Note

Barring Entry to the Legal Profession: How the Law Condones Willful Blindness to the Bar Exam's Racially Disparate Impacts

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INTRODUCTION

In early 2020, the COVID-19 pandemic forced state bar examiners across the country to make unprecedented decisions regarding the impending bar examinations.[1] The bar exam, a high-stakes test that nearly every law school graduate must pass in order to practice law,[2] is traditionally administered twice a year in each jurisdiction.[3]

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1. *See* Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, APPEAL (July 6, 2020), https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system [https://perma.cc/Y7BJ-9ATZ].

2. Numerous forms of the bar examination exist across the states although all are meant to demonstrate competency to practice the law. *Basic Overview*, A.B.A. (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview [https://perma.cc/98ED-MRQK]. By summer 2021, 38 jurisdictions will use the Uniform Bar Exam (UBE), a standardized test written by the National Conference of Bar Examiners (NCBE). *The Uniform Bar Examination (UBE)*, BAR EXAM'R, https://thebarexaminer.org/2019-statistics/the-uniform-bar-examination-ube/#step1[https://perma.cc/H4QJ-KXDQ]. The remaining states use some combination of specific components of the UBE (such as the Multistate Bar Exam) along with state-specific essay questions. *See e.g.*, Marilyn Odendahl, *Uniform Bar Exam Adoption Not Unanimous*, IND. LAW. (Jan. 8, 2020), https://www.theindianalawyer.com/articles/uniform-bar-exam-adoption-not-unanimous [https://perma.cc/82M3-ZFT9]. For the sake of simplicity, and because each jurisdiction uses its bar exam for the same purpose, this Note will simply use the terms "bar exam" or "bar" instead of distinguishing between different iterations of the test.

3. *Taking the Bar Exam*, HARV. L. SCH., https://hls.harvard.edu/dept/dos/taking

However, rapidly rising infection rates and nationwide shutdowns presented the question of whether this rite of passage warranted the public health risk.[4]

Amidst a statewide spike in COVID-19 hospitalizations during the summer of 2020, Texas decisionmakers found themselves considering this very question.[5] The state's Board of Law Examiners considered its options during a public meeting held virtually over Zoom on July 2, 2020.[6] Over 1,700 people joined the video conference and dozens testified.[7] Testifiers, many of them recent law school graduates, spoke about "being unable to pay rent, health insurance, car loans, and other necessary expenses if they could not start their jobs soon."[8] One argued that continuing to administer the bar exam, whether in-person or online, would only "reify the structural inequalities in our legal system," and that diploma privilege[9] presented the only equitable solution.[10] A Black[11] law graduate, noted the "intense personal stress" that students of color, especially Black students, were experiencing due to the pandemic and the ongoing "national reckoning on race" sparked by the then-recent murder of George Floyd.[12] Despite these compelling testimonies and widespread awareness of the pandemic's disproportionate effects on Black, Indigenous, and people of color (BIPOC)[13]

-the-bar-exam [https://perma.cc/BA37-XMFL].

4. *See* Hutton-Work & Guyse, *supra* note 1.

5. Texas Courts, *Texas Board Law Examiners*, YOUTUBE (July 2, 2020), https://www.youtube.com/watch?v=RzUAM6Ht91M&t=2592s (full recording of the July 2, 2020 Board of Law Examiners meeting).

6. *Id.*

7. *See id.*

8. *See* Hutton-Work & Guyse, *supra* note 1.

9. Diploma privilege allows graduates from accredited law schools to practice law without taking the bar exam. *See* Tim Zubizarreta, *The Diploma Privilege Manifesto*, JURIST (July 9, 2020), https://www.jurist.org/commentary/2020/07/jurist-eboard-diploma-privilege-manifesto [https://perma.cc/W6KC-W7LT].

10. Texas Courts, *supra* note 5, at 28:49 (testimony of Amber Magee).

11. This Note will capitalize the "B" in "Black" according to the AP writing style guide. *Explaining AP Style on Black and White*, AP (July 20, 2020), https://apnews.com/article/9105661462 [https://perma.cc/CF44-DPXS?type=image]. For more discussion, see Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html [https://perma.cc/FYY2-V45X].

12. *See* Hutton-Work & Guyse, *supra* note 1.

13. This Note will use the term BIPOC when referring to minority, non-white, and diverse students and people. The creators of the acronym sought to "highlight the unique relationship to whiteness that Indigenous and Black (African American) people have, which shapes the experiences of and relationship to white supremacy for all people within a U.S. context." *About Us*, BIPOC PROJECT, https://www.thebipocproject.org [https://perma.cc/F59L-9KWU]. This Note will also use the term "of color," such as "test takers of color," and avoid describing people as "minorities" unless directly

communities,[14] the Board of Law Examiners and the Supreme Court of Texas refused to implement emergency diploma privileges.[15] Instead, they cancelled the July bar exam, maintained the September exam date, and added an additional online testing date in October.[16]

During this time of national crisis, most states, like Texas, expressed great reluctance to consider alternatives to the bar.[17] Instead, some opted for a variety of slight modifications: completely cancelling bar exams in 2020 and scheduling new dates in 2021;[18] shifting the bar exam to a later date;[19] or offering online administration.[20] Many, however, refused to commit to any type of adjustment at all.[21] Nearly half of jurisdictions maintained in-person testing in July 2020[22] despite the doubling of COVID-19 cases in many states during this time.[23]

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quoting another source. For more discussion, see Danique Dolly, *A Major Request: Please Stop Calling Us Minorities*, EDUC. REIMAGINED (June 10, 2020), https://education-reimagined.org/a-major-request-please-stop-calling-us-minorities [https://perma.cc/2KCG-3EYC]; Derrick Z. Jackson, *The Term "Minority" Has Never Made Sense. Let's Cancel It*, GRIST (Aug. 17, 2020), https://grist.org/justice/the-term-minority-has-never-made-sense-lets-cancel-it [https://perma.cc/CF9Z-9J4U].

14. Wei Li, *Racial Disparities in COVID-19*, HARV. UNIV.: SCI. IN NEWS (Oct. 24, 2020), http://sitn.hms.harvard.edu/flash/2020/racial-disparities-in-covid-19 [https://perma.cc/F8GU-D7GR] ("Within the US, the pandemic is impacting racial groups differently, disproportionately affecting Black, Indigenous, and People of Color (BIPOC) communities.").

15. Amy Starnes, *Texas Supreme Court Cancels July Bar Exam, Adds October Online Test*, TEX. BAR BLOG (July 3, 2020), https://blog.texasbar.com/2020/07/articles/bar-exam/texas-supreme-court-cancels-july-bar-exam-adds-october-online-test [https://perma.cc/F5M8-F9PY].

16. *Id.*

17. *See July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS (Sept. 24, 2020), https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information [https://perma.cc/S43U-98G2] (indicating that 46 states still planned to use the bar exam).

18. The Delaware Supreme Court cancelled all bar exam testing dates in 2020. *Id*.

19. Hawai'i moved the July 2020 bar exam to September 2020. *Id.*

20. California administered their July bar exam online in October. *Id.*

21. *Id.*

22. Alabama, Colorado, Michigan, Nebraska, South Carolina, and Wyoming, among others, continued with in-person July exams. *Id.*; *see also* Pilar Margarita Hernández Escontrías, *The Pandemic is Proving the Bar Exam is Unjust and Unnecessary*, SLATE (July 23, 2020), https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html [https://perma.cc/D7F4-AESU] ("23 states are still opting for in-person bar exams [in July] . . . .").

23. During the month of July in 2020, the United States recorded 1.87 million new cases of COVID-19 and 33 states logged "one-day record increases in cases." Christine Chan & Lisa Shumaker, *U.S. Records Over 25,000 Coronavirus Deaths in July*, REUTERS (July 31, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-july/u-s-records-over-25000-coronavirus-deaths-in-july-idUSKCN24W1G1 [https://perma.cc/6CUV-HDVP].

Seventeen states denied "petitions or requests for an emergency diploma privilege."[24] Only four states (Washington, Oregon, Utah, Louisiana) and the District of Columbia passed resolutions to offer some form of emergency diploma privileges.[25]

States' decisions to maintain the bar exam despite a devastating pandemic that raised questions of equity[26] and even challenged the reliability of the test itself[27] revealed a devotion to the standardized test that defied even expert opinion from within the legal ranks.[28] Further analysis of this allegiance, however, reveals that the states' responses to the pandemic should not have been so surprising. For decades, state supreme courts,[29] the entities responsible for setting licensing standards in their respective jurisdictions, and the state bar examiners who carry out these requirements have refused to critically examine and address the disparate impacts of the bar exam.[30] Such disparate impacts are stark and predate the pandemic: in February 2020, only 17.6% of Black test takers passed the California Bar exam compared to half of white test takers.[31]

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24. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 17.

25. *Id.* These jurisdictions joined Wisconsin, the only jurisdiction in the United States to offer it permanently. Mark Hansen, *Wisconsin Bar Weighs a Degree of Change*, A.B.A. J. (Apr. 1, 2007), https://www.abajournal.com/magazine/article/wisconsin_bar_weighs_a_degree_of_change [https://perma.cc/4TML-P4DH].

26. *See* Hutton-Work & Guyse, *supra* note 1.

27. *See* Mike Stetz, *Timing of the Bar Exam—A Billion Dollar Issue in the COVID-19 Crisis and Beyond*, NAT'L JURIST (Mar. 30, 2020), https://www.nationaljurist.com/national-jurist-magazine/timing-bar-exam-billion-dollar-issue-covid-19-crisis-and-beyond [https://perma.cc/Z8NF-WEHB] (noting that remote proctoring and online testing "raises important test validity issues"); Joe Patrice, *Like COVID-19, Online Bar Exam is a Disaster and Was Entirely Preventable*, ABOVE L. (Oct. 6, 2020), https://abovethelaw.com/2020/10/like-covid-19-online-bar-exam-is-a-disaster-and-was-entirely-preventable [https://perma.cc/4MWT-FZVJ] (noting complaints of tech failures, racially biased facial recognition software, and lack of tech support during online administration of the bar exam).

28. *See, e.g.*, Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah J. Merritt, Patricia E. Salkin & Judith W. Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ctr. Interdisc. L. & Pol'y Stud., Working Paper No. 537, 2020), https://images.law.com/contrib/content/uploads/documents/292/63885/COVID19-and-the-July-2020-Bar-Exam.03.22.201-copy.pdf [https://perma.cc/R72B-AWEF] (a working paper written by a team of law professors and educational policy experts arguing that the public health emergency foreclosed the possibility of traditional bar administration and necessitated other "humane options" for licensure).

29. This Note will refer to the highest courts in each state as state supreme courts even though Maryland, New York, and West Virginia have different names for their highest courts. *State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts [https://perma.cc/LS6H-G2ZJ].

30. *See infra* Section II.B.

31. *General Statistics Report February 2020 California Bar Examination*, STATE BAR

Despite these racial disparities, constitutional protections against unequal treatment present little hope for legal accountability. The profession's willful blindness to the bar exam's disparate effects on test takers of color has only been reinforced by a judicial interpretation of the Equal Protection Clause that permits courts to remain ignorant to everything but the most flagrant, undisguised instances of racism.[32] This controlling interpretation of the Equal Protection Clause presents an insurmountable barrier that occludes constitutional challenges. Furthermore, even if courts could construe the Equal Protection Clause to confer liability for more insidious forms of discrimination, such as those that have been perpetuated by the bar, the absolute immunity granted to judges and boards of bar examiners has made seeking recourse nearly impossible.[33] The long-measured disparate impacts of the bar exam on would-be lawyers of color is not a product of an "absence of knowledge," it is "the cultivation of institutions, ideologies, and rhetorical mazes that unwitness racism."[34]

This Note analyzes the legal doctrines that have protected decisionmakers from legal accountability for decades of disparate impacts on test takers of color. While the legal path forward is not immediately clear given these barriers, this Note aims to provide legal activists, policymakers, and others with a legal analysis of how the law has evolved to inhibit progress regarding lawyer licensure, and guide future conversations about which pressure points to pursue. Part I provides an overview of the persistent "diversity problem" in the legal profession, details the exclusionary history and discriminatory impacts of the bar exam, and outlines the governance structure of lawyer licensure. Part II describes how absolute immunity and the Equal Protection doctrine have intertwined to create a nearly impenetrable barrier against legal liability and condone the willful blindness of states to the racially disparate impacts of the bar. Finally, Part III presents a call to action to states and lawmakers to face the disparate impacts of the bar exam head-on by collecting data and addressing the blind spots the Fourteenth Amendment's court-created intent requirement might have promoted in the legal profession.

CAL., http://www.calbar.ca.gov/Portals/0/documents/FEB2020-CBX-Statistics.pdf [https://perma.cc/SNS4-48TB]. In real numbers, 74 Black test takers passed on the first try, compared to 497 white test takers. *Id.*

32. *See infra* Section II.B.1.

33. *See infra* Section II.A.

34. Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI., 473, 475 (2019).

I. HISTORICAL, STATISTICAL, AND STRUCTURAL STUDY OF LAWYER DEMOGRAPHICS AND THE BAR EXAM

Diversity in the legal profession, or lack thereof, has elicited concern for decades.[35] Despite these years of awareness, a persistently disproportionate number of lawyers identify as white.[36] In 2020, an American Bar Association (ABA) report revealed that the number of Latinx, Black, Asian, Indigenous, and mixed-race lawyers grew only three percentage points over a decade.[37] A National Association of Law Placement (NALP) study also revealed a story of incremental change in the private sector: in 2020, lawyers of color constituted 17.95% of all lawyers in private practice, an increase of just 7.37% in fourteen years.[38] James Leipold, head of NALP's data collection for over a decade, commented in 2019 that the diversification of the

35. *See, e.g.*, Demetria Frank, *Social Inequity, Cultural Reform & Diversity in the Legal Profession*, 13 S. J. POL'Y & JUST. 25 (2019) (arguing that law schools need to undergo "cultural reform" in order to meet the diversity shortfall in the legal profession); Lorraine K. Bannai & Marie Eaton, *Fostering Diversity in the Legal Profession: A Model for Preparing Minority and Other Non-Traditional Students for Law School*, 31 U.S.F. L. REV. 821, 821 (1997) ("In recent years, law schools have struggled to recruit and graduate a more diverse student population."); Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299 (1987) (finding Black and Hispanic Americans face a number of barriers that lead to their disproportionate numbers in the legal profession); Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PENN. L. REV. 351, 352 (1970) (discussing a new policy of some law schools to give preferential admissions treatment to Black applicants in recognition that institutions had historically discriminated against them).

36. *See infra* note 37 and accompanying text.

37. *ABA Profile of the Legal Profession 2020*, A.B.A. 33 (July 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [https://perma.cc/SNS4-48TB] (showing that between 2010 and 2020, the number of lawyers of color increased from 11.4% of all lawyers to 14.1%). The National Lawyer Population Survey consists of reporting from "[i]ndividual state bar associations or licensing agencies." *National Lawyer Population Survey*, A.B.A. (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2009-2019.pdf [https://perma.cc/88Y4-SMQ5].

38. *2020 Report on Diversity in U.S. Law Firms*, NAT'L ASS'N L. PLACEMENT 9 (Feb. 2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf [https://perma.cc/5SG2-BTNB] (finding that in 2006, lawyers of color made up 10.58% of the legal profession). Although the public sector does not track lawyer demographics to the same extent as the NALP, a 2015 study on the diversity of nonprofits and foundations reported that only 18% of nonprofit staff identified as a person of color. Lea S. Gutierrez, *Missing: Where is the Public Sector in Discussions About Diversity in the Legal Profession*, *in IILP Rev. 2019–2020: The State of Diversity and Inclusion in the Legal Profession,* INST. FOR INCLUSION LEGAL PRO. 80–81 (2020), http://www.theiilp.com/resources/Documents/IILP_2019_FINAL_web.pdf [https://perma.cc/X3TH-WFHD].

industry seemed to move "at a rate so slow as to seem almost imperceptible at times."[39]

Decisionmakers and the legal community must ask themselves if they are content with this incremental change, and radically rethink lawyer licensing. This Part seeks to inform such a rethinking. Section A will illustrate the benefits of a more diverse profession. Section B will present the history of the bar exam and its governance. Section C will examine the bar's current impacts on test takers of color.

A. A MORE DIVERSE LEGAL PROFESSION WILL RESULT IN BETTER REPRESENTATION FOR CLIENTS, INCREASED PUBLIC TRUST IN LEGAL INSTITUTIONS, AND ASSIST THE COUNTRY'S JOURNEY TOWARDS EQUITY

By 2045, the United States will be "majority minority," and nonwhite people will constitute more than fifty percent of the population.[40] The majority of people under thirty years of age will be nonwhite in less than ten years.[41] As the United States becomes more racially diverse, the legal profession should take notice and respond—a diversifying populace will result in more diverse clients and litigants. A more diverse legal workforce will not only more accurately reflect its clients, but better represent them.[42] According to late Justice Ruth Bader Ginsburg: "[a] system of justice is the richer for the diversity of background and experience of its participants. It is the poorer . . . if its members—its lawyers, jurors, and judges—are all cast from the same mold."[43]

Studies also suggest that a more diverse legal profession would benefit both the public and private sectors.[44] One found that legal services organizations more effectively serve their clients when their

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39. *2019 Report on Diversity in U.S. Law Firms*, NAT'L ASS'N L. PLACEMENT 2 (Dec. 2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf [https://perma.cc/CV4U-YFB4].

40. *See* Stef W. Kight, *America's Majority Minority Future*, AXIOS (Apr. 29, 2019), https://www.axios.com/when-american-minorities-become-the-majority-d8b3ee00-e4f3-4993-8481-93a290fdb057.html [https://perma.cc/S727-42T9].

41. *See id*.

42. *See* Brief of the American Bar Association as *Amicus Curiae* in Support of Respondents and Urging Affirmance at 15, Fisher v. U. Tex. at Austin, 570 U.S. 297 (2013) (No. 11-345) ("A diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.").

43. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003).

44. *See, e.g.*, Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J. L. & PUB. POL'Y 4, 4–5 (2008).

lawyers reflect the racial makeup of the community.[45] If an organization works primarily with Black clients, they should seek to employ Black lawyers because: (1) a shared identity will "make[] it more likely that a Black attorney will be able to gain a Black client's trust"; (2) "Black attorneys communicate more effectively with Black clients"; and (3) white lawyers are "more likely to be perceived as part of 'the system,' limiting the trust of clients who have been disproportionally mistreated by the legal system."[46] On the private side, diverse law firms regularly "out-perform" peer firms in revenue, a result likely explained by the "higher productivity, better critical thinking skills, and varied perspectives that flow from a heterogeneous workplace."[47] In a profession that works primarily with people and depends on client demand, lawyers must be aware of the ways that different cultures "influence . . . behaviors or . . . values" and avoid "substituting their own judgment for that of their clients and fail[] to pursue their clients' true objectives."[48]

An increase in lawyers of color could also increase public trust in the legal profession and system in general. In 2018, 28% of Americans believed lawyers had "low" or "very low" honesty or ethical standards, and only 19% of Americans thought lawyers had "very high" or even "high" honesty or ethical standards.[49] The only professions that people trusted less than attorneys were business executives, stockbrokers, telemarketers, car salespeople, and members of Congress.[50] Not necessarily the best company. This country's democratic ideals rely, at least ostensibly, on the representation of the people.[51] When the people arguing, articulating, and interpreting the law look disproportionately different from the populace, trust declines.[52] More racial

45. *Id.*

46. *Id*. at 16.

47. Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEG. PRO. 1, 36 (2009).

48. Debra Chopp, *Addressing Cultural Bias in the Legal Professions*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 370 (2017).

49. Megan Brenan, *Nurses Again Outpace Other Professions for Honesty, Ethics*, GALLUP (Dec. 20, 2018), https://news.gallup.com/poll/245597/nurses-again-outpace-professions-honesty-ethics.aspx [https://perma.cc/9SMV-28AF].

50. *Id.*

51. David Plotke, *Representation is Democracy*, 4 CONSTELLATIONS 19, 19 ("Representation is crucial in constituting democratic practices."); *see also* Sophie Vaughan, *Why Representation in Politics Actually Matters*, TEEN VOGUE (Mar. 17, 2020), https://www.teenvogue.com/story/why-representation-in-politics-matters [https://perma.cc/RY7F-DCC6] ("If the system is meant to be a representative democracy, then it should be representative of the many populations it serves . . . .").

52. *Diversity in the Legal Profession: The Next Steps*, A.B.A.: PRESIDENTIAL DIVERSITY INITIATIVE 9 (Apr. 2010), https://www.americanbar.org/content/dam/aba/

diversity in the legal profession could result in "greater trust in the mechanisms of government and the rule of law."[53]

Diversifying the legal bar could also lead to the diversification of other influential civic roles. For example, a legal career often creates a pathway to elected roles.[54] The law consistently remains among the most common professions held by Congressmembers.[55] In 2019, 54% of U.S. Senators and 37% of U.S. House members possessed a law degree.[56] Although a law degree is not by any means a requirement to run for or hold public office, the systematic exclusion of people of color, especially Black people, from the bar has had "the effect of excluding a disproportionate fraction of [B]lack [people] from politics."[57] Furthermore, influential political roles do, at least in many jurisdictions, require a law degree, such as prosecutor, attorney general, and judge.[58]

Finally, if this country is truly committed to racial justice and equity, diverse perspectives in the law are paramount. Since the founding of the United States, decisionmakers have used the law as a tool to favor "whiteness" while denying social mobility to BIPOC communities.[59] Courts once wielded the law to uphold the stripping of land from indigenous tribes,[60] segregation by race,[61] denial of United States citizenship to non-white people,[62] and internment of Japanese-

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administrative/diversity-inclusion-center/next-steps-report.pdf [https://perma.cc/8AG4-KBY7] ("Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice.").

53. *Id*. at 5; *see also* Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 80 (2012) ("Increasing diversity promotes greater trust and participation in the American political, economic, and legal systems.").

54. *See* Tom Murse, *Members of Congress by Profession*, THOUGHTCO. (Jan. 16, 2020), https://www.thoughtco.com/members-of-congress-by-former-professions-3368253 [https://perma.cc/7KN3-4NDN].

55. *Id.*

56. Thomas Lewis, *INSIGHT: Law School Popular for Congress, with Harvard, Georgetown Topping List*, BLOOMBERG L. (Jan. 25, 2019), https://news.bloomberglaw.com/us-law-week/insight-law-school-popular-for-congress-with-harvard-georgetown-topping-list [https://perma.cc/SAV7-YBKZ].

57. George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 638 (2003).

58. *Id.*

59. Judy Helfand, *Constructing Whiteness*, RACE, RACISM, & L. (Aug. 26, 2011), https://racism.org/articles/race/66-defining-racial-groups/white-european-american/378-white11a2 [https://perma.cc/65CX-EXFB].

60. Johnson v. M'Intosh, 21 U.S. 543, 569–70 (1823).

61. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

62. United States v. Bhagat Singh Thind, 261 U.S. 204, 215 (1923).

Americans.[63] While diverse representation will not reverse the racist underpinnings of the law, it can ensure that as the law continues to evolve, a more diverse and representative profession will play a part in shaping it. Judges and lawyers interpret and mold the law; they can lead movements as effective "agents of social change"[64] and shift how the law is wielded to uphold justice.[65]

B. THE HISTORICAL AND CURRENT ROLE OF THE BAR EXAM IN THE EXCLUSION OF BIPOC PEOPLE FROM THE PRACTICE OF LAW

Among the multitude of reasons for the lack of diversity in the legal profession, scholars have widely acknowledged the bar exam's historical and present role as a gatekeeper to the legal profession for would-be lawyers of color.[66] This Section focuses on the final barrier that remains after a BIPOC student endures the LSAT,[67] takes out loans to cover tuition and living costs,[68] and survives a white-

63. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

64. James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559, 1560 (2009).

65. *See generally* Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61 (2008) (discussing the ways today's lawyers are changing norms in legal practice).

66. *See* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 386–93 (2002) ("[T]he existing bar exam serves as yet another barrier to achieving the declared goal of developing a more diverse bench and bar."); Floyd Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259, 291–93 (2010) ("Unfortunately, the final step [the bar exam] can be the most challenging obstacle for African American law students to overcome."); Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem*, 24 STAN. L. POL'Y REV. 379, 405–07 (2010) ("Almost all would agree that the individual state bar examinations act as a severe impediment to certain members of underrepresented minority groups becoming attorneys.").

67. LaTasha Hill, *Less Talk, More Action: How Law Schools Can Counteract Racial Bias of LSAT Scores in the Admissions Process*, 19 UNIV. MD. L.J. RACE, RELIGION, GENDER, & CLASS 313, 313–14 (2019) ("The staggering LSAT score gap between White and minority test-takers has remained true for decades and consistently appears in a variety of data from different sources."); Eremipagamo M. Amabebe, *Beyond "Valid and Reliable": The LSAT, ABA Standard 503, and the Future of Law School Admissions*, 95 N.Y.U. L. REV. 1860, 1862 (2020) ("[T]he LSAT's critics have proffered empirical evidence indicating that the test is . . . [a] discriminatory barrier to entry for women and minorities, and a sorting mechanism that entrenches existing wealth and power within the legal system.").

68. *See* Debra Cassens Weiss, *Study Finds Widening Gap in Expected Law School Debt Based on Race and LSAT Score*, A.B.A. J. (Mar. 1, 2016), https://www.abajournal.com/news/article/study_finds_widening_gap_in_expected_law_school_debt_based_on_race_and_lsat [https://perma.cc/B4K7-SGM3] ("The increased cost of attending law school falls most heavily on blacks, Hispanics, and those with low LSAT scores . . . ."); *see also* Valerie Fontenot, *Disparities in Student*

dominated institution,[69] and how the bar exam might "contribute to [the legal profession's] lack of diversity, or what might less generously be called its continued segregation."[70]

1. The Racist and Exclusionary History of the Bar Exam

In Colonial America, admission to the bar required a legal apprenticeship with a practicing attorney and approval from a local court.[71] The specific requirements were determined on a state-by-state basis.[72] By the 1820s, however, the public began to grumble that the licensing process was "elitist and contrary to the ideals of democracy" because only young men with connections could secure the apprenticeships necessary to become an attorney.[73] This disapproval resulted in the relaxation of admissions standards to the point where "virtually any man" could seek to enter the legal profession.[74] One applicant's account from this era details how he "passed the bar" by verbally responding to questions such as "what is a contract?" which were posed by Abraham Lincoln, then an Illinois bar examiner, from his bathtub.[75]

The shift from oral to written exams started in 1855 when Massachusetts required applicants without three years of legal study to

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Loans: How Did We Get Here and What Can We Do?, A.B.A. (July 16, 2019), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-disparities-in-student-loans (last visited Oct. 25, 2021) (providing a brief overview of the disparity in student loan debt and repayment, especially among Black and Hispanic students).

69. Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 221–22 (2017) ("While legal educators teach students to identify, isolate, and even question the legal rules in a particular case, it is from a white-privileged normative foundation. Law professors rarely teach law students to systematically question the biased foundation of the legal system, or the ways in which dominate culture and systems of privilege influence the law.").

70. Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1700 (2002).

71. Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RSRV. L. REV. 1191, 1193 (1995).

72. *Id.* at 1194.

73. *Id.* at 1195.

74. *Id.*

75. *Id.* at 1196; *see also* John A. Matzko, The Early Years of the American Bar Association, 1878-1928 (Aug. 1984) (unpublished Ph.D. dissertation, University of Virginia) (on file with author) ("Virtually every legal memoir of the early nineteenth century seems to include a half-humorous illustration of the casual manner in which prospective lawyers were certified to practice in antebellum America.").

pass a written test.[76] New York created its own written and oral test in 1877, and Idaho and Nevada soon followed.[77] Around this time, so-called "elite lawyers" began to form "exclusive bar associations," such as the American Bar Association, for the alleged purpose of "rais[ing] the status and competence of lawyers."[78] Bar associations often viewed regulation of the profession as one of their duties and claimed that making the profession more exclusive would raise professional standards and the quality of representation.[79] However, it is impossible to ignore that around the same time, the rise of urban living and industrialism in the early twentieth century had prompted many immigrants and Black Americans to attend part-time law schools in the hopes of advancing their livelihoods.[80]

The rising number of non-white lawyers distressed the nation's bar associations and law school leaders.[81] In 1911, the dean of the University of Chicago Law School publicly supported instituting a minimum college requirement because it would serve as a way to "reduc[e] hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar."[82] Bar associations sought to keep membership focused on the "decent part" of the legal profession, which invariably included white male "well-to-do" business lawyers, and excluded those characterized as "ignorant even of the English language" who would "vulgariz[e] the profession."[83] These bigoted fears ignited a drive to "purify the legal profession of minorities" who threatened the business of white attorneys.[84] The legal profession, in the form of state bars and the ABA, strived for this so-called purification by lobbying for "tougher" bar exams and mandatory school accreditation.[85] Although these lawyers claimed their actions arose out of a concern for "consumer protection," the timing of these changes with the increase in ethnic minorities entering the profession raises serious doubts about whether this intention was genuine.[86]

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76. Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEG. ETHICS 359, 374 (1996).

77. *Id.*

78. Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 3–4 (2020).

79. *Id.* at 4; *see* Hansen, *supra* note 71, at 1197.

80. George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEG. EDUC. 103, 109–10 (2003).

81. *Id.*

82. *Id*. at 111.

83. Matzko, *supra* note 75, at 7–8.

84. Shepherd, *supra* note 80, at 110.

85. *Id.*

86. *See id.* ("It was no coincidence that bar pass rates plummeted and mandatory

Professional bar associations sought to control entrance into the profession through a "written bar exam administered by a permanent board of examiners" and, as these bar associations gained influence, they set their sights on diploma privilege which had existed in many states since the mid-nineteenth century.[87] The ABA publicly expressed disapproval of diploma privilege in 1921, citing a preference for candidates to prove their qualifications through an exam administered by a "public authority."[88] In the 1930s, complaints from bar associations complaining about the "overcrowding" of the bar and the "horde of unqualified applicants" led to the establishment of the National Conference of Bar Examiners (NCBE) as overseer of state bar exams.[89] The powerful influence of state bar associations and coded language meant to stoke fears of dominance by ethnic minorities and the poor directly contributed to the rapid decline of diploma privilege. As of 2021, only one state, Wisconsin, continues to offer diploma privilege to all of its law school graduates.[90]

2. The Bar Exam Today

Presently, each state, and the District of Columbia, and their board of bar examiners either writes or adopts a bar exam that "generally consists of a multiple-choice section, essay questions, and one or two 'performance' questions."[91] The bar exam, however, continues to evolve. As of July 2021, 38 states have adopted the Universal Bar Examination (UBE).[92] The UBE, written and administered by the NCBE, is a uniformly administered and graded exam meant to lower costs for states and give test takers a portable score that allows them

accreditation began at exactly the time when minorities were finally overcoming overt discrimination and becoming lawyers. The bar exam and accreditation were the ABA's new line of defense against minorities that the ABA erected after overt discrimination began to fail. Although the ABA asserted that tough bar exams and accreditation were necessary for consumer protection, the calls for consumer protection came only when many new minority lawyers were beginning to compete effectively with the ABA's members.").

87. *See* Zubizarreta, *supra* note 9.

88. Hansen, *supra* note 71, at 1201.

89. *See* Zubizarreta, *supra* note 9.

90. Hansen, *supra* note 71, at 1201–02.

91. Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 231 (2014).

92. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube [https://perma.cc/9LBJ-LW77]; *Which States Have Adopted the Uniform Bar Exam (UBE)?*, JD ADVISING (Oct. 29, 2020), https://www.jdadvising.com/which-states-have-adopted-the-ube [https://perma.cc/SQV6-4QRM] (stating that Texas and Oklahoma will adopt the UBE in February and July, respectively).

to practice in any (participating) state.[93] Although the NCBE operates as a non-profit, it works closely with state actors like boards of bar examiners.[94] Although many have welcomed the widespread standardization of the exam, others criticize what they view as a de-emphasis on state-specific law and an over-emphasis on "subject matter knowledge" at the cost of "problem solving, legal reasoning and analysis, legal research, factual investigation, client counseling," and other skills relevant to the practice of law.[95]

3. Governance of the Bar Exam and Licensing Standards

The requirements to sit for the bar exam, UBE or not, "vary little from state to state."[96] In all jurisdictions, applicants need to have met graduation requirements for an undergraduate institution and "completed all requirements for graduation from an ABA-approved law school."[97] Making any changes to these licensure requirements and the bar exam requires action from a state's judicial branch, which "govern[s] and administer[s] the existing bar exam."[98] In the United

93. Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PRO. LAW. 43, 45 (2014).

94. *See About NCBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/about [https://perma.cc/4RML-SKQG] ("In fulfilling our mission, we . . . provide support to jurisdiction exam administrators before, during, and after each exam administration . . . [and] provide training for jurisdiction graders."); *see also 2019: Year in Review*, NAT'L CONF. BAR EXAM'RS 4 (2020) ("We help jurisdiction bar admissions processes run well from start to finish by providing support and training to jurisdiction administrators and graders, providing scoring and research services after each exam and on an as-needed basis, and conducting character and fitness investigations on behalf of jurisdictions.").

95. Honabach, *supra* note 93, at 47–50.

96. Hansen, *supra* note 71, at 1202.

97. *Id*; *see also Comprehensive Guide to Bar Admission Requirements*, NAT'L CONF. BAR EXAM'RS vii (2020), https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [https://perma.cc/VYL6-A6RJ]. A few states do not require graduation from an ABA-approved law school to sit for the bar exam; however, restrictive stipulations like the non-approved school needs to be in the state where a test taker takes the bar, or the applicant must have practiced in another state for a certain number of years exist. Hansen, *supra* note 71, at 1203; *Practicing Outside California*, SAN JOAQUIN COLL. L., http://www.sjcl.edu/index.php/prospective-students/why-sjcl/practicing-outside-california [https://perma.cc/5SBQ-C74G].

98. Curcio et al., *supra* note 66, at 416; *see* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1172 (2003); *see, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 520.1–18 (vesting bar admission in New York with the Appellate Division of the Supreme Court); OHIO CONST. art. IV, § 2(b)(1)(g) (granting the Supreme Court of Ohio exclusive jurisdiction to regulate admission to the practice of law in Ohio); Colo. R. Civ. P. 202.1 ("The Supreme Court exercises jurisdiction over all matters involving the licensing and regulation of those persons who practice law in Colorado.").

States, the highest court plays a legislative role in determining the rules of conduct for lawyers and their licensure.[99] Therefore, the legal profession differs from other licensed professions, such as medicine or accounting, which are regulated by state statutes.[100] The purported reasoning for this unique regulatory and governance framework arises out of respect for the "constitutional doctrine of separation of powers" and the "inherent authority of the courts to regulate those appearing before them."[101] Although state supreme courts possess the chief responsibility for regulating the legal profession in their states, the "day-to-day regulatory efforts"[102] usually fall to state bodies such as a board of legal licensure[103] or a unified bar association.[104] Regardless, these bodies are ultimately "subject to the authority of the state supreme courts."[105]

However, the doctrine of absolute immunity of the judicial branch makes legal accountability for the disparate impacts of the bar exam or challenges to the bar passage requirement nearly impossible.[106] The extension of absolute immunity from judges to "non-

99. *See* Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 720 (2016).

100. *See, e.g.*, Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, 7 VIRTUAL MENTOR 1, 1 (2005) ("The right to practice medicine is a privilege granted by the state. Each state has laws and regulations that govern the practice of medicine and specify the responsibilities of the medical board in regulating that practice. These regulations are laid out in a state statute, usually called a medical practice act."); *Accountancy Rules and Law*, N.M. REGUL. & LICENSING DEP'T, http://www.rld.state.nm.us/boards/Accountancy_Rules_and_Laws.aspx [https://perma.cc/8Z3Z-RHZT] ("The practice of public accountancy is governed by the 1999 New Mexico Public Accountancy Act.").

101. Terry, *supra* note 99, at 720–21.

102. *Id.* at 720.

103. *See, e.g.*, *About the Board*, TEX. BD. L. EXAM'RS, https://ble.texas.gov/about [https://perma.cc/PX8E-ZBXH] ("The Texas Board of Law Examiners is an agency of the Texas Supreme Court.").

104. Terry, *supra* note 99, at 721; *see, e.g.*, *Ethics & Discipline*, STATE BAR GA., https://www.gabar.org/barrules/ethicsandprofessionalism/index.cfm [https://perma.cc/8DR4-4844] ("Although the Supreme Court of Georgia retains ultimate authority to regulate the legal profession, the State Bar of Georgia's Office of the General Counsel serves as the Court's arm to investigate and prosecute claims that a lawyer has violated the ethics rules.").

105. Terry, *supra* note 99, at 721. For discussion on the effectiveness of this regulatory scheme and/or whether the judicial branch is the best authority to govern the legal profession, see generally Barton, *supra* note 98.

106. *See, e.g.*, *Texas Board of Law Examiners Rulebook* 37, TEX. BD. L. EXAM'RS (Dec. 1, 2019), https://ble.texas.gov/txrulebook [https://perma.cc/95AS-YLLA] ("The Board and its members, employees, and agents are immune from all civil liability for damages for conduct and communications occurring in the performance of and within the scope of their official duties relating to the character and fitness qualification,

judges," like members of licensing boards, shields relevant decisionmakers.[107] Despite the criticism that this seemingly impenetrable and far-reaching immunity thwarts legitimate civil rights complaints,[108] there have been few recent developments towards reform.[109]

C. THE DISPARATE IMPACTS OF THE BAR EXAM

The last study that analyzed and reported the demographic breakdown of bar exam results concluded before the 20th century begun.[110] The study, overseen by the Law School Admission Council (LSAC), strove to present results from fifty jurisdictions[111] and represented "the first time that national race- and gender-specific bar passage data" had been analyzed.[112] Thirty-six states, "actively supported" the study, while fourteen "declined to participate for a variety of reasons."[113] Reasons for refusing ranged from "lack of interest" and "distrust of the use" of the data.[114] For these states, the study used indirect data such as law school graduation rates and lists of passing candidates published by each jurisdiction.[115]

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eligibility, examination, monitoring, and licensing of Declarants, Applicants, and Probationary Licensees."); *Rule 105*, PENN. BD. L. EXAM'RS, https://www.pabarexam.org/bar_admission_rules/105.htm [https://perma.cc/PST2-VDVQ] ("The Board of Law Examiners, and its members, employees, and agents are immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law."); *Rules for Admission to the Bar*, MINN. STATE. BD. L. EXAM'RS (Apr. 6, 2020), https://www.ble.mn.gov/rules [https://perma.cc/D3BD-CNRG] ("The Board and its members, employees, agents, and monitors of conditionally admitted lawyers are immune from civil liability for conduct and communications relating to their duties under these Rules or the Board's policies and procedures.").

107. For more, see Margaret Z. Johns, *A Black Robe is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 307–10 (2006).

108. *See, e.g.*, *id.*; Timothy M. Stengel, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 TEMP. L. REV. 1071 (2012); Douglas K. Barth, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?*, 27 CASE W. RSRV. L. REV. 727 (1977).

109. *See infra* Section II.A.

110. Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, LAW SCH. ADMISSION COUNCIL (1998), https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf [https://perma.cc/VF72-H93M].

111. *Id.* at 5.

112. *Id.* at 2.

113. *Id.*

114. *Id.*

115. *Id.*

The results represented 93% of students who started law school in the fall of 1991 and subsequently graduated.[116] The final report revealed that of the students who started law school in the fall of 1991, 91.93% of white, 61.4% of Black, 66.36% of Indigenous, 80.75% of Asian, and 74.57% of Latinx test takers passed the bar examination on the first try.[117] Despite these obviously disparate passage rates, the study explicitly declared it would not address questions regarding the "role of the bar examination itself" in passage rates of test takers of color and potential bias in the test.[118] Furthermore, the report's "Historical Introduction" uses an almost celebratory tone to conclude that "minority law students graduate and pass the bar examination soon after graduation in significant numbers" even though a few pages later, it reports a thirty percent gap in passage rates between Black and white test takers.[119]

Although a comprehensive disaggregation of exam results has not happened in recent years, evidence of the bar exam's continued disparate impact on test takers of color is "overwhelming."[120] While most states do not report passage rates by race,[121] the disaggregated data that does exist is eye-opening. California, the only state to regularly publish a demographic breakdown of passage rates, illustrates the size of this disparity. 50.1% of white test takers passed the February 2020 bar exam on the first try.[122] Conversely, 17.6% of Black test takers, 25.2% of Latinx test takers, and 27.7% of Asian test takers cleared the same hurdle.[123] Despite the California bar exam's reputation as one of the toughest in the country,[124] the gap between white and non-white passage is striking, especially considering the

116. *Id.* at 6.

117. *Id.* at 27 tbl.6.

118. *Id.*

119. *Id.* at vii.

120. Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 952 (2020).

121. *See infra* Section II.B.2.

122. *General Statistics Report—February 2020 California Bar Examination*, STATE BAR CAL. 2 (2020), https://www.calbar.ca.gov/Portals/0/documents/FEB2020-CBX-Statistics.pdf [https://perma.cc/5LUJ-4F45].

123. *Id.*

124. In 2018, barely 40% of all July test takers passed. David L. Faigman, Stephen C. Ferruolo & Jennifer L. Mnookin, *Op-Ed: Why is it So Much Harder to Become a Lawyer in California Than in New York?*, L.A. TIMES (Nov. 29, 2018), https://www.latimes.com/opinion/op-ed/la-oe-faigman-california-bar-exam-20181129-story.html [https://perma.cc/DMP8-LRE6].

relatively high diversity of California's law schools[125] and the state's broader majority-minority population.[126]

Occasional reports from New York also present disparities between white and BIPOC test takers, particularly Black and Latinx test takers.[127] 90.1% of white test takers in New York passed the July 2017 bar exam on the first try.[128] Only 68.5% of Black, 77.6% of Latinx, and 85% of Asian test takers cleared the same hurdle.[129] New York's adoption of the UBE in 2016 did not seem to make much of a difference: In July 2015, 85.1% of white test takers passed the bar exam on the first try; 58.6% of Black, 65.6% of Latinx, and 73% of Asian test takers did the same.[130]

Bar Exam Passage Rates by Race[131]			
	LSAC Study[132] (1996)	California[133] (Feb. 2020)	New York[134] (July 2017)
White	91.9%	50.1%	90.1%
Black	61.4%	17.6%	68.5%

125. For example, fourteen law schools located in California placed in the top fifty most diverse law schools in the country in 2020 (Golden Gate Univ. (9), Univ. of S.F. (16), Univ. of Cal.-Davis (19), Univ. of Cal.-Irvine (21), Santa Clara Univ. (24), Cal. W. (26), Univ. of Cal.-Hastings (31), Univ. of Cal.-Berkeley (33), Univ. of S. Cal. (35), Loyola L. Sch. (36), Univ. of the Pac. (39), Univ. of Cal.-L.A. (40), Stanford (47), and Pepperdine Univ. (48)). *See 2020 Raw Data Law School Rankings*, PUB. LEGAL, https://www.ilrg.com/rankings/law/1/desc/MinorityStudents [https://perma.cc/G6HG-WKH4].

126. Hans Johnson, Eric McGhee & Marisol Cuellar Mejia, *California's Population*, PUB. POL'Y INST. CALIF. (Mar. 2021), https://www.ppic.org/publication/californias-population [https://perma.cc/8LAH-Q3HC] (showing that in 2019, people of color accounted for 64% of California's population).

127. *See* Howarth, *supra* note 120, at 953 ("Reports that have been occasionally released for New York bar exam pass rates also show wide disparities.").

128. *Impact of Adoption of the Uniform Bar Examination in New York*, NAT'L CONF. BAR EXAM'RS RSCH. DEP'T 166 tbl.4.2.24 (Aug. 20, 2019), https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf [https://perma.cc/U3S5-KRA7].

129. *Id.*

130. *Id.*

131. Although the 1996 LSAC study included data for Native test takers, California and New York combined Native test takers with "other" races and/or those who identified as mixed race.

132. Wightman, *supra* note 110.

133. *General Statistics Report—February 2020 California Bar Examination*, *supra* note 122.

134. *Impact of Adoption of the Uniform Bar Examination in New York*, *supra* note 128.

Latinx	74.6%	25.2%	77.6%
Asian	80.8%	27.7%	85.0%

The 1996 LSAC study and more recent data from California and New York, the two most populous states in terms of licensed lawyers,[135] strongly indicate that the bar examination does not meet the goal of "fairness" that the NCBE[136] touts.[137] This evidence raises two questions: (1) why have state courts and bar examiners remained relatively immune from legal challenges despite such dramatically disparate outcomes for people of color and (2) why, in the 21st century, is disaggregated data on bar passage rates still so limited? In exploration of these questions, the next Part analyzes how the equal protection doctrine and absolute immunity have evolved over time to condone blindness to the bar exam's racial discrimination,[138] and how decisionmakers have, in turn, freely ignored the bar exam's disparate impacts.

II. ABSOLUTE IMMUNITY, EQUAL PROTECTION, AND HOW THEY HAVE INTERTWINED TO ENCOURAGE WILLFUL BLINDNESS

The Fourteenth Amendment of the United States Constitution, ratified in 1868, orders in part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[139] This consequential phrase has been dubbed the Equal Protection Clause. In the *Slaughter-House Cases*, the Supreme Court interpreted the purpose of the Equal Protection Clause:

> [T]he one pervading purpose . . . lying at the foundation of [the Fourteenth and the Fifteenth Amendments] . . . [is] the freedom of [Black people in the

135. In 2020, California had 168,569 licensed attorneys and New York had 184,662. *ABA National Lawyer Population Survey: Lawyer Population by State*, A.B.A. (2020), http://web.archive.org/web/20210611210138/https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2020.pdf [https://perma.cc/6LSG-U35W].

136. Although not every state has adopted the Universal Bar Examination (UBE), "[m]ost jurisdictions use one or more of the bar exam components developed by NCBE." *2019: Year in Review*, *supra* note 94, at 13.

137. *About NCBE*, *supra* note 94.

138. The bar exam has also been challenged for its disparate impacts on people with disabilities, Peter Blanck, *Thirty Years of the Americans with Disabilities Act: Law Students and Lawyers as Plaintiffs and Advocates*, 45 HARBINGER 8, 19 (2021), and low-income earners, Allen Mendenhall, Opinion, *The Bar Exam is Unfair and Undemocratic*, NEWSWEEK (Apr. 15, 2015), https://www.newsweek.com/bar-exam-unfair-and-undemocratic-322606 [https://perma.cc/F39P-8EK7] ("The burden of the bar exam falls disproportionately on low-income earners . . . who lack the ability to pay for law school or to assume heavy debts to earn a law degree.").

139. U.S. CONST. amend. XIV, § 1.

> United States], . . . the security and firm establishment of that freedom, and the protection of [Black Americans] . . . from the oppressions of those who had formerly exercised unlimited dominion over him.[140]

This vision suggests that at, at least at one point, the Supreme Court saw the potential of the Fourteenth Amendment to affirmatively protect and establish the rights of non-white Americans.

This Part, however, will trace how absolute immunity and the Equal Protection doctrine have intertwined to create a multi-layered barrier against holding decisionmakers legally accountable for the bar exam's disparate effects. It will also discuss how the Supreme Court has warped the original "pervading purpose" of the Equal Protection Clause into one that condones willful blindness[141] to discrimination, especially with regards to the bar exam. Section A will provide an overview of how state courts and their associates have been granted absolute immunity from Equal Protection civil suits. Section B will then discuss the rise of the malicious intent doctrine of the Equal Protection Clause, and its role in the acceptance of willful blindness to disparate impacts.

A. THE SHIELD OF ABSOLUTE IMMUNITY

The Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, provides for damages liability against federal and local officials for Constitutional violations.[142] Congress passed the Act, also referred to as the "Ku Klux Klan Act," to allow Black plaintiffs to seek redress against discriminatory state actors.[143] The Supreme Court, however, has since carved out a large set of exceptions to this means of accountability. In *Tenney v. Brandhove*, the Court ruled that section 1983 had implied absolute immunity for legislative acts.[144] Later, the Court also read

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140. 83 U.S. 36, 71 (1873).

141. "Willful blindness" combines the ideas of "intentional blindness" and "willful ignorance." The former, a portmanteau of "intent" and "colorblindness" coined by Ian Haney-López, is meant to sum up the "Court's racial jurisprudence" of remaining "intentionally blind to racial context." Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012). "Willful ignorance," as described by Michael Boucai, is used in criminal law as the legal equivalent to knowledge where a person "intentionally avoids learning a fact whose knowledge would make her subsequent conduct knowingly illegal." Michael Boucai, Note, *Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws*, 18 NAT'L BLACK L.J. 239, 244 (2004).

142. David M. Coriell, Note, *The Transferred Immunity Trap: Misapplication of Section 1983 Immunities*, 100 CORNELL L. REV. 985, 988 (2015); *see also* 42 U.S.C. § 1983.

143. *See Civil Rights Act of 1871*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/civil-rights-act-1871 [https://perma.cc/3UKA-KKHT]; *Historical Highlights: The Ku Klux Klan Act of 1871*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ [https://perma.cc/A2XU-XTX3].

144. 341 U.S. 367, 378–79 (1951).

absolute immunity for judicial acts into the section.[145] The Court rationalized these interpretations by looking at "the backdrop of the common law as it stood in 1871" and concluding that Congress would not have implicitly repealed "firmly established immunities for government officials."[146]

This Subsection describes how, even before reaching the uphill battle of establishing Fourteenth Amendment liability, the doctrine of absolute immunity prevents large swaths of plaintiffs, such as test takers of color, from challenging state courts and their associates.[147]

1. The Absolute Legislative Immunity of the Courts

Legislative immunity "encompasses the function of legislative decisionmaking."[148] Established in the Speech or Debate Clause of the U.S. Constitution,[149] legislative immunity is considered "beyond challenge."[150] The majority in *Tenney v. Brandhove* ruled that California state legislators could not be held liable under section 1983 because "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."[151] As long as the legislators act "in a field where legislators traditionally have power to act," they possess immunity from actions for damages

145. Pierson v. Ray, 386 U.S. 547, 553–55 (1967).

146. Coriell, *supra* note 142.

147. For the sake of length, this Note will only address absolute immunity. However, in the case where a government official does not have absolute immunity, they would likely still receive qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Qualified immunity protects a state actor from civil liability unless they violated a "clearly established right." Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). The doctrine of qualified immunity has also received a fair amount of criticism from judges and academics alike for "hamper[ing] the development of constitutional law." *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018).

148. Coriell, *supra* note 142, at 990. The United States Supreme Court has repeatedly stated that immunity law takes a "functional approach" that considers the "nature of the responsibilities of the individual official" and not from a specific "rank or title." Cleavinger v. Saxner, 474 U.S. 193, 201 (1985) (citations omitted); *see also* Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 475 (2008) ("[A]bsolute immunity goes to the task, not to the office. This means a couple of things. Even office holders who are protected by absolute immunity only receive absolute immunity for certain tasks, not all of them.").

149. U.S. CONST., Art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

150. Forrester v. White, 484 U.S. 219, 224 (1988).

151. Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

or prospective relief.[152] According to the *Tenney* majority, the justification for this privilege is obvious: to allow elected officials to best legislate and represent the interests of those who voted them into office, "without fear of prosecutions, civil or criminal."[153] In his dissent, however, Justice Douglas worried that under the majority ruling, injured parties had lost the ability to hold legislators accountable, "no matter the extremes."[154]

Although a state's supreme court is generally considered part of the judicial branch, the Supreme Court's decision in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.* strongly suggests that the establishment of bar licensure requirements would qualify as a legislative act that grants a court absolute legislative immunity.[155] In *Consumers Union*, the Court considered whether the Supreme Court of Virginia possessed immunity from a section 1983 claim.[156] Plaintiffs alleged that the state court violated the First and Fourteenth Amendments by promulgating a rule that prohibited attorney advertisement.[157] The Virginia Supreme Court countered by alleging that it possessed both inherent and statutory authority to "regulate and discipline attorneys,"[158] and that the state legislature had "vested . . . its entire legislative . . . power over the legal profession" to do so.[159]

The U.S. Supreme Court ruled that establishing professional rules conferred legislative immunity on the Virginia Supreme Court and "foreclose[d] suit against" it because these rules resembled legislative statutes.[160] The rules did not "arise out of a controversy which must be adjudicated," and instead related to "a need to regulate conduct for the protection of all citizens."[161] If state lawmakers had promulgated such rules, they would have also received absolute legislative

152. Sup. Ct. of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 733 (1980) (quoting *Tenney*, 341 U.S. at 379); *see also* Chemerinsky, *supra* note 148, at 476 ("Also, legislators have absolute immunity for injunctions for legislative functions.").

153. *Tenney*, 341 U.S. at 373–74 (quoting Coffin v. Coffin, 4 Mass. 1, 27 (1808)); *see also id.* at 377 ("The privilege [of legislative immunity] would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."); Coriell, *supra* note 142, at 991.

154. *Tenney*, 341 U.S. at 383 (Douglas, J., dissenting).

155. 446 U.S. 719 (1980).

156. *Id.* at 721.

157. *Id.* at 724–26.

158. *Id.* at 721.

159. *Id.* at 722.

160. *Id.* at 731, 734.

161. *Id.* (quoting Consumers Union of U.S., Inc. v. Am. Bar Ass'n, 470 F. Supp. 1055, 1064 (E.D. Va. 1979) (Warriner, J., dissenting)).

immunity; therefore, so should the Virginia Supreme Court.[162] In addition, the Court emphasized the Virginia Court's inherent authority to regulate the state bar.[163]

Similarly, a state supreme court could argue that licensure regulations, including the requirement to pass the bar exam, are "rules of general application and are statutory in character" serving a legislative purpose.[164] In all U.S. jurisdictions, including territories like Palau and Guam, the jurisdiction's highest court has authority on bar admission.[165] Supreme courts generally emphasize their inherent authority to legislate in the domain of lawyer licensures.[166] Therefore, the United States Supreme Court's firm stance on granting absolute legislative immunity for legislative acts presents a seemingly insurmountable roadblock to legal accountability. However, this blanket grant of absolute immunity should trigger questions regarding whether judges, whose elections or appointments to the bench often look different from legislative elections, should enjoy the same immunities without the same democratic checks, and whether administrative offices who carry out the licensure requirements of the supreme courts should benefit from absolute immunity as well.

2. The Accountability of Judges to Voters

In determining the bounds of legislative immunity, the United States Supreme Court noted that the democratic political process, not the judiciary, was the appropriate adjudicator for legislators' actions. According to *Tenney*, "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses [by legislators]" because "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed."[167] By ensuring that legislators answer only to voters on

162. *Id.* at 733–34.

163. *Id.*

164. *Id.* at 731 (quoting *Consumers Union*, 470 F. Supp. at 1064 (Warriner, J., dissenting)).

165. *See Comprehensive Guide to Bar Admission Requirements*, *supra* note 97, at 1 chart 1.

166. *See e.g.*, *Rule 103: Authority for and Effect of Rules*, PA. BD. L. EXAM'RS, https://www.pabarexam.org/bar_admission_rules/103.htm [https://perma.cc/NTC2-YPCL] ("The Supreme Court declares that it has inherent and exclusive power to regulate the admission to the bar and the practice of law."); *Washington State Court Rules: Admission and Practice Rules*, WASH. CTS., https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_01_00_00.pdf [https://perma.cc/N3RX-PAA5] ("The Supreme Court of Washington has the exclusive responsibility and the inherent power to establish the qualifications for admission to practice law, and to admit and license persons to practice law in this state.").

167. Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

Election Day, "rather than . . . to courts or investigators," absolute legislative immunity balances the need for decisionmakers to legislate without fear of legal retaliation with the need for public accountability.[168] This balancing, however, becomes distorted in the context of judicial appointments and elections.

The selection of judges to state benches does not mirror the election process for state representatives. For one, judicial appointments and elections vary widely across jurisdictions; a sharp contrast to the relatively uniform practices of legislative elections.[169] Furthermore, once a judge wins an election or appointment, the length of their term varies anywhere from six years to a lifetime term.[170] In thirty-two states, the term of a supreme court justice is eight years or longer.[171] In three states, appointed supreme court justices may serve until they reach seventy years of age or retire.[172] In contrast, state legislators are limited, at maximum, to four year terms.[173] After a judge has been appointed or elected,[174] the process of maintaining their seat for additional terms can also differ. In twenty states, additional terms are decided for at least one court through retention elections, which require only a simple majority of voters to vote yes.[175] Nineteen states hold either partisan or nonpartisan elections for their highest court, and

168. Kenneth A. Klukowski, *Sued for Speechifying: Legislative Immunity Trumps* Monell *Liability*, 23 TEX. REV. L. & POL. 601, 644–45 (2019).

169. *Compare Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/XU3A-BY9W] (presenting a wide variety of judicial election types and term limits), *with Lengths of Terms of State Representatives*, BALLOTPEDIA, https://ballotpedia.org/Length_of_terms_of_state_representatives [https://perma.cc/B8XH-6SC7] (describing the general uniformity of state practices with only a handful of outlier states).

170. *See State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts [https://perma.cc/LS6H-G2ZJ].

171. *See id.*

172. Massachusetts supreme court justices can serve until they turn 70 years of age. *See id.* New Hampshire supreme court justices serve until they retire or when they turn 70. *See id.* Rhode Island justices have life terms with no mandated retirement age. *See id.*

173. *Length of Terms of State Senators*, BALLOTPEDIA, https://ballotpedia.org/Length_of_terms_of_state_senators [https://perma.cc/B5ZL-W62Y].

174. Judges are appointed by the governor in 26 states, elected through elections in 22 states, and appointed by the state legislature in 2 states. *See Judicial Selection: Significant Figures*, *supra* note 169; *State Supreme Courts*, *supra* note 170.

175. *Judicial Selection: Significant Figures*, *supra* note 169; *Retention Election*, BALLOTPEDIA, https://ballotpedia.org/Retention_election [https://perma.cc/2MXZ-EPZR]; *see also* Kenneth J. Aulet, *It's Not Who Hires You But Who Can Fire You: The Case Against Retention Elections*, 44 COLUM. J.L. & SOC. PROBS. 589, 606 (2011) (finding that retention elections have become highly partisan and susceptible to "manipulative characterizations . . . by interest groups").

the remaining states grant additional terms either by continued gubernatorial appointments, legislative appointments, or some hybrid.[176]

Judicial elections themselves also look very different from the race of a typical state legislator. Unlike legislators who run on campaign platforms and policy proposals, judges must maintain a neutral role in the law's administration.[177] Additionally, because many voters do not pay close attention to judicial races, identity politics can play an influential role.[178] Corporations and other political interests can also greatly impact judicial elections; donors often view judicial races as good investments because they receive less attention, but can generate powerful influence on the law's interpretation.[179] Although judicial elections have been characterized as "sleepy affair[s],"[180] the power of judges can have an outsized impact on their electorates.[181]

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176. *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states [https://perma.cc/D2RQ-ZG8G].

177. *See, e.g.*, *Chief Justice Roberts Statement – Nomination Process*, U.S. CTS. (Sept. 12, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/FZH4-ZQQT] ("Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them.").

178. *See Why Judicial Elections Matter, and Other Common Questions About the March Primary*, INJUSTICE WATCH (Mar. 2, 2020), https://www.injusticewatch.org/news/2020/why-judicial-elections-matter-and-other-common-questions-about-the-march-primary [https://perma.cc/AU4M-XBYV] (finding that in Cook County, Illinois "Irish-sounding female names have a proven statistical advantage" and that candidates are often recruited "based on the strength of their 'ballot name.'").

179. *See The Problem with Judicial Elections*, LAMBDA LEGAL, https://www.lambdalegal.org/justice-out-of-balance/judicial-elections [https://perma.cc/VRX8-G5VQ] (summarizing the issue of judges needing to campaign for their job).

180. David Schultz, Minnesota Republican Party v. White *and the Future of State Judicial Selection*, 69 ALBANY L. REV. 985, 985 (2006).

181. *See generally* Andrew M. Hutchison, Note, *One Person, Five Votes: An Argument for Applying the Equal Protection Clause to Iowa's Judicial Elections*, 8 J. GENDER RACE & JUST. 211 (2004) (arguing that because the Supreme Court has held that "one person, one vote" does not apply to judicial elections, significant "vote dilution" has occurred in states). For example, in 2020 Judge Jill Karofsky won a ten-year term to the Wisconsin Supreme Court in a nonpartisan election despite garnering votes from only 23.2% of the electorate. *See Wisconsin Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2020 [https://perma.cc/6H6Y-QVNY] (showing Judge Karofsky received 855,573 votes in April 2020); Reuters Staff, *Fact Check: Wisconsin Did Not Have More Votes Than People Registered*, REUTERS (Nov. 4, 2020), https://www.reuters.com/article/uk-factcheck-wisconsin-more-votes-regist/fact-checkwisconsin-did-not-have-more-votes-than-people-registered-idUSKBN27K2WU [https://perma.cc/2DZH-E2JD] (showing 3,684,726 registered Wisconsin voters in November 2020).

The effects of elections on judicial neutrality has induced concern since the eighteenth century. In 1788, Alexander Hamilton argued that judges would lose their "necessary independence" if they felt that pandering to voters could secure their seats.[182] Similar criticisms have spanned the ages: in 2003, the ABA formally recommended that states abandon judicial elections in light of the "corrosive effect of money" on campaigns.[183] Even former Supreme Court Justice Sandra Day O'Connor once stated that state judicial elections were "awful" and that she "hate[d] them."[184]

If state judicial elections more closely resembled legislative elections, they would become more susceptible to the "majority tyranny," undermine the separation of powers, and potentially affect the democracy of nonjudicial elections.[185] Such effects would "debilitate state courts' ability to protect the health of our democracy."[186] By granting absolute immunity to judges for legislative acts, the Supreme Court has created a concerning catch-22: although legislative immunity depends on a democratic process that holds judges accountable, a truly democratic process would threaten judicial neutrality.

3. Examining the Extension of Absolute Immunity to State Boards of Bar Examiners

The United States Supreme Court has attempted to remain "quite sparing in [its] recognition of absolute immunity . . . and [has] refused

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182. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.").

183. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 929 (2016) (quoting A.B.A. COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 1–2 (2003)).

184. James Podgers, *O'Connor on Judicial Elections: "They're Awful. I Hate Them*," A.B.A. J. (May 9, 2009) (quoting Justice Sandra Day O'Connor), http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s [http://perma.cc/5DXC-6CX4].

185. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 318–23 (2008) (explaining how judges could get involved in deciding the outcomes of partisan races, and the other ways that judicial elections could undermine this country's democratic process); *see also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 324 (2010) (highlighting the dangers to neutrality that judges who ran, and won, on "tough-on-crime" platforms present).

186. Pozen, *supra* note 185, at 318.

to extend it any further than its justification would warrant."[187] Scholars, however, have argued that courts have impermissibly broadened immunity to "new officials and new functions that were never intended to be free from section 1983 liability."[188] By doing so, courts have limited the ways that litigants can claim relief under legitimate claims of discrimination.[189] This Subsection examines how a court would likely extend the shield of absolute immunity to non-judicial entities involved in the lawyer admission process.

Although a state's highest court dictates lawyer licensure policies, such as the bar passage requirement,[190] in all states but one, the actual administration of the bar exam and enforcement of the licensure requirements typically fall to an entity commonly referred to as the state board of bar examiners.[191] These entities act as an arm of the judicial branch and, therefore, claim absolute judicial immunity from civil suits related to what they deem as adjudicative actions.[192]

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187. Burns v. Reed, 500 U.S. 478, 487 (1991) (internal quotations omitted).

188. Coriell, *supra* note 142, at 987; *see also* Johns, *supra* note 107, at 270.

189. Coriell, *supra* note 142, at 987.

190. *See Chart 1: Promulgation of Rules, Prelegal Education Requirements, Law Student Registration, and Bar Exam Eligibility Before Graduation*, NAT'L CONF. BAR EXAM'RS, https://reports.ncbex.org/comp-guide/charts/chart-1 [https://perma.cc/2J6G-H9PE]; *see e.g.*, *Minnesota Supreme Court*, MINN. JUD. BRANCH, https://www.mncourts.gov/supremecourt.aspx [https://perma.cc/T6W5-5PC8] ("The Supreme Court is responsible for the regulation of the practice of law and for judicial and lawyer discipline."); *Seeking Admission to the Bar in Massachusetts*, MASS.GOV, https://www.mass.gov/seeking-admission-to-the-bar-in-massachusetts [https://perma.cc/E4G2-49A3] ("To become a licensed attorney in Massachusetts by Examination or by Motion, you must meet the requirements and the qualifications established by the Supreme Judicial Court.").

191. *See* discussion *supra* note 165; *see, e.g.*, *Welcome to the Office of Attorney Regulation Counsel*, COLO. SUP. CT., https://www.coloradosupremecourt.com [https://perma.cc/CVH8-RN8L] ("[The] Attorney Regulation Counsel . . . oversees attorney admissions, attorney registration, [etc.] . . ."); *Board of Bar Examiners*, VT. JUDICIARY, https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/bar-examiners [https://perma.cc/3HYM-3CX6] ("The Board of Bar Examiners is charged with determining the eligibility of applicants as part of the admission process to the Vermont bar . . . ."). Although different states have different names for these entities, this Note will refer to the body that administers the bar and enforces admission requirements as a "board of bar examiners."

192. *See e.g.*, *SCR 2.009 Immunity*, KY. OFF. BAR ADMISSIONS, https://kyoba.org/Views/public/Content.aspx?page_id=183 [https://perma.cc/58EV-RJDQ] ("Any person who communicates information to a member of the Board, Committee or its affiliates concerning an applicant for admission to the Kentucky Bar shall be granted immunity from all civil liability."); *Rule 17(a) Immunity*, ALASKA RULES CT., https://public.courts.alaska.gov/web/rules/docs/bar.pdf [https://perma.cc/PP2U-XHSW] ("Members of the Board . . . and all Bar staff are immune from suit for conduct in the course and scope of their official duties as set forth in these Rules.").

Even though a state board of bar examiners' role in determining accommodations for the bar exam has been considered a "quasi-judicial" function deserving of absolute immunity,[193] its role in "licensing . . . attorneys"[194] and "processing applications for admission to practice law"[195] has not yet been cemented as such by a federal court. Cases with similar fact patterns, however, provide guidance: in *Butz v. Economou* the Supreme Court weighed a variety of factors to reason that, "government officials who *perform the function* of a judge . . . were entitled to judicial immunity" because they presided over proceedings that "were functionally the same as judicial proceedings."[196] A few years later, the Supreme Court in *Cleavinger v. Saxon* articulated the *Butz* factors as follows:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.[197]

These factors attempt to balance "the kinds of protections that justify absolute immunity" with the need to protect government officials from liability for every single decision they make.[198]

When considering the roles of permit-granting boards or professional licensing boards, like those regarding dentists[199] or physicians,[200] lower court decisions weighing the *Butz* factors have expressed concern that without absolute immunity, the law would subject government officials to an onslaught of litigation.[201] Furthermore, courts have emphasized that the presence of safeguards and an adversarial nature of proceedings balances out this immunity.[202] This

193. *See, e.g.*, Sinapi v. R.I. Bd. Bar Exam'rs, 910 F.3d 544, 554 (1st Cir. 2018) ("As to this claim, it is manifest that the Board members enjoy quasi-judicial immunity.").

194. *Our Mission: What We Do*, STATE BAR CALIF., http://www.calbar.ca.gov/About-Us/Our-Mission [https://perma.cc/TST8-YGYP].

195. *Office of Bar Admissions*, OFF. BAR ADMISSIONS, https://barapplication.sccourts.org [https://perma.cc/S7KV-S3X7].

196. Johns, *supra* note 107, at 274 (emphasis added); Butz v. Economou, 438 U.S. 478, 512–13 (1978).

197. Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

198. Johns, *supra* note 107, at 300.

199. *See* Beck v. Tex. State Bd. Dental Exam'rs, 204 F.3d 629 (5th Cir. 2000).

200. *See* Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992).

201. *See, e.g.*, *Beck*, 204 F.3d at 636 (internal quotation omitted) ("It is important that board members [were able to] make these decisions free from the threat of incurring personal liability . . . .").

202. *See* O'Neal v. Miss. Bd. Nursing, 113 F.3d 62, 66 (5th Cir. 1997) ("[Sufficient] [p]rocedural safeguards such as the right to counsel, adequate notice of a hearing, and the opportunity to present and cross-examine witnesses are all readily available to any

makes sense in a situation where someone's career is on the line—the process of revoking a physician's or a dentist's license will likely resemble a litigious process that requires character statements, cross-examinations, and the introduction of witnesses in front of a fact-finder.[203] Furthermore, zoning boards who make decisions affecting the bottom-lines of developers and corporations with deep pockets might require protection to avoid falling prey to economic intimidation.[204]

However, these situations look quite different from the more administrative considerations of a law graduate's bar application.[205] A typical list of bar licensure requirements includes graduating from an ABA-accredited school, meeting "character and fitness" standards, and passing the bar exam and Multistate Professional Responsibility Examination (MPRE).[206] But even though the bar exam arguably plays the most influential part in a candidate's application,[207] it also presents the least opportunity for appeal. States typically allow an applicant to appeal an "adverse determination" of character and fitness—a process that can include witnesses, evidence, and cross-

person charged by the board.").

203. *See id.*

204. *See e.g.*, Dotzel v. Ashbridge, 438 F.3d 320, 327 (3d Cir. 2006) ("[T]he risk of threats and harassment is great. The monetary stakes are often quite high . . . making the possibility of liability an especially potent adversary of objectivity."); Keystone Redev. Partners, LLC v. Decker, 631 F.3d 89, 96 (3d. Cir. 2011) (internal quotations omitted) (noting the need to protect board members from "a corporation that will muster all of its financial and legal resources").

205. This Note does not address additional common law arguments against extending judicial immunity to a board of bar examiners. For discussion on this topic, see the dissent in *Watts* which mentions that licensing boards did not exist during the passage of section 1983, and that courts should refrain from making "freewheeling policy choice[s]" in establishing new immunities or courses of actions. 978 F.2d 269, 278 (6th Cir. 1992) (Martin, J., dissenting).

206. *See, e.g.*, *Rules Governing Admission to the Practice of Law*, SUP. CT. GA. 2 (Nov. 1, 2018), https://www.gabaradmissions.org/rules-governing-admission [https://perma.cc/2B2Z-UMCS]; *Rule 4: General Requirements for Admission*, MINN. STATE BD. L. EXAM'RS, https://www.ble.mn.gov/rules [https://perma.cc/PR5T-2BET]. Although this Note does not discuss the MPRE, which seeks to standardize the level of ethics a lawyer should possess, it presents another financial and time barrier. For more discussion, see Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299 (2003).

207. A test taker must have graduated from an accredited law school to even register for the bar exam in almost all states. *See* Allyson Evans, *Can Anyone Take the Bar Exam?*, MAGOOSH (July 6, 2017), https://magoosh.com/bar-exam/can-anyone-take-the-bar-exam [https://perma.cc/5MU6-5HLW]. Furthermore, only .14% to 1% of all applicants are denied based on character and fitness grounds. Leslie C. Levin, *Rethinking the Character and Fitness Inquiry*, 22 PROF. LAW. 19, 20 n.3 (2014).

examination[208]—but will not consider an appeal of a bar examination score.[209] The handful of states that do allow appeals, permit them only under "extraordinary" circumstances.[210] This means that for the nearly twenty percent of first-time bar takers who failed the bar exam in 2019, their options were limited to sacrificing more money and time retake the exam or give up on licensure.[211]

The courts' fear of "opening the floodgates" to litigation also warrants evaluation.[212] Courts rarely provide objective proof that a certain decision will in fact trigger an onslaught of cases or illustrate what exactly "constitute[s] a flood."[213] Additionally, the typical law student, unlike a real estate developer or practicing dentist, has far fewer incentives for taking a bar examiner to court. For one, the average law graduate possesses roughly $145,000 in debt,[214] suggesting that potential litigants might not possess the funds to hire a lawyer and file a suit. For many, a balancing of financial and time costs will fall in favor of re-taking the bar exam. However, for those applicants, such as a class of BIPOC would-be lawyers who seek to challenge the bar and its persistent disparate impacts, the courts should present a meaningful opportunity to appear before the law. Although the Supreme Court tends to opt for judicial economy when it perceives a floodgate of litigation against long-standing systems,[215] such an approach raises

208. *See, e.g.*, *Rule 15 Adverse Determinations and Hearings*, MINN. STATE BD. L. EXAM'R'S, https://www.ble.mn.gov/rules [https://perma.cc/PR5T-2BET]; *What Happens if an Applicant is Denied a Certification Recommending Admission to the Bar Based Upon Character and Fitness?*, PA. BD. L. EXAM'RS, https://www.pabarexam.org/c_and_f/cffaqs/16.htm [https://perma.cc/N8QB-UAPC].

209. Indiana, Michigan, Mississippi, and Guam offer some form of appeals process. *See Which States Allow Bar Exam Appeals?*, WHAT LAWS. KNOW (Aug. 12, 2019), http://whatlawyersknow.com/state-allow-bar-exam-appeals [https://perma.cc/8AG3-8J67].

210. For example, Utah allows appeals in cases of "substantial irregularity in the administration of the examination that resulted in manifest unfairness or because of mathematical errors in the scoring." *Id.*

211. Stephanie Francis Ward, *Law Schools See an Increase in Bar Passage Rates, New ABA Data Shows*, A.B.A. J. (Feb. 18, 2020), https://www.abajournal.com/news/article/law-schools-see-increase-in-bar-pass-rates [https://perma.cc/9TC5-TC79].

212. Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation*", 6 U. PA. J. CONST. L. 377, 379–80 (2003).

213. *Id.*; *see also* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1010–12 (2013) ("What therefore appears as a straightforward argument in fact brings with it a host of normative questions.").

214. Ryan Lane, *Average Student Loan Debt for Law School Graduates*, NERDWALLET (May 21, 2021), https://www.nerdwallet.com/article/loans/student-loans/average-student-loan-debt-law-school [https://perma.cc/T4YJ-M3HQ].

215. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (declining to create a rule that a statute with racially disparate impacts should be invalid, noting that such a rule would be "far reaching").

questions of how the legal system can ever remediate these inequities by avoiding them.

4. The Need for an Executive Decision

The exercise of absolute immunity "defeats [the] purpose" of section 1983: to provide a remedy for the deprivation of constitutional rights by the abuses of a government official.[216] Where the law fails to create a pathway to accountability, reformers may have to look to extrajudicial remedies that will consider the policy implications of protecting government officials against preserving individuals' constitutional rights. For potential policy solutions and demands, various efforts to abolish qualified immunity for police officers could provide guidance.[217] For example, the President of the United States should issue an executive order that would lift absolute immunity for judges acting in a legislative capacity or bar examiners acting in a judicial capacity, as has been suggested with regards to qualified police immunity.[218] States could also take a more active role in enacting legislative solutions. In the realm of qualified immunity, the Colorado 2020 state legislature passed a bill removing legal immunities for police officers from "on-the-job misconduct."[219] Legislation addressing the absolute immunity of courts and their associates in the context of licensing requirements could carve out a space for a class of plaintiffs to seek legal accountability against supreme courts and boards of bar examiners.

However, the simplest and most compelling solution is for a defendant court or board of bar examiners to simply allow a bar exam

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216. Johns, *supra* note 107, at 315; *see also* Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), http://bostonreview.net/law-justice/alex-reinert-we-can-end-qualified-immunity-tomorrow [https://perma.cc/7N6T-LT85] ("If we step back and consider the overlap of [absolute and qualified immunity] doctrines, one conclusion is inescapable: . . . the Supreme Court has increasingly narrowed the pathway for plaintiffs to succeed, even when a constitutional violation is established.").

217. *See e.g.*, April Rodriguez, *Lower Courts Agree—It's Time to End Qualified Immunity*, AM. CIV. LIBERTIES UNION (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity [https://perma.cc/9SHA-78JU] (laying out problems with qualified immunity).

218. Press Release, City of Milwaukee, Council Members Urge President Biden to Issue Executive Order Banning the Use of Qualified Immunity for Police Officers in Wrongful-Death Lawsuits (Jan. 22, 2021), https://city.milwaukee.gov/ImageLibrary/Groups/ccCouncil/News/2021/District-05/CombinedJointlettertoPresidentBidenonqualifiedimmunityexecorder-merged.pdf [https://perma.cc/L6AY-QNYV].

219. Keith Coffman, *Colorado Reform Law Ends Immunity for Police in Civil Misconduct Cases*, REUTERS (June 19, 2020), https://www.reuters.com/article/us-minneapolis-police-colorado/colorado-reform-law-ends-immunity-for-police-in-civil-misconduct-cases-idUSKBN23R05X [https://perma.cc/C8EB-7MT5].

challenge to proceed.[220] Absolute immunity is an affirmative defense that a defendant must raise.[221] If the defendant does not raise the defense, courts cannot consider it.[222] States that are committed to diversifying the bar and dismantling the exclusionary and racist barriers of the legal profession should give plaintiffs an opportunity to make their case in court.

B. SHRUGGING OFF THE PURPOSE OF THE EQUAL PROTECTION CLAUSE

Unfortunately, even if a class of plaintiffs could argue that a state court or a state board of bar examiners could be held liable under the Fourteenth Amendment for the bar examination's discrimination against test-takers of color, it would quickly run into another roadblock: the willful blindness of the courts to discriminatory impact. To trigger strict scrutiny of a state statute, the plaintiff must show that the statute "classifies by race, alienage, or national origin" either expressly,[223] or by demonstrating a discriminatory impact and purpose.[224] Racial classifications are considered "constitutionally suspect" and "subject to the most rigid scrutiny."[225] Under this heightened standard, laws will be upheld "only if they are suitably tailored to serve a compelling state interest."[226] Unfortunately, discriminatory laws rarely, if ever, include explicit suspect classifications,[227] and subsequent case law has narrowly interpreted the Equal Protection amendment to require evidence of a motivating "purpose" of discrimination, a nearly impossible task for a plaintiff.[228] Where the

220. *Cf.* Reinert, *supra* note 216 (arguing state attorneys general and law departments should just stop raising the defense of qualified immunity).

221. Attwood v. Clemons, 818 Fed. App'x 863, 866 (11th Cir. 2020) (citing Jackson v. City of Atlanta, 73 F.3d 60, 63 (5th Cir. 1996)); *see e.g.*, Sup. Ct. of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 729 (1980) ("[D]efendants filed a petition for rehearing, arguing for the first time, on judicial immunity grounds.").

222. *See* Reinert, *supra* note 216.

223. City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

224. Washington v. Davis, 426 U.S. 229, 239–42 (1976).

225. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (internal quotations omitted).

226. *Cleburne*, 473 U.S. at 440.

227. *See e.g.*, Doron Samuel-Siegel, Kenneth S. Anderson & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICHMOND PUB. INT. L. REV. 137, 185 (2019) ("[T]he search for discriminatory intent is an increasingly disingenuous undertaking since, in an era where explicit racial discrimination is generally disfavored in mainstream society, it is well-known that litigants can rarely adduce smoking-gun evidence of intentional discrimination.").

228. *Davis*, 426 U.S. at 248; Samuel-Siegel et al., *supra* note 227, at 153–54 ("As a result of this standard, which requires the plaintiff to identify a wrongdoer with discriminatory intent approaching malice, plaintiffs of color rarely obtain judicial relief from the discriminatory effects of facially neutral policies.").

plaintiff fails to show these requirements, the court will apply a lower standard of rational review that is highly deferential to the state actor.[229] This Section analyzes the path from the lofty promises of the Fourteenth Amendment to its current powerlessness to address the racially disparate impacts of the bar examination, and how a laser focus on searching for overtly prejudicial intent has blinded courts to a system of racism that has obstructed BIPOC from entering the legal profession for generations.

1. By Focusing on a Finding of Malicious Intent, the Supreme Court Condoned Blindness to Discrimination

After *Brown v. Board of Education*, which ruled that the "segregation of children in public schools solely on the basis of race" violated the Fourteenth Amendment,[230] southern states enacted "facially race-neutral obstructionist laws" that were "defended as a constitutional alternative to laws that facially mandated segregation."[231] These facially neutral laws, such as "pupil placement law[s],"[232] permitted southern states to continue state-mandated segregation in an ostensibly Constitutional manner.[233]

In *Griffin v. County School Board*, the defiance of the South influenced the Supreme Court to consider congressional intent as a basis on which to strike down a facially-neutral, but ultimately discriminatory, law.[234] The case involved a Virginia school district that closed integrated public schools and offered grants to children to attend "private" schools opened solely for white pupils.[235] Seeing through the district's allegedly neutral policies, the Court dismissed any "nonracial grounds" presented by the state, and found the state had acted

229. Haney-López, *supra* note 141, at 1829.

230. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493–95 (1954); *see also* Boucai, *supra* note 141, at 240 ("The Warren Court's decision in *Brown v. Board of Education* was widely received as the harbinger of a new judicial commitment to make good on the Fourteenth Amendment's long-obscured promise.").

231. Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 12 (2016).

232. Pupil placement laws mandated that school officials use certain criteria, such as "psychological qualification of the pupil for the type of teaching and association involved" to assign children to schools. Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372, 382 (N.D. Ala. 1958). Such criteria acted as subtext for keeping white and Black children separated. *See* Brian K. Landsberg, Lee v. Macon County Board of Education*: The Possibilities of Federal Enforcement of Equal Educational Opportunity*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 20 (2016).

233. Eyer, *supra* note 231, at 12–15.

234. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964); *see also* Eyer, *supra* note 231, at 20–21.

235. *Griffin*, 377 U.S. at 221.

unconstitutionally based on its *intent* to separate white and Black students.[236] After *Griffin*, the Court continued to define how it could use intent, ruling later that a finding of intent did not require "direct proof" but could be inferred from "the challenged action as well as the surrounding context."[237]

The Court further addressed how facially neutral statutes could undermine civil rights objectives in *Griggs v. Duke Power Co.*[238] Although *Griggs* found a Title VII violation under the 1964 Civil Rights Act—which prohibits employment-based discrimination[239]—and not the Fourteenth Amendment, it demonstrates that courts have considered disparate impact as powerful, and dispositive, sources of evidence. The plaintiffs in *Griggs*, a group of Black employees, challenged a "standardized general intelligence test" used by their employer to determine job transfers.[240] The plaintiffs submitted evidence that the test contributed to the disqualification of Black applicants from transfers at a much higher rate than white applicants.[241] Although the employer claimed it did not intend to discriminate by implementing the test, the Court concluded that "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as built-in headwinds for minority groups and are unrelated to measuring job capability."[242] Such a practice went against the purpose of Title VII.[243] Although *Griggs* addressed a violation of the 1964 Civil Rights Act, future plaintiffs attempted to apply its ruling of "fair in form, but discriminatory in operation" to cases under the Fourteenth Amendment.[244]

Federal courts, however, have refused to transfer the disparate impact analysis to Fourteenth Amendment claims. The Fifth Circuit Court of Appeals declined to accept a *Griggs* approach of disparate impact in a challenge to the Georgia bar exam in *Tyler v. Vickery*.[245] A

236. *Id.* at 231 ("Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.").

237. Haney-López, *supra* note 141, at 1796.

238. 401 U.S. 424 (1971).

239. 42 U.S.C. § 2000e (1964).

240. *Griggs*, 401 U.S. at 426.

241. *Id.*

242. *Id.* at 432 (internal quotations omitted).

243. *Id.* at 430–31 ("What is required by Congress [under Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

244. *Id.* at 431.

245. 517 F.2d 1089 (5th Cir. 1975).

class of Black plaintiffs who failed the bar exam challenged the exam's constitutionality under the Fourteenth Amendment.[246] Among other things, the plaintiffs claimed that, "irrespective of intent, the Georgia bar examination inherently denies equal protection of the laws to Black applicants because of the much greater rate at which they fail the examination."[247] They argued that the court should "apply [the *Griggs* disparate impact framework] by analogy," and find that a "greater adverse impact on Black applicants" indicates the exam's unconstitutionality.[248] As evidence, plaintiffs pointed to July 1972 when one hundred percent of Black test takers failed the Georgia bar exam, and February and July of 1973 when more than fifty percent of Black test takers failed.[249] Plaintiffs argued that such disparate impacts should trigger strict scrutiny.[250] The court, however, rejected the plaintiffs' suggestion, claiming that a "statistical argument" was not enough to demonstrate a constitutionally suspect racial classification.[251]

The *Tyler* court demonstrated a willful blindness to discrimination and justified its decision by conceding that "few legislative efforts . . . could survive such scrutiny" as suggested by plaintiffs.[252] Despite the glaring evidence of disparate impact, the court took a more deferential approach to reason that the bar exam had a rational relationship to the state's right to "insist on a minimum standard of legal competence as a condition of licensure."[253] In his dissent, Judge Adams suggested that "sustained de facto discrimination . . . shown together with the absence of an investigation, or indeed any effort, by the administrators of the state program to ascertain whether the seemingly purposeful discrimination is intentional in fact or is explainable by the circumstances" might be enough to demonstrate a "systematic, long-continued pattern of unequal results."[254] He also criticized how swiftly the majority deferred to the bar examiners, without allowing the plaintiffs an opportunity to submit more evidence.[255]

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246. *Id.* at 1092.
247. *Id.* at 1095.
248. *Id.* at 1095–96.
249. *Id.* at 1092.
250. *Id.* at 1099.
251. *Id.* at 1099–100.
252. *Id.* at 1100.
253. *Id.* at 1101.
254. *Id.* at 1106–07 (Adams, J., dissenting).
255. *Id.* at 1108; *see also* Cecil J. Hunt, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. STATE UNIV. L. REV. 721, 742–43 (1996) ("The majority seemed too quick to believe the evidence presented by the Board of Bar Examiners. . . . [T]he court foreclosed the appellants from any opportunity to establish . . .

The Supreme Court further refined the role of intent while ignoring compelling statistical evidence of disparate impact in *Washington v. Davis*.[256] Although the *Davis* Court seemed to break away from *Tyler* by suggesting that sustained disparate impacts could perhaps *suggest* discriminatory intent,[257] it emphasized the need to identify an "invidious discriminatory purpose" behind the challenged policy.[258] The *Davis* plaintiffs sought to challenge the "validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department."[259] The D.C. Circuit Court of Appeals used *Griggs* to strike down the test on constitutional grounds,[260] and find that "lack of discriminatory intent was . . . irrelevant," in light of the "substantial body of evidence" of disparate impacts on "disadvantaged groups."[261] The Supreme Court, however, ruled that the lower court had "erroneously applied the legal standards" by using an analysis that was not the "constitutional rule."[262]

The Court harkened back to an analysis that "adhered "to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory *must ultimately be traced to a racially discriminatory purpose*."[263] The Court, therefore, ruled that a "discriminatory racial purpose," or "purpose or intent" to discriminate was *necessary* to establish a constitutional discrimination claim and shift the burden of proof.[264] Although the Court showed some willingness to consider the role of context in discerning this purpose,[265] it took care to note that on its own, disparate impact did not suffice to subject classifications to strict scrutiny.[266]

The *Davis* Court looked discrimination in the eye and turned away. It admitted its "difficulty understanding" how a facially-neutral employment qualification could be racially discriminatory "simply

purposeful racial discrimination and justifiably to invoke strict scrutiny analysis at trial.").

256. 426 U.S. 229 (1976).

257. *Id.*

258. *Id.* at 242; *see also* Boucai *supra* note 141, at 249 ("*Washington v. Davis* was the decision that made intent to discriminate an explicit requirement of equal protection violations.").

259. *Davis*, 426 U.S. at 232.

260. Davis v. Washington, 512 F.2d 956, 965 (D.C. Cir. 1975).

261. *Id.* at 960–61.

262. *Davis*, 426 U.S. at 238–39.

263. *Id.* at 240 (emphasis added).

264. *Id.* at 240–41.

265. *Id.* at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

266. *Id.* at 243.

because a greater proportion of [Black applicants] fail to qualify" than white applicants.[267] *Davis* garnered criticism for ignoring racism's existence on a systemic level, and the "different racial realities" that Black and white people face.[268] The Court briefly acknowledged systemic racism by conceding a disparate impact analysis would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and *licensing* statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[269] But it quickly washed its hands of responsibility, claiming a solution should come from the legislature, the body that created and tolerated such discriminatory laws in the first place.[270]

Justice Stevens' concurrence suggested that some exceptions should exist where the "disproportion is . . . dramatic."[271] He claimed that the "objective evidence of what actually happened" is often the most revealing evidence of intent, because decisionmakers have a sense of the likely outcomes of their decisions.[272] Additionally, Justice Stevens noted the "unrealistic" expectation for plaintiffs to "uncover the actual subjective intent of the decisionmaker" or find some "improper motive" that may have affected the decision.[273] Justice Stevens' words forecasted the difficulty that potential plaintiffs challenging the bar exam might face, especially given the so-called impartiality of standardized tests.[274]

However, where the *Davis* Court may have been at least willing to use history and context to inform its analysis,[275] *Personnel Administrator of Massachusetts v. Feeney*[276] marked the beginning of the dismantling of "[h]olistic engagement with evidence of racial discrimination

267. *Id.* at 245.

268. Haney-López, *supra* note 141, at 1809–10; Boucai *supra* note 141, at 250 (finding that the Court's decision required an "utter disregard of 500 years of racial subordination on this continent not to perceive that the discrepancies in exam performance are, in large part, but one consequence of a disgraceful racial history.").

269. *Davis*, 426 U.S. at 248 (emphasis added).

270. *Id.* ("[I]n our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.").

271. *Id.* at 254 (Stevens, J., concurring).

272. *Id.* at 253.

273. *Id.*

274. *See, e.g.*, Delgado v. McTighe, 522 F. Supp. 886, 894 (1981) ("This review [of the Pennsylvania bar examination and how it is administered and graded] further reveals that the bar examinations are neutral on their face . . . .").

275. *Davis*, 426 U.S. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .").

276. 442 U.S. 256 (1979).

against non-[w]hites."[277] The plaintiff, a white woman, alleged Massachusetts' statutorily absolute preference for veterans in government hiring discriminated against women because it "operate[d] overwhelmingly to the advantage of males."[278] The Court responded that the Equal Protection Clause guarantees only "equal laws, not equal results,"[279] and insisted that discriminatory intent "either is a factor that has influenced the legislative choice or it is not."[280] The Court refused to overlook the "legitimate noninvidious purposes"[281] of the challenged law, and demanded evidence the policy was motivated "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[282] The Court also dismissed the plaintiff's claim of second-order discrimination,[283] based upon the fact that military status was "*de jure* restricted primarily to men," because "the history of discrimination against women in the military is not on trial in this case."[284]

The willful blindness of courts, honed and delineated in *Davis* and *Feeney*, emerges in legal challenges against the bar exam. The plaintiffs in *Richardson v. McFadden* became the victims of such blindness and the high burden of proof in the Fourth Circuit.[285] Plaintiffs, four Black law school graduates, argued that because of the South Carolina State Bar's "past history of racial discrimination" and "the disproportionate impact of the examination on [B]lack [test takers]," the bar examiners had the burden to prove that the bar exam is sufficiently job related to satisfy Title VII.[286] Although the court recognized that if the "Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid."[287] However, the court stated that such standards were "inappropriate" in the context of a Fourteenth Amendment challenge.[288] Despite recognizing the disparate impacts and its invalidity under Title VII, a law meant to root out invidious barriers to employment

277. Haney-López, *supra* note 141, at 1825.

278. *Feeney*, 442 U.S. at 259.

279. *Id.* at 273.

280. *Id.* at 277.

281. *Id.* at 275.

282. *Id.* at 279.

283. Plaintiff claimed that second-order discrimination existed because military status was "*de jure* restricted primarily to men." Eyer, *supra* note 231, at 62 (quoting *Feeney*, 442 U.S. at 278).

284. *Id.*

285. 540 F.2d 744 (4th Cir. 1976).

286. *Id.* at 746.

287. *Id.* at 747.

288. *Id.*

regardless of their neutral intent,[289] the Fourth Circuit opted instead to use what they called "a more rigorous standard."[290]

The plaintiffs then attempted to demonstrate the bar examiners' discriminatory purpose by pointing to circumstantial evidence of invidious purpose like the elimination of diploma privilege and reciprocity between states around the time that Black applicants attempted to take advantage of these policies.[291] Outside sources have highlighted the dubious timing of these changes.[292] The court, however, chose to consider as a matter of "controlling importance," the bar examiners' claims that "there have never been laws or rules of court prohibiting [B]lack [people] from practicing law in the State or imposing different standards based on race."[293] Because there were "neutral reasons" for all the contested changes and the state bar had always been "open" to Black lawyers, the court concluded that plaintiffs had not proven a "deliberate state scheme of de jure discrimination."[294] Therefore, under a rational basis review the court found that the bar examination did not violate the Fourteenth Amendment,[295] despite inconsistencies in the grading of the exam.[296] The majority opinion conceded in a later iteration of the case[297] that the court likely did not even possessed subject matter jurisdiction over the case,[298] but still

289. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

290. *Richardson*, 540 F.2d at 747.

291. *Id.*

292. Because the University of South Carolina refused to integrate its law school in the 1950's, a state school decided to operate a program for Black law students. After this school granted diploma privilege to two Black graduates of the program in 1950, state legislators moved to eliminate diploma privilege. By 1951, all law graduates in South Carolina needed to pass the bar exam to receive licensure. The requirement was intended to "bar Negroes and some undesirable whites" according to a South Carolina legislator. According to a South Carolinian historian, "[e]xams were always a resource for the white community . . . . There was no question that race was the principal factor." Sarah Coello, *SC's Next Generation of Attorneys Asks Court to Reconsider Bar Exam Requirement*, POST & COURIER (Charleston, S.C.) (July. 12, 2020), https://www.postandcourier.com/news/scs-next-generation-of-attorneys-asks-court-to-reconsider-bar-exam-requirement/article_c05200a6-c09e-11ea-a3b0-1bf13dad3c14.html [https://perma.cc/HMK3-N3UZ].

293. *Richardson*, 540 F.2d at 747.

294. *Id.* at 748–50.

295. *Id.* at 750.

296. *See* Howarth, *supra* note 120, at 942 ("Witheringly, the Fourth Circuit described the evidence introduced to validate the cut score as 'very subjective and general in nature and hardly acclaimed by the educational testing experts who testified.'" (quoting *Richardson*, 540 F.2d at 749)).

297. Richardson v. McFadden, 563 F.2d 1130 (4th Cir. 1977); *see also supra* Section II.A.

298. *Id.* at 1131 (noting that because the law examiners were performing a "judicial function on behalf of the South Carolina Supreme Court," they were likely immune

opted to write an opinion discussing why plaintiffs were not entitled to relief.[299]

Similarly, federal courts in *Pettit v. Gingerich*[300] and *Delgado v. McTighe*[301] shrugged off constitutional challenges to the bar exam despite compelling evidence of disparate impacts. The *Pettit* court ruled that "disparate racial impact stemming from the Bar examination does not suffice to evidence a suspect racial classification and thereby trigger a strict scrutiny analysis."[302] While the *Delgado* court acknowledged the disproportionate amount of Black test takers failing the Pennsylvania bar, it still found plaintiffs had "failed to carry their burden of proving their allegations that the Board *intended* to discriminate against them."[303] Both decisions acknowledged the exam's disparate impacts but, satisfied with neutrality on its face and the assumption that the bar rationally serves a state's legitimate purpose, refused to apply strict scrutiny. The *Pettit* court framed its opinion with the understanding that "the State has a legitimate interest in regulating admission to the Bar" before ruling that, without proof of intentional discrimination, the plaintiffs could not survive summary judgment.[304] *Delgado* even expressed concern over measured disproportionate impacts, but dismissed them as "policy questions."[305]

By designating "malice [a]s the only form of intent that counts," the Supreme Court and federal courts have condoned an intent doctrine that "excludes evidence of continued discrimination against non-Whites rooted in history, contemporary practices, and social science. More generally, it blinds the courts to the obvious truth that discrimination has evolved since the civil rights era and no longer exclusively takes the form of hooded bigotry."[306] Looking for overt malicious intent is a judicial technique to *avoid* finding discrimination. This preoccupation with finding malicious intent has allowed bar examiners and other decisionmakers to defend themselves from evidence showing the discriminatory impact of the bar on BIPOC test takers.[307]

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from review); *see supra* Section II.A.3 (discussing extension of judicial immunity to bar examiners).

299. *Id.*
300. 427 F. Supp. 282 (D. Md. 1977).
301. 522 F. Supp. 886 (E.D. Pa. 1981).
302. *Pettit*, 427 F. Supp. at 292.
303. *Delgado*, 522 F. Supp. at 898 (emphasis added).
304. *Pettit*, 427 F. Supp. at 292.
305. *Delgado*, 522. F. Supp. at 898.
306. Haney-López, *supra* note 141, at 1784.
307. *Id.* at 1854.

2. The Willful Blindness of Courts to the History of Discrimination in the Bar Exam is Reflected in the Lack of Data Accountability Among the States

The courts' unwillingness to consider evidence of disparate impacts on bar applicants of color has done little to prevent, and has perhaps even encouraged, the willful blindness of state courts and bar associations to the bar exam's discriminatory effects against BIPOC test takers. Courts have glanced at data and deemed it insufficient to trigger strict scrutiny without evidence of discriminatory or malicious intent, an impossibly high standard.[308] Paired with absolute immunity, the current Equal Protection doctrine provides little to no incentive for state courts and other decisionmakers to consider dramatic changes to licensing requirements or, as this Section will discuss, to even track and publish disaggregated data. The lack of disaggregated data regarding bar passage from the NCBE or state courts and bar associations would prevent potential plaintiffs from proving some malicious intent on the part of bar examiners and state courts, and disparate impact on a state-by-state basis.[309]

In addition to absolute immunity, states' continued blindness to the disparate impacts of the bar exam hinders any attempts to challenge the test's validity and licensing requirements. In the civil rights context, data is necessary to "uncover[] practices that perpetuate different forms of discrimination."[310] A powerful example is the use of disaggregated data to ensure effective and targeted policies to alleviate effects of the COVID-19 pandemic.[311] California has also used their disaggregated bar passage data to inform policy changes that have directly resulted in an increase in BIPOC lawyers.[312] By tracking data, leaders can be held accountable to creating targeted change.[313]

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308. *See supra* Section II.B.1.

309. Boucai, *supra* note 141, at 281.

310. *See* Juli Adhikari & Jocelyn Frye, *Who We Measure Matters: Connecting the Dots Among Comprehensive Data Collection, Civil Rights Enforcement, and Equality*, CTR. AM. PROGRESS (Mar. 2, 2020), https://www.americanprogress.org/issues/women/news/2020/03/02/481102/measure-matters-connecting-dots-among-comprehensive-data-collection-civil-rights-enforcement-equality [https://perma.cc/PNS6-4BJE].

311. *See* Austin Clemens, *The Coronavirus Pandemic Highlights the Importance of Disaggregating U.S. Data by Race and Ethnicity*, EQUITABLE GROWTH (Apr. 17, 2020), https://equitablegrowth.org/the-coronavirus-pandemic-highlights-the-importance-of-disaggregating-u-s-data-by-race-and-ethnicity [https://perma.cc/MWJ6-LPDC] ("[P]olicymakers must have disaggregated data to create policies that will address these underlying economic and health disparities.").

312. *See infra* notes 354–363 and accompanying text.

313. *Id.*

Data can also serve as a powerful source of evidence in lawsuits. In *Pettit*, members of the Maryland Board of Law Examiners pointed out that although the plaintiffs claimed a "disproportionately high percentage of [Black test takers] who [had] failed the bar examination," they were unable to present official numbers of such disproportion.[314] Based on this, the Board concluded that "such allegations . . . in fact *demonstrate* that [Black test takers] have not failed the Maryland examination at a higher rate than white examinees."[315] Although plaintiffs tried to make up for the lack of official data by conducting interviews, the Board deemed the evidence as "hopelessly inconsistent."[316] The court did not seem to mind that the bar examiners "[c]laim[ed] to lack any systematic data on the race of the Bar applicants" even as the examiners attempted to undermine plaintiffs' attempts to create some data transparency.[317]

By avoiding disaggregated data, courts and state bar associations can dance around the reality that the most definitive factor in attorney licensure,[318] bar passage, results in such racially disparate outcomes. Additionally, by avoiding the reality of the disparity, states can continue to offer vague promises about diversity and general plans. For example, the ABA, which considers itself the "national voice of the legal profession"[319] and wields an influential role in lawyer licensure[320] has named the diversification of law schools and the legal profession a priority for decades.[321] The ABA has attempted to address the diversity issue through the creation of "commissions, diversity initiatives, action groups, councils, 'diversity days,' and scholarships."[322] However, such superficial efforts have failed to drive meaningful

314. Brief of Appellees at 14–15, Pettit v. Gingerich, 582 F.2d 869 (4th Cir. 1978) (No. 77-1599), 1977 WL 203348, at *14–15.

315. *Id.* at 15 (emphasis added).

316. *Id.*

317. Pettit v. Gingerich, 427 F. Supp. 282, 290 n.4 (D. Md. 1977).

318. *See supra* notes 205–211 and accompanying text.

319. *New ABA Profile of the Legal Profession Report Shines Light on Legal Deserts, Law School Debt*, A.B.A. (July 22, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/07/new-aba-profile-of-the-legal-profession-report-shines-light-on-l [https://perma.cc/98NY-UWWQ].

320. Matzko, *supra* note 75, at 1.

321. In 1984, the ABA created the ABA Task Force on Minorities in the Legal Profession, the precursor to the current Commission on Racial and Ethnic Diversity in the Profession, which focused on the integration of minority lawyers to the profession and in the judiciary. *Timeline*, A.B.A. (May 28, 2020), https://www.americanbar.org/groups/diversity/DiversityCommission/timeline (last visited Oct. 25, 2021).

322. Shepherd, *supra* note 80, at 104.

improvements; between 2010 and 2020, the number of lawyers of color saw a meager three percent growth.[323]

The ABA has been reluctant to tackle larger, more systemic changes within its power, such as advocating for alternatives to the bar exam or its abolishment entirely.[324] On the contrary, the ABA has in fact reinforced the import of the bar exam by passing Resolution 316, which requires seventy-five percent of a law school's graduates to pass the bar exam within two years, or the law school will risk losing its accreditation.[325] Critics noted the resolution put a burden on law schools to churn out test-passers and "focus[ed] on entirely the wrong thing in its efforts to improve diversity.[326] Lackluster attempts to increase racial diversity without a more serious look at the systemic practices will not remedy the years of racism and exclusion that the ABA once openly encouraged.[327]

The ABA is not the only entity that has shown willful blindness to the bar exam's disparate outcomes while using vague diversity initiatives to virtue signal. A search on the National Conference of Bar Examiners' website for the word "diversity" only returns two results: both regarding a partnership between the NCBE and another organization to provide bar study support to "individuals from traditionally underrepresented racial and ethnic groups and disadvantaged communities."[328] A search for the word "race" returns zero results. A

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323. *ABA Profile of the Legal Profession 2020, supra* note 37, at 33.

324. *ABA Section of Legal Education Releases Comprehensive Report on Bar Passage Data*, A.B.A. (Feb. 18, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/aba-section-of-legal-education-releases-comprehensive-report-on- [https://perma.cc/A2LX-L93M] (The Managing Director's Office of the ABA Section of Legal Education and Admissions to the Bar reported that "there is no other single outcome that better measures whether a law school is offering a rigorous program of legal education" than data showing bar passage rates).

325. *See Council Enacts New Bar Passage Standard for Law Schools*, A.B.A. (May 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/05/legal-ed-bar-passage-rate (last visited Oct. 25, 2021).

326. Jane E. Cross, *The Perfect Storm of ABA Standard 316: Is the ABA Trying to Get Students Out of the Rain or Passing the Blame?*, 22 NAT'L BAR ASS'N MAG. 18, 19 (July 2017) ("While the resolution found a mark in law schools, it misses a better target. There is an opportunity in the midst of this self-examination to explore the nexus between legal education and the use of the bar examination as a gatekeeper for the profession.").

327. For example, in 1914, after the ABA discovered that it had unknowingly accepted three Black lawyers into its membership, ABA leadership passed a resolution saying, "[I]t has never been contemplated that members of the colored race should become members of this Association." Matzko, *supra* note 75, at 238; REPORT OF THE THIRTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 64 (1914); *see also supra* Section I.C.

328. *NCBE and CLEO Announce New Collaboration*, NAT'L CONF. BAR EXAM'RS (Oct.

report from the "Testing Task Force," which has been tasked with undertaking a "three-year, comprehensive, empirical study to ensure that the bar examination continues to assess the minimum competencies required of newly licensed lawyers" makes no mention of race, cultural competency, or diversity.[329] The 2019 "Examination Statistics" also conspicuously lacks any data on demographics.[330] The fact that an organization who helps determine the fate of law graduates every year seems to have little regard for the role that race and bias might play in its tests should raise concern.

State bar associations similarly profess a dedication to diversity without taking steps to measure the problem.[331] Although California continues to track disaggregated data on bar passage rates in its state,[332] it remains nearly alone in this regard.[333] Moreover, the states named in *Delgado*, *Pettit*, and *Tyler* still do not release disaggregated data on bar passage or even on the diversity of the legal profession in their state.[334] Unfortunately, these states reflect the norm. In 2020, the ABA noted that "most state bars and state licensing agencies do not track race and ethnicity in the profession." In 2020, twenty-one states reported the race and ethnicity of lawyers—up from only *nineteen states* in 2010.[335] This lack of data contradicts leaders in the

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26, 2018), https://www.ncbex.org/news/cleo-collaboration [https://perma.cc/WUK4-QMWW].

329. *Overview of Recommendations for the Next Generation of the Bar Exam*, NAT'L CONF. BAR EXAM'RS, https://nextgenbarexam.ncbex.org/overview-of-recommendations [https://perma.cc/N3QG-V6JP].

330. *See 2019 Statistics*, BAR EXAM'R, https://thebarexaminer.org/2019-statistics [https://perma.cc/LHB7-JCSH] (The NCBE manages the Bar Examiner website).

331. According to the ABA, only 21 states reported the racial demographics of their lawyers in 2020. *ABA Profile of the Legal Profession 2020*, *supra* note 37, at 33. This was an increase by two states from 19 in 2010. *Id.*

332. *See General Statistics Report*, STATE BAR CAL. OFF. ADMISSIONS (Feb. 2019), https://www.calbar.ca.gov/Portals/0/documents/FEB2019_CBX_Statistics.pdf [https://perma.cc/62TW-BT6Q].

333. Howarth, *supra* note 120, at 952 ("Many jurisdictions do not disclose bar passage rates by race or ethnicity, but the available information reveals persistent significant racial and ethnic disparities in bar exam passage.").

334. The Maryland State Bar Association released a "State of the Legal Profession" in 2018; however, it is available only to bar members and the description does not specify whether it will provide disaggregated information by race. *State of the Legal Profession*, MD. STATE BAR ASS'N, https://www.msba.org/state-of-profession [https://perma.cc/C8PC-SC5S]. The South Carolina Bar Association recently set out on a five-year plan to survey and track diverse attorneys in the state. Haley Walters, *SC Lawyers Launch Plan to Study, Promote Diversity in Legal Community*, GREENVILLE NEWS (July 30, 2020), https://www.greenvilleonline.com/story/news/2020/07/30/sc-lawyers-launch-plan-study-promote-diversity-legal-community/5426955002 [https://perma.cc/UTH7-AMP9]. The results are expected in fall of 2022. *Id.*

335. *ABA Profile of the Legal Profession 2020*, *supra* note 37, at 33 (emphasis

profession who claim a commitment to diversity while remaining unaware of many lawyers of color practice in their state. Some jurisdictions, such as Minnesota, have begun to recognize the importance of collecting demographic data.[336] However, state bars still have a long way to go to create an accurate picture of bar passage by race. This lack of data makes it difficult to ascertain whether the states have meaningfully addressed the disparate impacts claimed by plaintiffs in the 1970s and 80s. The few that do track data have found the continued existence of disparate impacts. Forty years after *Richardson v. McFadden*, only 7.4% of total active bar members[337] and 8.4% of members under the age of thirty-six identified as African American in South Carolina.[338] Statewide, 26.8% of South Carolinians identify as Black or African American.[339] White lawyers make up 86.9% of the profession, but only 67.2% of the state population.[340]

Finally, state supreme courts, which play a primary role in setting licensure standards in all jurisdictions in the United States,[341] have also fallen into the trap of setting lofty aspirations for racial equity without demanding accountability for discriminatory systems. The Conference of Chief Justices (CCJ) which "was founded . . . to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance," released a resolution in 2020

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added).

336. The Minnesota State Bar Association released a report stressing the importance of collecting data in order to accurately define the problem without relying on anecdotes, to "provide foundational support of the existence of disparities, which is harder to ignore," and to guide targeted solutions. *MSBA Report & Recommendation on Demographic Data Collection*, MINN. STATE BAR ASS'N 2 (2014), https://www.mnbar.org/docs/default-source/diversity-msba/final-msba-report-and-recommendation-to-the-sup-ct.pdf?sfvrsn=2 [https://perma.cc/Y7CU-SAYE].

337. South Carolina has a unified bar association, meaning that attorneys practicing in South Carolina must also join the South Carolina State Bar Association. *About Us*, S.C. BAR, https://www.scbar.org/about-us [https://perma.cc/A55Q-JWDR].

338. *See Bar Member Data*, S.C. BAR (July 15, 2020), https://www.scbar.org/media/filer_public/87/71/8771760e-8198-4ede-93d3-fbfd9c5a0e3c/bar_member_data-active_all_ages__36_and_below_7-15-2020_logo.pdf [https://perma.cc/2477-APQS].

339. *See South Carolina Population 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/states/south-carolina-population [https://perma.cc/EJT3-F4N3].

340. *See Bar Member Data*, S.C. BAR (July 15, 2020), https://www.scbar.org/media/filer_public/87/71/8771760e-8198-4ede-93d3-fbfd9c5a0e3c/bar_member_data-active_all_ages__36_and_below_7-15-2020_logo.pdf [https://perma.cc/EJT3-F4N3]; *South Carolina Population 2021*, *supra* note 339.

341. *See Comprehensive Guide to Bar Admission Requirements*, *supra* note 97, at 1 chart 1.

titled "In Support of Racial Equality and Justice for All."[342] While the overall message spoke of equity, the CCJ's resolution "to develop career pathways to improve the racial and ethnic diversity of the . . . legal community" seems hollow without targeted data-based initiatives.[343] The CCJ certainly recognizes the importance of data, however, as in the immediately preceding bullet, the organization pledged to "collect, maintain, and report court data regarding race and ethnicity that enables courts to identify and remedy racial disparities."[344]

The need for disaggregated data has also been recognized in efforts to diversify the bench.[345] By demanding disaggregated data on the racial demographics of judges, researchers acknowledge that "[s]tates cannot improve diversity on the bench if they do not know the ways in which diversity is lacking."[346] Similarly, and directly related to the diversity of judges, meaningful change in the diversity of the legal profession will require the use of accurate and disaggregated data to define the disparities and prevent decisionmakers from averting their eyes.

III. A CALL TO ACTION IN TWO PARTS

Addressing the lack of data, and the continued legal reinforcement of willful blindness to the bar exam's disparate impact, will require a variety of approaches. This Section suggests two. First, states and other stakeholders should start collecting and releasing disaggregated data of bar exam passage. Second, courts must begin unpacking intent doctrine and consider when decades of willful blindness should equate to a malicious purpose.

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342. *See Conference of Chief Justices*, CONF. CHIEF JUSTS., https://ccj.ncsc.org [https://perma.cc/PG3J-MNHM]; *In Support of Racial Equality and Justice for All*, CONF. CHIEF JUSTS. (July 30, 2020), https://ccj.ncsc.org/__data/assets/pdf_file/0017/51191/Resolution-1-In-Support-of-Racial-Equality-and-Justice-for-All.pdf [https://perma.cc/8KVA-XQYM].

343. *In Support of Racial Equality and Justice for All*, *supra* note 342, at 2.

344. *Id.*

345. Yuvraj Joshi, *Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It*, LAMBDA LEGAL 10–12 (June 2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20170607_diversity-counts.pdf; *see also The Stunning Lack of Diversity on the State Court Bench*, LAMBDA LEGAL, https://www.lambdalegal.org/node/42701 [https://perma.cc/7HGK-NVNU].

346. Yuvraj Joshi, *Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It*, LAMBDA LEGAL 6 (June 2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20170607_diversity-counts.pdf [https://perma.cc/72NN-NTR9].

A. COLLECT DISAGGREGATED DATA AND USE IT TO CREATE TARGETED SOLUTIONS

States and the NCBE must shake off the collective blindness to the disparate impacts of the bar examination on BIPOC test takers, regardless of how federal courts have failed to recognize and legitimize the disparities. They can start this process by collecting and reporting disaggregated data of bar passage by race.[347]

Such a demand will likely engender a few criticisms. The well-documented theory of stereotype threat, which shows that answering demographic questions can "raise inhibiting doubts and high-pressure anxieties in a test-taker's mind," poses a potential issue.[348] Additionally, some have expressed "concern for applicants' privacy interests" or a "desire to avoid even the appearance of impropriety or discrimination."[349] However, law schools that already collect demographic data of their students or applicants who register for the test online could provide racial demographics of test-takers. Additionally, California has released race data for decades without complaints regarding privacy or impropriety; "[o]n the contrary, as a consequence of this open information practice, California sits at the forefront of confronting the problem of racially disparate bar performance and serves as a model for the rest of the nation in this regard."[350]

The Biden administration should also play an influential role in encouraging data collection. As President Biden noted early in his presidency, "over the course of the past year . . . the blinders [have] been taken . . . off the nation of the American people. What many Americans didn't see, or had simply refused to see, couldn't be ignored any longer."[351] Although the President was referring to the continued police violence against Black and Brown communities, his words speak to a general need to "change [the] whole approach to the issue of racial equity."[352] President Biden demonstrated his commitment to doing so by signing four executive orders "aimed at advancing racial

347. Data disaggregated by disability and sexual orientation could also ensure transparency of the test's impact on people with marginalized gender identities and disabilities.

348. *Stereotype Threat Widens Achievement Gap*, AM. PSYCH. ASS'N (July 15, 2006), https://www.apa.org/research/action/stereotype [https://perma.cc/6AKU-S32E].

349. Hunt, *supra* note 255, at 727–28.

350. *Id.* at 728.

351. *Remarks by President Biden at Signing of an Executive Order on Racial Equity*, WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity [https://perma.cc/DN26-79NS].

352. *See id.*

equity for Americans."[353] One of the orders "direct[ed] the Department of Housing and Urban Development 'to take steps necessary to redress racially discriminatory federal housing policies.'"[354] The President must hold other institutions, such as the NCBE, state bar associations, and state supreme courts accountable for the lack of transparency. Such an action would fulfill Biden's goals of achieving racial equity.[355] It would also help create more targeted approaches for addressing the disparity.

The Biden administration should also look to California as an example of how disaggregated data can drive real outcomes for would-be BIPOC lawyers. In 2017, the State Bar of California completed a study which examined, among other things, the potential effects of lowering California's "cut score"[356] which, at the time, was set to 1440.[357] Using California's disaggregated data, the study showed that if the cut score had been lowered to 1390 in 2016, 40.4% more Black test takers, 26.1% more Latinx test takers, and 23.5% more Asian test takers would have passed.[358] At the then-current cut score of 1440, the eventual passage rate of Black test takers was only 53.1%.[359] The achievement gap between Black and white test takers was 27.4%.[360]

A 2020 study showed that if the California cut score was lowered even more, to 1330, the cut score in New York, the achievement gap would have lowered to 18%.[361] If California had adopted a cut score of 1350 in 2009, there would have been a 9.9% increase of Black lawyers, 8.7% increase of Latinx lawyers, and 7.9% increase in Asian lawyers in California by 2019.[362] The study also found that "no

353. *See* Brian Naylor, *Biden White House Aims to Advance Racial Equity with Executive Actions*, NPR (Jan. 26, 2021), https://www.npr.org/sections/president-biden-takes-office/2021/01/26/960725707/biden-aims-to-advance-racial-equity-with-executive-actions [https://perma.cc/PX78-ACDY].

354. *See id.*

355. *See id*.

356. The minimum score needed to pass the bar exam. Mitchel L. Winick, Victor D. Quintanilla, Sam Erman, Christina Chong-Nakatsuchi & Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards* 3, MONTEREY COLL. L. (Oct. 15, 2020), https://dx.doi.org/10.2139/ssrn.3707812 (last visited Oct. 25, 2021).

357. Michael G. Colantuono & Leah T. Wilson, *Final Report on the 2017 California Bar Exam Studies*, STATE BAR CAL. (Dec. 1, 2017), http://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf [https://perma.cc/4HJ3-92WX].

358. *Id.* at app. A, tbl. 5.

359. Winick et al., *supra* note 356, at 20 fig. 8.

360. *Id.* at 5.

361. *Id.* at 24, 38.

362. *Id.* at 29.

relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys in the jurisdictions studied."[363] Overall, the study noted that "maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites."[364]

Based on the 2017 data, California lowered its cut score from 1440 to 1390 in July 2020.[365] The October 2020 bar, the first to utilize the lower cut score, had a pass rate over 10% higher than the July 2019 bar.[366] Furthermore, 56% of first-time Black test takers passed on their first try,[367] as compared to only 17.6% in February 2020.[368] Although an unacceptable gap still remains between BIPOC test takers and white test takers,[369] these numbers demonstrate how California was able to take relatively swift, targeted action and create large impacts while being sure that such changes would not negatively affect the public because it had been collecting disaggregated data.

However, the profession should strive for more than lowering cut scores. Disaggregated data could force decisionmakers to face the reality of the bar exam's discriminatory impact and start to seriously consider other options such as abolishing the bar exam in favor of some form of diploma privilege or a focus on testing "practical legal knowledge."[370] The idea of a Public Service Alternative Bar Exam (PSABE), which would require applicants to "spend ten to twelve weeks working in the state court system" while being evaluated on their real-world skills, has also been suggested.[371]

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363. *Id.* at 5.

364. *Id.*

365. *See California's High Bar Exam Cut Score is Failing Communities of Color*, IMPACT FUND (July 16, 2020), https://www.impactfund.org/california-cut-score [https://perma.cc/QPD5-EGJE].

366. *See* Stephanie F. Ward, *California Releases Bar Exam Results, and Like Many Jurisdictions Sees Increase in Pass Rates*, A.B.A. J. (Jan. 11, 2021), https://www.abajournal.com/news/article/california_bar_exam_results_october_2020 [https://perma.cc/GF36-FG27].

367. *See General Statistics Report October 2020 California Bar Examination*, STATE BAR CAL. 2 (2020), https://www.calbar.ca.gov/Portals/0/documents/OCT2020-CBX-Statistics.pdf [https://perma.cc/62PX-AKNE].

368. *See supra* note 122.

369. 83.7% of white test takers in California passed the October 2020 bar exam on the first try, while 56% of Black test takers, 66.3% of Latinx test takers, and 61.3% of Asian test takers did the same. *See supra* notes 367–368.

370. Howarth, *supra* note 120, at 964–65.

371. Glen, *supra* note 70, at 1696; *see* Stephanie F. Ward, *What Alternatives to the July Bar Exam are Being Considered in Light of COVID-19?*, A.B.A. J. (Mar. 23, 2020),

Whatever course courts and bar associations take, accurate data should drive action in pursuit of a specific and measurable goal. Derrick Bell, a civil rights lawyer and activist, pointed out the importance of facing the truth of discrimination head-on: "a realistic appraisal of racism's crucial role in the society, far from being capitulation, would enable us to recognize the potential for effecting reform . . . . At the least . . . understanding the true nature of racism would equip us to weather its myriad harms."[372] Although courts have decided that disparate impacts do not equate to discrimination worth fighting under the Fourteenth Amendment, much work remains for decisionmakers to ensure the goals of equal protection and a "societal commitment to the eradication of the substantive conditions of Black subordination" and the subordination of other BIPOC communities, persevere.[373]

B. START ASKING AND EXPLORING AT WHAT POINT WILLFUL BLINDNESS MIGHT BECOME THE NECESSARY INTENT FOR DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE

The near-impossibility of holding anyone accountable for the disparate impacts of the bar exam, despite decades of recognizing the exam's role in creating a disproportionately white legal profession, highlights the need to recognize how generations of willful blindness to racism and discrimination should become an iteration of the "invidious intent" that the Supreme Court sought in *Davis*.[374] This conversation could draw inspiration from criminal law's use of the "willful ignorance" jury instruction, which "tell[s] the jury that it may find the knowledge element for the crime to be satisfied by the defendant's willful ignorance of the relevant fact."[375] This concept of willful ignorance, which has been accepted in some form in criminal law by the United Supreme Court and all eleven circuit appeals courts,[376] works to prevent defendants from "escaping responsibility by burying [their] heads in the sand."[377] Or perhaps the conversation should

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https://www.abajournal.com/news/article/in-light-of-the-coronavirus-crisis-working-paper-suggests-alternatives-to-the-july-bar-exam [https://perma.cc/AL42-JX42].

372. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 115 (2018).

373. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988).

374. 426 U.S. 229, 242 (1976).

375. Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023, 1023 (2014).

376. *Id.* at 1024.

377. Alexander F. Sarch, *Willful Ignorance in Law and Morality*, 13 PHIL. COMPASS 5, 5 (2018); *see also* United States v. Lee, 966 F.3d 310, 323 (2020) ("[The deliberate

discuss how a decisionmaker could weigh "discriminatory effects of government action" in order to "analyze both the harm complained of and the potential remedy within their given social and historical context."[378]

Although this Note will not attempt to analyze how a court could map these concepts of willful ignorance or restorative justice onto a Fourteenth Amendment challenge against the bar exam, it recognizes that the current judicial understanding of intent does not reflect or encompass the discrimination that BIPOC law students and would-be lawyers of color feel in the face of systemic barriers. As Charles R. Lawrence, a critical race theory and legal scholar, wrote:

> [R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.[379]

Professor Lawrence's words continue to resonate today. Over the course of the five-hour Texas Board of Law Examiners meeting on the effects of COVID-19 on the bar exam, none of the board members explicitly stated an intent to discriminate against test takers of color[380]; nevertheless, to BIPOC students who had already been disproportionately affected by the pandemic, and who had already endured barriers such as the LSAT and financial costs (which also have measured disproportionate effects on Black and Brown students), the message was clear: we know this is hard on you, but we don't care enough to change anything.[381]

In this vein, adjudicators and decisionmakers must ask themselves whether they want to take what Kimberlé Crenshaw has dubbed either an "expansive view" or "restrictive view" of antidiscrimination law, such as the Fourteenth Amendment.[382] The former "stresses equality as a result" while the latter "treats equality as a process, downplaying the significance of actual outcomes."[383] Similarly, Dr. Ibram X. Kendi, an author and historian, has said that "society's

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ignorance instruction] ensures that a defendant cannot bury his head in the sand to avoid liability.").

378. Samuel-Siegel et al., *supra* note 227, at 142.

379. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

380. *See* Texas Courts, *supra* note 5.

381. *See* Hutton-Work & Guyse, *supra* note 1 (detailing how during testimonials, board members "appeared distracted and disinterested" and "downplayed the health risks and potentially devastating economic threats").

382. Crenshaw, *supra* note 373, at 1341.

383. *Id.* at 1341–42.

understanding of racism has focused on the perpetrators rather than the victims," and that if a policy results in racial injustice, the intended outcome should not matter.[384]

This Note has given an overview of the many legal roadblocks that exist to challenging the bar exam and analyzed the actors whose actions could and should be held accountable. However, the fact that a legal labyrinth exists to make litigation based on disparate impacts difficult does not mean that those disparate impacts do not exist.[385] In order to begin untangling the "web of ignorances"[386] that the Equal Protection doctrine and absolute immunity have allowed among state courts and bar associations, judges, legislators, and the legal community, the legal profession must refocus on the outcomes they want to see, and reframe policy and the law to reach that conclusion.

CONCLUSION

The law and decisionmakers have routinely ignored history, data, and the lived and real experiences of BIPOC people to continue upholding the institution of the bar exam. This Note highlights how the doctrines of absolute immunity and Equal Protection have intertwined to prevent a true reckoning of the bar exam's discrimination by focusing on actors and intent instead of its disparate impacts. Such a system has provided little incentive to courts, bar associations, and other decisionmakers to snap out of their own willful blindness. These decisionmakers, recognizing the importance of a diverse legal profession and the exclusionary history of the bar, should not wait for a change to come through lawsuits; they should begin by collecting disaggregated data that will inform targeted and systemic change and discussing the expansion of intent to encompass the history and awareness of the bar exam's systemic discrimination against test takers of color. If courts and bar associations are truly committed to diversity and inclusion, they must confront and dismantle the bars they have constructed and continue to maintain against a meaningfully inclusive profession. Rethinking the profession's reliance on the bar exam is a great place to start.

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384. *See* Brita Belli, *Kendi: Racism is About Power and Policy, Not People*, YALENEWS (Dec. 7, 2020), https://news.yale.edu/2020/12/07/kendi-racism-about-power-and-policy-not-people [https://perma.cc/F6SM-Y362] ("If we train our focus on outcomes and victims . . . intention will become irrelevant.").

385. *See* Boucai, *supra* note 141, at 253 ("[A]n intent standard under the Equal Protection Clause is manifestly underinclusive.").

386. *Id.*