *Outsourcing Self-Regulation*, 80 WASH. & LEE L. REV. (forthcoming 2024).

¹³² *Id.*

practical approaches of what newly minted attorneys will need to engage in is a significant step in the right direction. If removing the Bar Exam as the method of creating new lawyers is not going to happen in a widespread fashion shortly, these changes are the next best thing. We must ensure the road is being built with more than just good intentions.¹³³ Something that must be stated explicitly is that adhering to the strict timeline in the creation and execution of this new format is incredibly reckless and problematic. Failure to have the flexibility to address concerns means that we are making holes in the proverbial boat without a bucket in sight, all while promising to reach our faraway destination intact and dry. That is a recipe for serious disaster.

Theoretically, changes in the format of the exam can increase access and fairness, as well as provide a real-world impact and reflection of skills. Another angle that needs further exploration is how law schools will support this approach with professors who will take charge of preparing students. The thing is, attorneys who wish to become law professors already need to be hyper-credentialed, with nearly half holding PhDs and almost three-quarters having completed teaching fellowships.¹³⁴ This all while overwhelmingly representing the same small list of elite and not particularly diverse law schools who are not having trouble on the Bar Exam in its current forms.¹³⁵ We do not need to guess at the makeup of the class in relation to the diversity that most professors come from.¹³⁶ Yet, bringing skills into the class changes who will be leading¹³⁷ and the focus will go more to clinicians with actual useful skills. This can maybe help change the second-class nature of

¹³³ Otherwise, we all know where it will lead us.

¹³⁴ Karen Sloan, *Law Professor Applications Plummet as Law Schools Raise Their Sights*, REUTERS (Aug. 22, 2022, 3:09 PM), <https://www.reuters.com/legal/legalindustry/law-professor-applications-plummet-law-schools-raise-their-sights-2022-08-22/> [https://perma.cc/MJ4N-2RTQ].

¹³⁵ See *Where law professors went to law school*, NAT'L JURIST (Aug. 11, 2020, 7:11 AM), [https://nationaljurist.com/national-jurist-magazine/where-law-professors-went-law-school/#:~:text=The%20top%20six%20law%20schools,%2C%20and%20Iowa%20\(5\)](https://nationaljurist.com/national-jurist-magazine/where-law-professors-went-law-school/#:~:text=The%20top%20six%20law%20schools,%2C%20and%20Iowa%20(5)) [https://perma.cc/W6WM-7EC7]; see also Karen Sloan, *Harvard, NYU Law are tops for first-time bar exam pass rates*, REUTERS (Apr. 27, 2022, 2:07 PM), <https://www.reuters.com/legal/legalindustry/harvard-nyu-law-are-tops-first-time-bar-exam-pass-rates-2022-04-27/> [https://perma.cc/A5S7-X9NQ]. Pass rates for Harvard, Yale, Princeton and similarly situated schools which represent breeding grounds for new professors have historically incredibly high pass rates on the bar exam.

¹³⁶ See Vernellia Randall, *Overall Rankings: 2021 The Whitest Law School Rankings*, RACE, RACISM AND THE LAW (Mar. 8, 2021), <https://racism.org/2021-law-school-rankings?showall=1> [https://perma.cc/9WV3-8XEL]. These top-ranked schools are historically and predominantly white and male.

¹³⁷ See generally Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 564, 576 (2000); see also O. J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 MINN. L. REV. 2663, 2694 (2023). Skills and Academic Success professors are more representative of women and people of color than in traditional doctrinal professor roles.

secondary-topic professors.¹³⁸

III. CRITIQUE OF ACCREDITATION PROCESS & ABA'S ROLE

A primary consideration of NextGen is its potential impact on the ABA Standard 316 rate.¹³⁹ With no real understanding of where cut-offs should be set, a miscalculation on the front end may very reasonably create a situation where schools are substantially missing their accreditation-required mark. This can be solved by the ABA adjusting Standard 316, before the potential shift to NextGen. This could allow for the requirement to be met so long as a graduate has either passed the Bar Exam, or is actively engaged in good standing and making progress (whatever that definition is) toward a supervised-practice alternative path within the same time window allowed. Another approach would be to reimplement the pre-2019 version of the standard and take into account the impact of schools and jurisdictional mission and access focus.¹⁴⁰

Standard 316 creates an arms race with the scores that bastardizes and cannibalizes the third year of legal education to transform it into an extended bar exam preparatory course on steroids.¹⁴¹ Many of us in legal education are guilty of it. There are standards that must be met, but the truth is that this time is more important and could be utilized better to instill real experience and skill in soon-to-be attorneys. Clinical hours, hands-on experience, real client interactions, and God forbid accounting or business for lawyers (so they know how to run a firm), are all better uses of their time than preparing for the Bar Exam.¹⁴²

The ABA needs to get out of the business of thinking the Bar Exam results have any bearing on a law school's ability to provide meaningful, sufficient, and educationally sound experiences,¹⁴³ particularly since they are linked to increasingly

¹³⁸ See generally Durako *supra* note 137, at 565; Salinas *supra* note 137, at 2693.

¹³⁹ In 2019 the current, revised definition of Standard 316 (at least seventy-five percent of a law school's alumni who take a bar exam must pass the bar within two years of graduation, as opposed to the previous five-year period) was implemented, against dissent from many schools and the membership of the ABA at large. See Guidance Memorandum from the Managing Director, ABA Section of Legal Educ. & Admissions to the Bar on Standard 316 and Reporting of Bar Exam Outcomes (June 2019) (on file with author). It "replaced previous Standard 316 that permitted measuring compliance based on as few as seventy percent of a law school's graduates and included multiple methods for complying, including multiple measures for first-time and ultimate pass rates based on different cohorts of students and different time frames."

¹⁴⁰ See Boothe, *supra* note 7, at 185.

¹⁴¹ See generally Emmeline Paulette Reeves, *Teaching to the Test: The Incorporation of Elements of Bar Exam Preparation in Legal Education*, 64 J. OF L. EDUC. 645, 645 (2015); see also Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. OF L. EDUC. 224, 227 (2007).

¹⁴² Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 MINN. L. REV. 2729, 2737 (2023).

¹⁴³ See generally JOAN W. HOWARTH, *SHAPING THE BAR THE FUTURE OF ATTORNEY LICENSING* (1st ed. 2022).

shifting, untested, unproven, and historically discriminatory methods.¹⁴⁴ The stark truth is that the “ABA’s accreditation standards did *not* originate as a means of ensuring the quality of education, but rather as a means of combating increasing competition among lawyers and among law schools.”¹⁴⁵

The ABA should focus on the schools and the three years a student is there, not the time after. What happens post-graduation needs to be left to the jurisdictions, who are the licensing bodies anyway.¹⁴⁶ The local jurisdictions, not the ABA, get to decide, what is sufficient on an individual basis. The local jurisdictions are not admitting or denying entire schools, they are only looking at each applicant’s performance. This goes back to the fact that the performance of graduates on any standardized exam post-school is only a reflection of that individual student’s ability, access to support, and life circumstances at the time. It is not somehow a mirror of the school they graduated from. If there is a fear that removing Standard 316 would cause a decline in education levels from the school side, there are still dozens of other standards and regulations to maintain.¹⁴⁷ Surely this recently-adjusted standard, full of historic battles, is not the only thing protecting students in law schools from what would otherwise be a failing legal education.¹⁴⁸

Furthermore, the focus of the ABA in Standard 316 being placed at seventy-five percent pass rates as being some magical number, seems arbitrary. Schools that get fifty, sixty, and seventy percent of their students to pass the Bar Exam are just as valuable and necessary for the legal community and the public. The need to make schools publish their information is more understandable, but that is something they already do through public disclosure Standard 509.¹⁴⁹ Along the same line of data collection and distribution, the ABA should be the entity collecting bar passage numbers, not the schools. The ABA should also publish all the law school results in full.¹⁵⁰ Let the public make up their mind about what law school they want to attend and whether it is worth the time and money.

¹⁴⁴ Gutowski, *Stop the Count*, *supra* note 5, at 593.

¹⁴⁵ Herb D. Vest, *Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494, 497 (2000).

¹⁴⁶ See generally Karis Stephen et al., *Regulating the Legal Profession*, THE REGUL. REV. (Feb 5, 2022), <https://www.theregreview.org/2022/02/05/saturday-seminar-regulating-legal-profession/> [<https://perma.cc/HDA5-UHVK>].

¹⁴⁷ See *Standards*, *supra* note 6.

¹⁴⁸ See Karen Sloan & Celia Ampel, *ABA Rejects Stricter Bar-Pass Rule for Law Schools*, BLOOMBERG L. (Feb. 6, 2017), <https://www.law.com/nationallawjournal/almID/1202778545389/> [<https://perma.cc/CYY3-2VMV>]; see also William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates’ Competence: How a Standard Based on Students’ Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. C.R. & SOC. JUST. 3, 7 (2017).

¹⁴⁹ *509 Required Disclosures*, A.B.A., <https://www.abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/45R3-X5P>].

¹⁵⁰ Gutowski, *Stop the Count*, *supra* note 5, at 589 (2023).

A. Accreditation & Licensure in America

The accreditation status of institutions in America is generally presented to the world in a binary format of either accredited or non-accredited.¹⁵¹ Accreditation has historical roots in being used as a conduit for information-sharing related to the quality and rigor of an institution or program of higher education.¹⁵² Accreditation has devolved into a method to determine access to funding, both private and federal-based, as well as student loan eligibility.¹⁵³ It has turned into a gatekeeping checklist item to be obtained or else schools risk not being able to attract students with the funding that the students as well as the institution need.¹⁵⁴

A good way to understand the landscape of accreditation in the United States is to look at the last century and its evolution during several distinct periods in the twentieth century. Before 1936, the system of accreditation was focused on regional, voluntary associations to create standards that were internally facing and to compete for enrollments.¹⁵⁵ Students who enrolled at the time were spending their own money and had little way to differentiate schools outside of their limited and regional familiarity.¹⁵⁶ This is where accreditation provided a valuable service for comparison.

Between 1936 and 1952, there was a refocusing from simply standardizing educational institutions via accreditation to seeing the need to provide support and help these same institutions improve.¹⁵⁷ Perhaps nothing was more impactful to the changes in accreditation at this stage than the Servicemen's Readjustment Act of 1944, or the G.I. Bill.¹⁵⁸ This Bill provided incentive and financial support for veterans to go to school with the only limitation being that the school had secured

¹⁵¹ ANDREW GILLEN, DANIEL BENNETT & RICHARD VEDDER, *THE INMATES RUNNING THE ASYLUM? AN ANALYSIS OF HIGHER EDUCATION 1* (2010).

¹⁵² *Id.*

¹⁵³ Kevin Caret, *Asleep at the Seal: Just How Bad Does a College Have to Be to Lose Accreditation?* WASH. MONTHLY, (Mar. 1, 2010), <https://washingtonmonthly.com/2010/03/01/asleep-at-the-seal/> [<https://perma.cc/MMG9-YR5M>] (“[A]ccreditation has come to mean evaluating yourself against standards of your own choosing in order to indirectly receive large amounts of free government money.”).

¹⁵⁴ See generally Andy Portinga, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 670 (1996); see also Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267, 271–2 (1995) (In a similar way, the Bar Exam and particularly its examiners are acting as gatekeepers, with very little (if any) oversight); see e.g., Ashley M. London, *Who Watches the Watchmen? Using the Law Governing Lawyers to Identify the Applicant Duty Gap and Hold Bar Examiner Gatekeepers Accountable*, MICH. ST. L. REV. (forthcoming 2023).

¹⁵⁵ See Joshua C. Hall, *Higher Education Accreditation: Market Regulation or Government Regulation Revisited* 11 (W. Va. U. Dep’t of Econ. Working Paper No. 15-42, 2015).

¹⁵⁶ *Id.* at 13–14.

¹⁵⁷ GILLEN, BENNETT & VEDDER, *supra* note 151, at 4.

¹⁵⁸ Servicemen’s Readjustment Act of 1944 (G.I. Bill), Pub L. No. 78–46, 58 Stat. 284 (codified as amended as 28 U.S.C.A §§ 3001–3035).

state educational agency approval.¹⁵⁹ This led to significant instances of abuse, diploma mills, a general lack of quality in education, and the waste of federal money.¹⁶⁰

From 1952 to 1985, in response to the issues that the G.I. Bill brought about, Congress reapproved the next version of the G.I. Bill to extend the benefits to veterans of the Korean War and took into consideration what kind of meaningful limitations they could impose.¹⁶¹ Part of the Bill created the requirement for the Commissioner of Education (today called the Secretary of Education) to “publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution”¹⁶²

The 1952 Bill was the result of a compromise where private accreditors would be able to determine whether standards were sufficiently met to allow any particular institution to be eligible for federal funding and aid.¹⁶³ As a result, since 1952, we have a history of approved accrediting agencies acting in a government-appointed and approved capacity to monitor and decide on federal fund availability. This created a dynamic where many substandard institutions were gaming the system to gain accreditation and by extension, funding, yet were not maintaining the rigor and value that Congress originally envisioned.¹⁶⁴ Emboldened by their newfound authority and shifting focus on support, accrediting agencies found themselves providing feedback to “improve” more often than holding institutions accountable.¹⁶⁵

Post-1985 is when a shift to increased accountability and assessment in higher educational institutional accreditation—prompted in response to the concerns of educational quality standards not being met as well as growing student loan default—rose out of the ashes.¹⁶⁶ The Reauthorization of the Higher Education Act

¹⁵⁹ *Id.*

¹⁶⁰ Harold Orlans, *Accreditation in American Higher Education: The Issue of Diversity*, 30 MINERVA, 513, 513 (1992); see also Joshua C. Hall, *Higher Education Accreditation: Market Regulation or Government Regulation Revisited* (W. Va. U. Dep’t of Econ. Working Paper No. 15-42 2015).

¹⁶¹ GI Bill of 1952, *supra* note 25.

¹⁶² *Id.*; see also Higher Education Facilities Act of 1963, 20 U.S.C.A. § 751(f)(5) (omitted).

¹⁶³ Barbara Brittingham, *Accreditation in the United States: How Did We Get to Where We Are?* 145 NEW DIRECTIONS FOR HIGHER EDUC. 7, 11 (2009).

¹⁶⁴ GILLEN, BENNETT & VEDDER, *supra* note 151, at 5.

¹⁶⁵ See Anne D. Neal, *Dis-Accreditation*, NAT’L ASS’N OF SCHOLARS, 431, 432 (2008) (Reviews for accreditations are largely performed by representatives of the education industry, including members of other institutions who are also up for accreditation renewal at some stage in the future. This means that “teams cannot reasonably be expected to be independent arbiters of quality . . . Knowing that their own institutions will undergo accreditation review, there is a tacit interest in keeping standards low.”); see also Peter Ewell, *U.S. Accreditation and the Future of Quality Assurances*, (2008) (“The experience of working in the academic, in itself, is deemed sufficient preparation for review team members to be able to ‘recognize quality.’”).

¹⁶⁶ Terese Rainwater, *The Rise and Fall of SPRE: A Look at Failed Efforts to Regulate Postsecondary Education in the 1990s*, 2 AM. ACAD. 107, 107 (Mar. 2006).

of 1992 provided additional limitations on the utilization of funding allocation at the institution level while also expanding the role and requirement for accreditation agencies to play a larger role in learning assessment outcomes.¹⁶⁷ Today, we can view this as the status quo, where the federal government provides authorization for accrediting agencies to act on their behalf to ensure the quality of education while simultaneously acting as a teller and guard for funding.¹⁶⁸ This created a power shift where accreditors are now able to squeeze and leverage institutions to adjust their academic freedom as well as influence admissions, retention, and overall autonomy.¹⁶⁹

B. The Role of Accrediting Bodies

Consumer protection as an argument for the need for accreditation has been around for a long time.¹⁷⁰ Arguments in favor of the need for accreditation tend to center not only around the idea that it is important to provide public information, but also as a way of ensuring a transparent process so that there can be trust in the accreditation body and process itself.¹⁷¹ However, often the results of the procedures, advantages and disadvantages, and strengths and weaknesses of an accredited institution are kept confidential and secret.¹⁷² The reality is there is a lack of internal ranking or additional information by the accreditation agencies, such

¹⁶⁷ Higher Education Act of 1992, Pub. L. No. 102-325, 106 Stat. 448.

¹⁶⁸ Barbara Brittingham, *An Uneasy Partnership: Accreditation and the Federal Government*, 40 THE MAG. OF HIGHER LEARNING 32, 37 (2008) (“[A]ccreditation and the federal government are joined through the Secretary’s process of recognizing accreditors to serve as **gatekeepers** for federal financial aid.”) (Emphasis added).

¹⁶⁹ A.B.A. STANDARD 212-1, STANDARD FOR APPROVAL OF LAW SCHOOL (2013–2014) (The ABA in its Interpretation of Standard 212-1 states “The **requirement of a constitutional provision or statute** that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions **is not a justification for a school’s non-compliance** with Standard 212.”); Thom Lambert, *The ABA, the AALS, and the Rule of Law*, TRUTH ON THE MARKET (Feb. 15, 2006), <https://truthonthemarket.com/2006/02/15/the-aba-the-aals-and-the-rule-of-law/> [<https://perma.cc/8QUP-X38A>].

¹⁷⁰ See Vickie Schray, *Assuring Quality in Higher Education: Recommendations for Improving Accreditation* (Sec. of Educ. Comm’n of Educ. Comm’n on the Future of Higher Education No. 14 2006) (“[T]he overriding public interest in accreditation over the last 50 years has been defined in terms of protecting consumers as well as federal and state student grant and loan programs from flagrant fraud and abuse.”).

¹⁷¹ Doug Lederman, *More Meaningful Accreditation*, INSIDE HIGHER ED. (Apr. 22, 2009) (The problem inherent in accreditation is “that higher education accreditation seeks to do two totally different things: ensure a minimum level of quality. . . and encourage individual colleges to improve themselves.”).

¹⁷² Milton Greenberg, *America’s Colleges Should Rank Themselves*, THE CHRON. OF HIGHER EDUC. (June 16, 2000), <https://www.chronicle.com/article/americas-colleges-should-rank-themselves/> [<https://perma.cc/Q5XY-J2QM>].

as the ABA.¹⁷³ This means that the public is forced to utilize third-party rankings like U.S. News & World Report, which simultaneously are riddled with problems.¹⁷⁴

The ABA explicitly states that it does not rank or believe in ranking for law schools.¹⁷⁵ If this premise of non-ranking and equality is to be accepted at face value, then it follows that are claiming a view that graduating from any ABA-accredited law school as being the same for the student and the public. If it truly did not believe in a ranking of law schools, why then, if there is no difference between the education at all ABA-approved schools, is there a need for another distinguishing barrier to practice, mainly the Bar Exam?¹⁷⁶

A better potential approach is to provide a comprehensive, publicly facing report of each law school and how they are performing on required standards. However, there should be a score allocated to each as well as an overall total compliance level.¹⁷⁷ There can be a simplified cut-off overall point, but knowing where each school sits relative to that minimum accreditation point, and which areas are deficient, is a better way.¹⁷⁸

The notion that accreditors are acting in a fashion that is meaningful and impactful is fallacious.¹⁷⁹ One of the main reasons schools are sanctioned or lose accreditation is more related to financial reasons than anything else.¹⁸⁰ This is not to say that the government would do a better job or that they should take over full control and engage in the accrediting action themselves.¹⁸¹ “The failure of

¹⁷³ A.B.A., *Statement on Law School Rankings*, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/?login [<https://perma.cc/DR3K-LMB2>] (last visited Feb. 19, 2024).

[N]either the American Bar Association nor its Section of Legal Education and Admissions to the Bar endorses, cooperates with, or provides data to any law school ranking system. No ranking or rating system of law schools is attempted or advocated by the ABA. Rather, the ABA provides only a statement of the accreditation status of a school. Fully approved schools have demonstrated that they are operating in compliance with each of the ABA Standards for Approval of Law Schools. Their compliance is regularly monitored and comprehensive reviews are conducted every tenth year.

¹⁷⁴ See Rory Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 ST. MARY’S L.J. 991 (2022); see also Chris Guthrie, *Towards A Mission-Based Ranking*, 60 JURIMETRICS J. 75 (2019).

¹⁷⁵ *Statement on Law School Rankings*, *supra* note 173.

¹⁷⁶ Scott Jaschik, *Do Law Schools Need a Second Ranking From ‘U.S. News’?*, INSIDE HIGHER EDUC. (Feb. 18, 2019), <https://www.insidehighered.com/admissions/article/2019/02/18/us-news-plans-new-ranking-law-schools> [<https://perma.cc/U3WY-EN22>].

¹⁷⁷ GILLEN, BENNETT & VEDDER, *supra* note 151, at 2.

¹⁷⁸ *Id.*

¹⁷⁹ Richard K. Vedder, THIRTY-SIX STEPS: THE PATH TO REFORMING AMERICAN EDUCATION 33 (2014) (“Accreditation provides little useful information because both high and low-quality schools receive the same accreditation . . . they restrict entry into the higher education marketplace . . . and they are riddled with conflicts of interest.”).

¹⁸⁰ AM. COUNCIL OF TRUSTEES AND ALUMNI, WHY ACCREDITATION DOESN’T WORK AND WHAT POLICYMAKERS CAN DO ABOUT IT 5 (2007).

¹⁸¹ Rebecca Frawley, *Should Accreditation Be Conducted by the Federal Government?*, J. OF EDUC. POL’Y, Spring 2014.

accreditation to perform the certification function is increasingly apparent. In fact, the more experience one has with higher education, the less likely one is to believe that accreditation ensures meaningful educational standards.”¹⁸²

C. *Similar Professional Accreditation Bodies*

The legal profession is not the only profession that requires post-secondary education.¹⁸³ Nor is it the only profession that has a post-educational licensure exam before being able to engage in varying levels of work in that profession.¹⁸⁴ However, where legal licensure deviates is in the impact that aggregated individualized performance on the licensure test has on the accreditation of the school from which the examinees graduated.¹⁸⁵ Taking a closer look at medical, engineering, psychological, and accounting licensure and accreditation will provide a clearer picture and alternatives to the methods that are used for law.

1. Medical: LMCE, COCA

To become a doctor in the United States, students and graduates attending Liaison Committee on Medical Education (LCME)-accredited schools meet the minimum requirements to sit for the United States Medical Licensing Examination (USMLE).¹⁸⁶ The accreditation body of the LCME provides the procedure and process for more than 140 medical programs that award Doctor of Medicine (MD) degrees.¹⁸⁷ Similarly, the American Osteopathic Association’s Commission on Osteopathic College Accreditation (COCA) oversees the accreditation process for osteopathic medicine and requires students to pass the first two levels of the Comprehensive Osteopathic Medical Licensing Examination (COMLEX) as a prerequisite to graduation.¹⁸⁸ COCA produces, reviews, and engages with annual and progress reports as well as complaints.¹⁸⁹ There are similarities and differences

¹⁸² GILLEN, BENNETT & VEDDER, *supra* note 151, at 12.

¹⁸³ Doctors, Engineers, Psychologists, and Accountants are comparable examples of professions that require postsecondary education.

¹⁸⁴ All of these professions have licensure exams for graduates to pass before being able to practice, as professionals. These include the Step exams, the Boards, the NextGen CPA exam, etc.

¹⁸⁵ This is a reference to ABA Standard 316.

¹⁸⁶ Damon H. Sakai et al., *Liaison Committee on Medical Education Accreditation: Part I: The Accreditation Process*, 74 HAWAII’ J. MED. AND PUB. HEALTH 311 (2015); see also Donald G. Kassebaum et al., *The Influence of Accreditation on Educational Change in U.S. Medical Schools*, 72 ACAD. MED. 1128 (1997).

¹⁸⁷ Barbara Barzansky et al., *Continuous Quality Improvement in an Accreditation System for Undergraduate Medical Education: Benefits and Challenges*, 37 MED. TCHR. 1032, 1033 (2015).

¹⁸⁸ Harris Ahmed et al., *An Update on Medical School Accreditation in the United States: Implications for the Single Graduate Medical Education (GME) Era*, CUREUS, Feb. 2023, at 1, 3; see also *What is the COMLEX-USA?*, AM. MED. ASS’N (July 18, 2023), <https://www.ama-assn.org/medical-students/usmle-step-1-2/what-comlex-usa> [<https://perma.cc/67LZ-EEDR>].

¹⁸⁹ Andrea Williams, & Konrad C. Miskowicz-Retz, *Colleges of Osteopathic Medicine: The Process of Continuous Evaluation*, 110 J. AM. OSTEOPATHIC ASS’N 144, 144 (2010).

in the makeup and activities of the LCME and COCA. Perhaps the most glaring one is that the LCME does not require students to pass any level of the USMLE or the COMLEX as a requirement before graduation.¹⁹⁰

The makeup of the USMLE test committee represents the schools and stakeholders they impact.¹⁹¹ Performance metrics via public disclosure covering students or graduates on either the USMLE or the COMLEX are not required by LCME or COCA.¹⁹² In simplified terms, this means that none of this is reflected on the school, and certainly not for accreditation requirements. Indeed, public disclosure of student success rates, along with third-party rankings, is available. They act as a way to provide information and ensure public knowledge of important metrics, but they are not organized as part of systemic accreditation criteria.¹⁹³ Law schools should have a similar program that has examinations connected to the university for the students while they are still enrolled and under the purview and control of the institution.

2. Engineering: NCEES

Like the ABA, the Accreditation Board for Engineering and Technology, Inc. (ABET) is recognized and authorized as a designated accrediting agency by the DOE.¹⁹⁴ Interestingly, unlike institutional accreditation, the specialized accreditation that ABET provides for engineering is not connected to financial aid directly and instead is used as a marker of program strength and prerequisite to

¹⁹⁰ Ahmed et al. *supra* note 188, at 3.

¹⁹¹ *About the USMLE*, USMLE, <https://www.usmle.org/about-usmle> [<https://perma.cc/TN5Y-BTSK>] (“Members of USMLE test committees include biomedical scientists, educators, and clinicians from every region of the United States. Virtually all LCME-accredited medical schools in the United States have been represented on USMLE test committees.”).

¹⁹² Mohammed Galal El Din Ahmed & Fouzia Shersad, *Unique Requirements of Medical Education: A Comparison of Accreditation Requirements for Higher Education and Medical Education*, Conference Paper at Arab Network for Quality Assurance Higher Educ.: Challenges in the Arab Region 11 fig. 1 (Dec. 2011).

¹⁹³ Jill Kathryn Richardson, *An Evaluation of Nursing Program Administrator Perspectives on National Nursing Education Accreditation* (May 2015) (EdD dissertation, University of Southern California) (ProQuest)

[I]n a 2006 survey, the Council of Higher Education Accreditation (CHEA) reported that only 18% of the 66 accreditors surveyed provided information about the results of individual reviews publicly; less than 17% of accreditors provided a summary on student academic achievement or program performance; and just over 33% of accreditors offered a descriptive summary about the characteristics of accredited institutions or programs (Council of Higher Education Accreditation, 2006).

¹⁹⁴ See List of Agencies, *supra* note 26; see also Nancy Kate D. Abel & Abel A. Fernandez, *ABET Accreditation of Undergraduate Engineering Management Programs: Established Versus New Programs—The Similarities and Differences*, 17 *ENG’G MGMT. J.* 3, 4 (Mar. 2005) (“[T]he U.S. Council for Higher Education Accreditation recognizes ABET as the agency responsible for evaluating and certifying the quality of engineering education in the United States. . . . [m]ost state licensing authorities recognize ABET accredited programs as satisfying the educational requirements for PE licensure.”).

licensure.¹⁹⁵ There are comprehensive and specific requirements for any program that wishes to be ABET-accredited.¹⁹⁶ There are currently four different commissions, including the Engineering Accreditation Commission (EAC), that ABET uses to accredit programs.¹⁹⁷ The importance of receiving and maintaining accreditation is vitally important. By way of example, the National Council of Examiners for Engineering and Surveying (NCEES) administers the Fundamentals of Engineering Exam (FE), which can only be taken after graduating with an engineering degree from an ABET-accredited program.¹⁹⁸

In terms of the licensure exam for engineering and the accreditation body, “no formal connection exists between (1) ASCE’s BOK or ABET’s criteria and (2) NCEES’s FE Exam”¹⁹⁹ While public disclosures of student performance from particular programs can be provided, they are not part of the accreditation policy and requirements.²⁰⁰ What becomes clear is that just as for medical educational accreditation, so too for engineering, there is not an alumni performance-related metric on the licensing exam set as a requirement for accreditation.²⁰¹

3. Accounting: NASBA, AICPA

This Public Accounting is regulated and governed by state statutes.²⁰² The Association to Advance Collegiate Schools of Business (AACSB) is actively accrediting nearly 700 business schools and has a specific accounting program accreditation.²⁰³

¹⁹⁵ Gregory L. Heileman & Chaouki T. Abdallah, *ABET Won’t Let Us Do That!*, CHANGE: MAG. HIGHER LEARNING, May–June 2019, at 62, 63.

¹⁹⁶ John Enderle et al., *The ABCs of Preparing for ABET: Accreditation Issues for Biomedical Engineering Programs Undergoing the “Engineering Criteria” Review Process*, 22 IEEE ENG’G MED. AND BIOLOGY MAG. 122 (2003).

¹⁹⁷ See generally *At A Glance*, ACCREDITATION BD. FOR ENG’G TECH., <https://www.abet.org/about-abet/at-a-glance/> [<https://perma.cc/S9FK-WPYQ>] (last visited Jan. 20, 2024); see generally *What Programs Does ABET Accredit?*, ACCREDITATION BD. FOR ENG’G AND TECH., <https://www.abet.org/accreditation/what-is-accreditation/what-programs-does-abet-accredit/> [<https://perma.cc/6RTZ-5VQC>] (last visited Jan. 20, 2024).

¹⁹⁸ Kenneth J. Fridley, *The ASCE BOK, ABET Accreditation Criteria, and NCEES FE Exam – Are They Appropriately Aligned?*, Conference Paper at Am. Soc’y Eng’g Educ. Ann. Conf. & Exposition (June 26–29, 2016).

¹⁹⁹ *Id.*

²⁰⁰ See Atsushi Akera et al., *ABET & Engineering Accreditation – History, Theory, Practice: Initial Findings from a National Study on the Governance of Engineering Education* Conference Paper at Am. Soc’y Eng’g Educ. Ann. Conf. & Exposition (June 2019) (noting the absence of policy or requirement for public disclosure).

²⁰¹ See Fridley, *supra* note 198; see also Accreditation Board for Engineering Technology, ACCREDITATION BD. FOR ENG’G TECH., Accreditation Policy and Procedure Manual (2023–2024) (noting the absence of an accreditation requirement of performance on licensing exams).

²⁰² See, e.g., N.M. CODE R. §§ 16.60.3.1–15 (LexisNexis 2023).

²⁰³ See AACSB Accounting Accreditation Standards, ASS’N TO ADVANCE COLLEGIATE SCHOOLS BUS.; see also Steven C. Hunt, *Research on the Value of AACSB Business Accreditation in Selected Areas: A Review & Synthesis*, 8 AM. J. BUS. EDUC. 23, 24 (2015).

For accounting, the licensure exam graduates need to take is the Uniform Certified Public Accountant Examination (UCPA).²⁰⁴ There are significant changes scheduled for January 2024 (arguably similar to the NextGen for the Bar Exam) to transition into the CPA Evolution-aligned CPA Exam as part of a joint effort by the National Association of State Board of Accountancy (NASBA) and the American Institute of Certified Public Accountants (AICPA) to update the licensure exam for accountants.²⁰⁵

Similar to medical and engineering professional licensing and accreditation requirements, accounting does not have a passage rate for graduates of programs of education that are connected to school accreditation.²⁰⁶ Interestingly, the Association of Collegiate Schools of Business (AACSB),²⁰⁷ another accrediting agency like the AACSB, does not require a specific passage rate.²⁰⁸ Instead, they encourage institutions to describe how the curriculum supports the students to successful outcomes on the exam.²⁰⁹ When it comes to public disclosures, there are requirements by accrediting agencies related to student performance, attrition, graduation rates, job placements, certification, employment outcomes, etc.²¹⁰ Public disclosure requirements, though, are not the same as accreditation-impacting standards.²¹¹

4. Psychology: APA COA

This The American Psychological Association (APA) provides standards for

²⁰⁴ Randall B. Bunker, et al., *Comparison of AACSB Accounting Accredited & and AACSB Business Accredited Institutions Using the CPA Examination as a Post-Curriculum Assessment*, 14 J. ACCT. & FIN. 127, 129 (2014).

²⁰⁵ *Transition Policy Announced for the 2024 CPA Exam Under the CPA Evolution Initiative*, NAT. ASS'N STATE BOARDS ACCT. (Jan. 21, 2024), <https://nasba.org/blog/2022/02/25/transition-policy/> [<https://perma.cc/44BV-TF22>].

²⁰⁶ Letter from Yvonne Hinson, CEO, Am. Acct. Ass'n, & Stephanie Bryant, Exec. Vice President, Ass'n to Advance Collegiate Schools Bus., to Colleen K. Conrad, Exec. Vice President, Nat. State Bd. Acct. (Jan. 14, 2022), <https://www.aacsb.edu/media-center/news/2022/01/aacsb-and-aaa-write-to-nasba-on-cpa-exam-pass-rate-change> [<https://perma.cc/5D7U-WYWS>].

²⁰⁷ ASS'N TO ADVANCE COLLEGIATE SCHOOLS BUS., ACCREDITATION PROCESSES, ACTIONS AND TIME FRAMES POLICY 1 (n.d.).

²⁰⁸ ASS'N TO ADVANCE COLLEGIATE SCHOOLS BUS., 2018 STANDARDS FOR ACCOUNTING ACCREDITATION 20 (2021), (stating that one of the requirements are as follows: "[D]escribe how the degree programs align with professional certification and/or licensure requirements if this is an expectation for graduates of the unit's degree programs.").

²⁰⁹ *Id.*

²¹⁰ Joseph M. Woodside, *A Meta-Analysis of AACSB Program Learning Goals*, 95 J. EDUC. FOR BUS. 425, 427 (2020).

²¹¹ Haeyoung Shin et al., *Schools' CPA Review Course Affiliations and Success on the Uniform CPA Examination*, 50 J. ACCT. ACCREDITATION 1 (2020) (discussing that while UCPA performance by individual graduates is not impactful for AACSB accreditation, examinees who attend these institutions are claimed to outperform similar cohorts.).

accreditation to educational institutions for psychology.²¹² The APA Commission on Accreditation (APA-COA) is the primary programmatic accreditor for psychology professional training in the United States.²¹³ Another accreditor is the Psychological Clinical Science Accreditation System (PCSAS) and it is recognized by the Council of Higher Education Accreditation (CHEA).²¹⁴ A similar theme of lack of accreditation impact of aggregated individual licensure exam performance runs in psychology that there is an educational requirement present before being able to attempt the licensure exam and that graduates from accredited programs tend to outperform other examinees.²¹⁵ This is neither surprising nor out of what is seen when comparing ABA- and non-ABA-accredited school graduates' performance on the Bar Exam.

Where psychology professional licensure and education accreditation deviates from legal education, similar to medical, accounting, and engineering, is in the failure to attach personal post-graduate performance as impactful on accreditation of the school the examinee graduated from in the aggregate.²¹⁶ The APA requires institutions to publish their data as part of the accreditation mandates. But there is

²¹² AM. PSYCH. ASS'N, STANDARDS OF ACCREDITATION FOR HEALTH SERVICE PSYCHOLOGY AND ACCREDITATION OPERATING PROCEDURES 2 (2015).

²¹³ *About APA Accreditation*, AM. PSYCH. ASS'N, <https://accreditation.apa.org/about> [<https://perma.cc/CV2X-67EE>] (last visited Jan. 21, 2024); see also Thomas K. Fagan & Perri Dawn Wells, *History and Status of School Psychology Accreditation in the United States*, 29 SCH. PSYCH. REV. 28 (2000) (technically there is also the National Council for Accreditation of Teacher Education (NCATE), which along with the Teacher Education Accreditation Council (TEAC) merged with the Council for the Accreditation of Educator Preparation (CAEP) in 2014. However, these are not strictly psychology accreditation agencies and are therefore being left out of the analysis).

²¹⁴ *A Brief History of PCSAS*, PSYCH. CLINICAL SCI. ACCREDITATION SYS., <https://pcsas.org/about-pcsas/a-brief-history-of-pcsas-a-timeline/> [<https://perma.cc/3H64-HEB6>] (last visited Jan. 21, 2024); see generally Robert W. Levenson, *Clinical Psychology Training: Accreditation and Beyond*, 13 ANN. REV. CLINICAL PSYCH. 1, 3 (2017).

²¹⁵ Michael J. Ross et al., *Performance on the Examination for the Professional Practice of Psychology as a Function of Specialty, Degree, Administrative Housing, and Accreditation Status*, 22 PRO. PSYCH.: RSCH. AND PRAC. 347, 349 (1991).

²¹⁶ See generally, NAT'L ASS'N SCH. PSYCH., POLICIES AND PROCEDURES FOR THE REVIEW AND ACCREDITATION OF GRADUATE PROGRAMS IN SCHOOL PSYCH. (2023) (Psychological Clinical Science Accreditation System (PCSAS) guidelines state: "This commitment must be articulated explicitly in the program's documents, public disclosures, and website; must be operationalized through a coherent educational plan, curriculum, and allocation of resources; and must be demonstrated in the activities and accomplishments of the program's faculty, students, and graduates."); see generally also *The PCSAS Accreditation Process*, PSYCH. CLINICAL SCI. ACCREDITATION SYS., <https://pcsas.org/the-pcsas-accreditation-process/> [<https://perma.cc/UA8S-TQWU>] (last visited Jan. 21, 2024); AM. PSYCH. ASS'N, STANDARDS OF ACCREDITATION FOR HEALTH SERVICE PSYCHOLOGY AND ACCREDITATION OPERATING PROCEDURES 11 (2015).

Doctoral programs' specific educational aims and expected competencies may differ from one another; therefore, there is no specified threshold or minimum number for reviewing a program's licensure rate. Instead, the Commission on Accreditation shall use its professional judgment to determine if the program's licensure rate, in combination with other factors, such as attrition of students from the program and their time to degree, demonstrates students' successful preparation for entry-level practice in health service psychology.

no threshold to meet, only a need for public disclosure.²¹⁷

IV. OPTIONS & SOLUTIONS

Unfortunately, in reality, some version of a summative examination such as the Bar Exam will have to probably remain in many jurisdictions, at least for the time being. However, that exam should be a secondary option amongst a list of approved methods of licensure. Several steps, including in-school education shifts, post-graduation oversight, summative capstone projects, portfolio submissions, or an adjusted format of the exam, are all viable alternatives.

Even if the Bar Exam must exist, the ABA should not use performance on it to indicate compliance with standards to maintain accreditation amongst their schools. If they want to have some kind of standard to show law schools are keeping up with what they need to see, that there are no fly-by-night schools, they can have an examination testing metrics measurement; but it has to be within the school attendance parameters. Maybe at the end of the first year, leaving time for adjustments, is a reasonable option. However, to wait for a post-degree examination, which the school has no control over—to hold accreditation hostage—is ridiculous and inconsistent with similar DOE accreditation bodies.

A. ABA Accreditation as a Prerequisite

Being able to provide a good law education and having your students pass the bar exam do not necessarily go hand in hand. They are not synonymous with each other. There are many reasons why students may want to gain a law school education but are uninterested in practicing law.²¹⁸ Similarly, if the make-up of the student body is simply one that historically underperforms or has elements that impact performance, bar exam performance will not match up. To say that a law school that takes in students who otherwise are not even given an opportunity, trains them, and teaches them (even if only fifty percent pass the bar exam) is not doing important work is short-sighted and elitist. Every single student who does pass is someone in a family who was not given access or an opportunity otherwise. Not everyone will pass the Bar Exam. This is a reflection on the exam, not the school an examinee graduated from.

There are a handful of locations nationally that allow graduates from non-ABA schools to sit for the Bar Exam.²¹⁹ However, the most obvious advantage of attending an ABA-accredited law school is that it permits any graduate of that

²¹⁷ *Policies and Procedures*, AM. PSYCH. ASS'N, <https://accreditation.apa.org/policies> [<https://perma.cc/94YM-ALCN>] (last visited Jan. 21, 2024).

²¹⁸ See generally Dina Megretskaja, *Going to Law School When You DON'T Want to Be a Lawyer*, NEW ENG. L. BOS., <https://www.nesl.edu/blog/detail/going-to-law-school-when-you-don't-want-to-be-a-lawyer> [<https://perma.cc/VXE6-FFAV>] (last visited Jan. 21, 2024).

²¹⁹ Nachman N. Gutowski & Kayla S. Bell, *How Are Bar Exam Results Reported? A National Guide & Repository* (Feb. 1, 2023) (unpublished paper) (on file with SSRN).

institution to sit for the bar exam in any jurisdiction.²²⁰ There is no need for this format to exist anywhere, and for a long time, the ABA accreditation decision of a law school did not have an impact on the ability to become an attorney for students of those institutions.²²¹

Educational decisions in law schools, particularly focused in the final year, are heavily influenced by the desire to ensure maximum positive performance on the bar exam.²²² This leeching into the academic curriculum ends up being nothing more than an extended bar preparatory period, without much value for practical attorney work.²²³ It only serves to reinforce unrealistic confidence in those who pass the bar exam while simultaneously undermining the ability to innovate legal education.²²⁴ It is interesting to note that studies claiming a negative impact correlation between increased student participation in clinical programs and bar performance are questionable at best, yet they are actively propped up by the NCBE.²²⁵

B. Licensure Reforms, New Paths, and Reciprocity

The creation of a Bar Exam with little or even no input from the NCBE is possible.²²⁶ Beyond the traditional renegade jurisdictions, six additional jurisdictions during the COVID-19 pandemic held bar exams in their jurisdictions that were not reliant on the NCBE.²²⁷ There are alternatives to this exam; several states

²²⁰ *Frequently Asked Questions*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/ [<https://perma.cc/V9NB-BVUV>] (last visited Jan. 21, 2024).

²²¹ Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1041 (2001).

²²² O.J. Salinas, *Improving Bar Success: Curricular Changes at University of North Carolina School of Law*, THE BAR EXAM’R, Summer 2019, at 16–17, 18; see also Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 176 (2020).

²²³ See generally, e.g., Christopher J. Ryan Jr. & Derek T. Muller, *The Secret Sauce: Examining Law Schools That Overperform on the Bar Exam*, 75 FLA. L. REV. 65, 99–101 (2023); Eurilynne A. Williams, *Defying Middle Child Syndrome: A Proposal for Achieving Bar Success by Reimagining the 2L Experience*, THE LEARNING CURVE, Winter/Spring 2022, at 31.

²²⁴ See Markovic, *supra* note 77, at 19.

²²⁵ Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623, 625–26 (2019).

²²⁶ Gutowski & Bell, *supra* note 219, at 11, 24 (Louisiana and Puerto Rico are examples of jurisdictions that go it alone, with no elements of their exam coming from the NCBE, hopefully, this list will grow considerably in the future).

²²⁷ *July 2020 Bar Exam: Jurisdiction Information*, NAT’L CONF. OF BAR EXAM’RS (September 24, 2020, 11:34 AM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information> [<https://perma.cc/UY7X-DKCS>] (These jurisdictions were California, Florida, Indiana, Michigan, and Nevada. These same jurisdictions have historically created elements of their own exam and supplemented them with some input from the NCBE, usually in the form of the MBE

are already looking at what they may be, their impacts, and ultimately how to thoughtfully implement them. Oregon has an idea for a two-year program alternative.²²⁸ There are even discussions to have more specific examinations tailored to individual practice areas.²²⁹ Many attorneys pass the bar exam as it exists currently, and will do so for the new iteration; yet, they will go on to practice in an area of law that was not included on the test. Under the current system, they are considered competent yet are wholly unprepared to serve their clients and the public. There is a real need to ensure adequate representation, but there are already mechanisms for enforcement via the local jurisdictional bar associations that are responsible for lawyer misconduct and continued competency.²³⁰

Several jurisdictions have begun the review process to complete analysis studies focused on what approach to take moving forward. Florida is an example of a jurisdiction that has relied on the MBE component from the NCBE for the last fifty years.²³¹ They have looked at what alternatives may be possible for the second day of a two-day exam, and have completed a Practice Analysis Study.²³² The purpose of their study was to ensure the validity of the bar exam.²³³ Additionally, the Florida Board of Bar Examiners administers their bar exam to ensure demonstrated technical competence, defined as possessing the knowledge, skills, and abilities that are critical for newly licensed Florida attorneys to have at the time of admission to the Florida Bar.²³⁴ They are charged with exploring potential alternatives to the exam's design, not to whether there should be an exam to administer.²³⁵ This model of research and approach should be celebrated.

There needs to be a serious conversation about alternative licensure paths for new attorneys.²³⁶ We may want to call it licensure reform, not alternative pathways,

component. Many of these jurisdictions are actively considering how to move forward on their own or with even more limited reliance on the NCBE).

²²⁸ Recommendation from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, Oregon State Board of Bar Examiners (June 18, 2021) (on file with Oregon State Board of Bar Examiners).

²²⁹ Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L. J. 194, 205 (2011).

²³⁰ See Terry R. Wittler, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676 (1977); see also Debra Moss Curtis, *They're Digging in the Wrong Place: How Learning Outcomes Can Improve Bar Exams and Ensure Practice Ready Attorneys*, 10 ELON L. REV. 239 (2018).

²³¹ *Practice Analysis Study Report*, FLA. BD. OF BAR EXAM'RS app. G, at 1 (June 2022), https://www.floridabarexam.org/static/FBBE_Practice_Analysis_Study_Report.pdf [https://perma.cc/5L83-UC38].

²³² *Id.* at 1.

²³³ *Id.* at 15.

²³⁴ *Id.* app. A at 1.

²³⁵ See *id.* at 7–8.

²³⁶ See Deborah Jones Merritt, Andrea Anne Curcio & Eileen R. Kaufman, *Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways*, WASH. U. J.L. & POL'Y (forthcoming 2024) ("Survey responses from more than 1,750 bar candidates and

because sometimes the term “alternative” is seen as being less than.²³⁷ A common sentiment amongst attorneys in practice, when asked about changes to the process, is to take the position of “This is the way it’s always been.”²³⁸ That is nothing short of archaic thinking; similar arguments about student loan forgiveness are being made.²³⁹ We must innovate and adjust to thinking about better uses of choices and metrics for determining admission to the profession. The exam is problematic, no doubt. We also have to look more at the educational aspect for the examinees and students at the same time. Education needs to be more hands-on and practical for the benefit of everyone.

Moreover, in jurisdictions that currently allow any level of diploma privilege, or that utilized temporary supervised practice during COVID-19, the standards for performance are and were considered still met, and these examinees are removed from the count.²⁴⁰ Extrapolating out, with so many states looking for reforms to a traditional exam, the ABA must rethink Standard 316. When the time requirements for supervised practice are several hundred hours, required submission of portfolios, and other items, they are not going to be able to meaningfully maintain and apply the static standard uniformly. Whatever limited purpose Standard 316 was supposed to have, and any value that it is viewed as being held intrinsically in it, will all surely be moot in the coming years.

supervisors demonstrate that supervised practice provides a solid foundation for valid, feasible, and fair assessment of lawyering competence.”).

²³⁷ Brian R. Gallini, Dean and Professor of Law at Willamette University College of Law, is a highly respected leading licensure reformer and vocal proponent of this.

²³⁸ See, e.g., Thomas N. Wheatley, *The Bar Exam Is ‘Monster of a Test,’ But Worth Keeping*, BLOOMBERG L. (Sept. 24, 2020), <https://news.bloomberglaw.com/us-law-week/the-bar-exam-is-monster-of-a-test-but-worth-keeping> [<https://perma.cc/6V6E-MX6V>].

²³⁹ Atlas Porter, *The 5 Most Common Arguments Against Student Debt Forgiveness (And Why They Are Wrong)*, MEDIUM (Oct. 17, 2019), <https://atlasporter.medium.com/the-5-most-common-arguments-against-student-debt-forgiveness-and-why-they-are-wrong-6c28a1f0ec2f> [<https://perma.cc/4Y5X-VDB6>]. If we were to hold to this approach, then no one should use penicillin as it would be unfair to everyone who died of polio for us to not go through the same experience. This whole line of thinking is perverse.

²⁴⁰ *Annual Questionnaire: 2023 Bar Passage Questionnaire Instructions*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/questionnaire/ [<https://perma.cc/F3DN-UDU4>] (last visited Jan. 21, 2024):

Reporting graduates who have been admitted or have applications pending to be admitted via diploma privilege. Schools report the number of graduates who have been admitted or have applications pending to be admitted via diploma privilege separately from those graduates who took a bar exam. These “diploma privilege” graduates are not counted as bar exam “takers” or bar exam “passers” – they are reported as graduates who did not sit for a bar examination and are additionally reported in a separate “diploma privilege” category. This must be done in order to generate two bar passage rates. One bar passage rate will include just those graduates who took a bar exam. The second bar passage rate will include graduates who took a bar exam plus those who have been admitted or have applications pending to be admitted via diploma privilege.

C. States Leading the Pushback

1. Oregon

Oregon is leading the way in many respects to understanding potential varying pathways. Oregon’s Alternatives to the Exam Task Force (Task Force) submitted its recommendations to the Oregon Supreme Court in July 2021.²⁴¹ Their recommendations relied heavily upon IAALS’s *Building a Better Bar* research and, ultimately, proposed two new paths to licensure.²⁴² They are piloting a new pathway with two new ways to be licensed, including a Supervised Practice Pathway.²⁴³ This is intended primarily for out-of-state law graduates who want to practice in Oregon.²⁴⁴ Additionally, they would what they call Oregon Experiential, which involves a Capstone Project.²⁴⁵ Quoting the outgoing chair of the Oregon Board of Law Examiners, Joanna Perini-Abbott, “We are not lowering the bar to become a lawyer. We feel there are other ways that someone can demonstrate competence to practice law.”²⁴⁶

On September 7, 2023, the Oregon Supreme Court heard testimony regarding the proposal from the Task Force and rendered a decision on November 7, 2023, unanimously adopting the recommendations of the Oregon Board of Bar Examiners

²⁴¹ Maddie Hosack, *Oregon Becomes Trailblazer in New Attorney Licensing Pathway, Task Force to Receive Award*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Nov. 8, 2023), <https://iaals.du.edu/blog/oregon-becomes-trailblazer-new-attorney-licensing-pathway-task-force-receive-award> [<https://perma.cc/J8YA-5CN5>].

²⁴² Recommendation from Joanna Perini-Abbott, *supra* note 228. The first proposed path is the Oregon Experiential Pathway (OEP), a curriculum-based pathway in which law students would be required to complete a rigorous set of experiential learning credit hours. *See id.* at 7–14. At the end of law school, students would submit a capstone portfolio that the Oregon Board of Bar Examiners would use to assess minimum competence. *Id.* at 7–8. The second proposed path is the Supervised Practice Pathway (SPP), a practice-based pathway in which law graduates would engage in law work under a supervising lawyer for 1000–1500 hours. *See id.* at 14–24. Once the supervised practice hours are completed, the applicant would submit a portfolio of work samples that the Oregon Board of Bar Examiners would use to assess minimum competence. *Id.* at 14. The Oregon Supreme Court has approved these two new paths “in concept” and charged the Task Force with creating a new committee to propose a detailed plan for implementation. Letter from Joanna Perini-Abbott and Adrian Tobin Smith, Co-chairs, Licensure Pathway Development Committee, Or. State Bd. of Bar Exam’rs, to Or. State Bd. of Bar Exam’rs 5 (Aug. 2, 2023), <https://lpdc.osbar.org/files/2023.08.02LPDCLtrtoBBXreSPPE-ApprovedbytheLPDC.pdf> [<https://perma.cc/YKJ2-PJK3>].

²⁴³ *Id.*

²⁴⁴ *Id.*; *see also* Ayumi Davis, *Oregon Closer to Becoming Third State to Allow Would-Be Lawyers to Skip Bar Exam*, NEWSWEEK (Jan. 13, 2022, 4:22PM), <https://www.newsweek.com/oregon-closer-becoming-third-state-allow-would-lawyers-skip-bar-exam1669220> [<https://perma.cc/4NQQ-JHXP>].

²⁴⁵ *Id.*

²⁴⁶ Davis, *supra* note 244.

and the Supervised Practice Portfolio Examination (SPPE).²⁴⁷ There are multiple elements of the new SPPE pathway that graduates need to meet to gain licensure.²⁴⁸ This is not a diploma privilege and rather requires graduates to still produce work products as well as complete specified hours of supervised practice and other benchmarks.²⁴⁹ Impressively, this is only the beginning of the work Oregon is looking to do.²⁵⁰ They are now actively pushing and working to adopt another pathway that would be specific to the three in-state schools.²⁵¹

2. New Hampshire

New Hampshire and its Daniel Webster Scholar Honors Program is another good example of plausible approaches.²⁵² This program was established in 2005 at the

²⁴⁷ Jessica Rotter, *A History-making Vote Changes Attorney Licensure in Oregon*, WILLAMETTE UNIV. (Nov. 7, 2023), <https://willamette.edu/news/library/2023/11/sppe-approval-story.html> [<https://perma.cc/N8SR-2CVS>]; Aredeshir Tabrizian, *Alternative to Bar Exam Approved in Landmark Oregon Supreme Court Decision*, SALEM REPORTER (Nov. 8, 2028), <https://www.salemreporter.com/2023/11/08/alternative-to-bar-exam-approved-in-landmark-oregon-supreme-court-decision/> [<https://perma.cc/D82Y-6E4F>]; Karen Sloan, *No Bar Exam Required to Practice in Oregon Starting Next Year*, REUTERS (Nov. 7, 2023), <https://www.reuters.com/legal/government/no-bar-exam-required-practice-law-oregon-starting-next-year-2023-11-07/> [<https://perma.cc/X8BP-HAUT>].

²⁴⁸ See Recommendation from Joanna Perini-Abbott, *supra* note 228, at 14–24; see also The Oregon Supervised Practice Portfolio Examination, OREGON ST. BD. OF BAR EXAM'RS 10–17 (Aug. 2, 2023).

²⁴⁹ See Recommendation from Joanna Perini-Abbott, *supra* note 228, at 14–24; see also The Oregon Supervised Practice Portfolio Examination, *supra* note 248 (these include completing 675 hours of supervised legal work. Additionally, there will need to be a submission of legal writing examples, 8 to be exact. Moreover, there needs to be leadership in client interviews, negotiations, and other lawyering-focused skills. The compilation of all the requirements would be submitted to the Oregon bar examiners for 'grading.' Only after confirmation that the 'examinee' (graduate) has met the standards needed will they 'pass.' This is partly a semantic game to say is not a traditional diploma privilege, and to get around the need to still have some kind of 'examination.' This will meet that requirement.).

²⁵⁰ It is interesting to note that Oregon appears to be hedging their bets by both moving forward with alternative pathways, while simultaneously being among the first in the nation to announce adoption of the NextGen.

²⁵¹ See Karen Sloan, *Oregon Supreme Court to Vote on Bar Exam Alternative*, REUTERS (Sep. 5, 2023), <https://www.reuters.com/legal/legalindustry/oregon-supreme-court-vote-bar-exam-alternative-2023-09-05> [<https://perma.cc/3JS8-ZUYL>]. This would be similar to, and even partially based on, the University of New Hampshire Daniel Webster Scholar Program. See Letter from Joanna Perini-Abbott, *supra* note 242, at 7–14. There would be specified practice-focused coursework in the last two years of law school. *Id.* After completion of this track and graduation, there would potentially be no additional need for any other requirements. See *id.* This is more of a diploma privilege, though it requires more than the traditional ABA curriculum, and is focused on making the student practice-ready. This should be emulated everywhere.

²⁵² See *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [<https://perma.cc/GC9L-UUF5>] (last visited Feb. 1, 2024).

University of New Hampshire Franklin Pierce School of Law.²⁵³ Students are accepted into the program before their second year of law school and learn a host of practical skills such as counseling clients, taking depositions, appearing before judges, and negotiating.²⁵⁴ Throughout the program, they create portfolios of written and oral work that are assessed by bar examiners every semester; upon completion of the program, students are sworn into the New Hampshire State Bar.²⁵⁵

3. Nevada

Several other states are joining the call in rejecting the NextGen approach. Nevada recently completed an internal examination of the validity of their exam and the cut scores.²⁵⁶ During COVID-19, they removed the MBE entirely and have had the exam remote for several exam periods after COVID-19.²⁵⁷ The exam is now back in person and includes the MBE again,²⁵⁸ but perhaps they do not need the MBE moving forward at all. The current format of the Nevada exam is one-third unscaled MBE questions, one-third Nevada-created/specific performance exam, and one-third Nevada-created/specific essays.²⁵⁹ They are hoping to create a three-legged stool with a state-created and specific in-school multiple choice element, refocusing on problem-solving likely in the form of a Nevada-specific Performance Exam, and a post-exam supervised practice element for all examinees.²⁶⁰ This last part they need to still engage in further studies and the Nevada Supreme Court is actively

²⁵³ *Id.* It is especially rewarding to have the University of New Hampshire Law Review be the publishing entity for this article.

²⁵⁴ *Daniel Webster Scholar Honor Program, supra* note 252.

²⁵⁵ *Id.*

²⁵⁶ David Faigman & Richard Trachok, *The Nevada Bar Exam Study: Findings*, NEV. LAW. (July 2023), at 30.

The Nevada Supreme Court formed the Nevada Commission to Study the Administration of the Bar Examination and Licensing of Attorneys to look at alternate methods of determining minimum competence. On February 13, 2023, the commission submitted its report to the court, suggesting a three-prong approach to licensing in Nevada: 1) A foundational subject exam similar to the MBE, or in the alternative, the certification of law school content and grades in the seven foundational subjects; 2) Successful completion of a one-day Nevada Performance Test exam, testing basic lawyering abilities analyzing facts, statutes, and cases, similar to the Nevada Performance Test currently offered in the bar exam; and 3) Supervised practice. The court created two task forces to make implementation recommendations on law school certification of the foundational subjects and the supervised practice components. The court issued its order creating the task forces on April 19, 2023 . . . Each task force was directed to report back to the court in April 2024.

²⁵⁷ *See* Order Regarding Modified July 2022 Nevada Bar Exam, *In re* Matter of the July 2022 Nevada State Bar Examination (Nev. Apr. 21, 2022).

²⁵⁸ *Exam Subjects and Test Format*, STATE BAR OF NEV., <https://nvbar.org/licensing-compliance/admissions/bar-exam/exam-subjects-and-test-format> [<https://perma.cc/T85F-76FQ>] (last visited Feb. 1, 2024).

²⁵⁹ *Id.*

²⁶⁰ *See* Rick Trachok, Commission Report to Nevada Supreme Court, ADKT No. 0594 (Mar. 30, 2023); *see also* Order Appointing Task Forces, *In the Matter of the Review of the Administration of the Bar Examination and Licensing of Attorneys in Nevada*, ADKT No. 0594 (Nev. Apr. 19, 2023).

considering.

Separately, but in the same line of important adjustments being made, Nevada is also leading how recently graduated students can engage in limited supervised practice. A proposal to offer limited legal services in rural and underserved communities, as well as to extend a pipeline of attorneys to these areas, was submitted in the summer of 2023.²⁶¹ On October 19, 2023, Nevada Supreme Court Rule 49.5 was adopted, allowing recent graduates engaged in qualified employment limited certification as supervised legal practitioners.²⁶² This would allow for supervised practice of up to twelve months, presuming all the requirements are met.²⁶³ The permitted activities are fairly robust. They include the ability to appear in court (without the presence of the supervising lawyer), prepare documents for filing, prepare transactional documents, negotiate and mediate settlements, prepare and mail correspondence, and counsel and give legal advice.²⁶⁴ There is currently no publicly viable role for the UBE in future reform for Nevada, which all but guarantees that there is no role for the NextGen either.

Wisconsin does not need to dictate to states what to do to ensure the public that the lawyers taking this exam are minimally competent.²⁶⁵ States can do it better themselves and Nevada is a great example of that. Unfortunately, as is the case of non-UBE jurisdictions, the one element missing is reciprocity, as Nevada currently does not have any.²⁶⁶ However, this concept of accepting admission status and performance from neighboring jurisdictions is something that can be overcome, particularly as similar states such as California continue to move away from a national exam standard and are actively exploring reforms.²⁶⁷ Perhaps the biggest impediment to reciprocity in these cases is more of protectionist ideology and fear of flooding the market with other states' attorneys. Even in this problem, there is

²⁶¹ Petition, In the Matter of the Adoption of Supreme Court Rule 49.5, ADKT No. 0611 (Nev. July 27, 2023); see also Rachel E, *Nevada Supreme Court Considers Proposal for Law School Graduates to Offer Limited Legal Services in Legal Programs*, JD JOURNAL (July 31, 2023), <https://www.jdjournal.com/2023/07/31/nevada-supreme-court-considers-proposal-for-law-school-graduates-to-offer-limited-legal-services-in-legal-programs> [https://perma.cc/UH3R-T7BD].

²⁶² Order Adopting Supreme Court Rule 49.5, In the Matter of the Adoption of Supreme Court Rule 49.5, ADKT No. 0611 (Nev. Oct. 19, 2023).

²⁶³ *Id.* Ex. A, at 3.

²⁶⁴ *Id.* Ex. A, at 4–5.

²⁶⁵ A term of endearment for the NCBE, who are based out of this diploma privilege state.

²⁶⁶ *Admission Requirements*, STATE BAR OF NEV., <https://nvbar.org/licensing-compliance/admissions/admission-requirements> [https://perma.cc/KFL4-RPVV] (last visited Feb. 1, 2024) (“Nevada has NO RECIPROCITY OR ADMISSION BY MOTION of any kind. The Supreme Court of Nevada does provide limited practice rules including government or in-house counsel, student practice, and legal services.”).

²⁶⁷ See *Blue Ribbon Commission on the Future of the Bar Exam*, STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Archived-Committees/Blue-Ribbon-Commission> [https://perma.cc/38MQ-Q4MG] (last visited Feb. 1, 2024).

hope for the creation of recognition and portability amongst at least regional jurisdictions once new exam protocols are created and prove to be just as effective—and hopefully more even than—the current Bar Exam.

4. Delaware

Delaware is another example of a jurisdiction that appears to be distancing itself from the NCBE and NextGen. It is actively engaging in a study on diversity on the bench and for membership in the bar. Delaware prides itself on having one of the hardest bar exams in the country.²⁶⁸ The state used to only give the exam once a year; that has recently changed in 2023.²⁶⁹ Delaware is also looking at cut-score reform.²⁷⁰ The Delaware exam still currently utilizes the NCBE for some of its exam questions.²⁷¹ However, with NextGen coming as an integrated exam, the NCBE will not have those elements available for à la carte selection. This means that, presumably, Delaware will need to revamp its approach to be 100% NCBE-free.

Delaware already requires twelve weeks of service under an attorney who has practiced for ten years, even after passing the exam.²⁷² This is an additional element needed that is not replicated in most other jurisdictions, though perhaps it should be more common nationally. It is important to remember that this is a relatively small bar and jurisdiction.²⁷³ Out of the 259 people who took the exam in July 2022, only 52.9% passed.²⁷⁴ Before the NCBE individual components become no longer available with the launch of NextGen for smaller and medium-sized jurisdictions like Delaware, considering non-exam pathways should be an easy decision to make. This can have the added benefit of reducing the investment in creating a valid state-specific exam.

5. California

California is an exceptionally large jurisdiction that has to be in the conversation for what reforms to consider. There are approximately 16,000 people who take the California exam every year.²⁷⁵ Their Board of Bar Examiners is funded by the

²⁶⁸ See Xerxes Wilson, *Delaware is Changing the Bar Exam. Here's what that means for Current, Future Lawyers*, DEL. ONLINE (Feb. 21, 2023, 9:40 AM), <https://www.delawareonline.com/story/news/2023/02/21/delaware-changing-bar-exam-lawyers-what-to-know/69925167007/> [<https://perma.cc/XRP8-CJG6>].

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See *Frequently Asked Questions*, BD. OF BAR EXAM'RS OF THE SUP. CT. OF DEL., <https://courts.delaware.gov/bbe/faqs.aspx> [<https://perma.cc/85P6-KZAY>] (last visited Feb. 1, 2024).

²⁷² DEL. SUP. CT. R. 52. This is the concept referred to in Delaware as a Preceptor. See *id.*

²⁷³ See *2022 Bar Results*, BD. OF BAR EXAM'RS OF THE SUP. CT. OF DEL., <https://courts.delaware.gov/bbe/2022barresults.aspx> [<https://perma.cc/A736-8WLH>] (last visited Feb. 1, 2024).

²⁷⁴ *Id.*

²⁷⁵ *Examinations*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/admissions/examinations> [<https://perma.cc/ZC4H-GJNT>] (last visited Feb. 1, 2024).

legislature, and while that means they have considerable access to funding that other states do not, it also means they are politically influenced and appointed.²⁷⁶ There has been a Blue-Ribbon Commission on the Future of the California Bar.²⁷⁷ The recommendation from this study is to not go down the path of the relationship with the NCBE.²⁷⁸ The primary reasons for this include control, transparency, and access.²⁷⁹ The Commission is now developing a unique California exam and is moving away entirely from the NCBE.

Simultaneously, California is actively considering adopting a proposal for a Portfolio Bar Exam, for which it sought public comment through October 25, 2023.²⁸⁰ The proposal is in response to and based on the Report from the Alternative Pathway Working Group.²⁸¹ The Portfolio Bar Exam would allow for the supervised practice of law, followed by a submission of a working portfolio of essays, written work, negotiations, client encounters, and timesheets for review.²⁸² The basic elements of the process are robust and are created with the protection of the public in mind.²⁸³ There hopefully will be a push for recognizing other jurisdictions' exams, and an understanding that to do so would be necessary if they want anyone to reciprocate with their examinees as well. This is where neighboring states like Nevada may be able to come to an understanding about their exams. Ultimately, the California Supreme Court will be the decisionmaker on these changes.

6. Minnesota

Similarly, the Minnesota Board of Law Examiners is undertaking a two-year study that will require a comprehensive look at the bar examination and its history

²⁷⁶ See *Board of Trustees Discusses Challenging 2023 State Bar Budget*, STATE BAR OF CAL. (Jan. 20, 2023), <https://www.calbar.ca.gov/About-Us/News/News-Releases/board-of-trustees-discusses-challenging-2023-state-bar-budget> [<https://perma.cc/F8A4-7U4H>].

²⁷⁷ *Blue Ribbon Commission on the Future of the California Bar Exam*, *supra* note 267. The commission developed “recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law.”

²⁷⁸ See Final Report, Blue Ribbon Comm’n on the Future of the Bar Exam, State Bar of Cal., Recommendations from the Blue Ribbon Commission: Request for Adoption Following Public Comment and Transmission to the Supreme Court for Approval 3 (May 18, 2023), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000030806.pdf> [<https://perma.cc/5TTA-KLDS>].

²⁷⁹ See *id.* attach. A (The National Conference of Bar Examiner’s NextGen Bar Exam).

²⁸⁰ *Proposal for a Portfolio Bar Examination*, THE STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2023-Public-Comment/Proposal-for-a-Portfolio-Bar-Examination> [<https://perma.cc/GM3Q-LFT2>] (last visited Feb. 1, 2024).

²⁸¹ *Rep. from the Alt. Pathway Working Grp., State Bar of Cal., to the Bd. of Trustees*, STATE BAR OF CAL. (Sep. 21, 2023), <https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000031526.pdf> [<https://perma.cc/4955-PFVJ>].

²⁸² *Id.* at 3.

²⁸³ See *id.* attach. A, at 4–5 (listing the basic elements envisioned for the assessment method).

in the state, what the implications of being a UBE jurisdiction mean, and the potential for implementing reforms for determining minimum competency to practice law.²⁸⁴ The board will host several meetings and public hearings as well as solicit a broad range of stakeholders for input throughout the process.²⁸⁵ Lastly, the board plans to survey other states exploring this subject and will use the information gleaned to make its recommendations to the Minnesota Supreme Court in 2023.²⁸⁶ Dena Sonbol, Dean of Academic Excellence at Mitchell Hamline said, “My biggest concern as a lawyer myself . . . is ensuring that people that are becoming attorneys are people who are competent, skilled and ethical . . . If there is a way to achieve that without a bar exam, I would definitely support it.”²⁸⁷

7. Utah & New York

Utah is similarly interested in potentially extending some form of supervised practice same as it implemented during the pandemic.²⁸⁸ As one of the few jurisdictions to embrace temporary changes to licensure in response to COVID-19, it is a significant positive to see Utah continue to consider positive pathways forward. Utah is looking to consider a novel approach to how they license new attorneys.²⁸⁹ Utah is relying heavily on the IAALS report as a guide to model what should be covered as part of the exam priorities and goals.²⁹⁰

Finally, New York, one of the largest jurisdictions by size of annual applicants and in their influential power, has not yet publicly decided on whether to adopt NextGen.²⁹¹ Seeing as how once New York came on board for the UBE, that was seen by many other jurisdictions as a go-ahead signal that it was okay for them also to adopt it, what New York does in these next few years may be incredibly influential

²⁸⁴ Jonna Perlinger, *States Look Beyond Bar Exam to License Lawyers*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (July 19, 2022), <https://iaals.du.edu/blog/states-look-beyond-bar-exam-license-lawyers> [https://perma.cc/JFL5-U32A].

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Josh Verges, *Should New Lawyers Have to Pass the Bar Exam? MN Supreme Court Is Open to Alternatives*, PIONEER PRESS (Sep. 30, 2021, 10:25 PM), <https://www.twincities.com/2021/09/30/should-new-lawYERS-have-to-pass-the-bar-exam-mn-supreme-court-is-open-to-alternatives> [https://perma.cc/6VUJ-F3YT].

²⁸⁸ Logan Cornett, *Utah Bar Admissions Working Group Proposes Novel Pathway Grounded in IAALS' Research*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Oct. 26, 2023), <https://iaals.du.edu/blog/utah-bar-admissions-working-group-proposes-novel-pathway-grounded-iaals-research> [https://perma.cc/KMS4-86N5].

²⁸⁹ See Final Rep., Utah Bar Admissions Working Grp. 42–43 (Jan. 23, 2023), <https://iaals.du.edu/sites/default/files/documents/publications/ut-bar-admissions-wg-final-report.pdf> [https://perma.cc/BJ4Q-YF46] (listing proposed requirements for admission).

²⁹⁰ See Cornett, *supra* note 288.

²⁹¹ See *NextGen (July 2026)*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/nextgen> [https://perma.cc/4B49-4CPK] (last visited Feb. 6, 2024); see also Perlinger, *supra* note 284.

nationally.²⁹² The New York State Bar Association, hoping to engage with the New York Board of Law Examiners, wants to follow the example of Oregon when it comes to licensure rather than adopt the NextGen.²⁹³ If it does go a route similar to Oregon, it could (hopefully) spell the beginning of the end for the Bar Exam as we know it today and could certainly weaken the death grip the NCBE currently holds over the licensure of attorneys.

CONCLUSIONS

If the purpose of the Bar Exam is to ensure an objective baseline test of competency and skill, it is not achieving its intended goal. The hard truth is that data shows most lawyers reprimanded for failure to adhere to required standards are not newly minted attorneys, but rather those who have considerably more experience.²⁹⁴ It stands to reason that if a test is needed for admission to the profession to ensure that there is consistent proficiency, maintaining such a standard throughout practice should be a no-brainer.²⁹⁵ Unless the profession is willing to seriously entertain a continuing examination requirement for all attorneys, it seems that there is little merit in utilizing a bar exam at all.

By way of example, during COVID-19, the Louisiana Supreme Court voted four-to-three to allow for emergency admission only for specific categories of students and with additional requirements upon admission.²⁹⁶ Justice Crain dissented, saying that the court was making a mistake and they were listening to students who did not want to be tested for minimal competency.²⁹⁷ Another concern of his was that this would be added fuel to an already growing call to “eliminate such high-stakes testing.”²⁹⁸ Justice Crain was wrong about the former, but correct about the latter.²⁹⁹

²⁹² Unfortunately, there have been unofficial whispers that it is inevitable for New York to Adopt NextGen. All we can do is hope that is not the case.

²⁹³ See Third Rep. and Recommendations of the Task Force on the N.Y. Bar Examination, N.Y. State Bar Ass’n 13 (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/4VH5-SQBK>]

While a New York bar examination should be the primary pathway to practice, it also remains our view that New York should consider providing two alternative pathways to admission: (a) a pathway for admission through concentrated study of New York law while in law school; and (b) a pathway for admission through supervised practice of law in New York.

²⁹⁴ David Adam Friedman, *Do We Need a Bar Exam . . . for Experienced Lawyers?*, 12 U.C. IRVINE L. REV. 1161, 1173 (2022).

²⁹⁵ See *id.* at 1162–64.

²⁹⁶ See Ord. of the Sup. Ct. (La. July 22, 2020), <https://www.lsba.org/documents/Mentoring/BarExamLASCOrder72220.pdf> [<https://perma.cc/A326-2UH4>].

²⁹⁷ *Id.* (Crain, J., dissenting).

²⁹⁸ *Id.* (Crain, J., dissenting).

²⁹⁹ See Levin, *supra* note 64, at 142 (“The temporary changes in bar admission standards in 2020 may have created a window of opportunity for continuing advocacy for alternatives to the bar exam.”).

NEXTGEN LICENSURE & ACCREDITATION

The promise of an empirically and foundationally sound Bar Exam in the form of NextGen is far from there yet. ABA Standard 316 will undoubtedly be impacted by both the unknown aspects of this exam, as well as the yet unsettled adoption questions and cut score methodologies. Continuing to attach accreditation impacts for law schools based on aggregate individualized performance on a post-educational licensure exam does not make sense. It is not only out of line with similar professional licensing schemes, but it is also racially discriminatory. Divergent pathways that include supervised practice, diploma privilege, portfolio review, and other approaches are gaining steam in the face of the forced NextGen format conversion. A failure on the part of the NCBE to live up to its promises, including meaningful feedback from schools and stakeholders, is starting to reap its consequences. States should no longer feel the need to be attached at the hip to the NCBE to ensure a well-thought-out and valid licensing process for new attorneys. Actual and positive change is not only possible, it is here. Join us!

