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An Epic Fail

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Saint Louis University – School of Law

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INTRODUCTION

All at once, the U.S. found itself embattled with the threat of COVID-19, the new normal of social distancing, and the perennial scourge of racial injustice. While simultaneously battling those ills, the class of 2020 law graduates found themselves also contending with inflexible bar licensing policies that placed at risk their health, safety, and careers. During a global health pandemic, bar licensing authorities made the bar exam a moving target riddled with uncertainty and last-minute cancellations. This costly and unsettling uncertainty surrounding the bar exam administration was unnecessary because multiple alternatives were available to safely license new attorneys. A ball was dropped, and bar examiners at the state and national levels failed epically at an opportunity to be adaptive, decisive, and transparent, to the detriment of a class of new lawyers and the public they will serve. The dogged insistence on status quo that led to the bar exam chaos of 2020, has placed the method and purpose of bar examination under national scrutiny. This Article offers a critical analysis of the systemic failure of bar licensure authorities to respond adaptively to crisis; explores alternative processes to measure minimal competency; and suggests a theory about the institutional mindset that has dominated our perception of the bar exam. An entire class of bar takers was held captive to conventional thinking at a time that called for compassion and innovation. Any failures are ours, not theirs.

This Article makes four original contributions to the limited literature on licensing policy. Part I chronicles the disruptive impact of public crisis on the legal profession and our system of legal licensure. A historical account of threats to the flow of entry into the legal profession is particularly important at a time when the need for new lawyers is so great. Part II contrasts the emergency adaptive measures implemented by some jurisdictions to the negligible responses by others. Providing a scholarly account of systemic shortcomings in licensing policy is essential to establish a foundational framework for improving the process by which we license attorneys. Part III assesses the benefits and drawbacks of licensing alternatives presented to state courts during the early pandemic period. Exploring those alternatives from a neutral perspective is essential both to understand the courts' responses and to consider whether any of these alternatives hold promise for the future. Part IV explores the institutional legitimacy of the bar licensing process, and advances theories for states' rigid adher-

ence to the status quo, even in the face of life or death circumstances. Understanding the root causes of the chaos surrounding the administration of the summer 2020 bar exam can inform our licensing structure going forward. The aim of this work is to expand the existing literature by analyzing an avoidably chaotic outcome and to question under what circumstances and by what channels can we see bar exam policy reform. If not now, when?

I. THE PROBLEM OF THE PANDEMIC

The emergence of the novel coronavirus, coupled with a medical infrastructure ill-equipped to respond to its severest symptoms and rapid spread, wreaked havoc on our economic, legal, political, and social systems.¹ Businesses shuttered. Unemployment rates skyrocketed.² Jury trials were suspended and pretrial hearings that were not canceled proceeded via video or teleconference.³ Political elections were impacted, threatening the foundation of American democracy.⁴ Mandated social distancing prohibited congregation for commerce, leisure, worship,⁵ and intellectual exchange. During the early months

1. David Blumenthal & Shanoor Seervai, *Coronavirus Is Exposing Deficiencies in U.S. Health Care*, HARV. BUS. REV. (Mar. 10, 2020), <https://hbr.org/2020/03/coronavirus-is-exposing-deficiencies-in-u-s-health-care>.

2. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, [https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#:~:text=of%20the%2016.9%20million%20people,the%20pandemic%20\(78%20percent\)](https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#:~:text=of%20the%2016.9%20million%20people,the%20pandemic%20(78%20percent)) (“Of the 16.9 million people unemployed in July 2020, 9.6 million (57%) were unable to work because their employer closed or lost business due to the pandemic.”) (last visited Oct. 17, 2020); Rakesh Kochhar, *Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession*, PEW RSCH. CTR.: FACT TANK (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

3. Press Release, John Nevin, Commc’ns Dir., Michigan’s ‘Virtual’ Courtrooms surpass 500,000 hours of Zoom hearings (July 14, 2020), https://courts.michigan.gov/News-Events/press_releases/Documents/Zoom%20500000%20Media%20Release.pdf (stating that Michigan state courts logged 500,000 hours and held more than 6,800 remote hearings for a total of nearly 30,000 hours of proceedings); see also *Pandemic-Related Administrative Orders*, NAT’L CTR. FOR ST. CTS., <https://www.ncsc.org/newsroom/public-health-emergency/orders> (providing a partial list of courts that canceled hearing and trials during the early months of the pandemic) (last visited Aug. 12, 2020).

4. *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>; *COVID-19 and the 2020 Election*, ACLU KAN. (July 22, 2020), <https://www.aclukansas.org/en/covid-19-and-2020-election>.

5. See *Kelly v. Legis. Coordinating Council*, 460 P.3d 832 (Kan. 2020) (upholding the Governor’s ban that prevented public assembly of more than ten people, even in churches.); but see Associated Press, *Federal judge blocks Kansas limits on religious gatherings*, POLITICO (April 18, 2020, 10:44 PM), <https://www.politico.com/news/2020/04/18/judge-blocks-kansas-limits-on-religious-gathering-coronavirus-193907>.

of the pandemic, the interactive connectivity that is our societal fabric took a necessary back seat to preventative protocols aimed to minimize the spread of infection. Even with extreme social distancing, multiple future waves of infection were still predicted⁶ and, absent a vaccine, the reach of the deadly pandemic seemed unlimited.⁷

The health and economic worries brought on by the pandemic were further compounded by the civil unrest that erupted in response to multiple police killings of unarmed African American civilians.⁸ Streets were filled with peaceful protests, looting riots, and militarized police response.⁹ For the class of 2020, the world and law school they experienced were entirely and frighteningly different from that of every graduating class before them. Unlike their predecessors, members of the class of 2020 were unable to memorialize the end of their time in law school with the traditional hooding ceremony.¹⁰ They also had the unenviable distinction of ending the school year wondering when or if they would get to take the bar exam.¹¹

Faced with the medical reality that the threat of coronavirus rendered traditional administration of a bar exam unsafe, bar licensing authorities lagged woefully behind other institutions, including the rest of the legal profession, in responding adaptively to the health crisis.¹² Law schools understood the need to make modifications in or-

6. Nicholas Kristof, *Brace Yourselves for Waves of Coronavirus Infections*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/opinion/sunday/covid-whats-next.html>.

7. WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> (By May 2020, the COVID-19-related death toll in the United States was 81,795.) (last visited Sept. 26, 2020); Neil Ferguson & Imperial College COVID-19 Response Team, *Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce Covid-19 mortality and healthcare demand*, IMPERIAL COLL. LONDON (Mar. 16, 2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

8. See, e.g., Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 522–23 (2017).

9. Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond With More Force*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html>.

10. Eugene Sullivan, *Academic Regalia*, AM. COUNCIL ON EDUC. (Jan. 2020), <https://www.acenet.edu/Programs-Services/Pages/Academic-Regalia.aspx> (stating that hooding ceremonies date back to 12th century Europe, that they were first instituted to recognize graduating students as they entered into their scholarly careers, and that unlike the mortar board caps worn by undergraduates, those receiving masters or doctorate degrees are presented with hoods to show their continued pursuit of knowledge).

11. See generally Emma Goldberg, *Bar and Medical Exam Delays Keep Graduates in Limbo*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/us/bar-exam-coronavirus.html>.

12. Emma Cueto, *Bar Examiners 'Failed' COVID-19 Test, Prof Says*, LAW360 (July 27, 2020, 5:41 PM), <https://www.law360.com/articles/1295558/bar-examiners-failed-covid-19-test-prof-says>.

der to continue to service students during a pandemic.¹³ With alacrity, schools equipped their faculty members with web-based course delivery tools. Law faculties had to agree on pass/fail or other grading schema, and rethink examination methods. Law schools had to set guidelines for online examinations that would be fair to students, maintain exam security, and meet the required standards for legal education.¹⁴ Shifting to online educational delivery required the relocation of thousands of law students and the remote collaboration and connectivity of faculty, administrators, and IT professionals. Though perhaps imperfectly, the shift was done, and it was done in a manner that did not leave students uncertain about the available options to complete or continue their legal education. Those in charge of the commodity that is legal education rose to the occasion by being adaptive, collaborative, and flexible in the face of crisis.

Like law schools, states had the information, opportunity, and resources to implement safer methods of qualifying new attorneys for practice.¹⁵ Yet, many states failed to make timely and reasoned temporary departures from a testing modality fully incompatible with public safety and questionably out of touch with the needs of today's legal profession.¹⁶ The dogged insistence on an in-person exam in the face of pandemic conditions shaped public perception of the importance and purpose of bar examination. Claims that the bar exam perpetuates a lack of diversity in the legal profession reemerged with furor.¹⁷ Disgruntled bar candidates organized in protest against in-person examinations and lambasted states for not implementing licensing options that would better protect them from the risk of contamination and illness.

13. Paul Caron, *100% of Law Schools Have Moved Online Due to The Coronavirus*, TAX-PROF BLOG (Mar. 18, 2020), https://taxprof.typepad.com/taxprof_blog/2020/03/list-of-law-schools-that-have-moved-online-due-to-the-coronavirus.html.

14. Karen Sloan, *A Little Less Pressure with Law School Final Exams Amid COVID-19*, LAW.COM (Apr. 29, 2020), <https://www.law.com/2020/04/29/a-little-less-pressure-with-law-school-final-exams-amid-covid-19/>.

15. Elizabeth Gil, *INSIGHT: Beyond the Bar Exam – Covid – 19's Call to the Legal World*, BLOOMBERG L. (Aug. 12, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-beyond-the-bar-exam-covid-19s-call-to-the-legal-world>.

16. Brittney Zeller, *An Open Letter to the National Conference of Bar Examiners: We Need a Decision*, JURIST (Mar. 28, 2020, 5:55 AM), <https://www.jurist.org/commentary/2020/03/an-open-letter-to-the-national-conference-of-bar-examiners/>.

17. See, e.g., 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 (2014); 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/>.

[C]ourts across the country — including the United States Supreme Court — have moved hearings and arguments online,¹⁸ the bar exam remains a required and in-person activity. As our final semesters of law school moved online and many law schools adopted pass/fail grading, the bar exam remains a required and in-person activity. As law firms and legal organizations have moved their operations online and lawyers have embraced working from home, the bar exam remains a required and in-person activity. It is plain to any observer that things are not business as usual, yet bar applicants have been expected to operate as if nothing has changed.¹⁹

Bar applicants, law faculty, law school administrators, and members of the practicing bar sounded similar cries in the form of open letters,²⁰ signature petitions, and court filings. The cries were to no avail in all but a handful of states. A majority of states dug in their heels and insisted on business as usual — at a time and under circumstances that were far from usual.²¹

When pressed to consider alternatives like diploma privilege, supervised practice, and online administration, many state bar examiners were resolute in their insistence that only an in-person exam could protect the public from the entry of incompetent lawyers.²² Decision makers in most states stood firm on the position that for decades has been both commonly recited and widely criticized — that the bar exam tests minimum competence to practice law.²³ The courts that

18. Nina Totenberg, *Supreme Court Arguments Resume – But with a Twist*, NPR (May 4, 2020, 5:01 AM), <https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist>.

19. Dalton Hughes, Steven Tinetti & Mollie McGuire, *We Aren't Willing to Leave Any Bar Applicants Behind*, JURIST (July 6, 2020 6:44 PM), <https://www.jurist.org/commentary/2020/07/hughes-tinetti-mcguire-diploma-privilege/>.

20. Alicia Ouellette, Michael T. Cahill, Aviva Abramovsky, Melanie Leslie, Gillian Lester, Mary Lu Bilek, Eduardo Peñalver, Matthew Diller, Gail Prudenti, Anthony W. Crowell, Trevor W. Morrison, Horace Anderson, Jr., Michael A. Simons, Craig M. Boise & Elena B. Langan, *Deans' Letter to NY Court of Appeals on the Bar Exam*, FORDHAM L. NEWS (Apr. 2, 2020), <https://news.law.fordham.edu/blog/2020/04/02/deans-letter-to-ny-court-of-appeals-on-the-bar-exam/>.

21. See, e.g., Letter from Hon. Michael J. Garcia, N.Y. Ct. of Appeals, to the Deans of the fifteen New York law schools (June 22, 2020), <https://dp4dc.org/wp-content/uploads/2020/07/2020-06-22-Letter-to-Deans-of-NY-Law-Schools.pdf> (“[W]e do not have the luxury of abandoning our traditional, robust, in-person bar exam at this juncture.”).

22. Betsy AuBuchon, *UPDATE (7/9/2020) July Bar Examination*, MO. BD. OF L. EXAM'RS (July 9, 2020), <https://www.mble.org/news.action?id=1740> (When asked to consider diploma privilege, supervised practice, or an online exam to qualified July 2020 bar takers, the Supreme Court of Missouri responded “the Court has concluded none of these alternatives adequately ensures the core function of licensure, which is to protect the integrity of the profession and the public from those who have not demonstrated minimum competency to practice law.”).

23. *Id.*

have the ultimate oversight of state bar examiners had to balance the needs of the pandemic era bar applicants with its ongoing obligation to protect the public and the integrity of the profession.

Strong arguments were made that pandemic conditions warranted surrender of the often prevailing *we've always done it this way* mindset. If law school faculties, whether willing or not, were able to make adjustments to the method and manner of testing that had been relied upon for decades — if not centuries, state bar examiners should have been able to make temporary adjustments to the mode of testing and available avenues to licensure. While the public and rest of the legal profession watched, our courts and bar examiners failed us by prioritizing sacrament over protection and concern for the newest members of the profession. Bar applicants had invested months of study time only to see state bar examiners cancel exams just days before they were scheduled to be administered.²⁴ The real consequences of this epic failure are yet to be seen and fully appreciated.

A. A Timeline of Disruption

The novel coronavirus forced American law schools into crisis contingency planning mode. Before a majority of U.S. law schools had entered the spring break period, concerns about the reach and danger of the COVID-19 pandemic drove the fastest major paradigm shift in the history of legal education.²⁵ By April 2020, the 200 law schools accredited by the American Bar Association (“ABA”) transitioned all class offerings to online instruction.²⁶ Educational delivery was disrupted and students were displaced from their physical campuses and left to continue the school year online. The face-to-face instruction, that forever had been the primary modality of law school teaching, was no more — at least for the remainder of the 2019–2020 academic year.²⁷

Recognizing that the bar exam, as traditionally administered, is a huge gathering of people — the very thing that states should avoid —

24. Florida Supreme Court, *Florida Board of Bar Examiners postpones August 2020 Bar Exam*, FL. SUP. CT. (Aug. 17, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Board-of-Bar-Examiners-postpones-August-2020-Bar-Exam> [hereinafter Fl. Sup. Ct. Press Release].

25. David G. Broz, *We Are in the Midst of a Paradigm Shift for Higher Education*, GENSLER (Mar. 17, 2020), <https://www.gensler.com/research-insight/blog/coronavirus-paradigm-shift-for-higher-education>.

26. Paul Caron, *supra* note 13.

27. See, e.g., Tim Duane, *Teaching Law in the Time of COVID-19*, SSRN (July 5, 2020), <https://ssrn.com/abstract=3642820>.

the Collaboratory on Legal Education and Licensing for Practice (“The Collaboratory”) published a white paper warning that the public health crisis would render normal administration of the July bar exam improbable.²⁸ The white paper presented six options available to states and analyzed the benefits and limitations of each.²⁹ Following the careful analysis of each option was the urging for states to *act now*. Later hailed as prescient, in March 2020, the Collaboratory cautioned:

The progress of the COVID-19 pandemic makes one point abundantly clear: It is imperative to act quickly and plan ahead. It is already time to make decisions about the July 2020 bar exam. In addition to protecting the public health, we need to preserve the mental health of the candidates hoping to join our profession this year.³⁰

The widely cited policy paper sounded an early alarm of things to come; but rather than drawing proaction, its suggestions were met largely with inaction and resistance.

Sufficient information was available to state bar authorities to alert them to the safety concerns and the need to plan for alternative methods to license the next cadre of attorneys. Yet, shockingly, a majority of states took insufficient early action to prevent what would become known as bar exam chaos.³¹ Because the origin, mutation, and first human infection of the coronavirus were unforeseeable, no single entity could be held responsible for the emergence of COVID-19.³² But once its contamination rate, mortality rate, and manner of transfer had become better understood, leaders and institutions should not be permitted to circumvent accountability for their re-

28. *About*, THE COLLABORATORY, www.barcovid19.org/about/ (The Collaboratory is a group of 11 scholars who have studied and written about the bar exam, licensing, and legal education for many years.) (last visited Sept. 26, 2020).

29. Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol M. Chomsky, Andrea Anne Curcio, Marsha Griggs, Joan W. Howarth, Eileen R. Kaufman, Deborah Jones Merritt, Patricia Salkin & Judith W. Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY WORKS 3–7 (Mar. 22, 2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2309&context=facpub>.

30. *Id.* at 7.

31. Sara Randazzo, *Coronavirus Pandemic Creates Bar Exam Chaos*, WALL ST. J. (July 17, 2020); Paul Caron, *July 2020 Bar Exam Chaos: 50 States, 14 Different Approaches*, TAXPROF BLOG (July 5, 2020), https://taxprof.typepad.com/taxprof_blog/2020/07/july-2020-bar-exam-chaos-50-states-14-different-approaches.html.

32. Graham Readfearn, *How did coronavirus start and where did it come from? Was it really Wuhan’s animal market?*, GUARDIAN (Apr. 27, 2020, 8:46 PM), <https://www.theguardian.com/world/2020/apr/28/how-did-the-coronavirus-start-where-did-it-come-from-how-did-it-spread-humans-was-it-really-bats-pangolins-wuhan-animal-market>.

sponse or failure to respond to the foreseeable risks of infection and death.

B. A Path of Resistance

After widespread dissemination of and positive national reaction to the Collaboratory's white paper, the National Conference of Bar Examiners ("NCBE")³³ issued its own organizational policy paper pointing states away from diploma privilege, supervised practice, and any path to licensure not involving a bar exam.³⁴ The NCBE paper followed an announced decision that one state, Utah, had proactively implemented a "diploma privilege-plus" pathway to licensure and that two other states would develop their own online exams if they could not offer in-person testing.³⁵ Even as other states expressed willingness to consider any one or more of the Collaboratory's proposed alternatives, the counterdirective from the organization that provides the majority of the bar exams administered in the U.S. halted the progression away from a July exam.³⁶

Placing states and bar takers in a high-stress holding pattern, the NCBE declared that it would announce by early-May whether it would provide bar exams for states to administer in July.³⁷ At the same time that the NCBE directed jurisdictions away from any alternative path to licensure that did not include a bar exam, it said, essentially, we will let you know later if we decide to provide you with the

33. The National Conference of Bar Examiners ("NCBE") is a not-for-profit corporation founded in 1931. The NCBE has no regulatory authority, but writes, scores, and provides scoring guidelines for the bar examination used in all U.S. jurisdictions, except Louisiana. See generally *Our Mission*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/about/> (last visited Aug. 15, 2020).

34. National Conference of Bar Examiners, *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020*, THE BAR EXAM'R (Apr. 9, 2020), https://thebarexaminer.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf ("It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic.").

35. *Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak*, UTAH CTS. (Apr. 2020), <http://www.utcourts.gov/utc/rules-comment/wp-content/uploads/sites/31/2020/04/04.09.20-PROPOSED-ORDER-re-Bar-Waiver-final.pdf>.

36. Both California and Massachusetts announced that if the COVID-19 pandemic prevented a bar exam from being safely administered in person, they would offer an online exam. At the time of the announcements the NCBE had not developed an online exam for state use. See Stephanie Francis Ward, *California bar exam will be postponed and administered online*, ABA J. (Apr. 27, 2020, 4:17 PM), <https://www.abajournal.com/news/article/first-state-plans-for-online-bar-exam-if-in-person-test-is-not-possible>.

37. Stephanie Francis Ward, *Decision About Releasing July Bar Exam Materials Will Come in May, NCBE says*, ABA J. (Mar. 27, 2020, 1:43 PM), <https://www.abajournal.com/news/article/ncbe-decision-about-releasing-july-bar-exam-materials-will-come-in-may>.

exam that we insist your future lawyers take. Criticized as self-serving³⁸ and inconsistent,³⁹ the mettle of the NCBE stance bears witness to a monumental shift in power wielding — away from the states and in favor of the private NCBE — that is the result of widespread adoption of the Uniform Bar Exam (“UBE”).⁴⁰ Under a system of uniform examination, fewer states play any role in the writing and selection of the content to be tested on the bar exam. Like bar applicants, state courts were also held in abeyance for more than a month, awaiting the non-governmental entity’s determination of whether or not it would allow a state to administer its bar exam to license attorneys.

In May 2020, the NCBE announced that it would provide multi-state exams for states to administer in both July and September.⁴¹ While this announcement may have quelled anxiety over *whether* states would be permitted to offer a bar exam, it created angst about *when* the exam would be held. Some states initially opted to hold a September exam; other states remained committed to the traditional July exam dates; others opted for both July and September administrations; and a few states made no decision whatsoever.⁴² In the days and weeks following the NCBE decision, students ended their law school careers without pomp and circumstance, but with plans to study for a bar exam to be administered on a date uncertain.

38. Karen Sloan, *Ditching the Bar Exam Puts Public at Risk, Says Test Maker*, LAW.COM (Apr. 13, 2020, 1:10 PM), <https://www.law.com/2020/04/13/ditching-the-bar-exam-puts-public-at-risk-says-test-maker/?slreturn=20200813142709> (“It’s not surprising that the NCBE is against eliminating the test for admission. Developing the exam is the core function of the organization, which has nearly 100 employees and reported \$26.6 million in revenue in 2018, according to tax filings.”); see, e.g., *National Conference of Bar Examiners: Form 990 for period ending June 2019*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/362472009/01_2020_pre_fixes_34-36%2F362472009_201906_990_2020011617038295 (last visited Oct. 17, 2020).

39. Michael Ariens, *The NCBE’s Wrong-Headed Response to the Covid-19 Pandemic*, SSRN at 1, 10 (Apr. 28, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751; Joe Patrice, *NCBE Trashes Diploma Privilege, Sprinkles In Some Racist and Sexist Conclusions*, ABOVE L. (Apr. 14, 2020), <https://abovethelaw.com/2020/04/ncbe-trashes-diploma-privilege-sprinkles-in-some-racist-and-sexist-conclusions/> (“While Utah is on track to become the first state to shift to ‘diploma privilege plus’ because of the logistical hurdles presented by the COVID-19 crisis with other jurisdictions openly considering following their lead, . . . the NCBE tries — maybe a little too hard — to salvage its central role in licensing.”).

40. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1 (2019).

41. See *NCBE Covid-19 Updates*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2020), <https://www.ncbex.org/ncbe-covid-19-updates/> (stating the decision to add two additional dates for the bar exam traditionally offered only in July: September 9-10 and September 30-October 1).

42. *News Advisory: R.I. Bar exam for July postponed*, R.I. JUDICIARY (Apr. 13, 2020), <https://www.courts.ri.gov/PDF/Bar%20exam%20postponed%20041320.pdf> (“The Rhode Island Bar Examination scheduled for July 2020 has been postponed indefinitely because of COVID-19 related concerns, the Supreme Court announced today.”) (emphasis added).

Quickly, the uncertainty extended beyond the timing of administration and grew to include questions about *who* would be allowed to take the bar exam. Some states placed limitations on the number of candidates who could sit for the exam.⁴³ These limitations excluded repeat exam takers, out of state law school graduates, and LLM graduates.⁴⁴ New York, for example, announced in May 2020 that only graduates of one of New York's fifteen law schools who were first-time bar applicants could sit for the then-planned in person exam.⁴⁵ Although the chief judge for New York's Court of Appeals had hinted to seating capacity limits in an April notice, the announcement had the potential to displace thousands of New York bar applicants.⁴⁶ Efforts to prioritize first-time takers⁴⁷ and in-state law graduates (in New York and other states) were regarded by some as misguided and drew heavy criticism as violative of the dormant commerce clause.⁴⁸ The New York Board of Law Examiners responded to that criticism, in part, by directing applicants from out of state law schools who intended to practice in New York to apply to take the UBE in another jurisdiction and transfer their scores to New York.⁴⁹ That direction

43. Vikram David Amar, *Why It is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, JUSTICIA: VERDICT (May 21, 2020), <https://verdict.justia.com/2020/05/21/why-it-is-unconstitutional-for-state-bars-when-doling-out-bar-exam-seats-to-favor-in-state-law-schools> (explaining that after New York announced limitations on the number of applicants who would be allowed to sit for a then-planned in-person exam, other states like Connecticut, Massachusetts, Missouri, New York, and Tennessee announced seating or eligibility limitations, and imposed applicant capacities).

44. Emma Whitford, *Pandemic Hinders Bar Exam Retakers Who Aid the Indigent*, LAW360 (May 31, 2020, 8:02 PM), <https://www.law360.com/articles/1277931/pandemic-hinders-bar-exam-retakers-who-aid-the-indigent>.

45. Stephanie Francis Ward, *New York limits bar exam to in-state graduates because of coronavirus concerns*, ABA J. (May 1, 2020, 12:27 PM), <https://www.abajournal.com/news/article/new-york-limits-bar-exam-to-in-state-graduates>.

46. *Chief Judge Approves Temporary Authorization Program*, N.Y. CTS. (Apr. 28, 2020), <https://www.nycourts.gov/whatsnew/pdf/Chief-Judge-TemporaryAuthorizationProgram.pdf> ("Prevailing guidance indicates that, in September, New York will be affected by ongoing travel restrictions, limitations on large gatherings, and social distancing mandates — constraints that prevent us from maximizing space in our larger testing venues across the state. Seating capacity for the September examination is likely to be limited.").

47. Andrea Curcio, Marsha Griggs, Joan Howarth & Deborah Jones Merritt, *INSIGHT: Bar Exam Repeaters Shouldn't Be Pushed to the Back of the Line*, BLOOMBERG L. (June 1, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-bar-exam-repeaters-shouldnt-be-pushed-to-back-of-the-line>.

48. Claudia Angelos, Eileen Kaufman, Deborah Jones Merritt & Patricia E. Salkin, *INSIGHT: New York's Bar Exam Changes Are Misguided – Here's a New Proposal*, BLOOMBERG L. (May 7, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-new-yorks-bar-exam-changes-are-misguided-heres-a-new-proposal?context=search&index=3>.

49. N.Y. ST. BD. OF LAW EXAM'RS, <https://www.nybarexam.org> (such advice proved ill-advised as (1) the application period in all but a few states was closed at the time of the New York announcement; (2) many states quickly imposed seating capacities to prevent crowds of dis-

proved to be ill-advised as many would-be New York applicants later found themselves stuck taking exams in jurisdictions where they may never practice, because at least twelve UBE jurisdictions canceled their exams in favor of a non-portable, non-uniform exam.⁵⁰

Bar applicants scrambled to find a jurisdiction where they could take a bar exam. Those who could afford to do so applied in multiple jurisdictions to hedge their bets. Those without the financial resources to pay thousands of dollars in additional application fees, were fully at the mercy of the restrictive seating policies of the states. The bar-examiner-created imbroglio had aspiring bar takers submitting applications to take a bar exam in states where they had no connection and no intention of practicing law.⁵¹

Without guidance or definitive answers about the summer bar exams, commercial bar preparation companies and academic support professors struggled to set course start-dates and plan supplemental programming, thus reducing the efficacy of available support during bar study.⁵² About half-way through the bar study period, all the while studying, bar candidates did not know who would be allowed to sit for the exam, when it would be given, how the test would be administered, and what format the test would take. And then things got worse.

C. Social Unrest

As summer approached, the nation and the world had seen and heard George Floyd, an unarmed black man, as he gasped and pleaded for his last breath. Mr. Floyd died under the knee of a police officer sworn to serve and protect.⁵³ The Floyd killing followed, in close sequence, the premeditated and racially-motivated killing of

placed New York examinees from coming in; and (3) by July all but two of the jurisdictions that accepted displaced New York applicants had cancelled their UBE administration, leaving the displaced applicants without the opportunity to earn a portable UBE score).

50. See generally *NCBE Covid-19 Updates*, NAT'L CONF. B. EXAM'RS (Sept. 1, 2020, 1:49 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/status-table/>.

51. *Id.*

52. Sam Skolnik, *Covid-19 Forces Bar Exam Prep Companies to Alter Courses*, BLOOMBERG L. (June 24, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/covid-19-forces-bar-exam-prep-companies-to-alter-courses>.

53. Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

Ahmaud Arbery, a black man jogging in Georgia;⁵⁴ and the unanswered killing by police of Breonna Taylor, a black woman, while she was sleeping in her home.⁵⁵ During the extended and convoluted bar study period of the summer and fall of 2020, the deep wound of racial injustice in the United States was reopened as police officers sworn to serve and protect killed unarmed African Americans — repeatedly and with the appearance of impunity.⁵⁶

Those horrible and graphic narratives were superimposed onto the distress of the pandemic. As people grew restless from travel restrictions, business closures, and shelter in place rules, undisputable evidence of bigotry and unequal rights rose to the surface. The lethargy to prosecute the individuals viewed as responsible for the killings sparked protests in cities across the United States and abroad. Thousands of peaceful protestors were met with police resistance and military-style brutality.⁵⁷ In Minneapolis, the city where George Floyd was killed, 150 protestors were arrested in a single night. Nationwide, more than 10,000 people were arrested in early June 2020.⁵⁸

Protests against racial injustice continued for months after the Floyd killing, and an uncountable number of citizens, including journalists, attorneys, legal observers, protestors, and bystanders were detained, arrested, and attacked — not all of whom were aware of their legal and civil rights.⁵⁹ In some of the larger cities like Dallas, Los Angeles, and New York, the conditions of confinement may have vio-

54. Richard Fausset, *What We Know About the Killing of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

55. Richard A. Oppel, Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

56. All Things Considered, *Jacob Blake Paralyzed after Being Shot in the Back by the Police*, NPR (Aug. 25, 2020, 3:44 PM), <https://www.npr.org/2020/08/25/905926959/jacob-blake-paralyzed-after-being-shot-in-the-back-by-the-police> (radio interview commenting on a video that “shows a police officer who follows Blake around a vehicle and then shoots him in the back” seven times).

57. Jaclyn Peiser, *After video shows Wisconsin police shooting a Black man multiple times, National Guard is called to Kenosha*, WASH. POST (Aug. 24, 2020, 10:18 PM), <https://www.washingtonpost.com/nation/2020/08/23/kenosha-police-shooting-video-wisconsin/>.

58. Chas Danner & Margaret Hartmann, *More Than 10,000 Americans Have Been Arrested at George Floyd Protests*, INTELLIGENCER (June 4, 2020), <https://nymag.com/intelligencer/article/george-floyd-protests-police-clashes-continue-updates.html>.

59. Josh Verges, *Journalist blinded by rubber bullet during protest sues Minneapolis police, State Patrol*, MERCURY NEWS (June 11, 2020, 4:51 AM), <https://www.mercurynews.com/2020/06/11/journalist-blinded-during-protest-sues-minneapolis-police-state-patrol/>; Madeleine Carlisle, *Hundreds of Protesters Being Detained Illegally in New York City, Lawsuit Against NYPD Alleges*, TIME (June 4, 2020, 9:30 AM), <https://time.com/5847453/protests-illegal-jail-new-york-nypd-george-floyd-coronavirus/>; NBC News, *More than 300 Arrested as Peaceful NYC Rally Turns Violent with Police for 3rd Night*, NBC N.Y. (May 31, 2020 11:54 AM), <https://>

lated the constitutional rights of the accused and exposed them to COVID-19.⁶⁰ The subsequent protests, cries for police reform, and televised police brutality against peaceful protesters stirred a hunger in many law graduates to take their rightful place as champions of the Constitution, while leaving them to question its true meaning. The protested killings revealed racial and political realities of the U.S. legal system that will have an unquestionable formative impact on those entering the legal profession.

D. The Class of 2020⁶¹

As people reckoned with notions of privilege and prejudice, bar applicants were ushered into the uncomfortable nook between the rock and hard place. Bar candidates were forced to study in places that were not libraries, law schools, or quiet coffee shops, because those places remained off-limits due to COVID-19. They studied in the midst of the unavoidable distraction of national civil unrest. All the while managing the ulcerous uncertainty of not knowing if the bar exam would be postponed, canceled, or reconfigured into a format completely different from predecessor exams on which bar preparation is modeled. One situationally unfortunate class of law school graduates found themselves thrust into a pandemic that they did not create, and social unrest that they could not avoid.

Asking our heavily-invested law graduates to risk their health and the safety of their families for an opportunity to take the exam that deems them competent placed more faith in the ink and paper of a testing instrument than in the flesh and blood of the individuals who are the future of our profession.⁶² The bar exam should not be a moving target, but for 2020 bar takers that is what it became. Taking the bar exam should not be a life or death decision, but in the summer of 2020, it was just that.

www.nbcnewyork.com/news/local/nyc-protests-continue-saturday-following-night-of-arrests-violent-clashes-with-police/2439492/.

60. Ida Sawyer, *New York Protestors Jailed in Crowded, Filthy Conditions: Locked Up for Hours without COVID-19 Protections*, HUM. RTS. WATCH (June 9, 2020), <https://www.hrw.org/news/2020/06/09/new-york-protesters-jailed-crowded-filthy-conditions>.

61. References to “the class of 2020” hereinafter collectively and inclusively refer to applicants who registered or applied to take a bar exam in July, September or October 2020, without regard to their year of law school graduation or the degree conferred upon them.

62. Claudia Angelos, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/>.

The very outcome that the Collaboratory sought to warn against, had come to fruition, to the great disappointment of bar applicants. By mid-July, multiple states had canceled outright their bar exams, including some states that had previously postponed their exams until September. Canceling a bar exam is a devastating blow to a bar applicant. Canceling a bar exam only days before the scheduled exam hinges on cruelty. When the Kentucky Office of Bar Admissions canceled its July bar exam just eighteen days before the exam, applicants were understandably devastated. Gabbie Hill, a graduate of St. Louis University School of Law said: “We’re currently prepping for an exam that is constantly changing and wholly unpredictable. How are we supposed to study for an exam that is constantly changing locations, dates, and formats? Also, how long are we supposed to put our careers on hold?”⁶³

Another Kentucky bar candidate tweeted:

Kentucky just canceled the bar exam 18 days before the test. Postponed to October 5-6. I am incredibly upset. I can’t afford to go until October. I haven’t slept in 2.5 months studying for the KY bar exam. I have nightmares every night about this exam. I moved to Kentucky in April for this exam. This morning I hit 80% completion of [my bar prep course]. I am devastated. I have no words. I don’t know what to do.⁶⁴

Hyperbole notwithstanding, the real consequences of canceled and postponed bar exam dates were presented in testimony before boards of bar examiners,⁶⁵ summarized in impact statements delivered to state supreme courts,⁶⁶ and conveyed publicly via social media.⁶⁷

Canceling the bar exam, months into the bar study process, with no replacement date or substitute exam became a disappointing norm for the class of 2020 bar takers. Kentucky’s cancellation 18 days before the scheduled exam seems magnanimous when contrasted to

63. @GabbieHill, TWITTER (July 9, 2020, 11:42 AM), <https://twitter.com/GabbieHill/status/1281252452382265344>.

64. @emilydotgov, TWITTER (July 10, 2020, 1:27 PM), <https://twitter.com/emilydotgov/status/1281293860078063617>.

65. Staff Report, *State Bar board to meet virtually June 24-25; public comments accepted*, ST. BAR OF TEX. (June 24, 2020), <https://blog.texasbar.com/2020/06/articles/state-bar/state-bar-board-to-meet-virtually-june-24-25-public-comments-accepted/>. Texas BLE holds and live-streams public hearings that include comments on the bar examination (live stream and transcript available at <http://www.texasbarcle.com/CLE/BDPLAYER5.ASP?sMeetingID=062420>).

66. Designer, *Illinois Grads file Petition for Emergency Diploma Privilege*, UNITED FOR DIPLOMA PRIVILEGE (July 6, 2020), <http://www.unitedfordiplomaprivilege.org/2020/07/06/illinois-grads-file-petition-for-emergency-diploma-privilege/>.

67. See @GabbieHill, *supra* note 63; @emilydotgov *supra* note 64.

the Florida Board of Bar Examiners canceling its exam less than 72 hours from the scheduled exam date.⁶⁸ Florida, Louisiana, and New York canceled their scheduled exams, and did not do so callously or arbitrarily. However, the fact that they offered no substitute exam dates, and announced no plan for licensing new attorneys at the time of cancellation left a bad taste in the mouths of applicants and a critical public. Because they chose to ignore the foreseeable impact of the pandemic on bar exam administration, states like New York and Florida were afforded very little clemency from a vocal and disapproving public.

The news of cancellation from Louisiana was troubling not only to expectant bar takers, but also to other states that were planning to offer an online exam because Louisiana had provided its applicants an option to test in-person or online.⁶⁹ The cancellation of both the in-person and online formats of the planned Louisiana exam left other jurisdictions to wonder if there were untold complications with the online testing option. When the Court of Appeals canceled New York's scheduled September exam with no plan for a delayed exam date or an online exam, it could have displaced up to 10,000 bar applicants who had paid fees and had begun to study for a September exam.⁷⁰ Bar takers were left to wonder and continue studying. The consensus response to the New York announcement seemed to be that "[c]ancelling the bar exam with no clear plan demonstrates how far removed from the reality of bar study the [court] is. Adding more chaos to this uncertain time is devastating and traumatizing."⁷¹

Ultimately, the Court of Appeals agreed to move the New York bar exam online, but did so only after applicants had scrambled for a week seeking some path to licensure, possibly outside of New York.⁷²

68. Fl. Sup. Ct. Press Release, *supra* note 24.

69. Press Release, Louisiana Supreme Court, Louisiana Sup. Ct. Announces Changes to Method of Administration of August 24 and October 10, 2020 Louisiana Bar Exam (Aug. 12, 2020), https://www.lasc.org/Press_Release?p=2020-23; See also Press Release, Louisiana Supreme Court, The Louisiana Sup. Ct. and Louisiana Sup. Ct. Comm. On Bar Admissions Announce Changes To July 2020 Bar Examination (May 8, 2020), https://www.lasc.org/Press_Release?p=2020-13.

70. Karen Sloan, *New York Cancels September Bar Exam without Alternative Test in Place*, LAW.COM (July 16, 2020, 5:08 PM), <https://www.law.com/newyorklawjournal/2020/07/16/new-york-cancels-september-bar-exam-without-alternative-test-in-place/>.

71. *Id.* (quoting Allie Robbins, Associate Professor, CUNY School of Law); See NAT'L CONF. OF BAR EXAM'RS., *supra* note 50.

72. N.Y. ST. BD. OF LAW EXAM'RS, <https://www.nybarexam.org> (stating in a subsequent announcement one week after the cancelation, the New York Court of Appeals announced an online bar exam October 5–6, 2020).

The court's late decision was immediately criticized for what appeared to be poor planning or a lack of plan altogether.⁷³ By deciding to move its exam online, the court also contradicted its own stricture of the shortcomings of online examinations and its declaration that online exams cannot serve to protect the public.⁷⁴ Only one month before announcing a planned online exam for New York, the Court of Appeals had penned its unequivocal opinion of an online exam in a very stern letter to the deans of the fifteen New York law schools: "New York simply cannot afford to participate in an experimental protocol without a guarantee of integrity."⁷⁵ Critics unsubtly reminded the court that an online bar exam was no less experimental in July than on the date of the Court's June letter.⁷⁶ Even the most objective observer would struggle to characterize the contradictions and the multiple missteps in New York as reasonable under the circumstances.

California, a state that typically seats about 7,800 bar takers each July, joined New York, Florida, and Louisiana in canceling its in-person exam.⁷⁷ Not only did the California Supreme Court announce an October online exam, it also permanently lowered the California bar passage cut score.⁷⁸ With the news of an online exam, California also announced plans to develop a program of limited licensure that would permit qualified applicants to practice in certain fields under the supervision of a licensed attorney until the applicant passed the California bar exam.⁷⁹ Although California provided more guidance than

73. Susan Arbetter, *New York Cancels Bar Exam – Now What?*, SPECTRUM NEWS (July 17, 2020, 10:32 PM), <https://spectrumlocalnews.com/nys/central-ny/politics/2020/07/18/the-court-of-appeals-canceled-the-bar-exam—now-what->.

74. N.Y. ST. BAR ASS'N., REPORT OF THE NYSBA TASK FORCE ON THE NEW YORK BAR EXAMINATION (Mar. 5, 2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf>.

75. Garcia, *supra* note 21.

76. @dp4ny, TWITTER (July 23, 2020, 5:06 PM), <https://twitter.com/dp4ny?lang=en> ("Just one month ago, the Court of Appeals stated re: online exam that "New York simply cannot afford to participate in an experimental protocol without a guarantee of integrity." An online exam is no less experimental now than it was a month ago.").

77. *State Bar of California Releases July 2019 Bar Exam Results*, ST. BAR OF CAL. (NOV. 15, 2019), <http://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-july-2019-bar-exam-results>.

78. Letter from Jorge Navarrete, Clerk and Exec. Officer of the Cal S. Ct. to Alan K. Steinbrecher, Chair St. Bar of Cal., Bd. of Tr. (July 16, 2020), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/202006/SB_BOT_7162020_FINAL.pdf.

79. *Id.* ("The court recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate

New York or Florida initially did, applicants still had little information about security protocols for the in-person exam; waitlists and seating priority; scoring and content of online or state specific exam; and refund or transfer of exam fees. Like in so many other states, California applicants were left with more questions than answers.⁸⁰

In understandable exasperation, bar applicants pleaded for diploma privilege because taking the bar exam had become more uncertain than passing the bar exam.⁸¹ The pleas of bar takers in Louisiana were ultimately answered, but not so in other states that had canceled their exams.⁸² A divided Louisiana Supreme Court labored over the question of what to do with the class of 2020 bar takers, and granted an emergency diploma privilege. The court decided that diploma privilege was the only practical option under the circumstances of the pandemic. While the court's order is public, its deliberations were not. The Louisiana Supreme Court's decision to grant diploma privilege to the registered 2020 bar applicants was not unanimous and one justice penned an excoriating dissent.⁸³

For most bar takers, the story of 2020 is one that got progressively worse. States refused to acknowledge a need to provide licensure alternatives because COVID-19 made an in-person exam unsafe, and, at the same time, required applicants to sign assumption of risk liability waivers to hold them harmless should an applicant contract the virus during the exam. One scholar identified the waivers as an abuse of contract.⁸⁴ She argued that the waivers are unenforceable because they lacked consideration, were procured under duress, and were un-

these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent . . .”).

80. Marsha Griggs, *Unanswered Questions*, L. SCH. ACAD. SUPPORT BLOG (Apr. 13, 2020), https://lawprofessors.typepad.com/academic_support/2020/04/unanswered-questions.html.

81. Abigail Hess, *'Literal hell'— how the pandemic made the bar exam even more excruciating for future lawyers*, CNBC MAKE IT (Aug. 19, 2020, 5:40 PM), <https://www.cnbc.com/2020/08/19/literal-hell-the-pandemic-has-made-the-bar-exam-more-excruciating.html>.

82. Order of the Court, SUP. CT. OF LA. (July 22, 2020), https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.pdf (on July 22, 2020, the Louisiana Supreme Court entered an order granting diploma privilege to bar applicants who had not previously taken a bar exam).

83. Dissent to the Order of the Court, SUP. CT. OF LA. (July 22, 2020), https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.wjc.dis.pdf (Justice Crain dissented from the majority decision, comparing bar examination during a pandemic to bar examination in the wake of Hurricane Katrina: “Not even in the face of flood-induced homelessness, near complete displacement, and death did we eliminate this prerequisite. . . . Those applicants rose to the occasion and proved themselves worthy of a law license and the public's trust. I have no doubt the current applicants could do the same.”).

84. Andrea Boyack, *Abuse of Contract and the July 2020 Bar Exam*, NULR OF NOTE (July 15, 2020), https://blog.northwesternlaw.review/?page_id=1039.

conscionable.⁸⁵ Unconscionable or not, non-lawyer applicants were forced to sign and return these waivers as a condition of sitting for the exam that is required to allow them to become lawyers.⁸⁶ It is also likely not coincidental that support for diploma privilege from the practicing bar increased as information about these waivers became public.

Juxtaposed to the summer 2020 bar exam chaos and dizzying uncertainty, diploma privilege started to look more and more sensible and much less like an extreme. By mid-July, aspiring bar takers had organized in multiple states to lobby for an emergency diploma privilege that would grant licensure on the basis of law school graduation alone.⁸⁷ Soon the concerted movement for diploma privilege had drawn the support of law professors, law school deans, and practicing attorneys. Vocal efforts to delegitimize the push for diploma privilege were met with mixed reaction. Opponents of diploma privilege painted the class of 2020 law graduates as entitled, lazy,⁸⁸ and wanting to skip the exam because of “exam aversion.”⁸⁹ Their requests to bypass the bar exam were dismissed as trivial circumvention, but their requests were far from trivial. The failings of our ability to safely license new attorneys during a period of national crisis would have a direct and harmful effect on the public.

E. Meeting Public Need

A new paradox emerged in the legal profession. Scores of legal issues presented by the pandemic, and cries against racial injustice created a need for a new crop of attorneys.⁹⁰ When the need for new

85. *Id.*

86. *Id.*

87. UNITED FOR DIPLOMA PRIVILEGE, <http://www.unitedfordiplomaprivilege.org> (United For Diploma Privilege currently stands for emergency diploma privilege for JD degree holders and LLM degree holders, regardless of if they are first time test takers or otherwise, in all U.S. jurisdictions) (last visited Sept. 12, 2020); see also Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 9:28 AM), <https://news.bloomberglaw.com/us-law-week/states-pressured-to-waive-bar-exam-for-new-lawYERS-in-pandemic?context=article-related>.

88. Elizabeth Hernandez, *Worried about COVID-19, Colorado law school graduates seek alternative to in-person bar exam*, DENVER POST (July 7, 2020, 11:54 AM), <https://www.denverpost.com/2020/07/07/colorado-bar-exam-july-coronavirus-covid-cu-du/> (quoting Attorney Regulation Counsel for the Colorado Supreme Court, Jessica Yates, “The individuals who are asking [for diploma privilege] are the individuals who don’t want to take the bar exam.”).

89. Matthew Stanford, *Emergency diploma privileges are not the solution to coronavirus caused bar exam delays*, SCOCABLOG (Apr. 8, 2020), <http://scocablog.com/emergency-diploma-privileges-are-not-the-solution-to-coronavirus-caused-bar-exam-delays/>.

90. See Angelos et al., *supra* note 62.

attorneys was perhaps greatest, jurisdictions failed to develop a safe pathway for new lawyers to enter the profession. Without a law license earned through bar examination, for most, the three years and the \$80,000–120,000 spent on a legal education would be spent in vain.⁹¹ Although looked upon with dread by all who must take it, the bar exam is an imposed rite of passage into the legal profession.⁹² All but two U.S. states require new law graduates and first-time attorneys to pass a bar exam for regular admission to the bar.⁹³ The unsettling catch-22 of pandemic-era licensing was that a bar exam was both required to practice law, and yet potentially unavailable to those who needed to take it to be able to practice law. This crucial uncertainty was detrimental to the emotional and financial wellbeing of thousands of bar applicants and contrary to our societal goals.

The crises of COVID-19 and racial injustice exposed cracks in a legal system that previously had been presumed to be fair and in the best interest of the public. The cries for racial justice will not be quieted overnight. If states and municipalities reevaluate qualified immunity, debate hate crime legislation, and contemplate avenues of civil recovery for race-based 9-1-1 calls, the need for lawyers and legal service providers will increase. The societal costs of the pandemic will also foreseeably drive demand for affordable legal assistance:

Low- and middle-income people will urgently need lawyers to protect their housing rights, secure health care, fight for safe working conditions, challenge unfair lay-offs, stop abusive debt collectors, protect loved ones in nursing homes and prisons, navigate bankruptcies, and access new benefits that the government has promised to provide.⁹⁴

As the need for legal representation increases, it would be imprudent to erect unnecessary barriers to entry into the legal profession. The licensure delays of 2020 disrupted the flow of new attorneys into the legal profession. That disruption, even if temporary, could deprive the public of the very liberties that lawyers are sworn to protect.

91. Abigail Hess, *Only 23% of law school grads say their education was worth the cost*, CNBC MAKE IT (Feb. 21, 2018, 3:37 PM), <https://www.cnbc.com/2018/02/21/only-23-percent-of-law-school-grads-say-their-education-was-worth-the-cost.html>.

92. Griggs, *supra* note 40, at 6.

93. Wisconsin maintains a system for admission without bar examination for graduates of the state's two law schools pursuant to Wis. SUP. CT. R. 40.03. New Hampshire allows in-state law school graduates who have completed a specified honors program to practice law without taking a state bar exam pursuant to N.H. SUP. CT. R. 42.

94. Angelos et al., *supra* note 62.

The public protection role of bar licensure authorities was challenged by the inability to hold in-person exams. Pandemic prohibitions against large gatherings presented opportunities for states to explore practical options to maintain the flow of entry of new lawyers to the bar.⁹⁵ While some states showed a willingness to harness available technology and enact alternatives to protect the public's need for new lawyers, other states — ironically, also citing public protections — staunchly refused to depart from the paper and pencil in-person exam.⁹⁶ Only time will tell how the courts of public opinion will judge the states that followed either path.

II. CRISIS CREATES AN OPPORTUNITY FOR CHANGE

The pandemic crisis presented unique opportunities for innovation, reimagination, and reprioritizing in all sectors of our society. Law schools and the practicing bar utilized technology to prevent a total disruption in service to others, while those at the helm of bar examination, in all but a few states, seemed impervious to change. Even under pandemic conditions, bar authorities fought to maintain normal business practices. This preference for the status quo is not entirely surprising. When options for change are presented, status quo options tend to be seen as less threatening to decision makers and serve to reduce the negative emotions of anticipated regret.⁹⁷ Bar examiners are generally reluctant to deviate from a system and process that they believe protects the public.

University of Kentucky law professor, Brian Frye, said “[s]ometimes, it takes a crisis to make a change.”⁹⁸ Professor Frye and others circulated an early petition in support of a universal diploma privilege for law school graduates.⁹⁹ The petition urged that administration of an in-person bar exam during the pandemic, in the absence of a safe vaccine and any hint of containment, would be un-

95. See e.g., Angelos et al., *supra* note 29; Hutton-Work & Guyse, *supra* note 17.

96. Angelos et al., *supra* note 29; Hutton-Work & Guyse, *supra* note 17.

97. Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result from Reason and Emotion*, 129 PSYCH. BULL. 139, 143, 165 (2003); see e.g., Jason. J Riis & Norbert Schwarz, *Status Quo Selection Increases with Consecutive Emotionally Difficult Decisions, in the Society for Judgment and Decision Making poster presentation* (Nov. 19, 2000), http://www.chicagocdr.org/bdrm/bdrm_program.pdf.

98. Brian L. Frye, *It's Time for Universal Diploma Privilege*, JURIST (Apr. 6, 2020 10:03 AM), <https://www.jurist.org/commentary/2020/04/brian-frye-diploma-privilege/>.

99. Brian L. Frye et al., *Petition of Law Professors in Support of the Diploma Privilege for 2020* (Apr. 8, 2020, 12:00 PM), https://docs.google.com/document/d/1_xlIBRaFtaToYKfY5LOgdGQH2ECiwbN6IucgcEMA/edit?usp=sharing.

fair and unsafe.¹⁰⁰ Professor Frye’s petition was one of the first of many petitions. It preceded a flurry of news stories, blogs, and editorials advancing policy suggestions, public support, and utter disbelief at state courts’ almost universal refusal to adopt some emergency remedy.¹⁰¹

As the summer unwound, the 2020 bar takers were joined in large number by law school deans, professors, and alumni in passionate quests for emergency licensing measures.¹⁰² The common characteristic of the myriad requests was an appeal to the humanity and sense of fairness of the decision makers. The aggregate voice of bar takers sounded in plea for the chance to earn a living to be placed above dogmatic adherence to the status quo.¹⁰³ Those at the helm of legal licensure were asked to think outside of the traditional bar exam box. Although the majority of states refused to adopt emergency licensing measures, even temporarily, a handful of states embraced the opportunity to offer solutions for bar applicants and the public they would serve.

A. Thinking Outside the Box

In June 2020, the Washington Supreme Court issued an order granting the option of emergency diploma privilege to all first-time and repeat takers who had timely registered for its July or September bar exam.¹⁰⁴ In its order, the court acknowledged that “extraordinary barriers facing applicants currently registered to take the bar examina-

100. *Id.*

101. See e.g., CLINICAL LEGAL EDUC. ASS’N., STATEMENT OF THE BOARD OF DIRECTORS ON THE 2020 BAR EXAMINATION 1 (2020) (stating that State authorities should promulgate rules that “equitably account for the impact of [COVID-19] on recent law school graduates); Daniel Rodriguez, Utah Emergency Bar Order and the High Costs of Our Bar Federalism, PRAWFSBLAWG (Apr. 9, 2020), <https://prawfsblawg.blogs.com/prawfsblawg/2020/04/utah-emergency-bar-order-and-the-high-costs-of-our-bar-federalism.html> (noting the disparate impacts Utah’s attorney supervision rule might have on graduates of law schools that do not have at least an 86% first-time bar passage rate).

102. Letter from the Deans of New York’s Fifteen Accredited Law Schools to the New York Court of Appeals, (Apr. 1, 2020), <https://www.brooklaw.edu/-/media/Brooklaw/Safety-Security/letter-from-new-york-law-deans-to-chief-judge-diFiore-on-july-2020-bar-exam-april1.pdf> (on file with New York Court of Appeals); Letter from Deans of California Law Schools to the California Supreme Court (Apr. 17, 2020), <https://taxprof.typepad.com/files/ca-deans-letter.pdf>.

103. Emily M. Croucher & Allyssa M. G. Scheyer, *Diploma Privilege is the Only Ethical and Humane Path to Licensure During the COVID-19 Crisis*, JURIST (Apr. 9, 2020, 5:54 AM), <https://www.jurist.org/commentary/2020/04/croucher-scheyer-diploma-privilege/>.

104. Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, No. 25700-B-630 (Wash. June 12, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%20Granting%20Diploma%20Privilege%20061220.pdf>.

tion” made bar study and exam success elusive.¹⁰⁵ The Washington order was lauded by many for its progressive and compassionate stance, and feared by others for its potential to undam floodgates that could lead to the end of the bar exam.¹⁰⁶ The Washington precedent for emergency diploma privilege paved a path for other jurisdictions to adopt similar orders and possibly impose heightened eligibility requirements, as an added assurance of competency. The Collaboratory, and later others, offered the following heightened requirements: (1) completion of an online course or an exam that the state has developed to supplement the UBE, which could be easily accomplished in the few states that already require a state component; (2) successful completion of a clinic course or program; (3) an affidavit from a supervising attorney attesting that the candidate possesses the knowledge and skills to practice law with minimum competence;¹⁰⁷ or (4) completion of a “bridge-the-gap” or similar program.¹⁰⁸ The Collaboratory identified these optional add-ons as “diploma privilege-plus,” signaling that new attorneys should demonstrate some equatable measure of competency in addition to law school graduation.¹⁰⁹

Utah evaluated the available competency measures and adopted a “diploma privilege-plus” rule that suited the needs of its citizens.¹¹⁰ In April 2020, the Utah Supreme Court issued an emergency order that granted “diploma privilege” to 2020 bar exam applicants.¹¹¹ Under the terms of the order, such qualified applicants were admitted to practice law in Utah without examination, with the added proviso that they undertake 360 hours of practice under the supervision of an

105. *Id.*

106. Nicole Hernandez, *Washington law graduates exempt from bar exam amid pandemic*, KREM2 (July 2, 2020, 8:34 AM), <https://www.krem.com/article/news/health/coronavirus/coronavirus-bar-exam-law-students-washington/293-d8820b50-142e-45a2-b4ce-a1d941428256>.

107. Angelos et al., *supra* note 29, at 5 (stating that attorney supervision may come through the candidates work under an approved externship or law school employment).

108. Members of the City Bar of New York who are recent law graduates not yet admitted, or newly admitted lawyers who have been admitted within the last two years, can participate in a free Bridge-the-Gap program. *Bridge the Gap*, N.Y.C. BAR, <https://www.bar.org/bridge-the-gap-cle-ny-nj/> (last visited Aug. 14, 2020).

109. Angelos et al., *supra* note 29, at 6.

110. *See generally* Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak (Utah Apr. 21, 2020), <http://www.utcourts.gov/utc/rules-approved/2020/04/22/order-for-temporary-amendments-to-bar-admission-procedures-during-covid-19-outbreak-effective-april-21-2020/> [hereinafter Utah Order].

111. *Id.* at 1, 3 (The order created a pathway to practice law in Utah for bar applicants who graduated from an ABA-approved law school with a 2019 bar passage rate of 86% or higher).

experienced attorney.¹¹² In a public statement, the Utah Supreme Court described its emergency privilege as a “temporary accommodation designed to provide relief to certain applicants who had applied to take the Utah bar examination in July 2020 but [were] unable to do so because of public health concerns associated with the COVID-19 pandemic.”¹¹³

A closer look at the Utah emergency order reveals that it did not provide a pure diploma privilege, but rather a supervised practice path to licensure. Unlike the Washington order, Utah’s grant of licensure was not conferred solely on the basis of having graduated from an ABA-approved law school. Utah bar applicants who wished to capitalize on the alternative path to licensure also had to complete nine weeks of direct practice under the supervision of an attorney in good standing licensed in Utah for at least five years.¹¹⁴ Working collaboratively, Utah’s law school deans and high court provided an emergency pathway into the profession through legal education and supervised practice.

There can be no greater contradiction in the legal profession if the actual practice of law cannot serve as a proxy for competency presumed by examination. Under a supervised practice regimen, licensure candidates would perform a much fuller range of skills than can be tested on a bar exam, in any form. Supervised practice entails, *inter alia*, direct client interaction, legal research, scheduling, negotiation, oral presentation, a broad array of legal writing tasks, and the crucial soft skills of effective interpersonal communication. Unlike the bar exam, which some scholars argue focuses inordinately on broad legal knowledge, the setting of a supervised practice is more likely to represent the candidates’ future or intended practice areas, whether they be corporate, governmental, litigation, regulatory or transactional.¹¹⁵ Nonetheless, supervised practice as an avenue to licensure seems to have been eclipsed in the polarized debates over bar examination or diploma privilege. I will address this in Part III.

112. *Id.* at 2 (providing rule extension to applicants currently in good standing and licensed in another jurisdiction).

113. Press Release, State of Utah Jud. Council, Utah Sup. Ct. Issues Ord. Providing a Temp. Path to Bar Licensure for Certain Applicants Impacted by the Global Pandemic (Apr. 21, 2020), <https://www.utahbar.org/wp-content/uploads/2020/04/2020.04.21-COVID-Bar-Exam-PR-.pdf>.

114. Utah Order, *supra* note 110, at 1–2, 4

115. James S. Hardy, *Lowering the Bar: Why We Should Test Skills, Not Abstracts*, 38 *COLO. LAW.* 93, 98 (2009) (“[I]t seems a perverse injustice that we still force transactional attorneys — perhaps more than 50 percent of the current Bar — to pass a two-day exam containing not a single shred of knowledge they will ever use again.”).

B. Online State Law Exams

Indiana sent shockwaves through the legal community when it became the first state to announce that it would offer an online bar exam in July 2020.¹¹⁶ The Indiana Supreme Court order for online examination was initially followed by similar orders from the supreme courts of Nevada, Michigan, Louisiana, Texas, Florida, and California.¹¹⁷ Early test drives of the online exam system proved disastrous.¹¹⁸ Both Indiana and Nevada postponed their online exams, by one week and two weeks respectively,¹¹⁹ due to complications with the exam software provided by ILG Technologies.¹²⁰ Michigan became the first state to actually administer its bar exam online as scheduled. Like Indiana and Nevada, the exam launch in Michigan was not without technical glitch.¹²¹ The Chief Justice of the Michigan Supreme Court pledged to investigate the source of the glitch, understand why it occurred, and consider a path forward.¹²² Shortly after

116. *In re* July 2020 Ind. Bar Examination, 143 N.E.3d 300 (Ind. 2020).

117. *See, e.g.*, Order Approving Modified July 2020 Nevada Bar Examination, ADKT 0558 (May 20, 2020); Administrative Order Regarding Michigan Bar Examination, No. 2020-15 (May 18, 2020); Order Regarding Louisiana Bar Examination (Aug. 12, 2020); Nineteenth Emergency Order Regarding the COVID-19 State of Disaster, No. 20-9083 (Tex. July 3, 2020); *In Re* COVID-19 Emergency changes to the Administration of the July 2020 Florida Bar Examination, SC20-939 (Aug. 26, 2020); Order Concerning Modifications to the California Bar Examinations, Admin. Ord. 2020-08-10 (Aug. 10, 2020).

118. Dan Sullivan, *Technical glitches postpone Florida Bar exams*, TAMPA BAY TIMES (Aug. 17, 2020), <https://www.tampabay.com/news/florida/2020/08/17/technical-glitches-postpone-florida-bar-exams-set-for-wednesday/>; Debra Cassens Weiss, *Online bar exams delayed in 2 states because of issues with testing software*, ABA J. (July 27, 2020, 1:56 PM), <https://www.abajournal.com/news/article/online-bar-exams-delayed-in-two-states-due-to-issues-with-testing-software>.

119. Stephanie Francis Ward, *Indiana changes online bar exam again after 'repeated and unforeseen technical complications'*, ABA J. (July 29, 2020), <https://www.abajournal.com/news/article/state-changes-online-bar-exam-due-to-tech-issues>; Marilyn Odendahl, *Technological Problems Delay Indiana Remote Bar Exam One Week*, IND. LAW. (July 24, 2020), [https://www.theindianalawyer.com/articles/technological-problems-delay-indiana-remote-bar-exam-one-week#:~:text=the %20Hoosier%20state%20is%20postponing,Supreme%20Court% 20announced%20Friday%20afternoon](https://www.theindianalawyer.com/articles/technological-problems-delay-indiana-remote-bar-exam-one-week#:~:text=the%20Hoosier%20state%20is%20postponing,Supreme%20Court%20announced%20Friday%20afternoon) (Although Indiana was the first to announce that it would offer an online exam, it would not be the first state to administer an online bar exam. One July 24, 2020, a test drive of the exam software revealed malfunctions and the Indiana Supreme Court postponed the exam until August 4, 2020.).

120. ILG Technologies provides ILG Exam360, an application that provides the most comprehensive software available to jurisdictions to process all written examinations in electronic format. The software allows applicants to complete the written portion of the bar exam on a laptop. The graders can then read and score the written portion of the bar exam electronically, both in a secure environment. ILG EXAM 360, <https://www.ilgexam360.com/home.action> (last visited Sept. 13, 2020).

121. Stephanie Francis Ward, *State's online bar exam is delayed after technical glitch*, ABA J. (July 28, 2020), <https://www.abajournal.com/news/article/michigans-tuesday-online-bar-exam-has-a-delay>.

122. Press Release, C.J. Bridget McCormack, Michigan Sup. Ct. C.J. Bridget M. McCormack Statement Regarding the Bar Exam, Mich. Ct. News Release (July 29, 2020), <https://>

the Michigan online exam, both Indiana and Nevada were able to administer online exams without further incident.¹²³

The great significance of these pilot online exams is not the delays, nor the technical complications encountered, but the innovation and adaptation they reflected. The state supreme courts in Indiana, Michigan, and Nevada faced the same pandemic challenges and shouldered the same concern for supervising and regulating the practice of law within their borders as did the judicial leaders of other states. Yet, these states, with the input and endorsement of stakeholders, harnessed creativity and compassion to provide a path to licensure that mitigated the risk of infection presented by a traditional in-person exam.

Although Florida committed to offering an online exam, it was not as proactive as other states in so doing. In fact, until July 1, 2020, the Florida Board of Bar Examiners (“FBBE”) had been unwavering in its position that it would hold an in-person exam in July.¹²⁴ Record numbers of COVID-19 cases were reported in Florida as the state “re-opened” and the exam date approached.¹²⁵ Florida seemed to have been forced into online administration by public, and possibly political, pressure. Replacing the in-person exam with plans for an online version introduced additional stressors for Florida bar applicants as they would face a new exam format, and an unknown scheme for scoring and scaling with little time remaining to prepare. To the dismay of Florida bar applicants who had spent at least six weeks studying for the Multistate Bar Exam (“MBE”)¹²⁶ that is normally tested in Florida, the planned Florida online exam would not contain any Multistate

[courts.michigan.gov/News-Events/press_releases/Documents/Chief%20Justice%20Statement%20on%20MI%20Bar%20Exam.pdf](https://www.courts.michigan.gov/News-Events/press_releases/Documents/Chief%20Justice%20Statement%20on%20MI%20Bar%20Exam.pdf).

123. *Nevada Bar Exam Rescheduled for August 11–12, 2020*, ST. BAR OF NEV. (July 26, 2020), <https://www.nvbar.org/nevada-bar-exam-rescheduled-for-august-11-12-2020/>; Marilyn Odendahl, *Problems, complaints absent from remote bar exam*, IND. LAW. (Aug. 7, 2020), <https://www.theindianalawyer.com/articles/problems-complaints-absent-from-remote-bar-exam>

124. *Compare* Press Release, Florida Bd. of Bar Exam’r (May 5, 2020), <https://www.floridabarexam.org/web/website.nsf/52286ae9ad5d845185257c07005c3fe1/6a5d234624d10e8d8525855f0076ff01?opendocument> (announcing administration of an in-person bar exam in two cities), *with* Press Release, Florida Bar Exam Moves to On-Line Format in August 2020 due to Pandemic, Florida Bd. of Bar Exam’r (July 1, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-Moves-to-On-Line-Format-in-August-2020-due-to-Pandemic> (canceling the in-person bar exam to administer an online bar exam).

125. Brian Heckmann, *The Abject Failure of the Florida Board of Bar Examiners*, JURIST (Aug. 10, 2020, 10:18 PM), <https://www.jurist.org/commentary/2020/08/brian-heckmann-florida-bar-exam-failure/>.

126. The MBE is a timed 200-question multiple-choice exam testing Constitutional Law, Contracts and Sales, Criminal Law and Procedure, Evidence, Federal Civil Procedure, Real Property, and Torts that is created and sold to states by the NCBE.

content.¹²⁷ In essence, Florida bar applicants were relegated to begin bar study anew for an entirely different exam.¹²⁸

This history of disruptive change continued when the FBBE, again, canceled its scheduled bar exam — this time less than 72 hours before the test date — because administering a secure and reliable remote bar examination was not technically feasible.¹²⁹ The courts and administrators should be collectively lauded for their efforts and willingness to delve, without precedent, into online bar examination. However, these leaders must also accept the scorn of applicants who forewarned that the exam software, which had already failed in Louisiana, Indiana, and Nevada, was not reliable.¹³⁰

The exams given in Indiana, Michigan, and Nevada contained no multistate content provided by the NCBE. Nevada and Indiana further distinguished themselves by using an open-book format. The Indiana exam was comprised of short answer and essay questions;¹³¹ and the Nevada exam contained only state law essays and a homegrown performance test.¹³² The UBE and the bar exams in all but one U.S. jurisdiction is anchored by the 200-question multiple-choice MBE. The use of multiple-choice questions in bar exams has been a subject of scholarly and social critique.¹³³

Scholars have argued that the traditional bar exam does not measure the needed skills of an entry-level attorney; instead, it measures an examinee's ability to memorize Restatement provisions and to answer multiple-choice questions.¹³⁴ Taking a light-hearted, but deep-meaning jab at the use of multiple-choice testing in preparation for entry into the legal profession, Kyla Molina, a third-year law student

127. Heckmann, *supra* note 125.

128. *See id.*

129. Fl. Sup. Ct. Press Release, *supra* note 24.

130. Jack Evans, *The Florida Bar exam software crashes, freezes and can lead to hacks, examinees say*, TAMPA BAY TIMES (Aug. 11, 2020), <https://www.tampabay.com/news/2020/08/11/the-florida-bar-exam-software-crashes-freezes-and-can-lead-to-hacks-examinees-say/>.

131. Stephanie Francis Ward, *Indiana plans remote July Exam, and Nevada considers open-book test*, ABA J. (May 8, 2020, 11:15 AM), <https://www.abajournal.com/news/article/indiana-plans-for-remote-july-bar-exam-with-fewer-questions> (“The Indiana bar exam . . . does eliminate the MBE, but will include short-answer questions on MBE topics. It will also have essay questions about state law.”).

132. Ward, *supra* note 121; *see also* Karen Sloan, *First-Ever Open Book, Online Bar Exam Set for July*, LAW.COM (May 26, 2020, 11:46 AM), <https://www.law.com/2020/05/26/first-ever-open-book-online-bar-exam-set-for-july/>.

133. Eileen Kaufman, Andrea Anne Curcio & Carol L. Chomsky, *How to Build A Better Bar Exam*, N.Y. ST. BAR ASS'N J. 37, 37–38 (2018).

134. *Society of American Law Teachers Statement on the Bar Exam July 2002*, 52 J. LEGAL EDUC. 446, 447 (2002).

at the University of Oklahoma said, “[w]ith all these multiple choice . . . exams, I can only assume that I’ll be filing a lot of multiple choice motions one day.”¹³⁵ Another law professor commented separately, “if your lawyer sits back in a chair and counsels you based on his or her memory of some little used area of the law based on about 1.7 minutes of reflection — runaway as fast as you can. Of course, this is precisely what the [MBE] tests for. It’s a speeded memory test.”¹³⁶ The actions of the states who forsook the use of the MBE to move their exams online further support the theory that an assessment of professional competency does not, of necessity, include multiple-choice questions.¹³⁷ If and after Texas, California, and Florida are able to successfully administer online state law exams, it will be important to collect full data sets on the content, format, and examinee performance.

C. Multiple Paths to Licensure

Although some responded better than others, a forceful minority of states stepped up and showed that flexibility in licensing procedures could be effectively managed under dire circumstances.¹³⁸ After canceling its July in-person exam, the Texas Board of Law Examiners (“Texas BLE”) held a public meeting to announce its plans to offer both an online exam in October, and a “pandemic-proof” in-person exam in September.¹³⁹ The Texas BLE made plans to use monies not expended on a July exam to provide individual hotel rooms, with separate HVAC systems, for every applicant who sought to take the in-person September exam.¹⁴⁰ The provision of overnight lodging and a private place to take the exam that could be proctored from the hallway would not require the examinees to test in a room with other applicants.¹⁴¹ Texas found a way to safely offer a modified version of

135. @CanPanicNow, TWITTER (Apr. 28, 2020, 5:35 PM), <https://twitter.com/CanPanicNow/status/1255264317324365825?s=20>.

136. @JoeMastrosimone, TWITTER (Sept. 4, 2019, 12:58 PM), <https://twitter.com/JoeMastrosimone/status/1169293740915269633>.

137. Sloan, *supra* note 132 (noting that Nevada, California, and Utah have each adopted alternative means for testing professional competence).

138. Hutton-Work & Guyse, *supra* note 17.

139. Texas Courts, *Texas Board Law Examiners’ Personal Meeting Room*, YOUTUBE (July 16, 2020), <https://www.youtube.com/watch?v=CSF4CITm9mE> (Susan Hendrix, the Executive Director of the Texas Board of Law Examiners states “I think this [plan] is pandemic-proof” at 55:27–28).

140. *Id.*; TEX. BD. OF L. EXAM’R: FREQUENTLY ASKED QUESTIONS, <https://ble.texas.gov/faq.action#963> (last visited Sept. 13, 2020).

141. *Id.*

its state-specific exam and provide a separate option for online testing. The shortcomings, if any, to Texas's "pandemic-proof" plan were most likely connected to the manner of communication from the Texas BLE and the applicants desire for more transparency and details surrounding the plan.¹⁴²

By the time of the BLE announcement, the class of 2020 had already been run through the wringer of the canceled July exam, and denied requests both for diploma privilege and an apprenticeship (supervised practice) pathway to licensure. Texas bar applicants had ready access to the horror stories of bar takers in other jurisdictions. They were understandably distrustful of the examiners and the two new scoring schemes for the September and October exams.¹⁴³ Examinee concerns seemed to center around reliable internet access; appropriate study and testing locations access for October applicants; and privacy rights and the potential for COVID exposure for those who would be entering and exiting the hotel en masse, while testing in hotel rooms where the doors were required to remain open.¹⁴⁴ Even with imperfections, Texas's efforts to provide a secure and individualized in-person exam were a far cry from those jurisdictions who insisted on testing hundreds of examinees in a single room.¹⁴⁵

Washington and Oregon did not provide hotel accommodations for their bar takers, but must be credited with deriving plans that gave their applicants the broadest array of options.¹⁴⁶ The Supreme Court of Washington granted a blanket temporary diploma privilege to all applicants who had timely registered for the July 2020 or September 2020 exams, without regard to the applicants' state of residency, law school situs, or law school bar passage rate.¹⁴⁷ Most notably, the

142. E-mail from Andrea Reed, Student, SMU Sch. of L., to Marsha Griggs, Assoc. Professor of L., Washburn Univ. Sch. of L. (July 22, 2020, 12:46 PM) (on file with author).

143. *Bar Exam*, TEX. BD. OF L. EXAM'RS, <https://ble.texas.gov/current-exam> (last visited Sep. 7, 2020). The September 2020 Texas Bar Exam was given in-person in Austin, Dallas, and Houston. It consisted of the MBE (200 questions); 6 state law essay questions (instead of 12); one MPT; and 40 short answer questions testing Texas Procedure and Evidence Exam. The components are weighted as follows: MBE — 50%, MPT — 10%, Texas Essay 30%, and Texas P&E 10%. Contrast this content breakdown to the October online exam: MBE (100 questions instead of 200) (40%), MPT (10%), Texas Essay Exam (12 questions) (40%), and Texas P&E (10%).

144. Reed, *supra* note 142.

145. See Stephanie Francis Ward, *Test-takers express safety concerns, fears from in-person bar exam—including lack of masks, unclean bathrooms*, ABA J. (Aug. 10, 2020, 8:57 AM), <https://www.abajournal.com/web/article/one-in-person-bar-exam-had-applicant-with-covid-19-another-ignored-safety-measures-say-test-takers>.

146. WASH. SUP. CT. ORD. GRANTING DIPLOMA PRIVILEGE AND TEMPORARILY MODIFYING ADMISSION AND PRACTICE RULES (2020).

147. *Id.*

Washington diploma privilege was extended equally to first-time and repeat exam takers.¹⁴⁸ The fact that two of the state's three law schools are in Seattle, a city that was fully disrupted, and partially occupied, by social unrest and protests against police brutality, may have also influenced the court's decision.¹⁴⁹ Not only were locales for bar study limited due to the pandemic, applicants in or near Seattle's Central District and Capitol Hill (where Seattle University School of Law is located and many of its students and alumni reside) lived and studied within earshot of the Capitol Hill Autonomous Zone.¹⁵⁰ With the vocal support of the deans of all three in-state law schools, and the convergence of social unrest and pandemic conditions, Washington temporarily lowered its cut score, and gave applicants the option for diploma privilege, an online exam, or an in-person exam taken in either July or September.¹⁵¹ The in-person exam option would benefit any applicant who desired to obtain a portable UBE score.

Borrowing from aspects of the orders in Washington and Utah, Oregon also extended its diploma privilege to both in-state and out-of-state bar takers, and offered applicants the option to sit for an in-person exam.¹⁵² The Supreme Court of Oregon entered an order that granted the option of: (1) diploma privilege to all 2020 graduates of Oregon law schools; (2) diploma privilege to all 2020 graduates of ABA-approved out of state law schools with a first time bar passage rate of 86% or above; (3) an October online examination provided by the NCBE; or (4) an in-person exam in September for any law graduate who either did not qualify for diploma privilege or desired to take the in-person exam to earn a portable UBE score.¹⁵³ Oregon also temporarily lowered its UBE cut score, one of the highest in the country, from 274 to 266 for 2020 bar applicants.¹⁵⁴ The moves toward

148. *Id.*

149. See David Gutman, Evan Bush & Mike Carter, *After two months of protests, Seattle activists say work not done*, SEATTLE TIMES (Aug. 2, 2020, 6:00 AM), <https://www.seattletimes.com/seattle-news/politics/after-two-months-of-protests-seattle-activists-say-work-not-done/> (“The mass protests against police brutality and for racial equity that have dominated Seattle and the nation for the past two months are like few others in American history.”).

150. Seattle Times staff, *Seattle-area protests: Live updates on Monday, June 15*, SEATTLE TIMES (June 15, 2020, 6:49 AM), <https://www.seattletimes.com/seattle-news/seattle-area-protests-live-updates-on-monday-june-15/> (“[P]rotestors have claimed a few blocks of the streets nearby, calling it the Capitol Hill Autonomous Zone.”).

151. Letter from Debra L. Stephens to Rajeep Majumdar, Terra Nevitt & Jean McElroy (May 13, 2020) (on file with Washington State Bar Association).

152. OR. SUP. CT. ORD. APPROVING 2020 ATTORNEY ADMISSIONS PROCESS (2020).

153. *Id.*

154. *Id.*

diploma privilege in the Pacific Northwest states were giant steps away from published predictions that neither Oregon nor Washington, two states that for years had allowed diploma privilege for law graduates, would likely ever consider diploma privilege again.¹⁵⁵ Although adopted as an emergency response to crisis, one can only wonder whether any of these alternatives has potential for future or even long-term application.

III. ALTERNATIVE MEASURES OF PROFESSIONAL COMPETENCE

The pandemic challenged states to be malleable with their regulatory function. Alternative measures of assessing competency, such as those described by the Collaboratory, were available to provide courts with precisely the pivot room needed in a time of crisis when administration of a traditional bar exam was not feasible or not advisable.¹⁵⁶ Defenders of the bar exam feared that extending diploma privilege or other non-exam options to the class of 2020 was a ploy to eliminate the bar exam altogether.¹⁵⁷

The heightened sensitivities of those who sought to maintain the existing system of competency by exam seemed to have created blind spots to the pandemic-induced need for emergency measures and the limited and temporary timeframe for the same. None of the suggested alternatives excluded the requirement that candidates pass the Multistate Professional Responsibility Exam (“MPRE”) and meet the character and fitness requirements imposed by the state.¹⁵⁸ Any state law component that accompanies the uniform exam could also be an add-on requirement with the licensure alternatives. Maintaining the character and fitness, professional ethics, and state law competency requirements of the traditional licensure process should have made the

155. See W. CLINTON STERLING, WASHINGTON’S DIPLOMA PRIVILEGE 7 (2009) (claiming that it is unlikely that the diploma privilege rule in Washington will be resurrected.); see also OR. STATE BAR ADMISSIONS TASK FORCE, FINAL REPORT 4 (2008) (“[T]he majority concluded that the diploma privilege would amount to a delegation of the gatekeeper function to the law schools that is not desirable.”).

156. See generally Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Wegner, *Diploma Privilege and the Constitution*, 73 S.M.U. L. REV. F. 168 (2020) (discussing the diploma privilege alternative path to licensure).

157. BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 4 (Nat’l Conf. of Bar Exam’rs ed. 2020).

158. *Multistate Professional Responsibility Examination*, Nat’l Conf. of Bar Exam’rs, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/M5M8-PR7G>] [hereinafter *Multistate Professional Responsibility Examination*].

proposed temporary alternatives more palatable under the threat of COVID-19. Instead, the influence of COVID-19 has polarized the bar exam conversation to: bar exam or not. With ardent reasoning for either extreme, a multitude of middle ground alternatives seems to have been overlooked. I discuss the benefits and limitations of emergency diploma privilege and other options below.

A. Emergency Diploma Privilege

Of the available options, an emergency diploma privilege has been the most heavily debated. Under a pure diploma privilege, graduation from an ABA-accredited law school would be “sufficient evidence of competence to practice law, with no [added] requirement that the graduate take a bar examination.”¹⁵⁹ Identified by the moniker “diploma privilege,” in its truest form it describes a system of diploma sufficiency. Diploma sufficiency is not a new concept. Within the last 100 years, thirty-three U.S. jurisdictions used what I term diploma sufficiency for the admission of new attorneys into the practice of law.¹⁶⁰ Today, only two states routinely allow admission by diploma privilege: New Hampshire and Wisconsin.¹⁶¹ In New Hampshire, exercise of diploma privilege is limited to New Hampshire law school graduates who complete an optional honors program.¹⁶² Only Wisconsin allows all students who graduate from one of its two law schools to earn a law license without taking a bar exam.¹⁶³ The NCBE — headquartered in Madison, Wisconsin — has been led for the last 26 years by graduates of a Wisconsin law school who were admitted by diploma privilege.¹⁶⁴ Current NCBE president Judith Gundersen

159. Angelos et al., *supra* note 156, at 170.

160. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 646 (2000).

161. Valerie Strauss, *Why this pandemic is a good time to stop forcing prospective lawyers to take bar exams*, WASH. POST (July 13, 2020, 1:45 PM), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/>.

162. N.H. SUP. CT. R. 42 (XII) (The Daniel Webster Scholars program is a two-year course of study that requires students to demonstrate competency in communication, negotiation, organization, and work management. By supreme court rule, graduates of the Daniel Webster Scholar Honors Program who seek admission within one year of program completion are eligible for admission to the New Hampshire bar without further examination.); *see also NH Bar Admissions, General Information*, N.H. JUD. BRANCH, <https://www.courts.state.nh.us/nhbar/> (last visited Oct. 17, 2020).

163. WIS. SUP. CT. R. 40.03.

164. *The National Conference of Bar Examiners Names Judith A. Gundersen as President and CEO*, NAT'L CONF. OF BAR EXAM'RS (Aug. 28, 2017), <http://www.ncbex.org/news/judith-gundersen-ncbe-president-ceo/>.

publicly shared her journey from law school, to legal practice as a state prosecutor, then to a role in developing the bar exam that is used in most states today.¹⁶⁵ A journey that did not include a state bar exam.¹⁶⁶ Despite the inescapable irony that the head bar examiner never took a bar exam, Gundersen's distinguished career further supports the notion that a quality legal education can be sufficient to develop the minimal competence for the practice of law.

The diploma sufficiency programs in New Hampshire and Wisconsin have been in place for many years and require strict curricular alignments.¹⁶⁷ As such, they were not realistically deployable with the immediacy that pandemic conditions dictated. The class of 2020 sought an *emergency* diploma privilege that could not, under the circumstances, impose the restrictions and curricular requirements of the already established diploma sufficiency programs. For example, bar candidates in Illinois and Pennsylvania petitioned the state supreme courts for temporary diploma privilege that would admit current applicants from any ABA-approved law school, within and outside the state, including repeat takers and LLM program graduates.¹⁶⁸ The appeal of diploma privilege to applicants faced with the threat of a deadly virus and canceled, postponed, and repeatedly rescheduled exams made sense.

The fears and resistance behind diploma privilege were also somewhat understandable. Bar examiners and many members of the practicing bar feared that diploma privilege would admit candidates that a bar exam would keep out.¹⁶⁹ In the case of repeat takers, petitioners were seeking to have admitted to practice candidates who, by previous examination, have shown themselves not competent to deliver legal advice to the public.¹⁷⁰ Additionally, the courts and state examiners would have no basis to assess the degree or educational

165. Karen Sloan, 'I Understand the Anxiety and the Anger,' Says Top Bar Exam Official, LAW.COM (Aug. 13, 2020), <https://www.law.com/2020/08/13/i-understand-the-anxiety-and-the-anger-says-top-bar-exam-official/?slreturn=20200911145904>.

166. *Id.*

167. See Moran, *supra* note 160, at 648 ("[T]he Wisconsin diploma privilege took a stricter turn with the adoption of the thirty-credit rule and its companion the sixty-credit rule."); see also N.H. JUD. BRANCH, *supra* note 162 (discussing the requirements for the Webster Scholars program).

168. In re: Diploma Privilege for 2020 Ill. Bar Applicants at 3–6, Petition for Emergency Supreme Court Rule Amendment or Waiver, (2020) (M.R. 030451).

169. Josh Blackman, *The Elephant in the Room for the Diploma Privilege Debate*, REASON: VOLOKH CONSPIRACY (July 23, 2020, 6:33 PM), <https://reason.com/2020/07/23/the-elephant-in-the-room-for-the-diploma-privilege-debate/>.

170. In re: Diploma Privilege for 2020 Ill. Bar Applicants, *supra* note 168, at 4.

sufficiency of LLM degree graduates who are foreign trained attorneys and whose coursework in U.S. law and procedure does not parallel the requirements for the juris doctor degree.

When asked to consider diploma privilege, Mark Gifford, Wyoming State Bar Counsel opined, “[l]aw school diplomas represent an educational assessment, rather than a measurement intended for public protection. The former is a necessary, but not sufficient, condition of the latter.”¹⁷¹ Pointing to the inherent or perceived conflict of interest in allowing legal educators to also play the role of assessing the practice readiness of their graduates, Mr. Gifford encouraged states to resist diploma privilege, even on a temporary basis.¹⁷² Following Gifford’s argument, replacing the bar exam with a “mere” diploma requirement in states with less than a consistently high or perfect bar passage rate “would abdicate the duty of courts and bar admissions officials to ensure that the public is adequately protected.”¹⁷³

There is no escaping the fact of this fear that lawyers, judges, and certainly bar examiners have of unleashing unvetted attorneys into the public. Taken to extremes, however, this fear is protectionist at best, and obstructionist at worst. Consider Montana, a state that offered diploma privilege until 1983.¹⁷⁴ Montana has one law school. In 2019, the state’s overall bar pass rate was 83.94%.¹⁷⁵ In an order rejecting diploma privilege, the Montana Supreme Court averred:

[I]n 2019, the weighted average pass rate for first-time examinees was 81.43% for University of Montana law school graduates and 83.94% for examinees as a whole. Assuming a generous 85% pass rate, this would mean that if this Court granted diploma privilege in response to this Petition, *14 or 15 individuals would be admitted to the practice of law* in this State who would otherwise not be admitted. This is the harm this Court sought to avoid when it eliminated diploma privilege some 30 years ago. [Emphasis added.]¹⁷⁶

The text of the court order leaves no room for misinterpretation. The state’s bar and board of bar examiners, backed by their supreme court, would rather expose the presumptive 100 candidates to the risk

171. Mark W. Gifford, *Why Diploma Privilege for Law School Graduates is a Bad Idea: A Regulator’s Perspective*, WYO. ST. BAR (Apr. 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/>.

172. *Id.*

173. *Id.*

174. ORD. OF SUP. CT. OF MONT. IN RE RULES FOR ADMISSION TO THE BAR OF MONT. (2020).

175. *Id.*

176. *Id.*

of viral infection to keep out an unascertainable 14 or 15 from the practice of law.¹⁷⁷ In its order, the court also cited its concern to keep the role of setting the criteria for attorney admissions within the control of the state.¹⁷⁸ According to the court, a diploma privilege extended to graduates of ABA-approved law schools, diverts that control to the ABA.¹⁷⁹ This desire to maintain judicial control of bar admission is understandable and important. However, it also brings into question exactly who is protected by resisting a temporary and limited diploma privilege — the courts or the public?

To balance the protections necessary for both the public and our power structures, there are restrictive qualifiers that can be imposed on diploma privilege that will allow states to maintain their ability to set admission criteria. For one example, a state could limit diploma privilege to graduates of an ABA-approved law school with a first-time bar pass rate within a set threshold (*i.e.* the Utah model). As another example, a state could extend diploma privilege only to students who graduated in the top half, or top two-thirds of the law school class. This model should be attractive to the courts because empirical studies have shown that law students in the first, second, and third quartiles of their graduating cohorts are statistically most likely to pass a bar exam than those graduating in the bottom quartile.¹⁸⁰ Noting however, that adopting a GPA or rank-based model will draw the ire of students in the excluded section of the class. Also, such a measure could admit to practice a portion, albeit small, of graduates who would have failed a bar exam. Some students who are ranked in the first and second quartiles fail the bar. As mentioned in Part II, states can also require some term of supervised practice, or completion of some form of state law testing.¹⁸¹

There are compelling arguments for and against the grant of diploma privilege, with a strong home court advantage going to status

177. *Id.*

178. *Id.*

179. *Id.*

180. Douglas K. Rush, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 1, 8 (2007).

181. *See e.g.* District of Columbia Court of Appeals Order NO. M269-20 (Sept. 24, 2020), https://www.dccourts.gov/sites/default/files/2020-09/ORD_269-20.pdf (The District of Columbia entered an order granting a limited diploma privilege to 2020 bar applicants that imposed a three-year period of supervised practice as a precondition to licensure. The limited diploma privilege extends only to first time applicants who have previously taken a bar exam or been admitted to practice in another jurisdiction.).

quo. Possibly one promising development to come out of the pandemic will be an opportunity to collect performance and discipline data on lawyers who were admitted by diploma privilege in 2020 and compare it to data on peers admitted by exam in previous periods. States that offer both an in-person exam and a diploma privilege option for first-time applicants could do a comparative study of the results modeled after the Institute for the Advancement of the American Legal System (“IAALS”) study of the New Hampshire Daniel Webster program admittees.¹⁸² Such data could tip the scales one way or another in this contentious battlefield.

B. Limited Licensure

Limited licensure as a temporary measure to allow new law graduates to work in the practice of law until such time as they have an opportunity to sit for a bar exam was an early popular emergency alternative. In April 2020, the ABA Board of Governors issued a policy resolution that urged state bar licensing authorities to adopt emergency rules that would authorize 2019 and 2020 law graduates who could not take a bar exam because of the pandemic to engage in the limited practice of law under certain circumstances.¹⁸³ Many states expanded or relied upon existing temporary practice rules that permit law students to practice under a narrow set of guidelines to allow them to represent clients as part of an externship or clinical program. On its face, the limited licensure option seems to address the concern that new law graduates, in times of a pandemic health crisis, might have to wait for a year or more after graduation to become licensed and could not practice law in the interim.

Recognizing that the inability to take a bar exam could translate into an inability to earn an income, a temporary opportunity to practice law, in theory, would allow attorneys who had not yet taken a bar exam to provide legal services to the public within set limitations. But in reality, the notion of limited licensure sounds far better on paper than it actually is. Anecdotally, it is conceivable (and predictable) that legal employers would be hesitant to hire or trust an attorney

182. See Lloyd Bond & William M. Sullivan, *Ahead of the Curve: Turning Law Students into Lawyers – A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law* (Inst. for the Advancement of the Am. Legal Sys. Ed., 2015).

183. ABA STANDING COMMITTEE ON BAR ACTIVITIES AND SERVICES LAW STUDENT DIVISION, REPORT TO THE BOARD OF GOVERNORS [sic] 1 (2020) [hereinafter ABA STANDING COMM.].

whose ability to practice is constrained, with no guarantee that the attorney will pass a bar exam at the next available administration. The desire to avoid this very type of hiring risk is the reason that so many legal employers make offers after bar results are published.¹⁸⁴ A limited license may allow those who secured employment before graduation a chance to begin or continue work, but for the number of students who exit law school without a job offer and whose prospects for gainful employment expand with a law license in hand, the temporary practice option will be of little help.

For these law graduates, engagement in the practice of law could actually impede their opportunity to pass the bar, both because of the increased distance between law school and bar study, and the fact that the uniform exam does not test state codified or procedural rules.¹⁸⁵ To attorneys who took a bar examination in an era that predates the UBE, a period of clinical or supervised practice would most certainly be an asset in bar preparation. A bar candidate who had the benefit of experience with court procedural rules and exposure to tested areas of practice like family law, landlord-tenant disputes, or estate planning and administration could use that knowledge on the state bar exam.¹⁸⁶ But today's multistate exam content much more closely resembles law-school-style exams than the bar exams of days past, which adds more questions about the relevance of the uniform exam for law practice today.¹⁸⁷

Even for those applicants who have jobs and are able to practice on a limited basis, working and then stopping to engage in bar study may not be a financial reality. There is likely an “icing” effect for bar takers.¹⁸⁸ The more removed an applicant is from law school, the more difficult the recall. Some applicants, with intensive study, will be able to refresh themselves and successfully complete the bar exam — even as far out as 18 months after graduation. But graduates who were not top-performing students and/or who have the financial disad-

184. See EMPLOYMENT OUTCOMES AS OF APRIL 2020 (ABA Section of Legal Education and Admissions to the Bar eds., 2020) (compiled data showing that 73.7% of total 2019 law school graduates' employment was contingent on passing the bar).

185. Readfearn, *supra* note 32.

186. Marsha Griggs, *Sorry, Not Sorry: Temporary Practice in a Pandemic*, NULR OF NOTE (May 11, 2020), <https://blog.northwesternlaw.review/?p=1399>.

187. Jeff John Roberts, *It's not easy being an aspiring lawyer taking the bar exams during a pandemic*, FORTUNE (July 12, 2020, 8:30 PM), <https://fortune.com/2020/07/12/taking-the-bar-exams-during-covid-lawyers-law-students-us-coronavirus-pandemic/> (“The bar exam has outlived its credibility and its usefulness.”).

188. ST. BAR OF CAL., *supra* note 77.

vantage of not being able to study full-time will be at even greater risk of failing the bar. The Los Angeles Times Editorial Board referred to limited licensure as “the best of the bad options.”¹⁸⁹

A closer look at the ABA Resolution reveals that limited licensure provisions were not solutions to the unique predicament of the class of 2020. In fact, they were, at best, stop gap measures or placeholders not intended to disrupt the status quo. The ABA clarified that its resolution should not be “construed to amend, limit, or call into question, the historic and longstanding policy of the American Bar Association supporting the use of a bar examination as an important criterion for admission to the bar.”¹⁹⁰ But we should and must call into question that historic and longstanding policy, and by failing to do so we show more allegiance to a closed-book, two-day exam anchored by 200 multiple-choice questions than to the human beings who are the immediate future of the legal profession.¹⁹¹ The class of 2020 bar takers deserved no less than a creative and workable response to an emergency situation that would neither destroy nor impede their professional futures.

C. Remote Examination

By late-July 2020, 17 jurisdictions had announced plans to offer remote bar exams.¹⁹² Non-UBE states like Florida, Indiana, Michigan, and Nevada could control the content and timing of their online exams. The remaining states opted to use an online exam provided by the NCBE.¹⁹³ After months of prodding, the NCBE announced that it would provide an online exam for states who wish to administer their bar exams remotely.¹⁹⁴ For states that were unprepared to sup-

189. The Times Editorial Board, *Coronavirus has made it unsafe to take the California bar. So put new lawyers to work without it*, L.A. TIMES (July 14, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-07-14/law-student-diploma-privilege> (“The best of the bad options is to grant provisional licensed to members of the class of 2020 right away, without tests, and allow them to practice their new profession and earn their living under the supervision of lawyers who were licensed in the old-fashioned way.”).

190. ABA STANDING COMM. *supra* note 183.

191. Angelos et al., *supra* note 156, at 169.

192. *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (Sept. 2020), <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/#louisiana> (Arizona, California, District of Columbia, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Pennsylvania, Rhode Island, Tennessee, Texas, U.S. Virgin Islands, and Vermont.).

193. *NCBE COVID-19 UPDATES*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2020, 4:00 PM), <https://www.ncbex.org/ncbe-covid-19-updates/>.

194. *Id.*

ply their own test questions, the NCBE online option was a saving grace. To some degree, this option satisfied the fixation with admission by exam and spared bar takers of the need to risk their health and safety. But the NCBE online exam may have caused more new ails than it cured.

The timing of the NCBE online exam was a significant drawback. The NCBE was admittedly late to the game of online exams. As late as May 2020, the NCBE, by its own claim, had not developed an online exam.¹⁹⁵ Many states belatedly announced the switch from an in-person exam to the online exam that could only be offered in October.¹⁹⁶ In some cases, the announcement came only 18 days before the originally scheduled exam date.¹⁹⁷ Understandably, students who had progressed substantially in bar study were angered and frustrated by the eleventh-hour decision. The later exam date would also delay entry into the practice of law. The class of 2020 bar applicants would be taking the online bar exam in October, the month when a majority of states would normally release summer bar exam results.¹⁹⁸

The late move to an online exam also impacted the finances, living arrangements, employment prospects, and emotional wellbeing of bar takers. Another drawback to this option is the disparate impact it would have on bar candidates with unreliable internet access, and those without quiet, secure locations to take the exam.¹⁹⁹ As one Texas law school dean said, an online exam offered months after the scheduled July exam date “will not test who has competence, it will test who has the resources to forego employment and maintain childcare for an additional nine weeks.”²⁰⁰

195. See generally NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/ncbe-covid-19-updates> (last visited Sept. 20, 2020).

196. Sam Skolnik, *More States Move Upcoming Bar Exams Online in Response to Virus*, BLOOMBERG L. (May 18, 2020, 5:32 PM), <https://news.bloomberglaw.com/us-law-week/more-states-move-upcoming-bar-exams-online-in-response-to-virus>.

197. Amended Order In Re: Administration of 2020 Bar Examinations, KY. CT. OF JUST. https://kycourts.gov/courts/supreme/Rules_Procedures/202050.pdf.

198. Adaptibar Team, *When Are July Bar Exam Results Released*, ADAPTIBAR (Sept. 3, 2019), <https://blog.adaptibar.com/july-bar-exam-results/>.

199. Siri Chilukuri, *Illinois Bar Exam Being Held Online – But That Could Disadvantage Some Would-Be Lawyers Graduates Say*, BLOCK CLUB CHI. (July 23, 2020, 9:00 AM), <https://blockclubchicago.org/2020/07/23/with-the-bar-exam-coming-up-law-school-grads-worry-about-safety-of-in-person-test-during-pandemic/>.

200. Texas Courts, *Texas Board Law Examiners*, YOUTUBE (July 2, 2020), <https://www.youtube.com/watch?v=RZUAM6Ht91M&feature=youtu.be&t=11733> (Mike Barry, President and Dean, South Texas College of Law-Houston in a statement made during a public meeting of the Texas Board of Law Examiners).

The timing and test modality, however, were not the only major changes. The NCBE explained that it would not provide the scoring or scaling for its online exam that it typically provides for its other multistate exams.²⁰¹ Although the online edition of the exam utilized all the components of the UBE in reduced quantity, the exam will not qualify those who take it for the portable score that is the primary appeal of the UBE.²⁰² Each jurisdiction is responsible for scoring, scaling, and setting its own proficiency standards and cut score.²⁰³ So, every gain in candidate safety was offset by the lack of score validity.

The NCBE implicitly acknowledged the lack of score validity by refusing to scale its own online exam.²⁰⁴ Because cut scores are based on the scaled scores that the NCBE traditionally reports, not on raw scores that will be reported in 2020, Professor Deborah Jones Merritt admonished states against trying to apply their standard UBE cut scores to the online NCBE exam.²⁰⁵ Without access to the NCBE's historical databases and scaling algorithms, Merritt asserted, "there is no psychometrically defensible way for [a state] to convert its raw scores to the scaled scores that the current cut score demands."²⁰⁶

Also unanswered are many questions about the security and functionality of an online exam and the details of remote administration.²⁰⁷ The scope of this Article is constrained to the need for emergency short-term licensure alternatives. While I do not address the viability of long-term online testing, scholars are already divided

201. *NCBE COVID-19 UPDATES*, NAT'L CONF. OF BAR EXAM'RS (June 1, 2020 4:00 PM) <http://www.ncbe.org/ncbe-covid-19-updates/>.

202. Suzanne Darrow-Kleinhaus, *Portability of the UBE: Where Is It When You Need It?* (July 15, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652614).

203. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/>.

204. NAT'L CONF. OF BAR EXAM'RS, *supra* note 41.

205. Letter from Deborah Jones Merritt to Maryland State Board of Bar Examiners (Aug. 24, 2020), <https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/publiccomment-sonemergencydiploma.pdf> (The letter appears on pages 236–240 in a 500-page PDF of all the other public comments on the topic).

206. *Id.*

207. Sam Skolnik, *October Online Bar Exams Spark Technology, Privacy Concerns*, BLOOMBERG L. (Aug. 18, 2020), <https://news.bloomberglaw.com/us-law-week/october-online-bar-exams-spark-technology-privacy-concerns>; Melanie Blair, *Remote Exam Failures* (Aug. 19, 2020, 12:40 PM), <https://docs.google.com/document/d/10snZPtFdCzUlD-tzKAm14PQ7CvpaMA9k0H-CYVjr9as/edit> (quoting software provider Exterity: "[R]emote proctoring was not envisioned for use on large-scale, simultaneous-start 'event' exams. With four synchronized starts, thousands of examinees, and very-high stakes, we believe remote proctoring carries undue risk for the October exam."); *see also* @Melanie_K_Blair, TWITTER (Aug. 19, 2020, 12:40 PM), https://twitter.com/Melanie_K_Blair/status/1296124992434905096.

on the issue of secure administration of an online bar exam.²⁰⁸ Online administration is but one of several mechanisms available to states to measure or establish competency of new attorneys. Just as there was no full agreement about the bar exam as a measure of competence, there will certainly be continued debate about the best way to assess a new lawyer's readiness to enter practice. Whatever fate befalls the licensure process, state courts and their appointed boards will most assuredly remain in control of all pathways leading to practice. For that reason, it is crucial to explore the institutional motivation and decision-making processes of the courts and bar examiners.

IV. ASKING THE HARD QUESTIONS: WHY, AND WHAT NEXT?

The recent crises have brought into question both the actions and inactions of the bar examiners, and the bar exam itself. How is it that bar examiners were so technologically behind other standardized test makers that they could not readily pivot to a secure online delivery without unreasonable delay? What, if anything, can account for the seemingly tone deaf and dismissive stances that state and national bar examiners took in response to the mobilized pleas of bar applicants, law schools, legislators,²⁰⁹ and state bar associations?²¹⁰ Will public trust in bar examiners and/or the bar exam be lost? Perhaps the most pressing question to arise from the converging crises of 2020 is: why? Why does the legal profession continue to rely so heavily on bar examination in the face of such longstanding criticism? Why were examiners willing to expose applicants to the risk of death rather than make any modification to the method or modality of bar examination?

208. See e.g., Derek T. Mueller, *Blockchain and the Bar Exam*, EXCESS OF DEMOCRACY (Apr. 28, 2020), <https://excessofdemocracy.com/blog/2020/4/blockchain-and-the-bar-exam>; Josh Blackman, *A Word of Caution Before Offering the Bar Exam Online*, REASON: VOLOKH CONSPIRACY (Apr. 28, 2020), <https://reason.com/2020/04/28/a-word-of-caution-before-offering-the-bar-exam-online/>; but see Sara Berman, Gregory Brandes, Megan M. Carpenter & Andrew L. Strauss, *Secure Online High Stakes Testing: A Serious Alternative as Legal Education Moves Online*, SSRN (Apr. 7, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567894.

209. Senator Brad Hoylman (New York) introduced Senate Bill S8827A that would temporarily admit certain attorneys graduating from law school or taking the bar exam during the COVID-19 state disaster emergency. S.B. 8827A, 2020 Leg., 2019-2020 Legis. Sess. (N.Y. 2020).

210. See e.g., Michael Jones & Jonathan D. Koltash, *COVID-19 Task Force Recommendation*, PA. BAR ASS'N (2020), <https://www.pabar.org/pdf/2020/covid-19-tf-recom-diploma-privilege-final.pdf> (The Pennsylvania Bar Association requested that the Pennsylvania Supreme Court and Pennsylvania Board of Law Examiners offer a diploma privilege to applicants who graduated from law school between April 1, 2020 and June 30, 2020.).

What is it about the bar exam and those who champion it, that not even a deadly global contagion would deter its administration?

We must probe for answers to these questions to understand what went wrong in the spring, summer, and fall of 2020. It is essential that we first acknowledge the objective failures of licensing authorities during this period. We cannot give “an A for effort” to the select bar examiners who canceled and changed exams without sufficient notice, evidence of planning, or feasibility piloting.²¹¹ Neither should we give a pass to states that contributed to the unreasonable delay and uncertainty of the 2020 bar exams. Only through critical analysis of systemic failings can we improve our institutional structures. We need to understand what went wrong to make our system of licensure more resilient, and to explore whether that system (even in stable times) has become fossilized. We must determine to what extent the states’ poor responses are attributable to institutional structure; and to what extent the poor responses are attributable to blind insistence on status quo. To make these determinations, we must look at the institutional legacy of the bar exam and the organizational motives of those at its helm.

A. Institutional Legitimacy

The bar examination has become the constant in the legal profession. All other norms in our profession are subject to influential change. As new judicial opinions are rendered, the weight and relevance of case precedent changes. Legislative updates occur with each session of Congress, so our body of codified law is constantly subject to addition, amendment, or clarification. The bar exam, as a rite of passage into the practice of law, represents a universally understood status quo that is not subject to change on the basis of election or appointment. Although the content and format of the bar examination has evolved since its inception in 1855,²¹² the licensing examination is a sacred cow in the legal profession and most lawyers have an existential connection to its sanctity. That connection translates to our cognition and self-image. We have been professionally conditioned to

211. Interview by Karen Sloan with Judith Gunderson, ‘I Understand the Anxiety and the Anger’ Says Top Bar Exam Official, LAW.COM (Aug. 13, 2020, 3:14 PM), <https://www.law.com/2020/08/13/i-understand-the-anxiety-and-the-anger-says-top-bar-exam-official/> (quoting NCBE President Judith Gunderson, “I would give jurisdictions an A for effort in their handling of the July 2020 bar exam.”).

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

accept that taking and passing a bar exam is “just what you do” to become a lawyer.

When confronted with pathways into the profession that do not involve a bar exam, cognitive dissonance ensues. The internal (and often external) monologue of a traditionally licensed attorney tends to read like this:

The bar exam was horrible. It was the hardest test I have ever taken, but somehow I passed. I would never want to do that again, but there is no way that I will welcome you into my profession and call you a colleague if you don't undergo that same painful ritual.

The attachment that lawyers have to the bar exam is not because they think it measures competence. In fact, most do not have any particular affinity to the exam itself. But because the concept of licensure by examination is an indelible construct in the mentality of legal professionals, we cannot readily envision a path to practice without it. For lawyers, the bar exam is an institutional norm that they have internalized. Our behavior and sense of belonging is based on that norm.²¹³

The professional attachment to the bar exam is a function of deep-rooted institutional legitimacy. Legitimacy is the generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially-constructed system of norms, values, beliefs, and definitions.²¹⁴ The bar exam has a moral legitimacy that justifies its right to exist based on normative approval and acceptance.²¹⁵ In theory, the basis for the perceived legitimacy of the bar exam is not tied to the exam itself, but to the institutionalization of what bar examination represents: worthiness to practice law.²¹⁶ On the basis of that widely accepted legitimacy, the bar exam is an institution all to itself.²¹⁷

213. Denise Lach, Helen Ingram & Steve Rayner, *Maintaining the Status Quo: How Institutional Norms and Practices Create Conservative Water Organizations*, 83 TEX. L. REV. 2027, 2029 (2005) (explaining “[t]o become effective lawyers, academics, teachers, or members of any social group, we need to internalize and act on the norms governing the behaviors of the group or face the often negative consequences.”).

214. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995).

215. See e.g., John Dowling & Jeffrey Pfeffer, *Organizational Legitimacy: Social Values and Organizational Behavior*, 18 PAC. SOCIO. REV. 122 (1975).

216. See Mark W. Gifford, *Why Diploma Privilege For Law School Graduates Is A Bad Idea: A Regulator's Perspective*, WYO. ST. BAR (April 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/>.

217. Raimund Hasse & Georg Krücken, *Systems Theory, Societal Contexts, and Organizational Heterogeneity*, THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 541 (2008)

While this Article takes no position on the validity or utility of the bar exam, discussion of the functional legitimacy of the exam is vital to the understanding of the decision processes surrounding the iterations of the July 2020 bar exam. Because of the moral or normative legitimacy of the bar exam, its guardians (the bar examiners) enjoy an institutional legitimacy that affords great deference to their opinions and actions. Even if the examiners are rightly subject to exhaustive critique for their handling of the July 2020 bar exam, this failure may not have long-term effects. Once an institution establishes legitimacy, it becomes resilient to criticism for negative events or outcomes.²¹⁸ Stakeholders may be outraged at the missteps and insensitivity of the states that were dismissive of the health and integrity concerns of applicants. The callousness and corporate self-interest goes against societal norms. However, those same stakeholders, who are critical of the examiners' failings, will acquiesce to the will and determination of the examiners because of their preconditioned and shared belief in the necessity of the bar exam.²¹⁹

Institutional legitimacy can be an agent to drive change, or a barrier to prevent it. The institutional response to the crises surrounding the July 2020 bar exam could provide significant signaling about the future of the bar exam.²²⁰ The fact that the majority of examiners were unwilling to budge even slightly, and that others would allow the exam to be canceled outright rather than consider exam alternatives, reveals more than just inflexibility and ill-preparedness. It also signals a perilous vulnerability to change. Perhaps examiners feared that successful implementation of any one of the available alternatives, even on a one-time basis, would demonstrate that we do not need the bar exam as the sole arbiter of minimum competence to practice the law. That possibility cannot be discounted as we consider the institutional motivations and the collective influence of the many entities with stakes in the bar exam.

(Defining institution as repetitive social behavior that is underpinned by normative systems and cognitive understandings that give meaning to social exchange and thus enable self-reproducing social order).

218. Suchman, *supra* note 214, at 574.

219. *Id.*

220. See Erwin Chemerinsky, *INSIGHT: Pandemic Provides Opportunity to Rethink the Bar Exam*, BLOOMBERG L. (Aug. 25, 2020, 4:01 AM) <https://news.bloomberglaw.com/us-law-week/insight-pandemic-provides-opportunity-to-rethink-the-bar-exam> ("The crisis also should provide a basis for thinking about how the bar exam is administered and structured.").

B. Stakeholders and Influence

The stark degree to which the responses of bar authorities contrasted with other segments of the legal profession is surprising, if not alarming. Given the similar institutional characteristics of the state courts (that oversee the bar authorities) and law schools,²²¹ one would have plausibly expected states to respond to pandemic-imposed limitations in ways comparable to law schools. But recent history proved that not to be the case. The disparate reactions to the need for emergency measures are more likely attributable to the systemic dissimilarities than the institutional similarities. That courts do not have the same accountability as law schools could explain the different and dawdled responses from the majority of states.

Both law schools and courts have multiple stakeholders and constrained budgets. Law schools, typically, are heavily dependent on a main university or parent organization and their alumni for budget allocations and fundraising. As such, those stakeholders will have direct influence in law school decision making processes. Most notably, law schools are answerable to regulators at the state, regional, and national levels. While law schools are answerable to multiple stakeholders, courts, in contrast, answer for, not to, their stakeholders.

Courts are self-governing and are not subject to annual review or the strict accreditation standards of law schools. Courts have as their constituents the most vulnerable members of society, including those who have paid for a legal education but cannot yet use it. In matters of law and equity, courts are bound by hierarchical precedent. In matters of administration and regulations, courts tend to be persuaded by the nudging of associations and the platforms they support.

Associations like the ABA, the NCBE, and the Conference of Chief Justices (“CCJ”) have exerted great influence on state courts in the realm of bar licensure. The CCJ is a voluntary organization of state chief justices that is largely unknown to the practicing bar and legal educators.²²² It makes sense that a judicial institution bound by precedent would rather adopt and be guided by the established resolutions of entities like the CCJ. The CCJ played a significant behind-the-scenes role in states’ mass adoption of the UBE.²²³ A CCJ resolution encouraged the bar associations in each state to establish emer-

221. Griggs, *supra* note 40, at 17.

222. THE CONF. OF CHIEF JUSTS., <https://ccj.ncsc.org> (last visited Sept. 20, 2020).

223. Griggs, *supra* note 40, at 17.

gency preparedness committees to assist individuals of limited means in the event of a natural disaster or other public emergency.²²⁴ On one hand the CCJ promoted proactive public protection by pushing states to have emergency plans in place to service the poor and disadvantaged. Yet, on the other, the resolution did not encompass the need for emergency preparedness as it relates to the courts' regulatory role in entry to the legal profession.

The role of the courts in licensing attorneys is one of authority and oversight.²²⁵ One scholar posits that state bar examiners and other occupational licensing entities are often granted the same type of investigative, rulemaking, and adjudicative authority as other state administrative agencies.²²⁶ These licensing entities have great need for supervision and oversight, because they are susceptible to the "same risks and concerns as any other administrative agency that [de facto] possesses and exercises combined governmental powers."²²⁷ Although necessary and important, the oversight measures that are fairly standard in administrative agencies are often absent in the context of licensing attorneys.²²⁸ Whether or not induced by crisis, important decisions regarding the licensure process must be independently evaluated, including exam mode, test security, scoring, content, format, passage thresholds, and more. The judicial deference to external constituencies combined with distrust and a lack of transparency on the part of the examiners, make even temporary change unlikely.

C. Examiners as Gatekeepers

To understand the resistance to change, temporary or otherwise, it is important to view the bar exam from the vantage point of those who know it best — the bar examiners. Even under optimal conditions, there is much more than meets the eye that goes into the making of a bar exam. Those deployed in bar exam related roles — from character and fitness investigators, to essay graders, and for-hire test

224. THE CONF. OF CHIEF JUSTS., RESOLUTION IN SUPPORT OF THE PROVISION OF LEGAL SERVICES FOLLOWING A MAJOR DISASTER OR PUBLIC EMERGENCY (2020), https://ccj.nsc.org/_data/assets/pdf_file/0015/23406/02132019-emergency-preparedness.pdf.

225. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, 22–27 (1986) ("lawyer licensing [is] almost always . . . housed under the judicial branch of state government.").

226. Bobbi Jo Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*, 70 ARK. L. REV. 609, 615 (2017).

227. *Id.*

228. *Id.* at 620–21.

proctors — all work in conjunction with the appointed bar examiners to discharge an office of great societal importance. There are layers of research, accountability, and quality control involved in the drafting of the questions.²²⁹ There is beta testing of the exam content.²³⁰ There is scoring, rescoring, and equating.²³¹ And there are measures for exam security that rival Area 51. The parties involved in the production of the bar exam range from psychometricians to politicians, all whom must gingerly weigh input from the podium, the bar, and the bench. Judicially appointed state bar examiners typically balance their roles with their full-time role as a practicing attorney, law professor, or judge.

Of necessity, bar examiners operate independently of political and law school influence to make decisions about scoring and bar admissions. Understandably, their decisions will be unpopular to some. And while bar examiners are the reasoned targets of much blame surrounding the fate of the July 2020 exam, we must acknowledge that the sole role of the body of bar examiners is to maintain a system of licensure by examination. Decisions about avenues to licensure that do not involve a bar exam, are outside the purview of examiners. New rules to establish alternative paths to licensure will have to be the responsive byproduct of a judicial decree or legislative act. Yet, the courts that oversee the bar examiners are not likely inclined to share or relinquish their authority to govern entry into and supervision of the legal profession.²³²

The extent to which that authority has been delegated to boards of bar examiners creates a further divide between the realities of practice and the content and expectations of the bar as a testing instrument. It is also important to recognize that the administrative arm of the examiner boards may be run by non-lawyers who lack first-hand knowledge of all that is required to prepare for and pass a bar exam. Examiners stand guard at the gateway to the legal profession like sen-

229. Timothy Davis & Marcy G. Glenn, *How Are Questions Written for NCBE's Exams? Part One: Two Multiple-Choice Question Drafters Share the Process*, 88 BAR EXAM'R 25 (2019); Sheldon F. Kurtz & Alexander W. Scherr, *How Are Questions Written for NCBE's Exams? Part Two: Two Written-Component Question Drafters Share the Process*, 88 BAR EXAM'R (Winter 2019–2020), <https://thebarexaminer.org/article/winter-2019-2020/how-are-questions-written-for-ncbes-exams-part-two/>.

230. Davis & Glenn, *supra* note 229.

231. See generally Lee Schroeder, *Scoring Examinations: Equating and Scaling*, 69 BAR EXAM'R 6 (2000).

232. W. Clinton Sterling, *Washington's Diploma Privilege*, 7 (Nov. 19, 2009) (unpublished article) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837685).

tries with one sole role: maintenance and protection. But what or who is being protected? From the perspective of the class of 2020 bar takers, and many others, bar examiners have become much more gatekeepers of the exam and examination process than of the public and the profession.

Bar exam administrators have seemingly been proselytized into believing that an exam is the only way to demonstrate competency to practice law. Like attorneys, state examiners have become disconnected from the actual content of the exam.²³³ Since adopting the UBE, states that just four years ago wrote their own exams, now show reluctance to assert any authority over licensing their own attorneys beyond making character and fitness assessments and establishing a passing cut score. In the 38 states that formally have adopted the UBE, the role of bar examiner essentially has been reduced to essay grader and arbiter of exception requests and character and fitness hearings.

Once the decision to adopt UBE is made, state examiners write none of the bar exam questions and have no input into which subject or rules will be tested. In fact, a correct answer to a multistate exam question, may be absolutely contrary to the actual law in the state where the test is administered.²³⁴ State bar examiners do not have the discretion to offer any variance from the grading point sheet to honor state law distinctions. That state bar exam authorities have become too inhibited to write their own exams, and almost fully restricted in the grading of the exam that it used to measure competency to practice within their states, is a disheartening consequence of broad adoption of the uniform examination.

This inhibition and broad deference to the test makers may explain, in part, the slow response from states to the pandemic crisis. Before the NCBE had announced definitively that it would provide exams for July and September (and much later an online version for October), UBE states were left with nothing to offer the class of 2020. These states had not produced any homegrown exam content for up to nine years. It is not pure coincidence that Indiana, Louisiana, Michigan, Nevada (and ultimately Florida) were able to pivot to create and plan to offer online exams before any definitive announce-

233. Griggs, *supra* note 40, at 24.

234. *Id.* at 54.

ment was made by NCBE.²³⁵ These five states have not yet adopted the UBE and their state bar examiners still make a practice of drafting and creating bar exam questions. We must also consider that decisions and recommendations of the NCBE (a private, unregulated entity that makes millions of dollars each year from the sale of bar exams, and bar related services and products) may not necessarily be in the best interest of the state or the bar applicants.²³⁶ As long as states continue to give such broad deference to the NCBE, it is impractical to expect to see any real changes to the bar exam process other than those endorsed by the NCBE.²³⁷

D. Systemic Distrust

Ultimately, the lifeblood of the opposition to licensure alternatives is distrust. The bar authorities are distrustful of anyone and everyone. Their test developers speak a language of scaling, equating, reliability, and validity and are not concerned with practicality, test preparation conditions, or cognitive load. Members of the practicing bar do not trust a new generation of lawyers to become their peers unless the newbies undergo the same stringent rituals that were forced upon them. The courts are distrustful of new ideas, and to some degree of themselves. The courts have become so far removed from legal education and attorney qualifications that rarely will they make a move that is not in lock step with a resolution or recommendation from the ABA or other influential entity.

The ABA distrusts the law schools it regulates, and the states' ability to test and regulate entry into the legal profession. The ABA distrust of law schools is both obvious and problematic. The ABA sets detailed guidelines by which schools must abide to maintain their status as member schools. Those guidelines include, inter alia, standards for legal education programs, an academic support program, experiential learning, and assessment.²³⁸ Yet even with those standards in place, the ABA mandates that law schools maintain an ultimate bar

235. Indiana, Michigan, and Nevada successfully administered online exams during the summer of 2020. At the time of this Article, both Louisiana and Florida had announced plans to offer an online exam, but canceled or postponed their exam.

236. See NAT'L CONF. OF BAR EXAM'RS, *supra* note 41; Sloan, *supra* note 38.

237. *But see* Chemerinsky, *supra* note 220 (Claiming that the NCBE acted irresponsibly by refusing to cancel in-person administration of the MPRE and providing paper exams for states to administer in-person during the pandemic).

238. 2020-2021 Standards and Rules of Procedure for Approval of Law Schools, ABA, https://www.americanbar.org/groups/legal_education/resources/standards/ (last visited Oct. 17, 2020).

passage rate of 75% or higher for all graduates who take a bar exam.²³⁹

The ABA is deeply entangled in a symbiotic relationship with the NCBE. The NCBE was established by the ABA Section on Legal Education and Admissions to the Bar to eliminate overcrowding in the profession.²⁴⁰ The ABA support for a uniform bar exam produced and controlled by the NCBE was one of several endorsing resolutions that shifted the balance of power away from states and to the central, non-governmental NCBE. The origins of the ABA as an early bar exam regulator, and its role in establishing the NCBE, has predictably led to a sustained and deferential relationship between the two entities.²⁴¹ Whether or not merited, the deference, at times, may be to the detriment of the public good, as seems to be the case with the debacle made of the July 2020 bar exam administration.

CONCLUSION

The aim of this Article has been to analyze the reactive handling of the pandemic crisis as it relates to bar exam administration, and to discuss the institutional influence that likely contributed to the staunch resistance to short-term change. While this is not intended as a critique of any particular jurisdiction, court, or body of examiners, the outcome and devastating impact on the class of 2020 bar takers show that the measures taken were largely ineffective, and in some cases more detrimental than helpful. While viable solutions were and remain available, decision-makers were dogmatic and resolute in their refusal to break ties, even temporarily, with the established method of bar examination. The 2020 bar takers will be indelibly traumatized by the circumstances surrounding their quest for licensure, and the manifestations of that trauma will surely influence interactions with their future colleagues in the profession. We will expect our future lawyers to champion justice as they join the fight to compassionately protect the rights of those impacted by COVID-19 and those taking a stand against racial injustice. The newest members of our profession will not soon forget the perceived insensitivity and spared justice they received in response to their plight.

239. *Id.* at 25 (“At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”).

240. Ariens, *supra* note 39.

241. *See generally id.*

Taking and passing a bar exam is the end goal of journey that is three years or more in the making. The limited and emergency situation, wrought by the pandemic and civil unrest, provided an opportunity to simply move up the goal line by a few yards by offering alternative paths to licensure. Whether the alternative should take the form of diploma privilege or supervised practice should be a matter left entirely to the states to decide. But, deciding against any reasonable alternative should not have been on the table for discussion. Our profession entrusted law examiners with an important responsibility and in 2020 many failed, epically, to maintain that trust.

In a country with constitutional protections that would embrace the risk of letting a guilty party go unpunished before wrongly punishing an innocent party, we must ask why we are willing to keep the 90% of bar takers who would pass a bar exam from practice, to exclude the 10% who might not.²⁴² Duquesne School of Law Professor Ashley London best summed up our obligation to the class of 2020 and beyond: “We owe the newest members of our profession the most protection, not the least. Our privilege and protectionism [are] showing and it is not a good look.”²⁴³

242. Elizabeth Olson, *High Percentage of Grads Pass Bar Within 2 Years, ABA Says*, BLOOMBERG L. (Feb. 18, 2020, 4:52 PM), <https://news.bloomberglaw.com/us-law-week/high-percentage-of-law-grads-pass-bar-within-two-years-aba-says>; *New Report Shows Most Law School Grads Passing Bar*, ABA, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/new-report-shows-law-schools/> (last visited Aug. 14, 2020).

243. @ProfAMLondon, TWITTER (June 16, 2020, 6:46 PM), <https://publish.twitter.com/?query=https%3A%2F%2Ftwitter.com%2FProfAMLondon1%2Fstatus%2F1273039225890443264&widet==tweet>.