

**STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION**

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

- 1. State your full name.**

Erin Cristina Dallinger-Lain

- 2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

Associate Dean for Academic Services and Tenured Professor of Law, Drake University Law School

- 3. State your date of birth (to determine statutory eligibility).**

January 2, 1985

- 4. State your current city and county of residence.**

Des Moines, Polk County

PROFESSIONAL AND EDUCATIONAL HISTORY

- 5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

Harvard University
October, 2018 through January, 2019
Bok Teaching Certificate: Higher Education Pedagogy

Drake University
August, 2012 through May, 2016
Doctor of Philosophy in Education Leadership

Drake University Law School
August 2006 through December, 2008
Juris Doctorate

Drake University
August, 2002 through May, 2006
Bachelor of Arts, Graphic Design and Political Science

- 6. Describe in reverse chronological order all of your work experience since graduating from college, including:**
- a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**

Associate Dean for Academic Affairs

July 2021- Present

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Jerry Anderson, Dean and Professor of Law

- Oversee the curricular offerings
- Hire and train adjunct professors
- Develop, implement and maintain policies regarding student life, curriculum, and accreditation
- Lead the Law School Administrators' Council
- Advise the Drake Law Alumni Diversity, Equity and Inclusion Council
- Oversee Honor Code processes, including conducting investigation when necessary
- Serve as standing ex-officio member of the curriculum committee
- Collaborate with the Dean on issues of budget, recruitment, faculty and staff personnel issues
- Oversee student services, career development and admissions offices.
- Serve on Graduate Council and Academic Chairs groups

Professor of Law

April, 2020 – Present

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Jerry Anderson, Dean and Professor of Law

- Received Tenure in April, 2020
- Committees: Hiring and Retention; Diversity; Curriculum; Assessment; Academic Task Force; African American Council

- Courses Taught
 - Law School
 - Race and the Constitution, LAW 99
 - Legal Writing II, LAW 105
 - Integrated Study Groups, LAW 015
 - Principles of Legal Analysis, LAW 010
 - Bar Exam Preparation, LAW 258
 - Introduction to Legal Writing, LAW 100
 - Studying the Law, LAW 100
 - Graduate
 - Ethics, Leadership and Social Justice, DOC 302
 - Counseling Diverse Populations, COUN 245
 - Undergraduate
 - Inequalities and Justice, INTD 065
 - Bulldog Foundations, INTD 025
 - Qualitative Methods, INTD 095
 - Social Justice and Culture, FYS 029
 - Introduction to Leadership, LEAD 001
 - Race and Ethnic Relations, SCJ 340
 - Victimology, CJ 301
 - Criminal Law and Procedure, CJ 360
 - Comparative Tort Law: China and US Perspectives, LAW 101 (Taught at University of International Business and Economics in Beijing, China)

Associate Provost for Campus Equity and Inclusion

May, 2017 – July, 2021

2507 University Ave. Des Moines, IA 50311

Drake University

Supervisor: Sue Mattison, Provost

- Developed, implemented, and maintained the Equity Action Partners program
- Led Hidden Labor Taskforce
- Led campuswide equity and inclusion programs for new faculty, academic chairs, FYS faculty, student senate, RA development
- Oversaw Campus Climate Assessment, a two year long survey and qualitative evaluation of equity on campus
- Overhauled faculty and staff hiring policies
- Led Faculty Senate initiatives which resulted in a Religious Holidays Policy, required bulldog foundations class, and required DEI course graduation requirement
- Developed three national and international conferences surrounding equity and inclusion topics
- Developed the CORE high school pipeline program
- Utilized and developed metrics to monitor progress in the areas of equity and inclusion

- Coordinated policies and practices to support the recruitment and retention of diverse identities, backgrounds and ideas among faculty and staff
- Responded to issues of equity and inclusion amongst the faculty, staff and students
- Sought external resources to support equity and inclusion efforts on campus
- Served on Dean's and Provost's Council

Independent Contractor with the ABA Rule of Law Initiative

December, 2018-May 2021

1050 Connecticut Ave. N.W., Suite 400, Washington, D.C. 20036

ABA ROLI

Supervisor: Maha Shomali

- Led five week-long seminars for Egyptian law professors and prosecutors about teaching the law
- Developed curriculum and created online learning modules for international cooperation in obtaining evidence, cybercrime, financial crimes, and asset tracing trainings for Lebanese prosecutors.

Associate Professor of Law

July, 2016 – May, 2020

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Jerry Anderson, Dean and Professor of Law

- See responsibilities and courses taught under professor of law

Assistant Dean for Academic Services

July, 2012 – May, 2017

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Andrea Charlow, Associate Dean for Academic Affairs and Professor of Law

- Developed and direct the Law School's academic success program, including the mandatory first-year Integrated Study Group (ISG) program
- Direct the joint degree, career opportunity, and master of jurisprudence programs
- Founded and direct the Law School's spring break pro bono volunteer trip
- Develop, direct and implement all orientation programming for the law school
- Oversee law school exam administration
- Oversee registration and develop academic schedules
- Counsel, advise, and discipline students concerning personal, disability, academic and disciplinary issues
- Supervise administrative staff, director of academic success and teaching assistants

CLEO Institute Director

January, 2016 - July 2016

2800 Eisenhower Ave. Ste 220-41 Alexandria, VA 22314

Council on Legal Education Opportunity, Inc.

Supervisor: Bernetta Hayes

- Wrote the successful \$150,000 grant proposal
January – July, 2011
- Developed and managed the budget for the Institute
- Developed the academic schedule for the Institute
- Developed curriculum for the Institute
- Taught seminars
- Planned, coordinated, and implemented all academic and non-academic activities for the Institute
- Hired and supervised professors, teaching assistants and staff working in the Institute
- Dealt with student discipline issues
- Assisted CLEO students in gaining admission to law school, including organizing a law school interview day

Academic Success Program Director

August, 2010 – July, 2012

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Andrea Charlow, Associate Dean for Academic Affairs and Professor of Law

- Taught a year-long study skills course
- Developed and directed the academic study groups
- Counseled all students on academic probation

CLEO Institute Director

January, 2011 - July 2011

2800 Eisenhower Ave. Ste 220-41 Alexandria, VA 22314

Council on Legal Education Opportunity, Inc.

Supervisor: Bernetta Hayes

- See responsibilities for CLEO Institute Director role in 2016

Assistant Director of Admissions and Diversity Initiatives

July, 2009 – July, 2012

2507 University Ave. Des Moines, IA 50311

Drake University Law School

Supervisor: Kara Blanchard, Assistant Dean for Admissions

- Recruited prospective students for Drake Law School and directed the LL.M. admissions process
- Developed and implemented minority student recruiting strategies
- Developed and implemented diversity pipeline programming
- Served as the coordinator of the Diversity Committee

Volunteer Law Clerk for Federal Magistrate Judge, Celeste F. Bremer

March, 2009 – July, 2009

123 E Walnut St, Des Moines, IA 50309

United States District Court- Southern District of Iowa

Supervisor: Celeste F. Bremer, Federal Magistrate Judge.

- Researched and assisted in writing opinions
- Wrote case summaries

Student Attorney

January, 2008-December, 2008

222 Fifth Avenue Des Moines, IA 50309

Polk County Attorney- Criminal Division

Supervisor: Anastasia Baker-Hurn, Assistant Polk County Attorney

- Served as co-council on four jury trials
- Tried as first-chair over 50 traffic court trials
- Conducted 250 hours of work

Waitstaff

February, 2008-December, 2008

428 E Locust St

The Continental

Supervisor: Kevin DuBay, Owner

Student Attorney

June, 2008 – August, 2008

2507 University Ave. Des Moines, IA 50311

Drake University Legal Clinic

Supervisor: Bob Rigg, Professor of Law

- Represented ten clients over a 3 month period
- Appeared in court at a variety of hearings
- Wrote and filed motions
- Completed 120 hours of work

Law Clerk

June, 2007 – August, 2007

400 E 14th St 1st floor, Des Moines, IA 50319

Iowa Civil Rights Commission

Supervisor: Don Grove, Supervisor, Screening and Housing Investigations

- Investigated civil rights complaints
- Wrote memos with proposed course of actions
- Assisted in writing determinations

Waitstaff

December, 2006 – May, 2007

3309 Ute Ave, Waukee, IA 50263

Rubes Steak House

Supervisor: Gabe Green

Legal Intern

June, 2006 – August, 2006
6360 S Rainbow Blvd, Las Vegas, NV 89118
Greater Las Vegas Association of Realtors
Supervisor: Deanne Rymarowicz, General Counsel

- Assisted with realtor arbitrations
- Wrote case law updates in real estate law
- Assisted with continuing education training for realtors

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

N/A

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

Iowa, April, 2009 - Present

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

N/A

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

N/A

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

N/A

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

N/A

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel,

chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

N/A

- f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

N/A

- 9. Describe your pro bono work over at least the past 10 years, including:**
- a. Approximate number of pro bono cases you've handled.**
 - b. Average number of hours of pro bono service per year.**
 - c. Types of pro bono cases.**

From 2010 through 2016 I lead an alternative spring break trip for law students to New Orleans to volunteer at the Pro Bono Project there. We assisted clients who had been impacted by Hurricane Katrina and the BP oil spill. We worked primarily on property succession issues. . I received the Bar Association Pro Bono Project Award of Merit in 2016 in recognition of these efforts, which served over 150 clients.

If you have ever held judicial office or served in a quasi-judicial position: N/A

- a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.**
- b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.**
- c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.**

- 10. If you have been subject to the reporting requirements of Court Rule 22.10: No**
- a. State the number of times you have failed to file timely rule 22.10 reports.**
 - b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:**
 - i. 120 days.**
 - ii. 180 days.**
 - iii. 240 days.**
 - iv. One year.**
- 11. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**
- a. Title of the case and venue,**
 - b. A brief summary of the substance of each matter,**
 - c. A succinct statement of what you believe to be the significance of it,**
 - d. The name of the party you represented, if applicable,**
 - e. The nature of your participation in the case,**
 - f. Dates of your involvement,**
 - g. The outcome of the case,**
 - h. Name(s) and address(es) [city, state] of co-counsel (if any),**
 - i. Name(s) of counsel for opposing parties in the case, and**
 - j. Name of the judge before whom you tried the case, if applicable.**
- A. Student v. Student Sexual Assault Adjudication (I cannot disclose party names)
 - B. I served as the hearing officer for a student to student sexual assault case under Title IX provisions. Ultimately, the respondent was found responsible and was suspended from school.
 - C. Through this process I researched the applicable Title IX and university policy regulations. I oversaw the trial like hearing, including hearing testimony, deciding on relevance, hearing statements from representing attorneys, and making the final decision.
 - D. N/A
 - E. I served as the hearing officer which is akin to a judge in a bench trial in the criminal and civil justice system.
 - F. May 2021
 - G. Student suspension
 - H. N/A
 - I. N/A
 - J. N/A

- A. State of Iowa vs. Jasiah Thane Finck
- B. The defendant was charged with Theft 2nd class D felony for stealing a trailer.
- C. I served as co-counsel representing Jasiah Fink at trial. I gave the opening arguments, assisted my co-counsel in voir dire, examined half of the witnesses, and presented video testimony. This was an opportunity to continue to use my license and continue to work on my skills, even though my job in academia does not provide a lot of time for practice.
- D. Jasiah Thane Finck
- E. Co-Counsel at Trial
- F. January 2018
- G. Defendant found guilty
- H. Hon. Tabitha Turner, District Associate Judge 5C, 222 5th Ave, Des Moines, IA 50309
- I. Brianna Shriver, Warren County Attorney, 301 N Buxton St # 301, Indianola, IA 50125
- J. Hon. Mark Frederick Schlenker, District Associate Judge 5A, 115 N Howard St, Indianola, IA 50125

- A. State vs. Mona Lynne Shaw; State vs. Edward Walter Bloomer; State vs. Kirk Adam Brown; State vs. Chester Lee Guinn
- B. The defendants were charged with trespassing on Wakonda club property for trying to effectuate a citizen's arrest on Karl Rove, who was attending a private party there.
- C. I worked on this case when I was an intern for the Polk County Prosecutor's office, and served as co-counsel during trial. The case was appealed and the Court of Appeals found no error, and the Supreme Court denied cert.
- D. Polk County
- E. Student Co-Counsel at Trial.
- F. November 2008
- G. Defendants found guilty
- H. Nick Bailey, student co-counsel, 203 1st Avenue S, Suite A Altoona, Iowa 50009
- I. Sally Frank, Professor of Law, Director of the General Civil Clinic, 2400 University Ave. Des Moines, IA 50311
- J. Hon. Colin Witt, District Judge 5C (deceased)

12. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

I have a wealth of skillsets and knowledge I have developed through my role as a professor and university administrator that I would bring to the Court of Appeals position. While Associate Provost for Campus Equity and Inclusion, I served as the decision maker in a sexual assault case on campus, which involved presiding over a trial-like hearing. In addition to hearing testimony, I considered how to apply the sexual assault policy, and wrote an opinion in the case. I also helped students understand how the process worked and what their role was throughout the case. I would bring similar attention to the parties to the Court of Appeals.

Currently, I play a key role in our honor code system in my Associate Dean role. This includes investigating complaints under the honor code, writing findings and proposing sanction.

In these cases I similarly try to use my role to help students understand the process, clearly lay out their options and advise them in various actions that they take. I often find myself playing a prosecutor-type role, but I am ever mindful of the students who are going through the system, and I will bring that same perspective to the bench.

Through my teaching and scholarship, I have extensive experience in research and writing which has led to publication on student engagement and persistence, graduation rates, bar pass rates, and current issues relating to law school success. I am also knowledgeable about several specific areas of law through my teaching. I have lectured and taught in the area of criminal law, U.S. constitutional law, contracts, torts, federal civil procedure, federal rules of evidence, and property.

Finally, having served in a variety of roles in a university setting, I regularly engage in long-range and strategic planning, and collaboration across diverse groups. Part of my work is to engage in group decision-making that may include a variety of constituents with differing agendas. Through this work I have developed the ability to build consensus, while provide opportunities for differing groups to share their experience and opinions. This sometimes includes working with deliberative bodies to pass new policies, such as our faculty senate. These skills will help me to continue and enhance the work of the Court.

- 13. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.**

N/A

- 14. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):**
- a. Name of business / organization.**
 - b. Your title.**
 - c. Your duties.**
 - d. Dates of involvement.**

Corn for a Cause
Co-Founder and Board Member
Volunteer for organization in delivery corn to food banks, or other food access places.
2018-Present

ACLU of Iowa
Board Member and Equity Officer
Serve on Governance Committee and attend quarterly board meetings. Provide equity and inclusion guidance to the affiliate.
2020-present

- 15. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.**

Iowa Supreme Court Access to Justice Commission, 2021-Present

- Member, on Limited Licensure Subcommittee
- Develop and interpreted data on how to make justice system more accessible and effective for all Iowans

Polk County Bar Association, 2017 – Present

- Vice President: 2022-2023; moving through line of succession to serve as President in 2024
- Board Member: 2017-Present
- Young Lawyers Division Chair: 2014-2017

- 16. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. “Participation” means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.**

Luther Park Board of Directors, 2019 – 2021, Board Member

Greater Des Moines Leadership Institute, 2017 – 2018, Member

Polk County Bar Association, 2014 – 2017, Young Lawyers Division, Chair

Des Moines Young Professionals Connection, 2014 – 2015, Diversity Chair

Des Moines Young Professionals, 2011 – 2015, Member

Polk County Women Attorneys, 2009 – 2012, Member

Southern District of Iowa Historical Society, 2009 – 2010, Member

Blackstone Inn of Court, 2008 – 2010, Member

Student Bar Association, Drake Law School, 2007-2008, ABA representative

Equal Justice Works, Drake Law School, 2007-2008, Member

Delta Theta Phi, Law School Fraternity, 2006-2008, Member

- 17. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity’s or court’s opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court’s electronic filing system), please attach a copy of the opinion.**

N/A

- 18. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.**

See attached.

OTHER INFORMATION

- 19. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.**

N/A

- 20. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.**

N/A

- 21. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.**

Lain, E. (2022). I think I can: How self-efficacy and self-regulation impacts Black and Latinx bar examinees. *Indiana Journal of Law & Social Equality*.

Devito, S., Hample, K. & Lain, E. (2022) Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination. *University of Michigan Journal of Law Reform*.

Lain, E. & Tyler, T. (2021) Navigating call-out culture: An approach for campus transformation and diversity leader resilience. In E. Parker (Ed.) *Becoming a Diversity Leader on Campus: Navigating Identity and Situational Pressures*. Routledge/Taylor and Francis Group Publishing.

Lain, E. (2018). Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment. *Journal of Legal Education*.

Lain, E. (2016). Experiences of academically dismissed Black and Latino/a law students: stereotype threat, fight or flight coping mechanisms, isolation and feelings of systemic betrayal. *Journal of Law and Education*.

Lain, E. (2013). Emotional intelligence: A valuable tool for traditional and non-traditional leaders. In Glodek, L., Harris, M. L., & Smith, G. (Eds.), *Follow the leader?* (pp. 3-11). Des Moines, IA: Author.

Lain, E. (2010). New Orleans trip reinforces students' law career decisions. *The Iowa*

Lawyer, 70 (5), 12-14.

22. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

- “Past, Present and Future of Affirmative Action,” Des Moines, IA, Polk County Bar Association Luncheon CLE, September, 2022.
- “Navigating Stereotype Threat as a Student of Color,” Des Moines, IA, Wanda Everage Symposium, August, 2022.
- “Diversity in the United States,” Des Moines, IA, Mandela Fellows Seminar, June, 2022.
- “Exploring Diversity, Equity and Inclusion in the Legal Practice and Profession,” Des Moines, IA, Polk County Women Attorneys Annual CLE, June, 2022.
- “Intro to Legal Analysis and Navigating Law School as a Student of Color,” Virtual, CLEO Pre-Summer Institute Seminar (4 day seminar), June, 2022.
- “Exploring Diversity, Equity and Inclusion in the Legal Practice and Profession,” Des Moines, IA, IAJ Work Comp Seminar, February, 2022.
- “Infusing Diversity, Equity, and Inclusion into the Law School Curriculum,” Virtual, AALS Annual Meeting, January, 2022.
- “Partners impacted by the new ABA Standards and their thoughts on impacts to the profession,” Virtual, AALS Annual Meeting, January 2022.
- “Diversity in the Legal Profession: Ethics CLE,” Virtual, General Practice Review CE Conference, December, 2021.
- “Exploring Diversity, Equity and Inclusion in the Legal Practice and Profession,” Des Moines, IA, Polk County Bar Association Annual CLE, November, 2021.
- “Intro to Legal Analysis and Navigating Law School as a Student of Color,” Virtual, CLEO Pre-Summer Institute Seminar (4 day seminar), June, 2021.

- “Combatting Bullying and Microaggressions in the workplace,” Virtual, Nyemaster, Goode, PC, June, 2021.
- “Implicit Bias in the Courtroom,” Virtual, Trial Practicum Program, April, 2021.
- “Experiences of DEI Development Facilitators with Navigating Racialized Conversations,” Virtual, Global Citizen Forum, March, 2021.
- “Navigating Racialized Interactions in the Classroom,” Virtual, ALWD Leadership Workshop, January, 2021.
- “DEI Law School Pedagogy Workshop,” Virtual, Drake Law School, January – May, 2021.
- “Diversity in the Legal Profession: Ethics CLE,” Virtual, General Practice Review CE Conference, December, 2020.
- Navigating Racialized Interactions in the Classroom, Virtual, Tulane Law School, December, 2020.
- “Understanding Police Oversight,” Virtual, Plymouth Racial Equity Group, September, 2020.
- “DEI Campus Training,” Virtual, Simpson College, September, 2020.
- “Racial Justice and Allyship,” Virtual, Community Engaged Learning Webinar, September, 2020.
- “Equity and Access in the virtual classroom,” Virtual, Drake Learning Series (Three part series) , July, 2020.
- “Intro to Legal Analysis and Navigating Law School as a Student of Color,” Virtual, CLEO Pre-Summer Institute Seminar (4 day seminar), June, 2020.
- “Best Practices in Teaching the Law,” Cairo, Egypt, A two-week seminar taught to Egyptian Law Professors through the American Bar Association and U.S. State Department Programming, February, 2020.
- “Diversity, Equity and Inclusion,” Des Moines, IA, Blank Park Zoo, February, 2020.
- “Gender Diversity in the Legal Profession CLE,” Des Moines, IA, Iowa Association for Justice, December, 2019.
- “Lawyer Well-Being: Ethics CLE,” General Practice Review CLE Conference, (Annually) December, 2013 – 2019.
- “An Introduction to Diversity, Equity and Inclusion CLE,” Des Moines, IA, Nyemaster,

Goode, PC, December, 2019.

- “Mental Health and Substance Abuse in the Legal Profession Ethics CLE,” Des Moines, IA, Polk County Bar Association Annual CLE, November, 2019.
- “How to handle the things they didn't prepare you for in your leadership program: Navigating Hate Incidents on Campus,” The Way Up Conference: Developing Women Leaders to Enhance Iowa Higher Education, Des Moines, IA, November, 2019.
- “Mental Health and Wellness in the Legal Profession CLE,” Des Moines, IA, Polk County Bar Association, October, 2019.
- “Diversity, Equity and Inclusion in Practice CLE,” Des Moines, IA, Iowa Civil Rights Commission, October, 2019.
- “Diversity, Equity and Inclusion in Practice CLE,” Des Moines, IA, Iowa Legal Aid, October, 2019.
- “Diversity Workshop: Business Case for Diversity,” Des Moines, IA, Des Moines Young Professionals Connection, September, 2019.
- “Reducing Implicit Bias in Determinations,” Des Moines, IA, Division of Workers' Compensation, September, 2019.
- “Reducing Implicit Bias in Determinations,” Des Moines, IA, Appeals Bureau- Iowa Workforce Development, September, 2019.
- “Future of Equity and Inclusion in Higher Education,” Des Moines, IA, Ray Society, February, 2019.
- “Best Practices in Teaching the Law,” Cairo, Egypt, A one-week seminar taught to Egyptian Prosecutor Lecturers through the American Bar Association and the U.S. State Department, December, 2018 and August, 2019.
- Equity and Inclusion Leadership, Des Moines, IA, Public Allies AmeriCorps- Evelyn K. Davis Center, June, 2019.
- “Intro to Equity and Inclusion CLE,” Des Moines, IA, Polk County Women Attorney CLE, May, 2019.
- “Infusing Equity and Inclusion into Art Museum Practices,” Des Moines, IA, Des Moines Art Center, April, 2019.
- “Navigating Hate Incidents on Campus: How Institutions can Respond with Progress in Mind,” Des Moines, IA, Move Passion to Progress: 33rd Annual Civil & Human Rights Symposium, March, 2019.

- “Future of Equity and Inclusion in Higher Education,” Des Moines, IA, Drake University National Alumni Board, February, 2019.
- “Global and Intercultural Learning,” Durban, South Africa, University of KwaZulu-Natal, October, 2018.
- “Diversity and Culturally Conscious Leadership,” Cambridge, MA, Harvard University Women in Leadership in Higher Education Conference, October, 2018.
- “Interrupting Bias in the Judiciary,” Des Moines, IA, Iowa Affiliate of the National Association of the Administrative Law Judiciary, September, 2018.
- “Equipping for Equity: Engaging Race and Ethnicity in the Classroom,” Des Moines, IA, Drake Learning Symposium, August, 2018.
- “Facilitating Conversations to Develop Action,” Des Moines, IA, Drake Learning Symposium, August, 2018.
- LGBTQ Safe Space Training, Des Moines, IA, Drake University, June, 2018.
- “Best Practices in Teaching the Law,” Cairo, Egypt, A two-week seminar taught to Egyptian Law Professors through the American Bar Association and the U.S. State Department, May, 2018.
- “How to Teach About Privilege,” Ames, IA, Iowa State University, June, 2018.
- “Issues of Wellness Impacting Iowa Lawyers, Des Moines, IA, C. Edwin Moore Inn of Court CLE, April, 2018.
- “Implicit Bias in the Practice of Law,” Des Moines, IA, Polk County Bar Association CLE, February, 2018.
- “Regulatory Rollbacks...How Do They Work? Exploring Recent Administrative and Regulatory Rollbacks of Title IX and Transgender Protections,” Des Moines, IA, Drake Law School, November, 2017.
- “Interrupting Bias in Hiring Practices,” Coe College, Administrator’s Roundtable, November, 2017.
- “Navigating Racialized Interactions in the Classroom,” Des Moines, IA, White Privilege Symposium, October, 2017.
- “Understanding and Embracing Equity and Inclusion,” Des Moines, IA, Junior League

Training, September, 2017.

- Using Racial Identity Development to Relate to Students,” Des Moines, IA, Drake University First Year Seminar Faculty Training, August, 2017.
- “Combatting Microaggressions in the Classroom,” Des Moines, IA, Drake University First Year Seminar Faculty Training, August, 2017 .
- “The Black Lives Matter Movement: Past, Present and Future,” Drake University Engaged Citizen Conference, February, 2017.
- “Mental Health and Substance Abuse Issues Affecting Iowa Lawyers,” Adel, IA, Dallas County Bar Association, February, 2017.
- “AALS President’s Program on Diversity Roundtable,” San Francisco, CA, The Association of American Law Schools Annual Meeting, January, 2017.
- “Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment,” Des Moines, IA, Drake Law School Diversity Seminar Series, November, 2016.
- "Implicit Bias in the Profession," Des Moines, IA, American Board of Trial Advocates (ABOTA) Annual Conference, October, 2016.
- “Creating Inclusive Working Environments for People of Color,” Des Moines, IA, Drake University Learning Symposium, August, 2016.
- “Noncognitive Skills Necessary for Success in Law School,” Drake Law School, CLEO Summer Institute, July, 2016.
- “The Law School Environment as Experienced by Academically Dismissed Black and Latina/o Law Students,” College Park, MD, NASPA Closing the Achievement Gap Conference, July, 2016.
- “Experiences of Academically Dismissed Black and Latino/A Law Students,” CUNY School of Law, Association of Academic Success Educators Annual Conference, May, 2016.
- “A Phenomenological Case Study: The Law School Environment as University of Iowa Experienced by Academically Dismissed Black and Latina/o Law Students”, Iowa City, IA, Iowa Educational Research and Evaluation Association Annual Conference, December 2015.
- “The Impact of Stereotype Threat in the Law School Environment on Academically Dismissed Minority Law Students,” Iowa City, IA, Iowa Educational Research and Evaluation Association Annual Conference, December 2015.

- “Retention of Diverse Talent in the Legal Field,” Des Moines, IA, Diversity & Inclusion within the Iowa Legal Community CLE Conference, October, 2015
- “Techno-stress and its impact on the profession,” Fairfield, IA, 8th District Bench-Bar CLE Conference, October, 2015.

23. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook: Erin Lain
 Linked in: Erin Lain
 Instagram: ecl004
 Twitter: @ErinLain

24. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

- Des Moines Business Record 40 under 40; January, 2020.
- CLEO Edge Award; October, 2018
- Greater Des Moines Partnership Inclusion Award; November, 2017
- Gertrude Rush Award; June, 2017
- Best Qualitative Research Poster Award, Iowa Educational Research and Evaluation Association Annual Conference; December, 2015
- Inducted into the William A. Blakey Diversity Pipeline Architects Group; November, 2013
- Student Bar Association Executive Board’s Dean Service Award; March, 2013
- Pro Bono Project of New Orleans- Law School of the Year Award; December, 2012
- Des Moines Young Professionals Diversity Committee Member of the Year; December, 2012
- Called to be True Blue Award for excellence in learning, integrity, and citizenship; January, 2012
- CLEO Diversity Award; January, 2012

25. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

- Jerry Anderson, Dean of Drake Law School, Supervisor, 515-271-2658
- Celeste Bremer, Federal Magistrate Judge, Former Supervisor and Mentor, 515-284-6200
- Tabitha Turner, District Associate Judge, Colleague, 515-286-3903

- Carol Phillips, Executive Director of Polk County Bar Association, Colleague, (515) 243-3904
- Sue Mattison, Provost of Drake University, Former Supervisor, 515-271-3751

26. Explain why you are seeking this judicial position.

I have deep roots in Iowa, and have dedicated my legal career to increasing access to justice and supporting the Rule of Law. Both of my parents are lawyers and academics, and have demonstrated a life of service to the ideals of justice. My mother grew up in Yale, IA, a small town of 300 people, and the Dallinger side of my family has been here since the 1860s. I received my undergraduate degree at Drake University. Following my law school graduation, I continued working for Drake, ultimately receiving a Ph.D. in Adult Education and Leadership. Throughout my legal career I have been active in the state and local Bar Associations, and contributed to national leadership through the American Bar Association, CLEO and the American Association of Law Schools.

In law school orientation, my class visited the Fort Des Moines Museum, where I first learned of the Women's Army Auxiliary Corps (WAAC) housed there, and heard about *In Re Ralph* and *Clark v. Board of School Directors*, some Iowa's first civil rights milestones. Iowa has a rich history in supporting civil rights from its early days to the present. I've seen how important the role of the judiciary is in protecting the rights of those living in our state. It excites me to think about joining the legacy of doing what is fair and what is right under our laws.

Years later, I served as chair of the committee that celebrated the 150th anniversary of the *Clark* case. As I re-read the decision, newspaper clips, and historical texts, I was impressed by how the rest of the country could look to Iowa for a common-sense understanding of the law. It is this approach that I hope to bring to the bench, and it is this long legacy that I hope to join.

I would be proud to serve as a member of the Court of Appeals because of the opportunity to make sure the justice system functions as designed. The appellate courts in Iowa are in charge of procedures that ensure that citizens have confidence in their results. If people cannot understand or access courts, they will not support and defend the Rule of Law. When I taught prosecutors in Egypt through the American Bar Association Rule of Law Initiative, I was able to compare and contrast our systems. Notably, I shared with the prosecutors the procedural safeguards and adherence to the Rule of Law that makes our system work. We talked about how these aspects of our system work to ensure fairness. Egypt has a significant backlog of civil and criminal cases, which undercuts the Court's authority, as most citizens do not expect to receive their "day in court." The lessons I took from that experience would inform my role on the bench.

The Iowa Court of Appeals is structured in such a way that it provides both procedural fairness, but expediency in handling the bulk of cases seeking review. It was designed to ensure our legal system is working as it should be. I value the checks and balances the Court of Appeals provides, and it is one of the reasons I am seeking this position. My skills in reviewing large amounts of data, synthesizing it, and writing cogent conclusions, in addition to my experience in public speaking and deciding significant issues would allow me to contribute to the work of this Court. As someone who is comfortable with group discussion, and the need to reach a consensus before taking action, I am confident that I could approach problem-solving with colleagues to ensure that the work of this court is completed effectively and efficiently.

27. Explain how your appointment would enhance the court.

I will bring a unique background and perspective to the Iowa Court of Appeals, and I would be proud to follow in the footsteps of Janet Johnson, the first woman on the Iowa Court of Appeals who also came from a career in academia. Although I do not have an extensive practice experience, I understand the application of rules and precedence to facts. As an appellate court judge, I would be constrained by the record that was established at the trial level, and the decisions made there. While not the traditional path to the judiciary, my scholarly work and demonstrated productivity shows that I am not afraid to take on large issues, do the research and clearly support my analysis. My experience as a fact-finder, prosecutor and adjudicator in the university setting will inform my work on the Court. Finally, I have expertise in implicit bias that I would use to enhance the work of the Court of Appeals to increase public support for the Rule of Law, by increasing not only the actual fairness, but the appearance of fairness that is offered by the Iowa justice system.

While obtaining my law degree, I discovered my love for research and writing, and discovered that law school could become a fairer experience if evidence-based methods of academic support were used to improve both teaching and learning. Through my Ph.D. in Education, time spent teaching, and my scholarly work, I have demonstrated my ability to research, analyze, and communicate in ways that are accessible to all.

In addition to coming from an academic background, bringing a unique adjudicatory experience, and a wealth of knowledge about implicit bias, I hope to bring compassion to the bench. Specifically, I will bring compassion for colleagues, court staff, the attorneys, and those who are navigating the system. While our system of laws works because we follow precedent and because judges approach cases with deference and objectivity, it is always important to remember the Iowans who are being impacted, no matter what side of the appeal they are on.

28. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: Erin Lain

Date: September 23, 2022

Printed name: Erin Lain

Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment

Erin C. Lain

Introduction

In summer 2016 I served as the director of the CLEO summer institute.¹ While racial violence was erupting in the country, I faced my own dilemma on how to deal with tension about race in the learning environment.² When I brought forty-four CLEO students to the county courthouse to watch sentencing hearings, one student spoke out to the attorneys, saying she felt that a black defendant was being mistreated. The public defender was taking questions from the students after the sentence had been pronounced and before the defendant was escorted out of the room. It made the public defender look insensitive, and she seemed unfazed by the lengthy sentence the defendant received. The student stood up and reprimanded the public defender. As a guest of the court, I was mortified at this student's actions, yet I also understood her perspective. I felt torn and did not know whether I should chastise her for speaking out or support her for standing up for what she perceived as an injustice.³ Ultimately, I decided to speak with the student one on one about the issue, as opposed to working through the issue with the

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1. The Council on Legal Education Opportunity (CLEO) is an organization that works to expand legal education opportunities for minority and low-income students. The CLEO summer institute is a six-week program preparing minority and low-income students for law school. The CLEO website can be found at <https://cleoinc.org/programs/pre-law-summer-institute/>.
2. Philando Castile and Alton Sterling were shot and killed by police and five police officers were killed by a sniper in Dallas, all within one week. See Sewell Chan, *Shootings in Dallas, Minnesota and Baton Rouge: What We Know*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/dallas-attacks-what-we-know-baton-rouge-minnesota.html>.
3. See Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 134 (2008) (Injustice can be defined as actions authorized by government or corporations that involve violations of fundamental human rights, including discrimination based on race, religion, or ethnicity).

entire group as a teaching moment. If I could have done it over, I would have pursued the latter choice.

These dilemmas frequently happen within the law school setting because of the nature of law and how it intersects with society.⁴ It is inevitable and important that racial issues be discussed in classrooms, particularly when considering our purpose of training future lawyers who will serve on the front lines.⁵ Be it affirmative action, *Terry* stops, freedom of expression,⁶ or discussions of disproportionate incarceration, these topics come up frequently within the law school curriculum. However, navigating these topics can seem like a minefield for most. Issues evoking tension and microaggressions can pop up unexpectedly, despite the lengths to which a professor plans the delivery of the material. This article will define racialized interactions and psychological safety within the classroom and discuss typical professor responses. It will also explore best practices and practical tools for professors to help students navigate and learn from these interactions while maintaining psychological safety. It will conclude with my own reflection on my practices in the classroom and provide examples from which others can learn.

Intersection of Law and Race

Law in the United States, whether explicitly or implicitly, serves as a race-based system of rights and privileges.⁷ Historically race was explicit in our legal system; it dictated who could be a citizen, who had the right to contract or be protected by laws, and who had the right to vote.⁸ Specifically, in cases such as *Dred Scott v. Sandford*, white supremacy over black people was articulated and made the law of the land. All branches of government—and all aspects of the law in the eighteenth and nineteenth centuries and the first part of the

4. See Anastasia M. Boles, *Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education*, 11 CHARLESTON L. REV. 209, 221-22 (2017) (discussing the vandalism at Harvard Law School in which black tape was put across the portraits of black tenured law faculty, how race intersects with law, and how cultural competency should be a part of the law school curriculum and skill development).
5. See Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 171-73 (2004) (describing a cultural competency education model that could be effective for law schools); see Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 403 (2005) (describing a framework to teach law students to develop self-awareness, which initiates multicultural lawyering competence).
6. The NFL *take-a-knee* protests have resulted in many racialized interactions within classrooms recently. See Debbie Truong, Sarah Larimer & Susan Svrluga, Georgetown Law students and faculty protest speech by Attorney General Jeff Sessions, THE WASHINGTON POST, September 26, 2018, https://www.washingtonpost.com/news/grade-point/wp/2017/09/26/georgetown-law-students-plan-to-protest-jeff-sessions-speech/?utm_term=.43bba122b966.
7. See F. Michael Higginbotham, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 4 (4th ed. 2015) (discussing the values and prejudices that shape law, and the history of *State v. Mann*, 13 N.C. 263 (1829)).
8. *Id.*

twentieth—promoted white supremacy as the foundation of the United States structure.⁹ Since the abolition of segregation and the civil rights movement, our cultural and legal systems have adopted colorblind methods of operation in which race and color are not acknowledged.¹⁰ Merely ignoring color serves to perpetuate whiteness as the norm, and the impact of law on nonwhites is readily noticeable. Despite laws not being discriminatory on their face anymore (de jure), such as past practices of redlining¹¹ or segregating schools,¹² race is still implicit in the impact of the law in terms of the way law functions (de facto), primarily through enforcement.¹³ Some law school courses that seem benign when it comes to race still have racial undercurrents within the laws of the cases themselves and in the manner in which they are applied.¹⁴ Race enters the legal academic setting through racialized facts, history, and classroom dynamics. The reality is that race is endemic to all cases, as all people have a race, including whites. Therefore, race is not just an issue for those who are nonwhite. This article, in analyzing best practices for navigating racialized interactions within the classroom, operates under a critical race theory premise that racism is normal and endemic within our society, and it permeates all aspects of our culture, including law.¹⁵

9. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 646-47 (2008) (discussing how whiteness was established as the societal norm through landmark cases and how white supremacy was the law of the land).
10. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 31 (2012) (discussing how neoliberalism brought about the colorblind nature of law).
11. Redlining was/is a discriminatory practice of denying financial services or raising prices in an area based on the racial makeup of that neighborhood. See Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 687 (1996) (giving an overview of the practice of redlining).
12. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (declaring segregation the law of the land); see also *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (finding separate but equal unconstitutional).
13. See Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (unveiling the way in which seemingly neutral laws have alarming disparate impact on people of color); see Amy Laura Cahn, *Our "Rights Are Not Cast in Stone": Post-Katrina Environmental "Red-Lining" and the Need for a Broad-Based Human Right Lawyering Movement*, 12 U. PA. J.L. & SOC. CHANGE 37, 39-40 (2009) (describing how property risk assessment after Hurricane Katrina rated areas differently for black and lower-class neighborhoods, essentially invoking redlining principles from the past).
14. See *id.*
15. First developed by Derrick Bell, Alan Freeman, and other scholars, as a response to critical legal studies (CRT), CRT emphasized that in order to understand oppression, the stories, experiences, and history of the oppressed must be examined. See Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE, ETHNICITY & EDUC. 69 (2005). Specifically, Litowitz suggests, "Racism is 'normal' in our society. Racist assumptions about minorities pervade our mind-set and are reinforced in the media and popular culture. Race is encoded not merely in our laws, but in our cultural symbols . . ." Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503,

Racialized Interactions

Improperly navigated racialized interactions diminish psychological safety for all students, but in particular for students of color. These interactions can include explicit conversations that deal with race, but also implicit discussions that may invoke the complexity of race.¹⁶ When students experience these incidents or any interactions that negotiate the complexities of race, the common reaction is powerful emotion.¹⁷ These emotions are amplified when students do not feel that they are valued within the conversation. For example, when issues arise in class of the police's use of force toward African-Americans, Deferred Action for Childhood Arrival, and immigration, the complexity of stereotypes, inferiority, criminalization of minorities, inequities, and privilege are some of the unspoken forces that shape the interaction. Students of any ethnicity may shut down because of the overwhelming emotion they feel, or they may feel fear because they do not perceive their identity or perspective to be valued within the environment.¹⁸ Similarly, students may react with anger and sharp words because their perceptions are being challenged or because their privileges are being revealed. In their basic form, racialized interactions consist of unequal power and privilege relationships; they reveal differences in perspectives, can be found offensive to others, may display prejudices and biases, and can elicit an emotional response.¹⁹

An example would be an overtly racial interaction that is commonly understood by the entire class. Sabrina, a law student in the Northeast, described her experience with racialized interactions in her criminal law class. She explained:

The one thing that stands out to me is that my second semester is when we took Crim law and it was the same semester that the Trayvon Martin incident took place. I was literally the only black person in my section in Crim law, I think it was made up of maybe two or three sections combined, but I was the only black student in the class. I sat front row, and I kind of like became the voice for African Americans everywhere. And the professor didn't quite know how to moderate that conversation.

I mean he didn't really know how to moderate it. He would be like "well that's an interesting perspective." It was kind of like he already had his mind made up about his course, because he's been studying this for numerous years, and listening to material for a long time. It was kind of like he didn't really care

506 (1997).

16. See PAUL C. TAYLOR, *RACE: A PHILOSOPHICAL INTRODUCTION* 5-6 (2d ed. 2013) (discussing how race talk is expressive, interpretive, and all around us).
17. See Derald Wing Sue, *Race Talk: The Psychology of Racial Dialogues*, 68 *AM. PSYCHOL.* 663, 664-65 (2013).
18. This is particularly true if the students come from underrepresented groups.
19. See Derald Wing Sue et al., *Racial Microaggressions and Difficult Dialogues on Race in the Classroom*, 15 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 183, 184 (2009).

about that aspect of that. It was more like he had an answer in mind that he wanted to hear from students, and mine was not it.²⁰

In this example, the death of Trayvon Martin evoked the complexities of race, but so did the fact that only one student of color was present in the classroom. This type of interaction and discussion had numerous levels of racialized interaction that were compounded by the class demographics.

Additionally, a racialized incident could be implicit, such as students snickering when a student of color speaks, or a professor of color receiving pushback from students about her qualifications. As pointed out in the article *Race and the Core Curriculum in Legal Education*,²¹ the property case *Johnson v. M'Intosh* brings up a host of racial issues about land obtained from Native American people as opposed to grants from the English government.²² It is foreseeable that this type of case could bring up comments about Native Americans, and students could comment on the racial hierarchy that existed for people of color, including Native Americans.

In both the Trayvon Martin and property examples, the students and the entire classroom are negotiating the complexities of race. The Trayvon Martin incident is explicit, and was probably expected by the professor, despite the student's evaluation that he was not prepared for the conversation surrounding race. In the property example, a professor may or may not be prepared to navigate a racialized interaction, particularly since the racialized interactions can come in endless forms and dynamics, thus making them difficult to navigate. A host of issues could be brought up, such as someone expressing the view that conquered people have no right to their land. Adversely, a student could comment on the vast history of white supremacy. These types of racialized interactions necessitate professor readiness for navigating issues on a moment's notice.

A 2009 study conducted by Sue found that the typical reactions for students during racialized interactions include fear, anxiety, anger, defensiveness, sadness, crying, leaving the classroom, and withdrawing from the class.²³ Another study by Sue explored how students of color experienced racialized incidents in the classroom. Sue's study found that the participants struggled with a cognitive dilemma of whether or not to speak up during these

20. Erin Lain, *A Phenomenological Case Study: The Law School Environment as Experienced by Academically Dismissed Black and Latina/o Law Students* 104 (2015) (on file with author).

21. See Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1512, 1513-20 (1991) (arguing that race should be a central focus in law school curriculum).

22. *Id.* at 1522. In *Johnson* the Court found in favor of the litigant, who had title through grants from the English crown as opposed to those who had received a grant from the Illinois and Piankeshaw nations. See *Johnson v. M'Intosh*, 21 U.S. 543, 590 (1823). The Court, with Justice Marshall writing the opinion, decided that the titles received from the government were superior to titles received from native tribes. Most notably the opinion refers to the native tribes as "fierce savages." See *id.*

23. Derald Wing Sue et al., *How White Faculty Perceive and React to Difficult Dialogues on Race*, 37 COUNSELING PSYCHOLOGIST 1090, 1098-1101 (2009).

interactions; they felt their integrity being attacked, they were fearful of the consequences of the conversation, and they were exhausted at having to deal with microaggressions.²⁴ When these interactions are effectively navigated, they can improve racial harmony, racial literacy, communication, and learning.²⁵ When they are ineffectively navigated, they can affect the mental health of all students,²⁶ perpetuate stereotypes, produce the stereotype threat effect²⁷ and lower productivity and academic performance,²⁸ and lessen empathy and compassion for others.²⁹

When students experience high emotional responses during a racialized interaction within the classroom, elements of fight, flight, or freeze response are triggered that stem from our threat coping mechanism. For different individuals, being faced with a highly charged topic—such as race within the classroom—may evoke symptoms of escape, such as flight or freeze, or a defensive response, such as fight.³⁰ Within the classroom, these three basic response systems could result in different behaviors. The fight response may

24. See Sue et al., *supra* note 19 at 187. Microaggression is a term used to describe small acts of intolerance. Derald Wing Sue, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010) They can be defined as “the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group.” *Id.* (For example, a woman changing sides of the street as she is walking to avoid oncoming black men would be a microaggression.)
25. See Sue, *supra* note 17, at 664. Additionally, Sue suggests that successful racialized dialogues can limit fear of differences and can increase compassion in students. *Id.*
26. See Derald Wing Sue et al., *Racial Microaggressions in the Life Experience of Black Americans*, 39 PROF. PSYCHOL.: RES. & PRAC. 329, 330 (2008).
27. Stereotype threat is the social-psychological impact on a person from negative stereotypes, which typically manifests in heightened stress. See Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 379 (2002). This stress can affect a student’s performance. See *id.* The typical illustration of stereotype threat is women performing worse on math exams when faced with the stereotype that women are bad at math. See *id.*
28. See Erin C. Lain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal*, 45 J.L. & EDUC. 279 (2016) (finding that black and Latino students who were academically dismissed from law school experienced a lack of safety in their environment that contributed to their academic performance); Jessica Salvatore & Nicole J. Shelton, *Cognitive Costs of Exposure to Racial Prejudice*, 18 PSYCHOL. SCI. 810 (2007) (finding that black subjects experienced the greatest cognitive impairment when they saw ambiguous evidence of prejudice, whereas white subjects experienced the greatest cognitive impairment when they saw blatant evidence of prejudice.).
29. See Lisa B. Spanierman, V. Paul Poteat, Amanda M. Beer & Patrick Ian Armstrong, *Psychosocial Costs of Racism to Whites: Exploring Patterns Through Cluster Analysis*, 53 J. COUNSELING PSYCHOL. 434 (2006) (discussing the relationship between unempathetic/unaware and insensitive/afraid clusters with lower awareness).
30. See D. Caroline Blanchard et al., *Human Defensive Behaviors to Threat Scenarios Show Parallels to Fear- and Anxiety-Related Defense Patterns of Non-Human Mammals*, 25 NEUROSCIENCE & BIOBEHAVIORAL REVS. 761 (2001) (review of defensive behaviors).

manifest in monopolizing the classroom dialogue, a raised voice, reddened face, or even crying. The flight and freeze response may result in students getting up to leave the room, withdrawing from the conversation, or not finding the words to articulate thoughts. The professor will need to be prepared to navigate and support these types of emotional reactions to create a successful and productive learning experience while navigating racialized dialogues.³¹

Psychological Safety

Scholars have long discussed the hostility of the law school classroom for minority students; often the sense of feeling unwelcome in the law school stems from not feeling safe.³² As first articulated by Strange and Banning in their book *Educating by Design*, safety and inclusion serve as the first in a hierarchy of needs for a student to succeed in their educational pursuits.³³ Feeling safe goes beyond physical aspects; safety also refers to the emotional and psychological security of the student. The theory of psychological safety, from the organizational psychology field, addresses how a person negotiates risks within a group setting.³⁴ Further defined in the learning environment, psychological safety is “the sense that one’s identity, perspectives, and contributions are valuable, despite the experience or possibility of discomfort or harm within a learning setting.”³⁵ Psychological safety allows students to be open to learning without a sense of vulnerability. When safety is lacking, students invoke defense mechanisms that monopolize the students’ cognitive energy.³⁶ Thus, they spend much of their energy coping rather than learning. Furthermore, studies show that hostile environments that attack the psychological safety of students

31. Danielle J. Maack, Erin Buchanan & John Young, *Development and Psychometric Investigation of an Inventory to Assess Fight, Flight, and Freeze Tendencies: The Fight, Flight, Freeze Questionnaire*, 44 COGNITIVE BEHAV. THERAPY 117 (2014) (describing the fight, flight, freeze phenomenon and providing a validated tool to measure the response).
32. See Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 238 (2001) (“studies of law schools reveal that women and students of color often experience these environments as hostile—they often feel alienated, isolated, devalued and attacked”); Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1761-62 (2007) (suggesting that the hostile learning environment affects minority student performance); Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL’Y 83, 123 (2013) (discussing the need for affinity groups to create a safe space within the law school environment for minority students because the wider culture is not safe).
33. C. Carney Strange & James H. Banning, *EDUCATING BY DESIGN: CREATING CAMPUS LEARNING ENVIRONMENTS THAT WORK* (Ursula Delworth et al. eds., 2001).
34. See Erica Gabrielle Foldy, Peter Rivard & Tamara R. Buckley, *Power, Safety, and Learning in Racially Diverse Groups*, 8 ACAD. OF MGMT. LEARNING & EDUC. 25, 26 (2009).
35. Jasmine D. Williams, Ashley N. Woodson & Tanner LeBaron Wallace, “Can We Say the N-word?: Exploring Psychological Safety During Race Talk”, 13(1) RES. HUM. DEV. 15, 18 (2016).
36. See Sue, *supra* note 17 at 663-72 (discussing the nature of racialized incidents and the common reactions among white faculty and students and faculty and students of color).

can contribute to poor academic performance among minority students.³⁷ While professors are negotiating racialized interactions within the law school setting, psychological safety of students should be their ultimate goal.

Another definition of safety within the educational setting is an environment free from humiliation. Callan describes this as “dignity safe,” in which being humbled is acceptable but being humiliated is not.³⁸ In his analysis, being humbled is akin to suffering a setback but does not rise to the level of the student questioning her worth or whether she belongs, which is how Callan defines humiliation. This notion helps to distinguish safety within the classroom from unreasonably hurt feelings.³⁹ Effective teaching requires acknowledgment of our history and stratification in our society, which leads to various groups being prone to humiliation or feeling worthless. When racialized interactions take place within the classroom, 400 years of history along with current inequities are compounding the sense of safety experienced by students in the discussion. As such, the professor, being aware of the issues of safety arising, may want to quickly navigate away from the topic to protect vulnerable students. However, that strategy rarely protects psychological safety of the student because of a lack of resolution and the reality that students know that others have hurtful views or do not understand privilege or oppression. One core component of psychological safety is feeling valued, or not feeling worthless or excluded. Knowing that a professor will help the class safely navigate racial interactions provides more sense of belonging and worth than having a professor cut off conversation to hide potentially humiliating comments.

A lack of psychological safety can harm all students, but students of color can be adversely affected on a more significant level.⁴⁰ Several scholars suggest that factors that lead to a lack of safety, including direct discrimination, stereotype threat, microaggressions, and racial unevenness, can result in diminished performance or academic dismissal from law school.⁴¹ These phenomena destroy safety, preoccupy a student with coping rather than learning, and

37. See John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 844 (2001) (discussing how prejudice and aversive racism affects performance); see Salvatore, *supra* note 28 at 810-15 (finding that black participants experienced impairment when faced with ambiguous prejudice).

38. See Eamonn Callan, *Education in Safe and Unsafe Spaces*, 24 PHIL. INQUIRY EDUC. 64 (2016).

39. See *id.* Often, the dialogue about safety on campus diverges into a discussion about how sensitive students are these days, but thinking in terms of humiliating versus humbling helps define a version of safety that can be understood and adopted by most.

40. See Lain, *supra* note 28.

41. See Barnes, *supra* note 32 (discussing the impact of race-based barriers on law school achievement among students of color); Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 72 (2013) (discussing the racial unevenness, or the presence of burdens on individual solely because of race, that exists for some students in law school); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools”*, 7 BERKELEY AFR.-AM. L. & POL'Y 1, 17 (2005) (discussing the hostile environment faced by minority students in law school and how it may adversely affect academic performance).

interfere with their cognitive process. Without maintaining an environment in which students are free from humiliation and feel their identity and perspectives are valued, professors can put students at a high risk of struggling so much that they will not be able to obtain a juris doctorate. The consequences from this struggle are a homogeneous profession, for which the legal field has already been criticized.⁴² Maintaining a psychologically unsafe environment that disproportionately affects students of color further perpetuates systemic issues of race that provide a better opportunity for those in the majority to become lawyers. Additionally, being a lawyer provides a position of power to those who hold the title, and when the profession maintains an unbalanced number of whites, then it further stratifies our country based on race.

Professor Reactions to Racialized Interactions

A study conducted by Pasque found commonplace and ineffective ways in which professors respond to racialized interactions and microaggressions in the classroom. These practices included failing to recognize the interactions, avoiding the conflict, and controlling the situation. Most professors range from *not recognizing* to *controlling* throughout a course, or even throughout a particular class session. Each of these teaching techniques results in various power dynamics and allows for more or less psychological safety and learning within the environment.

Not Recognizing Racialized Interactions

Within the Pasque study, a section of the faculty reported that they never experienced racialized interactions within their classrooms.⁴³ Faculty who taught classes in fields of study that did not overtly intersect with race, such as science or math, most frequently reported no issues with racialized interactions. Those who teach in the transactional fields of law, such as business association or contracts, also may not recall racialized interactions within the classroom. However, the understanding that our culture is inherently racialized suggests that there may be more hidden racialized interactions within the classroom than faculty may recognize.⁴⁴ For example, in the most benign classroom discussion about a topic not explicitly about race, a racialized interaction can occur when the comments of a minority student are discredited and ridiculed by others. Not picking up on these interactions results from a host of reasons, including

42. See Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.4ff843464557.
43. See Penny A. Pasque et al., *Pedagogical Approaches to Student Racial Conflict in the Classroom*, 6 J. DIVERSITY HIGHER EDUC. 1, 6 (2013).
44. Critical race theory examines society and culture through race, law, and power. See Yosso, *supra* note 15, at 69-70. This theory suggests that racism is pervasive throughout social structures and focuses on a social justice outcome. See *id.*

the societal norm of colorblindness.⁴⁵ This norm dictates that we should not see color and evaluate people only on their intrinsic nature. Colorblindness is a strategy to appear unbiased but results in the lack of attribution of race when it may be an underlying factor.⁴⁶ The Pasque study suggested that some faculty recognized differences of opinions or conflicts but were not willing to attribute these interactions to race.⁴⁷ Within the law school context, when students are encouraged to argue either side, and interactions are inherently adversarial, it lends itself to interactions that evoke race without being explicit.⁴⁸

Implicit racialized interactions in the classroom often extend from microaggressions or everyday, commonplace acts of intolerance.⁴⁹ Depending on the professor's racial identity development, these occurrences may go unnoticed.⁵⁰ The identity development of both white and nonwhite professors shapes how they see the world. Additionally, social cognition theory suggests that all individuals have biases, prejudices, and stereotypes, and that these are often formed at a very early age.⁵¹ Racial identity development suggests that we all fall on a spectrum of cultural beliefs in relation to our race. For people of color, the spectrum ranges from adhering to or upholding the cultural majority to understanding oppression and seeing themselves as actors to combat it. For white people, the spectrum ranges from colorblind mentality to embracing stereotypes of other racial groups to understanding and combating oppression. When faculty are in beginning stages of their cultural identity, when they do not understand structural racial hierarchies or unconsciously believe that the predominant white culture is superior, they may not recognize racialized interactions within the classroom, especially if the topic being

45. See Evan P. Apfelbaum et al., *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918, 918-19 (2008) (discussing colorblindness as a norm and studying when colorblind tactics are used as a method to not appear prejudice).
46. *Id.*
47. See Pasque et al., *supra* note 43 at 6-7.
48. See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 523 (2007) (describing the hierarchical nature of law school).
49. See Sue et al., *supra* note 23 at 1092.
50. See Derald Wing Sue & David Sue, COUNSELING THE CULTURALLY DIVERSE: THEORY AND PRACTICE 376-86, 407-21 (7th ed. 2016) Theories of Racial/Cultural Identity Development provide an understanding about how individuals think about and relate to their race. *Id.* These models suggest that we do not all understand ourselves as cultural beings in the same way. *Id.* In earlier stages, individuals either idealize the majority or see the world through a 'colorblind' lens. *Id.* In later stages, individuals can uphold their ethnic group and feel anger towards others. *Id.* Finally, in the most advanced stages, individuals can recognize their membership in an ethnic group put position themselves as individuals and members of humanity. *Id.* In this stage, individuals will also recognize and fight to combat oppression of others. *Id.*
51. See Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 545-46 (2015).

discussed is seemingly race-neutral. For example, if no one will sit by a Latina or African-American student on the first day of class, this may go unnoticed by a professor who is in the colorblind stage of racial identity development. Among the white majority in the room, choosing a seat to sit in may seem facially neutral, but for the student of color, this is a racialized incident.

Avoiding or Minimizing Racialized Interactions

Avoiding and minimizing racialized interaction within the classroom is a common response among professors, but this strategy provides little cultivation of psychological safety, and it can be harmful because it provides no learning opportunity.⁵² In the Pasque study, professors recognized when race was playing a role in an interaction, but they reported not wanting to spend time on arguments when it did not pertain to the class topic, not knowing how to navigate the experience, or not feeling comfortable with the emotions that would result in trying to deconstruct the interaction.⁵³

The tendency to avoid interactions largely results from anxiety about losing control and feeling uncomfortable. When confronted with a racialized interaction, a professor who attempts to effectively teach through the moment runs the risk of appearing racist,⁵⁴ realizing her own biases or prejudices,⁵⁵ or confronting her own privilege.⁵⁶ A professor who is navigating a conversation about racial disparities within the criminal justice system and allows the conversation to continue after a student suggests disproportionately more black and brown people are incarcerated because those groups have a violent disposition risks having students attribute the bias or bigoted statements to the professor. Similarly, the professor may start to become aware of her own privileges if she has never considered these issues before, or she may realize her biases if she finds herself agreeing with the student's comment.

These possibilities put the professor in an extremely vulnerable position; thus, the professor may feel avoidance is the better alternative. The problem with avoiding or minimizing for these reasons means that the comfort of the professor is being valued over the learning of the students. Particularly in the field of law, in which students need a significant amount of cultural competency to be successful in practice, the comfort level of the professor should not play a role.⁵⁷ Doing so would be akin to a professor not covering

52. See Pasque et al., *supra* note 43, at 7-8.

53. *Id.*

54. See Sue, *supra* note 17, at 664.

55. See John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (discussing how whites perceive their implicit and explicit actions in relation to their biases, as perceived by others).

56. See Spanierman et al., *supra* note 29, at 438-40 (discussing findings in a study that suggests that when confronted with privilege, those whites fall into various ranges of empathic reactions (e.g., sadness and anger); white guilt; and white fear (e.g., of other races)).

57. See Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for*

the rule against perpetuities because she was uncomfortable with the topic, despite its being tested on the bar exam.

In addition to avoidance, failing to provide students with a necessary learning experience also legitimizes the racialized interaction. When the professor redirects the conversation, uttered sentiments left without explanation leave those affected by the sentiments wondering if the professor agrees. It also pushes the reactive dialogue outside of the classroom, where a professor cannot moderate or manage the balance of power and perspectives of students.

Controlling Racialized Interactions

In the Pasque study, faculty also respond to racialized interactions by using their authority to stop or correct conversations. This type of response often takes the form of a monologue, chastisement of the initiating student, or changing the subject.⁵⁸ As with avoidance, the faculty who reacts to racialized interactions in a controlling way is largely acting out of fear. If the faculty member's authoritarian response manifests in a lecture to students, the result is essentially the same as with avoidance. Students construct their own narratives and dialogues about the incident outside of the classroom without guidance.⁵⁹ The authoritarian lecture likely does not change the mind of the aggressors in the situation because they were not able to analyze the interaction and hear different perspectives. Similarly, those who feel victimized by the interaction can also feel further stigma as a result of the professor's need to rescue and rehabilitate the class with his or her authority, much as being the teacher's pet produces a need to be protected.⁶⁰

Studies show that when individuals of color experience racism, either directly or vicariously, significant psychological symptoms occur. These include anxiety, depression, and hostility, in addition to feelings of hopelessness and lower self-esteem.⁶¹ Similarly, although whites directly benefit from systemic racism, research has shown that they also experience a psychological cost.⁶²

Cultural Competency, 38 S.U. L. REV. 1 (2010) (arguing for cultural competency to be a focus in legal education and outlining barriers to incorporating cultural competency into the curriculum and pedagogy).

58. See Pasque et al., *supra* note 43, at 8-9.

59. See Sue et al., *supra* note 19, at 187-89.

60. "[W]e don't have that opportunity to grow and challenge ourselves because we're looked at as ethnic." *Id.* at 188.

61. See Patton O. Garriott et al., *Individual Differences in the Impact of Vicarious Racism: African American Students React to the George Zimmerman Trial*, 23 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 174 (2017) (exploring how components of racial identity intensify negative psychological reactions to an incident of vicarious racism); Vanessa M. Nyborg & John F. Curry, *The Impact of Perceived Racism: Psychological Symptoms Among African American Boys*, 32 J. CLINICAL CHILD ADOLESCENT PSYCHOL. 258, 258-66 (2003) (studying the external symptoms of racism on African-American boys).

62. See Patton O. Garriott, Keisha M. Love & Kenneth M. Tyler, *Anti-Black Racism, Self-Esteem, and the Adjustment of White Students in Higher Education*, 1 J. DIVERSITY HIGHER EDUC. 45 (2008)

Fear, anxiety and lower self-esteem can result from both holding racist views and witnessing racism among whites.⁶³ To mediate these tangible results from racial interactions in the classroom that perpetuate racism, time and space must be provided for students to navigate these complex issues. When the conversation is cut off, the interaction likely remains one of a racist, bigoted, or biased nature, thus invoking the psychological results that have been demonstrated in studies.⁶⁴

The impulse of faculty to cut off dialogue before it gets out of control or before someone gets offended also stems from a peripheral knowledge that students need psychological safety within the classroom.⁶⁵ A professor may feel that control is the best way to protect students from hurtful dialogue and to promote cultural competency. However, to prepare them for the profession of law, in which lawyers experience a range of racialized interactions within their practice, a professor who helps to guide students through these interactions will provide a better learning experience than cutting off the conversation. Teaching through these interactions provides a framework for how students can use these skills in their professional careers.

Best Pedagogical Approaches

Various studies explore the most effective ways to navigate racialized interactions while maintaining psychological safety and promoting learning.⁶⁶ In addition to receiving training, studies show that faculty who demonstrate attunement, authenticity, and power-sharing generate the most effective class dialogues about race.⁶⁷ These three techniques require that the professor give adequate time to these conversations so that students have the ability to learn through the experience. Rushing through these interactions results in stopping the conversation in the highly emotional phase without transitioning to the phase of analysis of different perceptions. Although professors may feel pressured to cover content, allowing for racialized interactions to be fully deconstructed can promote learning in other areas of the class.⁶⁸

(exploring the negative impact racism toward blacks has on whites).

63. See Diane J. Goodman, PROMOTING DIVERSITY AND SOCIAL JUSTICE: EDUCATING PEOPLE FROM PRIVILEGED GROUPS 84-100 (2011) (discussing the cost of oppression for those in the majority).
64. See Garriott et al., *supra* note 61; see Nyborg & Curry, *supra* note 62.
65. See Sue et al., *supra* note 23, at 1100.
66. See *id.*; Sue et al., *supra* note 19; Sue, *supra* note 17; Pasque et al., *supra* note 43; Williams, *supra* note 35.
67. See Chris Linder, Jessica C. Harris, Evette L. Allen & Bryan Hubain, *Building Inclusive Pedagogy: Recommendations from a National Study of Students of Color in Higher Education and Student Affairs Graduate Programs*, 48 EQUITY & EXCELLENCE EDUC. 178 (2015) (finding that to build racially inclusive classrooms, authenticity, vulnerability, and validation must be present); Williams, *supra* note 36.
68. See *Supra* note 33 (describing the need for safety as the first hierarchy of need).

While some may argue that covering content is essential, there will always be areas of the law that cannot be covered and that students will need to learn on their own for the bar exam or practice. Part of the duty of legal education is to provide students with the skills to be successful attorneys.⁶⁹ This includes analysis, writing, and reasoning skills, but it also includes emotional intelligence and cultural competency skills. Without a knowledge of how systemic oppression and racism shape structures in this country, including the law, students will go on to be lawyers who simply take the system at face value instead of critically evaluating and improving it. Similarly, to work with clients of diverse backgrounds, cultural understanding and examining one's own biases, prejudices, and privileges are crucial to being a successful counselor.⁷⁰ Using these techniques to successfully navigate racialized interactions in the classroom will give students a sense of psychological safety. This will, in turn, promote belonging and learning and will help students develop their cultural competency. This is a critical skill for professors to develop and is equal to helping students understand subject matter jurisdiction or the restrictive covenants. Helping students navigate racialized interactions and helping them to understand the world around them will make them better lawyers.

Attunement

Identifying when a racialized interaction is occurring and understanding that there are likely multiple perceptions in the room allow the professor to facilitate the discussion. Attunement refers to the professor's ability to understand the varying lived experiences of the students.⁷¹ Being aware of these perceptions allows the professor to direct the students to consider different views and, thus, begin the learning process. Attunement does not mean calling on minority students to provide alternative perspectives, as that would diminish psychological safety by exploiting students.⁷² Attunement requires the professor to notice implicit interactions, pause the course content, and redirect the dialogue to allow for multiple perspectives to be shared or for the professor herself to share differing views.

Knowing the students in the class helps with professor attunement. Avoiding stereotyped assumptions about the students and their realities allows a professor to identify when an interaction can result in a lack of psychological safety.⁷³ Awareness of students' backgrounds—where they are from, what their goals are, and what is important to them—provides the

69. Law school is about skill-building.

70. *Id.*

71. See Williams et al., *supra* note 36, at 19-20; see Jonas Aspelin, *Beneath the Surface of Classroom Interaction: Reflections on the Microworld of Education*, 9 SOC. PSYCHOL. EDUC. 227, 230-31 (2006) (discussing misunderstanding/understanding and respect/lack of respect dynamic between professors and students).

72. See Pasque et al., *supra* note 43, at 12.

73. *Id.*

knowledge to see beyond a student's skin color or dress. For example, knowing that a student's religious background is Islam or Judaism helps a professor to be attuned to the varying perspectives in the classroom. Frequently, professors are attuned to student comprehension of a topic in their course. Blank stares, a lack of questions when the material is difficult, or furrowing of the students' brows suggests lack of understanding. Knowing the students' backgrounds, in conjunction with being attuned to varying perceptions and noticing body language, can assist a professor in redirecting the class conversation to address racialized interactions.

Attunement requires a level of cultural competency on the professor's part that brings her out of her own socio-cultural identity. In summer 2016, one of the professors teaching in the CLEO summer institute commented that she realized that she used pictures and references to only white people in her PowerPoints and examples. Teaching a room of more than forty students of color helped her to expand her attunement and to recognize cultural issues in her own teaching. Law professors have to keep up on the latest updates in their area of law, but there is also a need to keep up with cultural awareness. This type of awareness comes from diversity trainings that are held by many institutions, but it also comes from being aware of how race and oppression intersect the area of law in which a professor teaches. In an article on teaching race and whiteness, Armstrong and Wildman use the following illustration to demonstrate how easy race becomes part of the conversation and how developing attunement is necessary.

[T]he professor probed reasons for the plaintiff's involvement. "She was poor; she was probably homeless," said one student. A man in the first row raised his hand and offered in a helpful spirit, "she was probably [B]lack."⁷⁴

This interaction could have taken place in any course offered in law school, not just those that lend themselves to racial dialogues, such as constitutional law or criminal law. Attunement on the part of the professor requires a level of understanding to avoid inviting guesswork at the identity of the plaintiff in this situation, thus invoking a host of stereotypes that could serve as microaggression. In this situation, a student challenged the individual who said, "she was probably Black;" however, that may not always happen. It is the professor's responsibility to have a level of awareness of racialized interactions in the classroom, whether or not students bring it up and whether or not students of color are in the classroom. This awareness can come only from diligently studying issues of systemic oppression and racism within our society.

Authenticity

Being transparent and positioning oneself as a fellow thinker and contributor to the classroom community not only reduce burdens on professors, but allow

74. Armstrong & Wildman, *supra* note 9, at 653.

for students to be authentic in sharing their perceptions.⁷⁵ Authenticity involves professors' verbally acknowledging that they are cultural beings with biases and privileges.⁷⁶ Not only does acknowledging these aspects of self free professors from having to pretend they are superhuman, but it provides a vulnerability to the conversation that allows for others to share.⁷⁷ For example, a white female professor telling students "I have certain privileges that shape my worldview, so it is important for us to hear many perspectives" not only liberates the teacher but allows the students to think about how their own identities shape their perspectives.⁷⁸

The law school environment is based on an intense hierarchy that places the professor as the holder of knowledge.⁷⁹ Often the nature of class discussions within the law school environment serves to test the students' knowledge and understanding of the material, rather than a co-construction of knowledge among everyone in the room.⁸⁰ In the law school learning environment, authority is valued more than inclusion, as demonstrated by the way the professor tests the students' knowledge through the Socratic method. Rarely does a professor share her path to understanding a concept, so students maintain a false perception that the professor is all-knowing and always has been that way. In this type of environment, a professor who admits uncertainty or discloses her positioning as a cultural being changes the dynamics of the classroom and places herself on the same level of learning as the students. Although this is often foreign to the law school norm, it is the only way to navigate the intense conversations surrounding the complexities of race within our culture.

Authenticity allows professors to share when the conversation has entered an uncomfortable zone. Instead of relying on a minority student to point out a racialized interaction, a professor can, and should, take on the role of expressing discomfort. This further allows for dialogue to take place in a psychologically safe environment, because students can maintain their roles as valued members of the community without pointing out sources of pain and frustration in the class. For example, in reaction to a student vocalizing that there is inherent criminality to African-American people, a professor can

75. See Williams et al., *supra* note 35, at 19-20.

76. See Gale Young, *Dealing with Difficult Classroom Dialogue*, in *TEACHING GENDER AND MULTICULTURAL AWARENESS: RESOURCES FOR THE PSYCHOLOGY CLASSROOM* 347, 351-52 (Phyllis Bronstein & Kathryn Quina eds., 2003) (discussing how a successful dialogue includes students and instructors acknowledging their vulnerability and disclosing their own defense mechanisms, stereotyping behavior, and positioning in culture).

77. See Sue et al., *supra* note 19, at 189.

78. *Id.*

79. See Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 769-70 (2004) (discussing hierarchical method of teaching in law school).

80. See *id.*

pause the conversation, state that the comment made her feel uncomfortable, and further the conversation as needed.

Vulnerability feels unnatural to a professor, particularly in the legal field, because professors and students maintain an expert/novice relationship; the nature of class discussion emphasizes this dynamic, with the professor weaving together students' answers to create class instruction.⁸¹ Authenticity allows students to see the professor as a human and opens professors up to critique and ridicule.⁸² Most likely, if professors are attuned and authentic during racialized interactions, they may be accused of pushing a biased opinion.⁸³ However, allowing for a plurality of perspectives, including the professor's own perspective, and explaining that cultural competence is a necessary skill of all lawyers will help to combat those opinions. Stressing the importance of students' understanding the nuances of race in our society and tying this understanding to good lawyering will help students understand the reason for having in-depth conversations when racialized interactions occur within the classroom. Similarly, if the professor does not allow for the deconstruction of a racialized interaction, students can also accuse the professor of allowing or promoting racism or biases.⁸⁴ Authenticity and providing time for dialogue will help students to recognize the complexity of these issues and, hopefully, students will acknowledge that political or racial biases are inherent in everyone.

Power-Sharing

To promote learning and psychological safety, recognizing power and the ability to redistribute it plays a key role in effectively navigating a racialized interaction.⁸⁵ Teachers are often aware when one student monopolizes class discussion and time and usually are able to shift power around to other students to engage all students in learning. The sharing of power during a racialized incident is similar in that the professor needs to be aware of the power structures within the classroom and needs to use her own power to evenly distribute class time to varying perspectives. Dlamini defines power-

81. See Schuwert, *supra* note 79 (discussing law school power dynamic within the classroom).
82. See Eileen O'Brien, "I Could Hear You If You Would Just Calm Down": Challenging Eurocentric Classroom Norms Through Passionate Discussions of Racial Oppression, in IDENTIFYING RACE AND TRANSFORMING WHITENESS IN THE CLASSROOM 68, 70 (Virginia Lea & Judy Helfand eds., 2006) (discussing the role of emotion and humanness helps create an inclusive classroom).
83. See Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37, 42-43 (2008) (discussing students viewing professors as pushing an agenda until the students encounter a cultural difference in specific cases); Ben Zimmer, *Roots of the 'Safe Space' Controversy*, WALL ST. J. (Nov. 13, 2015), <http://www.wsj.com/articles/roots-of-the-safe-space-controversy-1447429433> (discussing the backlash against safe spaces).
84. See Pasque et al., *supra* note 43, at 6.
85. See Williams et al., *supra* note 35, at 19-20.

sharing as the empowerment of students to be responsible for their learning.⁸⁶ Shifting power also entails being aware of the societal structure present within the classroom. Students with particular identities are provided more power than others in a room, thus a professor should be aware if certain students are being talked over or are not being allowed to contribute.⁸⁷

Often when a racialized interaction occurs in the classroom, strong emotions are emitted; some will be silent, others outspoken.⁸⁸ It is the professor's role to distribute power as evenly as possible so all students can take place in learning and make meaning out of the interaction. Although a professor's first reaction may be to cut off dialogue to control the outspoken person or actor, as previously mentioned, this does not provide a learning opportunity.⁸⁹ It simply forces students to deal with the racialized interaction outside of the classroom in a noncontrolled environment.⁹⁰ Professors need to use their platform to limit the power of one or a few individuals and spread power to others in the room.⁹¹ Similarly, if no one is providing an alternative view that supports understanding of racial oppression within our culture and systems, it is the responsibility of the professor to provide that view.⁹²

Professors' roles in a racialized interaction primarily require them to control the process of the dialogue. If one student begins to speak out and monopolize the conversation, it is important for the professor to help the students to begin to think about their own perceptions and exploring others' perceptions. This promotes psychological safety because it allows all students to feel that they are valued even if they are uncomfortable.⁹³ For example, if a student makes a statement that the professor identifies as racialized, the professor can stop and say, "Something about what you said made me a little uncomfortable," or "I think we need to explore that issue in more depth." Then the professor can ask students to take a few moments to jot down their thoughts on what was said, allowing each student to catch up on the cognitive processing that the initiating student already conducted. Finally, the professor can allow for students to share their differing perspectives, which allows power to be shared throughout the class, as in the collaborative-learning technique Think/Pair/Share.⁹⁴ Power-sharing is one of the essential components of the process of

86. S. Nombuso Dlamini, *From the Other Side of the Desk: Notes on Teaching About Race when Racialised*, 5 RACE, ETHNICITY & EDUC. 51, 58 (2002).

87. See Foldy, Rivard & Buckley, *supra* note 34, at 26.

88. See Sue, *supra* note 18.

89. See Williams et al., *supra* note 35, at 19-20.

90. In my experience, this usually takes place on social media and has the potential to turn into bullying.

91. See Williams et al., *supra* note 35, at 19-20.

92. *Id.*

93. *Id.*

94. Think/Pair/Share is a three-step process in which students are asked to think through

deconstructing racialized interactions. Without the professor's effectively facilitating the conversation, the dialogue can spin out of control, with one student dominating the conversation, and emotions can run too high for students to learn.⁹⁵

Regulating and Supporting Emotions

While using the attunement, authenticity, and power-sharing techniques to navigate racialized interactions and maintain psychological safety in the classroom, the professor is responsible for supporting students' emotions. Studies show that high-emotion work⁹⁶ and stress⁹⁷ can affect students' cognitive abilities. However, professor support can mediate this impact through the use of specific techniques. For the interaction to be successful, professors need to help students navigate their stress and emotions to allow essential learning to happen. Ways in which professors decode (listen) and encode (respond) directly affect emotions within a highly charged racialized incident. Emotional response theory suggests that effective decoding, encoding, immediacy, and clarity skills result in positive emotional experiences⁹⁸ and emotional change.⁹⁹ Immediacy includes such decoding behaviors as eye contact and body language.¹⁰⁰ Clarity involves the encoding skills of using examples, descriptions, and explanations to help student understanding.¹⁰¹ Effective decoding and encoding strategies have an impact on student stress and emotion and need to be the primary concern of the professor in navigating a racialized incident.¹⁰²

Two studies by Titsworth et al found that the teacher emotional response that had the most impact on lessening negative emotions and heightening positive student emotions was communication competence, including decoding

the problem or issue on their own, pair with people around them to discuss and compare thoughts, and then finally share with the class as a whole. See Debora L. Threedy & Aaron Dewald, *Re-Conceptualizing Doctrinal Teaching: Blending Online Videos with In-Class Problem-Solving*, 64 J. LEGAL EDUC. 605, 620-21 (2015).

95. See Sue, *supra* note 17, at 664.

96. Emotion work is defined as the active management of emotional displays. See Joseph P. Mazer et al., *The Dark Side of Emotion in the Classroom: Emotional Processes as Mediators of Teacher Communication Behaviors and Student Negative Emotions*, 63 COMM. EDUC. 149 (2014).

97. See Todd David Peterson & Elizabeth Waters Peterson *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 398 (2009) (discussing the impact of stress and depression on learning).

98. See Mazer et al., *supra* note 96; Scott Titsworth et al., *The Bright Side of Emotion in the Classroom: Do Teachers' Behaviors Predict Students' Enjoyment, Hope, and Pride?*, 62 COMM. EDUC. 191 (2013).

99. See Susanne M. Jones & John G. Wirtz, *How "Does" the Comforting Process Work? An Empirical Test of an Appraisal-Based Model of Comforting*, 32 HUMAN COMM. RES. 217 (2006).

100. *Id.*

101. See Titsworth et al., *supra* note 98, at 195.

102. See Scott Titsworth, Margaret M. Quinlan & Joseph P. Mazer, *Emotion in Teaching and Learning: Development and Validation of the Classroom Emotions Scale*, 59 COMM. EDUC. 431, 431-52 (2010).

and encoding skills.¹⁰³ These types of skills include close and active-listening techniques and explaining concepts in a way that is accessible. Similarly, teacher immediacy has been shown to have an impact on students' feelings about the class, in addition to providing credibility to teachers. Successful immediacy skills include making eye contact with students who are speaking, making appropriate facial expressions, and moving freely. Finally, clarity assists in providing emotional support to students. Teacher clarity in communication has been shown to assist students with their perception of well-being¹⁰⁴ and provide a higher level of affinity for the coursework.¹⁰⁵ This includes providing examples and making connections among points of information. When navigating a racialized interaction in the classroom, professors must focus on emotionally supporting students by using nonverbal immediacy skills to invite conversation and help students feel at ease. Using body language that cuts off dialogue, such as not making eye contact or being stiff and rigid, will not help the emotional aspects of the discussion. It is also important that professors focus on communication competency skills such as encoding and decoding the situation. Active-listening techniques, by which the professor helps the conversation by actively listening and providing supportive language to continue the conversation, are essential. Using language that demeans, cuts off, or humiliates students will not support the conversation or the emotions of the students. Finally, being clear in the concepts being expressed and helping students to make connections is essential to support emotions. It is also important that the professor makes it clear that emotions are normal and important in difficult conversations. All of these emotional-support techniques will assist in helping the class navigate the racialized interactions.

Effective communication skills to help regulate student emotion work and stress, align with the attunement principle, by acknowledging heightened feelings students are having. This can be achieved through immediacy, which provides a level of approachability to the situation through the professor's body language.¹⁰⁶ Similarly, authenticity requires the professor provide clarity of thorough examples, self-disclosure, and descriptions while navigating the interaction. This level of authenticity provides interpersonal closeness, which helps to lessen psychological differences between the professor and the students and is also shown to regulate emotion.¹⁰⁷ Finally, in helping students to pause their thoughts through writing and sharing, the professor is helping

103. See Mazer et al., *supra* note 96; Titsworth et al., *supra* note 98.

104. See Michaela Gläser-Zikuda & Stefan Fuss, *Impact of Teacher Competencies on Student Emotions: A Multi-Method Approach*, 47 INT'L J. EDUC. RES. 136 (2008).

105. See Scott Titsworth & Joseph P. Mazer, *Clarity in Teaching and Learning: Conundrums, Consequences, and Opportunities*, in THE SAGE HANDBOOK OF COMMUNICATION AND INSTRUCTION 241 (Deanna L. Fassett & John T. Warren eds., 2010).

106. *Id.*

107. See Jones & Wirtz, *supra* note 99, at 219-22.

them to navigate their stress and emotion. Reflective writing has been shown to help reduce emotional stress.¹⁰⁸

Implementing Attunement, Authenticity, and Power-Sharing

Implementing the attunement, authenticity, and power-sharing strategies for exploring systems of race and oppression within our society, either intentionally or accidentally, requires great attention to human relationships and interactions. Attunement requires the professor to be aware of not only the interaction in the room, but also issues of marginalization, history, and oppression. Although legal educators have long stuck to the core-curriculum canon, there is growing evidence that exploring race as it intersects with society and law is necessary.¹⁰⁹ Similarly, sharing an authentic perception is necessary to frame the conversation surrounding a racialized interaction. This may come unnaturally, as law professors are not used to discussing their own biases or cultural positioning within society. However, without this disclosure and framework, the discussion will likely remain superficial and may not maintain psychological safety; therefore, students will not have the tools to explore race within our society, because they will not naturally evaluate their own cultural positioning. Additionally, the professor's primary role in helping the class to navigate a racialized interaction is to be aware of and manage the power structures in the room. This includes bringing out quiet voices and managing persistent voices. Using collaborative-learning techniques is one effective way to manage this type of dialogue and interaction. Attunement, authenticity, and power-sharing not only allow students to maintain their feeling of value in the classroom, but also help to support and regulate emotions that can impede learning.

Conclusion

When faced with a racialized interaction during the CLEO summer institute, I reacted by avoiding and minimizing the interaction. I took the student out in the hallway of the courthouse and talked to her about her outburst and asked if she was OK. I did not follow up with the remaining forty-three students in the program. I feared that although I am a biracial woman, the students would

108. See JAMES W. PENNEBAKER & JOSHUA M. SMYTH, *OPENING UP BY WRITING IT DOWN: HOW EXPRESSIVE WRITING IMPROVES HEALTH AND EASES EMOTIONAL PAIN* (2016) (summarizing writing techniques to reduce stress); James W. Pennebaker et al., *Disclosure of Traumas and Immune Function: Health Implications for Psychotherapy*, 56 *J. CONSULTING & CLINICAL PSYCHOL.* 239 (1988) (a study instructed fifty healthy students to write about either traumatic or stressful experiences; six weeks after the writing sessions, students reported improved health and mood).

109. Several scholars urge the legal academy to infuse the race and cultural-competency outcomes into education because of the growing disparities based on race that are affected or exacerbated by the law. See, e.g., Ansley, *supra* note 21; Boles, *supra* note 4; Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 *NEW ENG. L. REV.* 889 (1997); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 *ST. JOHN'S L. REV.* 901 (2003).

see me as racist for warning the student about her behavior in the court. I also wondered if my reaction and thoughts in response to the student were in some way racist or biased. The students reported back to me that they stayed up all night discussing the courthouse incident. In hindsight, providing a structured conversation after the courthouse visit would have promoted more learning.

In that situation, I did not show my vulnerability because I was fearful about how the students would perceive me. I prioritized my own feelings and insecurities over their learning, which resulted in a lost opportunity. Although a discussion at the courthouse in the moment would not have been possible, taking time out in the next day's class to hold a space for dialogue would have served the students better than leaving them without a forum for discussion. Sharing my vulnerability would have been risky, but it would have helped students understand how difficult these issues are within our world and how they need to be aware of structures in our country that perpetuate systemic oppression. Although the conversation would have been difficult to navigate, using my role as professor to share power among the students would have promoted more learning than after-hours conversations that did not include everyone. Since the 2016 CLEO summer institute, I have had other opportunities to navigate racialized incidents in the classroom, and although it will always be tough, using the attunement, authenticity, and power-sharing technique has helped to promote student learning and growth.

Recognizing our inherent tendencies within racialized interaction is important so that self-protection does not take precedence over student learning. If your natural reaction is to avoid or control, recognize that the least amount of learning comes from those two reactive techniques. Being attuned to the dynamics of the classroom and your students, being transparent about your privileges and biases, and sharing power throughout the classroom setting provides an environment that allows students to begin to understand the complexities of race within our society, which is essential to being an effective lawyer.

University of Michigan Journal of Law Reform

Volume 55

2022

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

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Recommended Citation

Scott Devito, Kelsey Hample & Erin Lain, *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J. L. REFORM 597 (2022).

Available at: <https://repository.law.umich.edu/mjlr/vol55/iss3/3>

<https://doi.org/10.36646/mjlr.55.3.examinig>

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

Scott Devito, Kelsey Hample & Erin Lain *

ABSTRACT

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

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

Ralph Ellison, *Invisible Man*¹

INTRODUCTION: THE UNEXAMINED EXAM

This Article is written with two purposes. First, we seek to sound the alarm that the bar exam is racially and ethnically biased.² For many, such an alarm will seem absurd. They will argue that the bar examination is difficult, but it is also fair; passing is a function of ability, work ethic, writing skill, and knowledge of the law—not race or ethnicity. Unfortunately, such a belief is unsupported by the evidence.³

Second, we write this Article as a call to action. Philosophers have, for millennia, warned us of the dangers of accepting beliefs without adequately testing them.⁴ Yet that is precisely what the legal community

1. RALPH ELLISON, *INVISIBLE MAN* 1 (1947).

2. All reliable evidence demonstrates that White examinees outperform examinees from communities of color with similar academic indicators. See discussion *infra* Part III (discussing empirical studies of the interaction between race/ethnicity and the bar examination). Additionally, this Article capitalizes all terms that refer to socially-constructed race and ethnic categories.

3. See *id.*

4. Over 2,000 years ago, Socrates argued that the good life was one in which we investigate and challenge our beliefs to determine whether what we think we know, we know. See PLATO, *Apology*, in 1 PLATO IN TWELVE VOLUMES 38a (Harold North Fowler trans., Harvard University Press 1966) (contending that death is a better outcome than living an unexamined life). In the twentieth centu-

has done with regard to the “objectivity” of the bar examination. The profession simply proceeds as if race and ethnicity are irrelevant to the probability that a bar-taker will pass the bar examination,⁵ or whitewashes the evidence of disparate outcomes and deems those differences inconsequential.⁶ Given empirical evidence to the contrary, we contend that the legal community must demand in-depth analysis of the bar examination’s questions, administration, and grading to determine why race and ethnicity appear to impact bar passage rates.

This Article engages in statistical analysis of first-time bar passage rates, at the school-jurisdiction level,⁷ for schools in Uniform Bar Examination (UBE) jurisdictions.⁸ The analysis reveals a highly significant, negative correlation between a school’s proportion of Black or Hispanic students and the first-time pass rate for that school-jurisdiction.⁹ In essence, as a school’s proportion of Black or Hispanic students increases, the school’s first-time bar passage rates decline three years later (when the enrollees are expected to graduate). This result is statistically significant to a p -value of 0.01.¹⁰ Such a result should greatly concern the legal profession as it provides clear evidence of disproportionate bar examination outcomes based on race and ethnicity

ry, Karl Popper proposed the theory of falsificationism which held that theories that could not, in practice, be shown to be false were pseudo-science, not scientific theories. KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 40–41 (1959) (proposing falsifiability as a criterion of the demarcation of science from non-science).

5. For example, despite testimony and evidence adduced to the Council of the ABA Section of Legal Education and Admissions to the Bar that the change it was considering for ABA-accredited law school bar passage standards was harmful to minorities, the Section simply, and without publicly releasing any documentary support, changed the standard anyway. *See, e.g.*, Society of American Law Teachers, *Letter to the American Bar Association House of Delegates* (Jan. 21, 2019), <https://www.lwionline.org/sites/default/files/SALT%20Jan%202019.pdf> [<https://perma.cc/U9BF-TYL2>] (“Adopting the proposed standard will have substantial negative impact on HBCU and other law schools with significant enrollment of people of color, including the law schools in Puerto Rico.”).

6. *See* discussion *infra* Part III (discussing empirical studies of the bar exam).

7. A “school-jurisdiction pass rate” is the pass rate of all students who graduated from a specific law school (e.g., the University of Connecticut School of Law) and passed the bar examination in a given jurisdiction (e.g., New York).

8. *See* discussion *infra* Part V.

9. *See* discussion *infra* Section V.B (describing the results of our analysis of the UBE).

10. *See id.* (noting that the correlations found in our study are statistically significant at the ninety-nine percent confidence interval). All measures of statistical significance discussed in this Article relate to the p -value of a statistical hypothesis. We will consider a result to be statistically significant if its corresponding p -value is less than or equal to 0.01. This means that there is no more than a 1 in 100 chance that our result is due to random variation. DAVID HENSHER, JOHN M. ROSE & WILLIAM H. GREENE, *APPLIED CHOICE ANALYSIS: A PRIMER* 46–47 (2005) (explaining p -values and statistical significance). Normally, in social science, a p -value of 0.05 (the result has a 1 in 20 chance of being due to random variation) is used as a measure of statistical significance. *See, e.g., id.*; SCOTT E. MAXWELL & HAROLD D. DELANY, *DESIGNING EXPERIMENTS AND ANALYZING DATA: A MODEL COMPARISON PERSPECTIVE* 47 (Wadsworth Publishing Company, 2d ed. 2004). That our results are statistically significant at a more stringent p -value of 0.01 (the result has a 1 in 100 chance of being due to random variation) demonstrates the robustness of those results.

and suggests that such disproportionality may result from the exam itself. It should also prompt the legal community to further study the bar exam, using student-specific data, to better understand why bar passage rates decline as a school's proportion of Black or Hispanic students increases.

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

I. THE BAR EXAM: A HISTORY OF RACIAL GATEKEEPING

Admission to the bar has not always been as uniform or academic as the procedures utilized today. For much of the nineteenth century, the bar consisted of an oral examination administered by an official acting on behalf of a particular jurisdiction constrained by few formal guidelines.¹¹ Toward the latter half of the nineteenth century, these relaxed standards were challenged. Beginning in 1880, states created central-

11. Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, 21 UNIV. WIS. L. SCH. GARGOYLE 3, 3 (1990) (discussing the early history of admissions to the bar in the United States).

ized bar examiners that gradually introduced state-wide written examinations for bar admission.¹²

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

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

12. See *id.* at 3–4 (discussing admission to the bar during the nineteenth Century).

13. *Id.* at 4.

14. *Id.* (discussing the development of the NCBE).

15. *Id.*

16. *Id.*

17. *Id.*

18. E.g., Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332, 365 (2013).

19. See Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363, 392–93 (1998) (discussing the history of law school admission standards).

20. See *id.* at 393–94 (discussing reports of Alfred Z. Reed).

role that such beliefs played in discussions surrounding the prospect of a formal bar.²¹

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

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

21. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 648–54 (2d ed. 1985).

22. See Roithmayr, *supra* note 19, at 398 (discussing the ABA’s accidental admission, and subsequent revocation, of membership to three Black attorneys).

23. *Id.*

24. See Sweatt v. Painter, 339 U.S. 629, 631 n.1 (1950) (“It appears that the University has been restricted to white students, in accordance with the State law.”) (citing TEX. CONST. art. VII, §§ 7, 14; 1925 Tex. Rev. Civ. Stat. 2643b (repealed 1971); 1925 Tex. Rev. Civ. Stat. 2719 (repealed 1969); 1925 Tex. Rev. Civ. Stat. 2900 (Supp.)).

25. *Id.* at 635–36 (finding that the University of Texas Law School’s denial of admission to Mr. Sweatt violated his right to equal protection under the Fourteenth Amendment).

26. Roithmayr, *supra* note 19, at 399 (quoting Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 343 (1938)) (internal quotation marks omitted).

27. Melli, *supra* note 11, at 4 (discussing the history of the bar exam).

28. *Id.*

29. *Id.*

ized standards that applicants were required to meet.³⁰ Like other bar exam unification initiatives, the MBE was an attempt to raise standards for entering the practice of law.³¹

States adopted the MBE into their bar exam practices because it relieved some of the burden of creating and grading their own exams.³² Further pressure to adopt the bar exam arose as, starting in the 1970s, the number of bar examinees increased significantly.³³ In 1963, 20,776 students entered law school.³⁴ Just ten years later, in 1973, that number reached over 37,000.³⁵ Law school enrollment continued to increase each decade, peaking at enrollment of 52,400 students starting law school in 2010.³⁶ This increase has played an essential role in state adoption of the MBE as a means of testing applicants for admission to the bar.³⁷

The modern history of the bar examination has been a steady march toward a national test; the MBE was introduced in 1972, followed by the Multistate Professional Responsibility Examination (MPRE) in 1980, the Multistate Essay Examination (MEE) in 1988, and the Multistate Performance Test (MPT) in 1997.³⁸ Then the NCBE first offered the UBE, which “is composed of the MEE, the MPT, and the MBE,” in February 2011.³⁹ One of the stated benefits of the UBE is that its adoption will “help ensure the consistency and quality of the bar exam.”⁴⁰ The UBE is currently offered in thirty-nine jurisdictions.⁴¹

While this shift to exam uniformity (and portability of score in the case of the UBE⁴²) is laudable, uniformity alone does not guarantee neutrality as to race or ethnicity.⁴³ In the 1970s (after the MBE’s initial in-

30. *Id.*

31. *Id.*

32. *See id.*

33. *See id.*

34. *See Enrollment and Degrees Awarded 1963–2012 Academic Years*, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf [perma.cc/BV8Y-LUVH].

35. *See id.*

36. *See id.*

37. Melli, *supra* note 11, at 4 (discussing the history of the bar exam).

38. AM. BAR ASS’N, RESOLUTION 109 AND REPORT TO THE HOUSE OF DELEGATES 2 (2016) <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F193> [perma.cc/5RAC-F5N6] (providing a short history of the modern bar exam).

39. *See id.* at 3 (describing the UBE).

40. *Id.* at 6 (discussing benefits of UBE adoption).

41. *See Jurisdictions That Have Adopted the UBE*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube/> [perma.cc/GD4S-FPB3].

42. *See id.* (“[The UBE] results in a portable score that can be used to apply for admission in other UBE jurisdictions.”).

43. For example, algorithmic systems designed to assess risk “bring uniformity, transparency, and accountability to the task,” yet nonetheless are subject to bias. Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2248, 2280 (2019) (“An algorithm can be designed to achieve any one of the [discussed] metrics of output equality, but not all of them together.”). Similarly, as we saw in

production), a string of lawsuits across the country alleged discrimination in the bar exam.⁴⁴ Most notably, in *Tyler v. Vickery*—a class action suit filed on behalf of Black bar examinees who failed the Georgia exam—the plaintiffs alleged outright discrimination, disparate impact, and lack of due process in Georgia’s practices.⁴⁵ The court rejected all three claims, finding that the bar examinees failed to establish intentional discrimination by the Georgia Bar Examiners.⁴⁶ Two years later, Black and Puerto Rican examinees who failed the bar in Pennsylvania also sued based on the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause.⁴⁷ They alleged that changes in the passing score requirements were arbitrary and intentionally discriminated against Black and Puerto Rican examinees.⁴⁸ These examinees achieved scores on the bar exam that would have passed in years prior, but due to Pennsylvania’s increased score requirements for passing, the petitioners failed.⁴⁹ Additionally, as noted in Section II.B *infra*, in the 1980s and 90s, state bars and judiciaries were sufficiently concerned about racial and ethnic bias in the judicial system (including in the bar exam) that they formed committees to study the issue; those committees conclud-

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

44. *See, e.g.*, *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); *Parrish v. Bd. of Comm’rs of Ala. State Bar*, 505 F.2d 12 (5th Cir. 1974), *opinion withdrawn*, 509 F.2d 540 (5th Cir. 1975), and *on reh’g sub nom. Parrish v. Bd. of Comm’rs of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975); *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976), *on reh’g*, 563 F.2d 1130 (4th Cir. 1977); *Pettit v. Gingerich*, 427 F. Supp. 282 (D. Md. 1977), *aff’d* 582 F.2d 869 (4th Cir. 1978); *Delgado v. McTighe*, 442 F. Supp. 725 (E.D. Pa. 1977).

45. The appellants argued

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

Tyler, 517 F.2d at 1093. The court rejected all three of these claims. *See id.* at 1093–1105 (discussing appellants’ arguments).

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

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

48. *Id.*

49. *Id.*

ed that the bar produced disparate outcomes based on the examinees' race and ethnicity.⁵⁰

II. Invisible People

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

50. See *infra* text accompanying notes 76–90 (discussing formation of committees to study disparate outcomes on the bar exam).

51. See, e.g., Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/44E9-YDPW>] (discussing Black Lives Matter protests in the United States); Code Switch, *A Decade of Watching Black People Die*, NPR (May 31, 2020), <https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die> [<https://perma.cc/6HEM-UDDW>] (discussing the current Black Lives Matter protest in the context of Eric Garner's July 2014 death and listing some of the Black people killed by the police since Eric Garner's death).

52. See, e.g., Code Switch, *supra* note 51 (discussing the then current Black Lives Matter protests).

53. Police brutality is often targeted against a person's race. See, e.g., Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 694–98 (1996) (discussing that racist beliefs underlay many acts of police violence against persons of color). At the same time, it is important to note that police brutality can, and is, targeted against other aspects of a person's identity including "sexual orientation, race, gender or gender identity, age or economic status." AMNESTY INT'L, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 164 (2005), <https://www.amnesty.org/en/wp-content/uploads/2021/08/amr511222005en.pdf> [<https://perma.cc/4EDQ-MN8M>].

54. Rasheena Latham, *Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between Institutional Racism in the Criminal Justice System and Trayvon Martin's Death*, 9 S.J. POL'Y & JUST. 80, 81–82 (2014). Institutional racism is particularly pernicious as "[i]t is discrimination permeated in our society from healthcare, education, law enforcement and virtually every institution or organization in America." *Id.* at 82–83. "Institutional racism occurs where an institution adopts a policy, practice, or procedure that, although it appears neutral, has a disproportionately negative impact on members of a racial or ethnic minority group." Vernellia R. Randall, *The Misuses of the LSAT: Discriminating Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 107 (2006).

55. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/post-everything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/> [<https://perma.cc/3PJM-8WXZ>] (discussing the lack of diversity in

strates, the percentage of active lawyers who are Asian, Black, or Hispanic continues to trail core U.S. demographic categories: in the percentage of persons admitted to law school, in the total U.S. population, and in the percent of the U.S. population aged 18–29 with a bachelor's degree. This places people of color at risk, as they are forced to rely on attorneys who are not from their communities and are thereby prone to implicit bias against people of color.⁵⁶

the legal profession); see also A.B.A. *National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, AM. BAR ASS'N (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf [<https://perma.cc/R6AS-WJZ9>] (listing the percentage of active attorneys by race and ethnicity).

56. There is clear evidence that lawyers, like all Americans, demonstrate implicit bias. See, e.g., Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104–05 (2017) (discussing results of study of implicit bias among judges relating to Asian Americans and Jewish Americans); Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53, 54–55 (2020) (discussing his studies showing lower callback rates when the prospective client has a Black-sounding name); Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3104–09 (2018) (noting how racial themes can arise in the context of prosecutorial summations); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631–40 (2013) (discussing how implicit racial bias may affect public defender decisions).

TABLE 1. LAWYER DEMOGRAPHICS

Race ⁵⁷	Active Lawyers ⁵⁸	ABA Law School Admissions ⁵⁹	% U.S. ABA Population ⁶⁰	U.S. Total Population ⁶¹
American Indian/ Alaska Native	<1%	0.5%	0.3%	1.28%
Asian	2%	6.3%	13.1%	5.9%
Black	5%	7.6%	8.9%	13.4%
Hispanic	5%	12.7%	11.4%	18.4%
Native Hawaiian/ Pacific Islander	<1%	0.1%	0.2%	0.5%
White	85%	62.1%	64.4%	76.3%

Some may argue that the true cause of the racial and ethnic imbalance in the legal profession is that there are not enough qualified BIPOC candidates.⁶² But as Eugene K. Pettis notes:

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

58. *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, AM. BAR ASS'N (2021) https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf [<https://perma.cc/4VAT-SZL5>] (providing lawyer trend demographics for the year 2021).

59. *See Section of Legal Education – ABA Required Disclosures*, AM. BAR ASS'N SECTION LEGAL EDUC. & ADMISSIONS TO BAR, <http://www.abarequireddisclosures.org/Disclosure509.aspx> (last visited Feb. 20, 2022) (choose “2020” from the dropdown relating to “Compilation – All Schools Data”; then click “JD Enrollment and Ethnicity” to download the relevant Excel file).

60. *See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS)*, <https://data.census.gov/mdat/#/search?ds=ACSPUMS1YPR2019> (providing educational attainment data for the year 2019) (To find the number of persons by race and age, in the “Select Dataset” dropdown, choose “ACS 1-Year Estimates 1-Year Estimates – Puerto Rico Public Use Microdata Sample”; in the “Select Vintage” dropdown, choose “2019” and then select “NEXT”; in the “filter by Topic” search box, select “Race and Ethnicity”; then check the boxes next to “American Indian and Alaska Native recode,” “Asian recode,” “Black or African American recode,” “White recode,” “Native Hawaiian recode,” and “Other Pacific Islander recode”; then click on “VIEW TABLE”; click on the plus sign next to “On Rows”; then click the box next to “Educational attainment”; then click “VIEW TABLE.” This will provide the number of persons in each race/ethnic category who have achieved various levels of educational attainment in 2019).

61. *See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APRIL 1, 2010 TO JULY 1, 2019 (June 2020)*, <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-sr1h.xlsx> [<https://perma.cc/JFH9-Z2K9>] (listing estimates of populations for the years following the 2010 decennial census) (data in Table 1 selected from the year 2019).

62. *See, e.g.,* George B. Shepherd, *No African Lawyers Allowed: The Inefficient Racism of the ABA's Accredited Schools*, 53 J. LEGAL EDUC. 103, 104–05 (discussing how the American Bar Association's accreditation system's focus on “qualifications” excludes Black people from law school); Sandra S.

That argument is baseless. Somehow recruiters find a way to enroll a disproportionately higher percentage of African-American football and basketball players to Division 1 schools across the country in comparison to their overall numbers in higher education. A “shallow pool of college attendees” never gets in the way of that recruitment effort.⁶³

Similarly, if the legal profession wanted more BIPOC attorneys, it could find a way to fill more slots in law schools with students from communities of color and ensure that those law graduates enter the profession at a higher rate. Those raising this “shallow pool problem” to explain the lack of attorneys and law students from communities of color are falling prey to implicit bias when they assume that the current system is fair (does not unjustly burden or benefit any racial or ethnic group) and accurate (uses the correct predictors of future success in law school and in the practice of law)—it is neither.⁶⁴ The legal profession’s racial and ethnic imbalance is all the more problematic considering its longstanding history. As Table 2 shows, for the last ten years, the proportion of lawyers who are American Indian/Alaska Native and Black have seen small declines; Native Hawaiian/Pacific Islander lawyers have seen no measurable change; Asian and Hispanic lawyers have seen small increases; and lawyers who self-identify as Two or More Races have seen the largest, but still small, increase.

Yamate, *Quest for the ‘Qualified’ Minority*, OR. STATE BAR BULL. 9, 9 (2002) (discussing the problems with law firms seeking to recruit “qualified” candidates from law schools).

63. Eugene K. Pettis, *RX Warning: Quitting Diversity Efforts Too Soon May Result in Harmful Relapse*, 9 FLA. B.J. 18, 21 (2018) (discussing diversity in the judiciary).

64. See, e.g., Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PNAS 16835, 16835 (2004) (providing the results of a decision-making model demonstrating that increasing diversity among decision makers can result in better outcomes than lower diversity focused solely on “high-performing” decision makers); Ayesha Whyte, *Recognizing Implicit Bias to Promote Diversity and Support a Culture of Inclusion and Innovation*, FORBES (Jan. 29, 2021), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/01/29/recognizing-implicit-bias-to-promote-diversity-and-support-a-culture-of-inclusion-and-innovation/?sh=2d7a93ce1cdb> [https://perma.cc/N8ZT-LLVV]. Hiring practices and their “hidden biases” result in “hir[ing] from a shallow talent pool.” Whyte, *supra*.

TABLE 2. TEN-YEAR TRENDS IN LAWYER DEMOGRAPHICS⁶⁵

Race	Percentage Point Change from 2011 to 2021
American Indian/Alaska Native	-0.6
Asian	+0.8
Black	-0.2
Hispanic	+0.9
Native Hawaiian/Pacific Islander	0.0
Two or More Races	+2.0

A. Maybe No One Will Notice the Problem

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

65. ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics, *supra* note 58 (providing lawyer population demographics from 2011 to 2021).

66. While debate over potential changes to the bar exam can be hotly contended at the time they are proposed, once the change is made, the legal profession is effectively walled out from knowing whether the change to the bar exam caused any (negative or positive) changes. For example, when the Florida Supreme Court raised the score required to pass the bar exam in 2003, three years later, the then-chair of the Florida Board of Bar Examiners refused to provide information as to the impact of that change on the pass rates of BIPOC test-takers stating: “This is a question that the board is studying and will forward its findings to the court.” Jan Pudlow, *Has Raising the Pass/Fail Lines on the Bar Exam Had a Disparate Impact on Minority Applicants?*, FLA. BAR NEWS (Dec. 1, 2006), <https://www.floridabar.org/the-florida-bar-news/examining-the-exam/> [<https://perma.cc/W3UX-WB8Y>]. This lack of information may lead members of the profession to assume that “no news is good news”—when that may not be the case.

67. The public seems to ignore the fact of racial/ethnic disparity in bar results even when that data is made known. For example, the ABA has just begun releasing bar data by race. See Stephanie Francis Ward, *New ABA Data Parses out Bar Exam Pass Rates by Race and Ethnicity* (June 22, 2021), <https://www.abajournal.com/news/article/new-aba-data-parses-out-bar-exam-pass-rates-by-ethnicity> [<https://perma.cc/JEC8-5DNQ>]. When we look at that data, we see that BIPOC exam takers underperform against White test takers. See *Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire*, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf. Public response to this data has been effectively nonexistent. The Authors have searched major news media outlets and could not find discussion of these results. Similarly, while a search using Google produces hits on the article, only one moderately well-known news source mentions the article. See Sam Skolnik, *Bar Exam Race Gap Shown in New Passage Rate Data for Law Grads*, BLOOMBERG L. (June 22, 2021), <https://news.bloomberglaw.com/daily-labor-report/bar-exam-race-gap-shown-in-new-passage-rate-data-for-law-grads> [<https://perma.cc/4PDM-AJPL>]. All other search results are for niche law professor blogs like Taxprof.blog and law news aggregators/websites.

68. Despite the fact that the issue of racial and ethnic disparity in bar results is not in the public eye, there are a number of people working on the problem. See, e.g., Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andra A. Curcio, Marsha Griggs, Joan W. Howarth,

there is effectively no publicly available data regarding bar passage rates by race or ethnicity.⁶⁹ California is the only U.S. jurisdiction that provides pass rates by race and ethnicity in its reported statistics each year.⁷⁰ Information from the July 2004 administration of the Texas bar exam is also available, as a result of the legislature directing the Texas Board of Law Examiners to produce such data.⁷¹ Given this state of affairs, people of good intentions simply lack concrete proof that a problem exists.

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

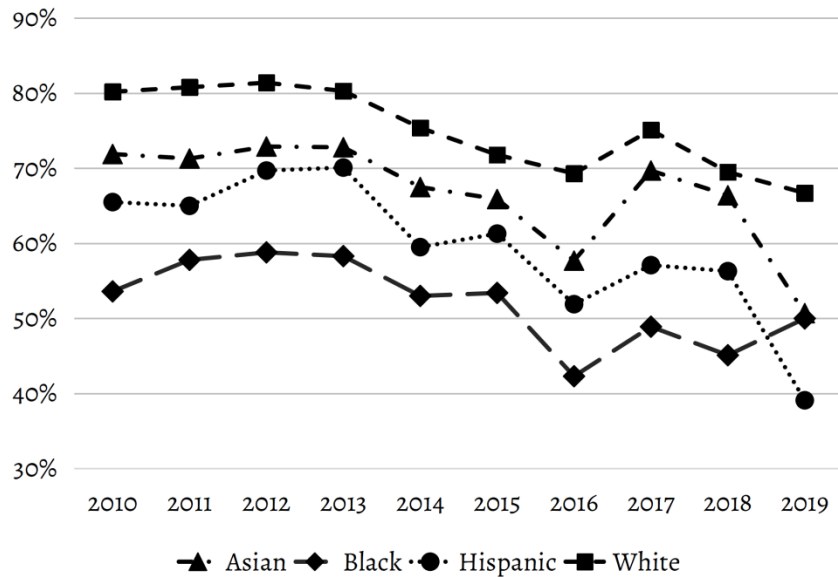
Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *The Bar Exam and the Covid-19 Pandemic: The Need For Immediate Action* (Ohio State Univ. Moritz Coll. of L., Legal Studies Working Paper No. 537, 2020), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3559060_code182808.pdf?abstractid=3559060&mirid=1 (discussing the need for and proposing options for licensing attorneys in light of the COVID-19 crisis); DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [<https://perma.cc/6WQF-2SVE>] (discussing the creation of competency-based measures for admission to the bar).

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

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

71. TEX. GOV'T CODE ANN. § 82.029 (West 2021) (“The Board of Law Examiners shall compile a report indicating the number of applicants who fail the July 2004 bar examination. The data shall be aggregated by gender, ethnicity, and race. The report shall also include an analysis of the identifiable causes of failure and recommendations, if any, to address the causes of failure. The board shall deliver the report to the legislature not later than December 31, 2004.”).

FIGURE 1. JULY FIRST-TIME CALIFORNIA PASS RATE—GRADUATES OF ABA-ACCREDITED LAW SCHOOLS⁷²



This data shows that for the last decade, on average, compared to White examinees, Asian examinees’ pass rates are 8.4 percentage points lower, Black examinees’ pass rates are 22.9 percentage points lower, and Hispanic examinees’ pass rates are 15.5 percentage points lower, on the annual July administration of the California bar exam. In addition, the minimum difference between White and Asian examinees is 3.1 percentage points, for Black examinees is 16.7 percentage points, and for Hispanic examinees is 10.2 percentage points. Furthermore, the maximum difference between Asian examinees and White examinees is 16 percentage points, for Black examinees is 27 percentage points, and for Hispanic examinees is 27.6 percentage points. Finally, at no point is the pass rate of Black, Hispanic, or Asian examinees higher than that of White examinees.

We find similar results in the Texas data. Pursuant to legislation, the Texas Board of Law Examiners collected pass rates from the July 2004 Texas Bar Exam for Asian, Black, Hispanic, and White Texas bar examinees.⁷³ As Table 3 shows, the first-time pass rates for Black, Hispanic, and Asian examinees were below those of White examinees. Asian examinees’ pass rates were 9 percentage points lower, Black ex-

72. See *Exam Statistics*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics> [<https://perma.cc/LS4G-ZH82>] (providing bar examination outcomes by race for each bar examination from June 2007 to February 2021).

73. TEX. GOV'T CODE ANN § 82.029.

aminees' pass rates were 33 percentage points lower, and Hispanic examinees' pass rates were 16 percentage points lower. Over the next two years (from 2004 to 2006), pass rates increased as those who failed the exam retook it. This closed the gap, but White examinees' two-year pass rate was still higher than Asian examinees by 2 percentage points, Black examinees by 17 percentage points lower, and Hispanic examinees by 5 percentage points.

TABLE 3. JULY TEXAS PASS RATE—GRADUATES OF ABA-ACCREDITED LAW SCHOOLS, 2004-2006⁷⁴

Race	First-Time Pass Rate	Pass Rate Within Two Years
Asian	75%	92%
Black	51%	77%
Hispanic	68%	89%
White	84%	94%

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

B. *Didn't We Already Fix This?*

Along with the lack of publicly available data, this Article urges a second explanation for the profession's failure to take clear and decisive action: the profession previously acted to address the problem and thereby concluded that the issue is fixed or being addressed by someone else.⁷⁵

In 1988, the Conference of Chief Justices adopted a resolution “encouraging all chief justices to establish task forces devoted to the study of gender bias and minority concerns as they relate to the judicial system.”⁷⁶ At the time, there were already four such task forces examining

74. STEPHEN P. KLEIN & ROGER BOLUS, INITIAL AND EVENTUAL PASSING RATES OF JULY 2004 FIRST TIMERS 5 tbl.5 (2006), <https://ble.texas.gov/klein-report-0606> [<https://perma.cc/W5PJ-T4YT>] [hereinafter TX PASSING RATES REPORT] (reporting on results of study of Texas bar takers); see also STEPHEN P. KLEIN & ROGER BOLUS, ANALYSIS OF JULY 2004 TEXAS BAR EXAM RESULTS BY GENDER AND RACIAL/ETHNIC GROUP (2004), <https://ble.texas.gov/statistics?keyword=klein#Question2> [<https://perma.cc/VCX5-NFRP>] [hereinafter GENDER & RACIAL/ETHNIC GROUP ANALYSIS].

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

76. Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1169 (1999).

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

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

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

77. *See id.* at 1169–70 (discussing the formation of task forces examining racial and gender bias in the judicial system).

78. FLA. SUP. CT. RACIAL & ETHNIC BIAS COMM’N, “WHERE THE INJURED FLY FOR JUSTICE”: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, FIRST REPORT EXECUTIVE SUMMARY 4 (1990), http://www.floridasupremecourt.org/pub_info/documents/racial.pdf [<https://perma.cc/N4G9-RURL>].

79. *See id.* at 20–21.

80. *Id.*

81. *Id.* at 21.

82. *Id.* at 21–22.

83. *See Report of the New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 262 (1992) (discussing the role of the bar exam in admission to the bar).

84. *See id.* at 263 (describing bar passage rates by race and ethnicity).

85. *See id.*

bar examination “has not been evaluated for cultural/economic bias and job-relatedness,” and (4) “[m]inorities are not adequately represented among contract graders and staff of the New York State Board of Law Examiners.”⁸⁶ In light of these findings, the Commission made a number of recommendations, including monitoring performance by race and reviewing questions for cultural bias.⁸⁷

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

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

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

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

86. *Id.* at 269.

87. *See id.*

88. Richelle M. Wahi, Minnesota Judicial Branch Action Following the 1993 Minnesota Supreme Court Task Force on Racial Bias in the Judicial System and Recommendations for Minnesota Judicial Branch Action in FY20-21 at 4, 29 (2019), https://www.mncourts.gov/mncourtsgov/media/scao_library/CEJ/Racial%20Fairness%20Committee/2019-Progress-Report-ON-1993-RACE-BIAS-TASK-FORCE-AND-RECOMMENDATIONS-UPDATED-4-29-19-WITH-APPENDICES.pdf [<https://perma.cc/A4RT-HK35>].

89. *See id.* at 29.

90. *See id.*

91. In addition, some may argue that any negative correlation between bar passage rates and the percentage of BIPOC graduates (i.e., as the percentage of BIPOC graduates increases, the school's pass rate decreases) is due to some percentage of those students being admitted to schools whose median credentials are well above that of those students. This mismatch theory contends

III. EMPIRICAL STUDIES OF RACE AND THE BAR EXAMINATION: DATA DESERT, WHITEWASHING, AND HEADS BURIED IN THE SAND

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

“that because professors pitch their lectures and assignments to the level of the median student, students with academic credentials well below their school’s median find it hard to understand lectures and assignments and otherwise keep up.” Richard Lempert, *Mismatch and Science Desistance: Failed Arguments Against Affirmative Action*, 64 UCLA L. REV. DISCOURSE 136, 138 (2016). This argument fails because the empirical evidence “find[s] that minorities benefit from attending schools where they are, according to the theory, overmatched.” *Id.* at 141 (discussing empirical studies on the impact of affirmative action on beneficiaries of affirmative action).

92. See, e.g., Keith Kamisugi, *Privacy, Not Political Correctness: Ideology, Not Science, Behind Richard Sander Request for Confidential Bar Exam Data*, EQUAL JUST. SOC’Y (Sept. 15, 2008), <https://equaljusticesociety.org/2008/09/15/privacy-not-political-correctness-ideology-not-science-behind-richard-sander-request-for-confidential-bar-exam-data/> [https://perma.cc/436F-YPPR] (discussing how a lawsuit seeking California Bar examination records from the State Bar violates the privacy of the applicants to the bar and that “[t]he State Bar holds the confidential information of Bar applicants in trust”); NCBE *Privacy Policy*, NAT’L CONF. BAR EXAM’RS (May 17, 2021), <https://www.ncbex.org/privacy-policy/> [https://perma.cc/TLW4-99H6] (providing the NCBE’s privacy policy and noting that the NCBE “is committed to protecting your privacy”); PA. BD. OF L. EXAM’RS, PENNSYLVANIA BAR ADMISSION RULES 33–34 r. 402 (2019), <https://www.pabarexam.org/pdf/rules.pdf> [https://perma.cc/2456-2T8B] (requiring that the actions and records of the Pennsylvania Board of Law Examiners be confidential and “not . . . disclosed or open to inspection by the public”).

93. See, e.g., Family Educational Rights and Privacy Act (FERPA), 34 C.F.R. § 99.2 (2008) (“The purpose of this part is to set out requirements for the protection of privacy of parents and students under . . . the General Education Provisions Act.”); FERPA, 34 C.F.R. § 30(a) (2004) (“[P]arent[s] or eligible student[s] shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student’s education records.”); FERPA, 34 C.F.R. § 99.3 (2011) (“Education records . . . [a]re (1) [d]irectly related to a student; and (2) [m]aintained by an education agency or institution or by a party acting for the agency or institution.”); cf. FERPA, 34 C.F.R. § 99.31 (2011) (permitting the disclosure of directory information); FERPA, 34 C.F.R. § 99.3 (2011) (“Directory information [to] include[] . . . the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status . . . ; dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.”).

94. The Authors reached out to law schools in an attempt to gather this data. This produced three results: (1) the dean of the law school ignored the request for a call to discuss the data; (2) the dean of the law school expressed interest but ultimately did not share the data; and (3) in the minority of cases, the dean of the law school agreed to share the data. One of our goals in publishing

Despite these difficulties, several empirical studies have been undertaken. These studies can be divided into three categories based on their conclusions: (1) one study that cannot draw a conclusion due to lack of data,⁹⁵ (2) studies that find disparate outcomes along racial and ethnic lines but then attempt to whitewash (obscure or explain) the results,⁹⁶ and (3) studies conducted by state-level actors finding racial and ethnic disparities in bar passage outcomes.⁹⁷ As we discuss below, all of these studies (other than that which failed for lack of data) support the conclusion that race and ethnicity are factors in bar passage.

A. No Data, No Result

The earliest large-scale, empirical study of race/ethnicity-related differences in bar passage rates that we could find was conducted in 1969, by George Neff Stevens—professor at the Texas Tech University School of Law and former Dean of the University of Washington School of Law—when “the deans of 133 law schools approved by the [AALS and ABA]” received a questionnaire on bar passage rates.⁹⁸ This study requested information regarding the total number of graduates, the number who passed, the number who failed, and the number for whom the pass rate was unknown.⁹⁹ This information was also “elicited with

this study is to help law school deans see the need for more in-depth study and therefore provide access to the data necessary for such analysis.

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

96. See Stephen P. Klein & Anthony McDermott, *An Examination of Possible Item, Test, and Grader Bias in the California Bar Examination*, 4 BLACK L.J. 553, 557 (1975) (claiming that even though their study found evidence of disparate outcomes, those outcomes were not the result of bias in the exam); LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 52 (1998), <http://files.eric.ed.gov/fulltext/ED469370.pdf> [<https://perma.cc/HWS7-SLSK>] (arguing that while race and ethnicity are a statistically relevant factor for bar passage, the effect of their addition to a model including LSAT and LGPA is minimal); see also TEX. GOV'T CODE ANN. § 82.0291 (West 2004) (expired 2005) (directing the Texas Board of Law Examiners to report on bar passage rates for the July 2004 bar exam by gender, ethnicity, and race).

97. See Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343 (2003) (discussing 1992 study commissioned by the New York Court of Appeals); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 570 (2004) (discussing 2001 study conducted by the Florida Board of Bar Examiners as ordered by the Florida Supreme Court); NAT'L CONF. OF BAR EXAM'RS, EXECUTIVE SUMMARY: IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%201%20Executive%20Summary.pdf> [<https://perma.cc/AFE8-UQAP>] (reporting on request from the New York State Board of Law Examiners to the NCBE to examine the impact of adoption of the UBE in New York).

98. Stevens, *supra* note 95, at 969, 971 (outlining the study and providing Professor Stevens' biographical sketch).

99. *Id.* at 969.

respect to [Black], [Native American], Mexican-American, [Hispanic] and [Asian]-American students.”¹⁰⁰ The ninety-eight questionnaires completed and returned demonstrated that “very few [Black], [Native American], Mexican-American[], [Hispanic] and [Asian]-American[students] [] graduated from approved law schools during the period of 1964–1968.”¹⁰¹ Unfortunately, many deans simply had no data as to pass rates.¹⁰² But, given the paucity of graduates from communities of color, some deans were able to provide a “recollection” report and

along these lines, a substantial number of deans stated that all their minority group graduates had passed a bar examination somewhere [or] . . . had done better than their white counterparts on the bar examinations . . . or at least as well . . . or that they compared favorably, or showed about the same ratio of pass-fail in each quartile. Several Deans stressed the point that, because they had so few minority group graduates, any attempt at comparison would be inappropriate.¹⁰³

The study concluded that the lack of data made it “virtually impossible” to determine if the bar exam produced racially or ethnically disparate results and recommended the creation of a national data bank to track such information.¹⁰⁴ Thus, the first empirical effort to understand whether the bar exam was racially or ethnically biased failed for lack of data.

B. *Whitewashing Racially Disparate Outcomes*

In 1975, Professors Stephen Klein and Anthony McDermott published the results of a study “to determine if there was cultural bias in the California Bar Examination.”¹⁰⁵ Using a “predictor score” computed based on undergraduate grade point average (UGPA), law school admission test (LSAT) score, and law school grade point average (LGPA),¹⁰⁶ this study found that Anglo (White) examinees received higher scores

100. *Id.* In this Article, when describing the results of a survey or study, we have replaced outdated terms for racial and ethnic groups that are no longer used and that may be offensive to readers today. You will find the replaced terms in brackets instead of the original terms used. We chose to change the terms because of the harm that historical language can cause. Please reach out to the authors if you would like the original categorizations.

101. *Id.*

102. *Id.*

103. *Id.* at 969–70.

104. *Id.* at 970.

105. Klein & McDermott, *supra* note 96, at 553.

106. *See id.* at 555 (discussing the regression equation for the study).

on the bar exam than Black or “Chicano”¹⁰⁷ examinees with the same predictor score.¹⁰⁸ Having established that there were racially/ethnically disparate outcomes on the bar exam, Klein and McDermott conducted further analysis that, they claim, shows that the exam itself is not actually biased.¹⁰⁹ They use two methods to estimate how many Black and Chicano students would have passed the bar if there was no bias as to scores.¹¹⁰ They conclude from these analyses that there was “no significant difference between the percentage of minority group members who actually passed versus those who would have been expected to pass had no bias existed.”¹¹¹ In essence, they claim that while there is bias in exam scores, it is inconsequential because *no significant* difference in pass rates could be expected even if the test was not biased. They conclude that:

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

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

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

107. Since the early twentieth century, Mexican Americans have used the word “Chicano” to describe people of Mexican origin living in the United States (feminine: Chicana, gender-neutral: Chicax). Roque Planas, *Chicano: What Does the Word Mean and Where Does It Come From?*, HUFFPOST: LATINO VOICES (Oct. 21, 2012) https://www.huffpost.com/entry/chicano_n_1990226 [https://perma.cc/JUP6-ZWAR]. Klein and McDermott use the masculine “Chicano” and “Latino,” but since their study in 1975, gender-neutral terms like “Latinx” and “Latine” have increased in popularity. Compare Klein & McDermott, *supra* note 96, with Terry Blas, “Latinx” Is Growing in Popularity. *I Made a Comic to Help You Understand Why.*, VOX (Oct. 23, 2019) <https://www.vox.com/the-highlight/2019/10/15/20914347/latin-latina-latino-latinx-means> [https://perma.cc/4HRC-N6KJ].

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

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

110. See *id.*

111. *Id.* at 556 (emphasis in original).

112. *Id.* at 557.

113. See *id.* (“On the basis of the foregoing discussion and findings, it seems reasonable to conclude that there is no statistical evidence that the predictors of Bar performance are biased against minority group members.”).

produced racially and ethnically disparate outcomes: they found that Anglo examinees outperformed Black and Chicano examinees who had the same predictor scores.¹¹⁴ Moreover, they note that students with the same LSAT scores who differ in race or ethnicity can expect different scores on the bar exam.¹¹⁵ These results are the very essence of bias.

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

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

114. *See id.*

115. *Id.* at 556 (discussing their first method for calculating whether the difference in score would produce a difference in bar passage rates).

116. *Id.* at 556. The LSAT score scale has changed over time. It was scored on a 200–800 scale until 1982, changed to a scale of 10–48 from 1982 to 1989, and in 1990 was changed to a scale of 120–180. *See* Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 159 n.248 (1993).

117. Klein & McDermott, *supra* note 96, at 555.

118. *Id.* at 556.

119. *Id.* at 557.

TABLE 4. LSAT SCORES AND EXAMINEE DEMOGRAPHICS 2007-2014¹²⁰

Race/Ethnicity	Average LSAT Score	Difference from Average White Score
American Indian/ Alaskan Native	147.0	-5.8
Asian/Pacific Islander	152.3	-0.5
Black	142.0	-10.8
Hispanic/Latino	146.3	-6.5
Puerto Rican	138.6	-14.2
White	152.8	0.0

These substantial differences demonstrate that the LSAT does, in fact, produce disparate results based on race and ethnicity.

In addition, there is evidence that the difference in outcomes does not dissipate when controlling for factors such as college attended, UGPA, or major. For example, William Kidder “matched African American, Chicano/Latino, Native American, and Asian Pacific American applicants with White applicants who possessed equivalent [UGPAs] from the same colleges during the same time period” (1996 to 1998).¹²¹ Kidder then looked to see if there were racial and ethnic differences in their LSAT scores. He found “that among law school applicants with essentially the same performance in college, students of color encounter a substantial performance difference on the LSAT compared to their White classmates. These gaps are most severe for African American and Chicano/Latino applicants.”¹²² These outcomes did not change even when Kidder matched by major within the same school.¹²³

The LSAT has also been determined to be a “speeded” exam that tests examinees’ reasoning ability and test-taking speed.¹²⁴ Studies show that minority students are disparately impacted by time limits in

120. See SUSAN P. DALESSANDRO, LISA C. ANTHONY & LYNDIA M. REESE, L. SCH. ADMISSION COUNCIL, LSAT TECHNICAL REPORT 14-02, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2007-2008 THROUGH 2013-2014 TESTING YEARS 22-23 (2014) (providing average score by race and ethnicity).

121. See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Education Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CALIF. L. REV. 1055, 1058 (2001) (discussing the study population).

122. *Id.*

123. *See id.*

124. See William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 1032 (discussing that the LSAT appears to measure two variables).

the context of exams where test-taking speed is relevant.¹²⁵ Thus, the speeded nature of the exam could explain the differential outcomes based on an examinees' race/ethnicity. That difference would not be due to the examinees reasoning ability, but rather the speed with which they completed the test.

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

In 1991, Dr. Linda Wightman, Law School Admission Council (LSAC) Vice President for Test Development and Research, undertook for LSAC a five-year national study of bar passage rates.¹²⁶ This study of 23,103 subjects is the largest and most comprehensive empirical study on the issue of bias in the bar exam that we have identified to date.¹²⁷ The study found statistically significant differences in first-time passage rates between White examinees and examinees from communities of color.¹²⁸

TABLE 5. LSAC NATIONAL STUDY OF BAR PASSAGE RATES¹²⁹

Race	Pass Rate	% of Examinees
American Indian	66.36%	0.46%
Asian	80.75%	4.16%
Black	61.40%	5.93%
Hispanic	74.81%	2.25%
Mexican American	75.88%	1.72%
Puerto Rican	69.53%	0.55%
White	91.93%	83.54%
Other	83.07%	1.38%

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

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

126. WIGHTMAN, *supra* note 96, at vi, 12.

127. See *id.* at 6.

128. *Id.* at 32.

129. *Id.* at 27 (providing listing passage rates by race and ethnicity).

“most like themselves.”¹³⁰ Even when examinees were clustered in this manner, there remained a statistically significant negative correlation between race/ethnicity and bar passage rate.¹³¹ The results of this analysis are provided in Table 6.

TABLE 6. BAR PASSAGE RATES AMONG LAW SCHOOL CLUSTERS¹³²

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

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

TABLE 7. RESULTS OF RACIAL/ETHNIC GROUPS AS COMPARED TO WHITE EXAMINEES (VALUES IN PERCENTAGE POINTS)¹³³

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

130. *Id.* at 28. Cluster analysis was used to place the schools into clusters based on seven factors: size, cost, selectivity, faculty/student ratio, percent minority, median LSAT, and median UGPA. *See id.* at 8–9. “The cluster analysis identified six naturally occurring clusters or groups of law schools.” *Id.* at 9.

131. *Id.* at 29.

132. *Id.* at 28 tbl.7 (“Number and percentage of study participants who passed the bar on the first attempt, by ethnic group and law school cluster”).

133. *See id.* at 28 tbl.7.

Dr. Wightman also found that adding ethnicity to a model of bar passage rates based on just LGPA and LSAT “showed a modest but statistically significant improvement over the LGPA and LSAT score model.”¹³⁴ The implication of the study’s conclusion, that “[t]he data . . . demonstrate that LGPA and LSAT score explain more of the variation in bar passage outcomes than do any of the other variables [including race/ethnicity] examined,”¹³⁵ is that race and ethnicity are not important factors for bar passage. Rather, the study posits, the difference is explained by the lower entering credentials and weaker law school performance of students from communities of color (compared to White students).¹³⁶

There are two problems with this result. First, it is worrisome that the primary investigator, Dr. Wightman, is an employee of LSAC, which develops and administers the LSAT.¹³⁷ As such, her analysis may have been influenced by her position in the organization.¹³⁸

Second, as noted above, LSAT scores themselves correlate with race and ethnicity. In essence, because LSAT scores are correlated with both some aspect of academic ability and race/ethnicity, a model based on LSAT and LGPA is really a model based on some measure of academic ability, race, ethnicity, and LGPA (success in law school). Adding a second variable that accounts for race or ethnicity should be expected to improve predictability only marginally, as that new variable accounts only for aspects of race and ethnicity not already captured by the LSAT. The fact that the addition of race and ethnicity improves the model only underscores the vital importance of race and ethnicity to bar passage rates. Furthermore, Dr. Wightman presents regression results showing negative and statistically significant relationships between Black, Hispanic, and Asian American students’ race/ethnicity and the probability of passing the bar, after controlling for LSAT and LGPA scores.¹³⁹ And,

134. *Id.* at 52 (discussing models of first-time bar passage based on study data).

135. *See id.* at 48.

136. *See id.* at 80.

137. *See* WIGHTMAN, *supra* note 96, at vi, viii–ix; *About the Law School Admission Council (LSAC)*, L. SCH. ADMISSION COUNCIL, <https://www.lsac.org/about> [perma.cc/MXR3-SJB6] (discussing services that LSAC provides including administering the LSAT).

138. While we seek to cast no aspersions on the character of Dr. Wightman, the dangers associated with research conducted by those with a pecuniary interest in the outcome are well-known and long-established. *See, e.g.*, Mark Barnes & Patrick S. Florencio, *Financial Conflicts of Interest in Human Subjects Research: The Problem of Institutional Conflicts*, 30 J.L. MED. & ETHICS 390, 391–92 (2002) (discussing how financial incentives can affect professional judgment); Bryan K. Church & Xi (Jason) Kuang, *Conflicts of Interest, Disclosure, and (Costly) Sanctions: Experimental Evidence*, 38 J. LEGAL STUD. 505, 505–06 (2009) (discussing the problem of financial conflicts of interest); Pilar N. Ossorio, *Pills, Bills and Shills: Physician-Researcher’s Conflicts of Interest*, 8 WIDENER L. SYMP. J. 75, 88 (2001) (“One reason that conflicts of interest create the probability that physician-researchers’ obligations will go unfulfilled is because conflicts may undermine judgment.”).

139. *See* WIGHTMAN, *supra* note 96, at 52 n.85 (“The data in the table above show that, for study participants who had the same LGPA and LSAT score, being Hispanic or Asian American instead of

as we will see, when we remove LSAT measures from our own analysis, leaving only race/ethnicity in the model, there is merely a small change in the predictivity of the model.¹⁴⁰

C. Heads Buried in the Sand

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

TABLE 8. JULY 1992 NEW YORK BAR EXAM OUTCOMES¹⁴³

Race	Pass Rate
Asian	53.0%
Black	37.4%
Hispanic	48.6%
White	81.6%

Nearly a decade later, “[i]n August 2001, the Florida Supreme Court ordered the Board of Bar Examiners to release racial data for first-time test takers on the February 2000 and July 2000 Florida bar exam.”¹⁴⁴ That study noted that “with a cutoff score of 131, 79.7% of . . . whites passed, compared to 65.6% of . . . people of color.”¹⁴⁵ The study further estimated what effect an increased cutoff score would have on pass rates, concluding that under a higher cutoff score, “68.5% of whites would pass, compared with 53.2% [of] people of color.”¹⁴⁶ Interestingly, “the Florida Board of Bar Examiners refused to release racial/ethnic data on the Florida bar exam in 2000.”¹⁴⁷

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

white reduced the odds ratio to approximately two thirds, while being black reduced it to approximately three quarters.”).

140. See *infra* Section V.B (discussing the LSAT Model and Lagged LSAT Model compared, respectively, to the Race & Ethnicity Model and the Lagged Race & Ethnicity Model).

141. See Booth Glen, *supra* note 97, at 346–349, 503 (discussing the study conducted by the Commission on Legal Education and Admission to the Bar, Association of the Bar of the City of New York and the Commission’s Report on Admission to the Bar in New York in the twenty-first century).

142. See *id.* at 508–10.

143. *Id.* at 509 (listing pass rates by race and ethnicity).

144. Kidder, *supra* note 97, at 570.

145. *Id.*

146. *Id.*

147. *Id.* at 569 (discussing disparate impact of higher bar standards).

amination with “[t]he data to be aggregated by gender, ethnicity, and race.”¹⁴⁸ This study found that the percentage of examinees passing was lower among communities of color as compared to White examinees.¹⁴⁹

TABLE 9. TEXAS JULY 2004 BAR PASSAGE RATES¹⁵⁰

Race	First-Time Pass Rate	Pass Rate for ≥ 2 Attempts	Total Pass Rate
Asian	75%	17%	92%
Black	51%	26%	77%
Hispanic	68%	21%	89%
White	84%	10%	94%

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

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

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

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

148. TEX. GOV’T CODE ANN. § 82.0291 (West 2021).

149. TX PASSING RATES REPORT, *supra* note 74, at 5; *see also* Gender & Racial/Ethnic Group Analysis, *supra* note 74.

150. TX PASSING RATES REPORT, *supra* note 74, at 5.

151. *See* GENDER & RACIAL/ETHNIC GROUP ANALYSIS, *supra* note 74.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* (describing regression models used).

account for the fact that different law schools may have different grade curves.¹⁵⁶ A 3.0 LGPA at School A may be an average LGPA (because the school's grade curve mean is set to 3.0) while that same 3.0 at School B may be above average (because School B's mean is set to 2.7). Thus, simply using LGPA is problematic because we do not know what that LGPA means in the context of that school.

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

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

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

156. See, e.g., Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 77 J. LEGAL EDUC. 415, 420–21 (1994) (discussing the types of grade curves utilized at law schools).

157. See, e.g., Kidder, *supra* note 121, at 1074 & tbl.1 (2001) (finding that students of different races/ethnicities with equal academic accomplishments at the college-level have different LSAT scores).

158. NAT'L CONF. OF BAR EXAM'RS, *supra* note 97, at 1; see also Press Release, N.Y. Ct. of Appeals, Impact of the Uniform Bar Examination in New York (Aug. 20, 2019), https://www.nybarexam.org/Docs/UBE_Report.pdf [perma.cc/CTU5-UJAQ] (announcing the release of the report).

159. See NAT'L CONF. OF BAR EXAM'RS, *supra* note 97, at 1, 4 (discussing how pass rates for racial groups changed after adoption of the UBE); see also NAT'L CONF. OF BAR EXAM'RS, RSCH. DEPT, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK, 1, 83, <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/9NZM-6Y9U>] (discussing pass rates for racial and ethnic groups)

160. NAT'L CONF. OF BAR EXAM'RS, *supra* note 97, at 4.

161. See *id.* at 3 (discussing changes in background characteristics).

groups) were the score necessary to pass the bar (the “cut score”) decreased.¹⁶² Currently a score of 1440 is required to pass.¹⁶³ The report analyzed more than 85,000 examinees that collectively took the bar exam more than 140,000 times between 2009 and 2019.¹⁶⁴ At the current cut score, the study shows that 52% of White examinees achieve the requisite 1440 on the exam, while 24% of Black examinees, 36% of Latino examinees, and 40% of Asian examinees meet that same threshold.¹⁶⁵ The study, reproduced as Table 10, concluded that pass rates for examinees of color would substantially increase were the score required to pass the bar exam reduced.¹⁶⁶

TABLE 10. CALIFORNIA 2020 REPORT ASSESSING IMPACT OF CUT SCORE¹⁶⁷

Race	Percentage Point Increase in Passage Rate at Cut Score			
	1300	1330	1350	1390
Asian	30	24	19	8
African American	33	24	18	6
Latino	34	26	21	8
White	31	25	21	8
Other	34	26	20	7

D. Avoiding the Obvious Conclusion

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

162. See State Bar of Cal., *Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type*, at 2 (2020), <https://www.calbar.ca.gov/Portals/o/documents/reports/CA-State-Bar-Exam-Cut-Score-Simulations-Analysis.pdf> [https://perma.cc/5GVB-SQW5] (explaining the background as to the purpose of the study).

163. *Id.* at 4.

164. *Id.* at 2 (discussing the simulation data and methodology).

165. *Id.* at 8 tbl.4 (listing percentage pass rate at the current and proposed cut-scores).

166. *Id.*

167. *Id.*

168. See Rachel L. Gregory, *Florida’s Bar Exam: Ensuring Racial Disparity, Not Competence*, 18 *Geo. J. Legal Ethics* 771, 773 (2005).

tions do not want to appear to be engaging in discriminatory behavior.¹⁶⁹

IV. POTENTIAL CAUSES OF DIFFERENTIAL BAR PASSAGE RATES

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

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

169. See Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 723–25 (1996).

170. Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 44 (2018).

171. Erin Lain, *I Think I Can: How Self-Efficacy and Self-Regulation Impacts Black and Latinx Bar Examinees*, 10 IND. J.L. & SOC. EQUAL. 113 (2022), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1134&context=ijlse> [<https://perma.cc/N3EE-QDTN>]. This qualitative study examined attorneys of color who passed the bar exam on the first attempt versus on the second attempt. *Id.* For those who failed their first attempt, themes of isolation during studying and experiencing outside distractions played a significant role in their perceptions of why they did not pass. *Id.*

172. Hunt, *supra* note 169, at 770–86 (1996) (discussing a variety of factors that lead to environmental barriers experienced by students of color in law school).

173. Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71, 73–74 (2010) (discussing the environmental challenges that students of color face).

174. See Milo Colton, *What Is Wrong with the Texas Bar Exam? A Minority Report*, 28 T. MARSHALL L. REV. 53, 60 (2002) (discussing the results of the Florida Supreme Court's Racial and Ethnic Bias Commission study of bar passage in Florida).

175. John M. Malouff & Einar B. Thorsteinsson, *Bias in Grading: A Meta-Analysis of Experimental Research Findings*, 60 AUSTRALIAN J. EDUC. 245–256 (2016) (providing a meta-analysis looking at over 1,900 graders and the influence of bias in essay grading).

and syntax are evaluated, and words are analyzed is inevitably infused with the grader's cultural positioning.¹⁷⁶

In 1996, Hunt wrote a detailed analysis of possible factors contributing to disparities in bar exam pass rates.¹⁷⁷ While this article is nearly thirty years old, the factors may still be contributors to disparate pass rates.¹⁷⁸ Hunt notes that many speculate that differences in pass rates are due to a lack of academic preparation and ability, specifically as a result of poor schooling in the K-12 and undergraduate pipeline.¹⁷⁹ Yet this does not explain why those with similar predictive indicators—such as UGPAs, LGPAs, and LSAT scores—may still fail the bar exam.¹⁸⁰ Hunt suggests that environmental factors within law school contribute to the disparities.¹⁸¹ Specifically, low expectations for students of color, a hostile environment where students of color are stigmatized and isolated, and a lack of academic support may all contribute to lower pass rates.¹⁸² Although academic support programs are more prevalent in law schools today,¹⁸³ extended programs that assist with bar exam preparation are not yet standard.¹⁸⁴ These factors, coupled with the way in which the bar exam is written and graded as well as larger systemic issues of oppression,¹⁸⁵ may be the primary causes of the bar passage gap.

176. *Id.*

177. Hunt, *supra* note 169.

178. *Id.* at 769.

179. *Id.* at 770.

180. See Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 765-79 (2017) (finding that undergraduate GPA is not predictive of bar exam success, LSAT scores explained thirteen percent of bar exam performance, and first year and final law school GPA predict fifty-two percent of an individual's bar exam performance).

181. *Id.* at 770-86.

182. *Id.*

183. Standard 309 of the ABA Standards and Rules of Procedure for Approval of Law School requires all law schools to provide academic support in order to give students a "reasonable opportunity" to join the profession. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, at 22 (Standard 309) (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

184. See, e.g., *id.* at 22 (Standard 309) (listing standards requiring law schools to provide academic support in order to obtain a law degree, but silent on law schools providing support for passing the bar exam); Stephanie Francis Ward, *More Law Schools Are Covering Bar Review Costs: Is it Improving Pass Rates?*, AM. BAR ASS'N J. (Oct. 20, 2016, 8:30 AM), https://www.abajournal.com/news/article/more_law_schools_covering_bar_review_costs_is_it_improving_pass_rates [<https://perma.cc/DQJ6-CE4D>]; see also *Taking the Bar Exam*, HARVARD L. SCH., <https://hls.harvard.edu/dept/dos/taking-the-bar-exam/> [<https://perma.cc/2TBR-8AKL>].

185. Chong, *supra* note 170, at 44-54.

V. OUR STATISTICAL ANALYSIS

This study relies on publicly available data reported by ABA-accredited law schools as part of the ABA's Standard 509 Required Disclosures between 2012 and 2019.¹⁸⁶ Data as to bar passage by jurisdiction, entering class credentials, race, ethnicity, geographic location, and law school rank were combined to form the research dataset.¹⁸⁷ Using this dataset, we examined the relationships between these factors and first-time bar passage rates. To ensure both a large enough dataset and uniformity as to the meaning of the bar pass rate, we limited the data to schools from UBE jurisdictions during periods where that jurisdiction tested using the UBE.

The statistical analysis demonstrates that even after controlling for school characteristics—such as tier, entering class credentials, and median LSAT scores—higher proportions of students who identify as Black or Hispanic are significantly associated with lower bar pass rates.¹⁸⁸ This decrease in pass rates cannot fully be explained by LSAT or UGPA quartiles for the entering class.¹⁸⁹

A. *The Model*

We utilize a fractional logistic regression analysis¹⁹⁰ to understand the relationship between a school's first-time bar pass rates in a particular jurisdiction and the proportion of students who identified as American Indian/Alaskan Native, Asian, Black, Hispanic, Native Hawaiian/Pacific Islander, Two or More Races, and White.¹⁹¹

186. This data is publicly available at two different website addresses. *Section of Legal Education – ABA Required Disclosures, 509 Required Disclosures*, AM. BAR ASS'N, <http://www.abarequireddisclosures.org/Disclosure509.aspx> (last visited Nov. 20, 2021); *Statistics*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/ (last visited Nov. 20, 2021).

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

188. See discussion *infra* Section V.B.

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

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

191. The analysis was run in STATA using a generalized linear model (“glm”) with a logit link to incorporate a curve. Our pass rate data has a binomial distribution because it is the number of successes divided by the number of trials.

Regression analysis identifies a curve of best fit that describes the relationship between the independent and dependent variables.¹⁹² This curve does not intersect with each data point,¹⁹³ meaning that the relationship described by our curve of best fit—in this case between student characteristics and first-time bar pass rates—is not perfect.¹⁹⁴ When the curve of best fit does not touch a specific data point, we measure the error between the pass rate predicted by our curve (or model) and the actual pass rate for that school, jurisdiction, and year.¹⁹⁵ Measuring those errors results in an “R-squared” value and indicates how well the line of best fit performs in describing the relationship.¹⁹⁶ The following regression models permit such errors to be correlated to each other if they stem from the same school. For example, if the model predicts a pass rate for School X in 2016 that is much lower than its actual pass rate from 2016, it assumes that its 2017 prediction is likely to be too low as well. Standard errors are clustered at the level of the school. Our full empirical model is defined in Equation 1 below.

EQUATION 1. OUR EMPIRICAL MODEL

$$\begin{aligned} \text{Pass Rate}_{ijt} = & \alpha \\ & + \text{Percent Minorities}_{it} * \beta \\ & + \text{Class Credentials}_{it} * \Delta \\ & + \text{School Characteristics}_{it} * \varphi \\ & + \nu_t \\ & + \varepsilon_{ijt} \end{aligned}$$

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

α is the intercept and is the predicted pass rate for any school-jurisdiction in 2012 if all the other variables here had a value of 0.¹⁹⁷

192. See, e.g., Jeffrey S. Kinsler & Jeffrey Omar Usman, *Law Schools, Bar Passage, and Under and Over-Performing Expectation*, 36 QUINNIPIAC L. REV. 183, 198 (2018).

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

194. See *id.*

195. See DAMODAR GUJARATI, *ECONOMETRICS BY EXAMPLE* 13–14 (2011) (discussing R^2 as a measure of goodness of fit).

196. See *id.*

197. While that interpretation is not relevant here with variables that take on non-zero values, including it in the regression is the least restrictive option; removing the intercept would force our regression line through the origin, while retaining the intercept allows the regression line to lie as close to the data as possible.

Pass Rate is a school's first-time bar pass rate in a UBE jurisdiction in a specified year where the school reported at least 70% of its graduates that year.¹⁹⁸

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

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

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

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

School Characteristics includes the school's region and tier.

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

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

198. Prior to 2019, law schools were required to "report [first-time] bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency." AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019, at 24 (Standard 316) (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf; cf. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–2020, at 24 (Standard 316) (2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf ("[Revised Standard 316 is] [a]t 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.").

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

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

Our analysis is based on several models, of increasing sophistication, examining the relationship between race/ethnicity and first-time pass rate.¹⁹⁹ In our first model (the “Base Model”), first-time bar passage rates²⁰⁰ for a school-jurisdiction in a given year are regressed on school characteristics (geographic region and tier) from that same year.²⁰¹ The Base Model does not account for the variables we seek to understand—race, ethnic identity, and entering credentials—but it does provide a baseline to which we can compare other models that include the desired variables.

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

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

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

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

201. *See infra* Table 11.

Ethnicity Model, and Lagged Full Model) that compare a school's characteristics in a given year to the pass rate three years later.²⁰² For example, the enrollment characteristics in year 2013 were compared to the first-time bar passage rate in 2016.

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

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

Table 11 presents the exponentiated coefficients²⁰⁴ from our regression analysis from each of the models. Certain coefficients have asterisks next to them. A single asterisk (*) means that the model is 90% confident that the relationship between that independent variable and pass rate exists and is therefore different from 0; two asterisks (**) indicate that the model is 95% confident that the relationship exists; and three asterisks (***) indicate that the model is 99% confident. We draw conclusions only from coefficients marked with asterisks because of these very high levels of confidence.

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

The LSAT Model adds the median LSAT score²⁰⁷ for the entering class to the Base Model. The coefficient from the median LSAT indi-

202. See *infra* Table 12.

203. See, e.g., *Bar Passage Outcomes*, AM. BAR ASS'N, <http://www.abarequireddisclosures.org/BarPassageOutcomes.aspx> (last visited Nov. 20, 2021) (providing drop down menus that allow access to collected data on a given school and year).

204. See WOOLDRIDGE, *supra* note 190, at 662 (discussing the fractional model as a logistic function). To interpret results about pass rates, then, we must undo that log by exponentiating.

205. See *infra* Table 11.

206. *Id.* (listing the McFadden's Pseudo R² value as 0.3462).

207. We only use median LSAT score because including more than one LSAT quartile results in significant multicollinearity with Variance Inflation Factor (VIF) values in the range of 16,000 to

cates that a one-point increase in an entering class's median LSAT, keeping all other school characteristics unchanged, is associated with a 9.27 percentage point increase in the pass rates.²⁰⁸ This result is significant at the 99% confidence level.²⁰⁹ Additionally, adding a measure of median entering credentials increases the explanatory power of the model. Explanatory power is indicated by a Coefficient of Determination statistic, which measures how much of the variation in the dependent variable is explained by the regression analysis. Because the dependent variable in this case—pass rate—requires fractional logistic regression analysis, the Coefficient of Determination used here is McFadden's Pseudo R-square. A value near 1 means that the model explains nearly 100% of the changes in pass rate across school-jurisdictions-years, and a value near 0 means that the model cannot explain any of the variation in pass rates. The bottom row of Table 11 shows that adding median LSAT to the Base Model increases the Pseudo R-square from 34.6% to 35.5%, an increase of 2.54% in explaining a school-jurisdiction's pass rate in a year.²¹⁰

The Race & Ethnicity Model adds the percent of the entering class that identified with each racial or ethnic category to the Base Model instead of median LSAT. This model examines the relationship between race/ethnicity and first-time bar passage results by jurisdiction, using the portion of White students as the omitted reference category.²¹¹ The analysis reveals a negative relationship between first-time pass rate and the proportion of students who identify as Black, Hispanic, Two or More Races, or Unknown Race.²¹² For example, as the proportion of students who identify as Black increases by 1 percentage point, all school characteristics held equal, the pass rate for that school-

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

208. See *infra* Table 11.

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

210. See *infra* Table 11.

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

212. See *infra* Table 11.

jurisdiction-year is predicted to be only 98.41% of what it would have been without that increase in Black students, a 1.59 percentage point reduction. This relationship is statistically significant at the 99% level of confidence. The explanatory power of the Race & Ethnicity Model, as measured by McFadden's Pseudo R^2 , increased by 2.17% compared to the Base Model.²¹³ This is similar in size to the improvement that resulted from adding median LSAT to the Base Model (2.54%).²¹⁴

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

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

213. See *id.*

214. See *infra* Table 11.

215. See, e.g., Kidder, *supra* note 121, 1074 & tbl.1 (2001) (finding that students of different races/ethnicities with equal academic accomplishments at the college-level have different LSAT scores).

216. See, e.g., *Summary Bar Pass Data: Race, Ethnicity, and Gender: 2020 and 2021 Bar Passage Questionnaire*, *supra* note 67 (providing national summary statistics on bar passage rates by race and ethnicity).

217. See *infra* Table 11 (listing the coefficient for LSAT 50th Percentile under the full model as 1.0951).

218. See *infra* Table 11 (listing the coefficient for percentage Black under the full model as 0.9894—where $1 - 0.9894 = 0.0106$ or 1.06%).

Race.²¹⁹ The Full Model provides a 4.16% increase in explanatory power compared to the Base Model.²²⁰

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

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

220. See *infra* Table 11 (listing the Full Model's McFadden's Pseudo R^2 as 0.3606).

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

222. See *infra* Table 11 (listing the LSAT Model's McFadden's Pseudo R^2 as 0.3550 and the Full Model's McFadden's Pseudo R^2 as 0.3606, and thus seeing an increase of 1.58% (0.3606/0.3550) by adding LSAT into the Full Model).

TABLE 11. SCHOOL-JURISDICTION PASS RATE, NOT LAGGED

Independent Variable	Base Model	LSAT Model	Race & Ethnicity Model	Full Model
% American Indian/ AK Native			0.9792	0.9968
% Asian			1.0227***	1.0036
% Black			0.9841***	0.9894***
% Hispanic			0.9896***	0.9969
% Native HI/ Pacific Islander			1.0226	1.0207
% Two or More Races			0.9806**	0.9858**
% Unknown Race			0.9909**	0.9890***
% Non-Resident Alien			0.9787***	0.9680***
LSAT 50 th Percentile		1.0927***		1.0951***
Midwest	1.0088	1.0407	0.9266	1.0693
Northeast	1.1154	1.0486	0.9635	1.0193
West	1.073	1.0269	0.8779	0.9511
Tier 1	3.5486***	0.7977	2.8398***	0.7252*
Tier 2	2.1866***	0.9629	1.8151***	0.8492
Tier 3	1.6061***	1.076	1.4572***	0.9813
Constant	2.6810***	0.0000***	4.2346***	0.0000***
# of Observations	2614	2614	2614	2614
McFadden's Pseudo R ²	0.3462	0.355	0.3537	0.3606

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

223. See *infra* Table 12. The initial models described in Table 11 compare first-time bar passage outcomes in a given year with school characteristics from the same year, while the models described in Table 12 compare first-time bar passage outcomes in a given year to the school characteristics from the year of admission. See *supra* Table 11; *infra* Table 12.

TABLE 12. SCHOOL-JURISDICTION PASS RATE, ENROLLMENT DATA LAGGED

Independent Variable	Lagged Base Model	Lagged LSAT Model	Lagged Race Model	Lagged Full Model
% American Indian/ AK Native			0.9863	0.9916
% Asian			1.0075	0.9788**
% Black			0.9868***	0.9929***
% Hispanic			0.9884***	0.9987
% Native HI/ Pacific Islander			0.9629	0.9843
% Two or More Races			0.9913	1.0003
% Unknown Race			0.9947	0.9865***
% Non-Resident Alien			0.9905	0.9783**
LSAT 50 th Percentile		1.1134***		1.1293***
Midwest	0.9764	1.0102	0.8754	1.0270
Northeast	1.1586	1.0781	1.0264	1.0912
West	0.9648	0.8624*	0.8663	0.9329
Tier 1	4.3670***	0.7388*	3.7423***	0.6366***
Tier 2	2.3591***	0.9171	2.0613***	0.7921*
Tier 3	1.7453***	1.1262	1.5996***	1.0163
Constant	1.9522***	0.0000***	2.8972***	0.0000***
# of Observations	1943	1943	1943	1943
McFadden's Pseudo R ²	0.4885	0.5000	0.4923	0.5031

Table 12 presents results from the lagged analyses that correspond to the models described in Table 11. The important difference is that the models in Table 12 include independent variables (e.g., race and ethnicity) with values collected three years before the relevant pass rate. In the first model (the “Lagged Base Model”), first-time bar passage rates²²⁴ for a school-jurisdiction in a given year are regressed on school

224. First-time bar passage rates for accredited law schools were collected from the ABA's *Standard 509 Required Disclosures* from 2014 to 2016 and from the ABA's *Statistics* from 2017 to 2019. See *Section of Legal Education – ABA Required Disclosures*, AM. BAR ASS'N, <https://www.abarequireddisclosures.org/Disclosure509.aspx> (last visited Feb. 21, 2022) (to access 509 required disclosures click on “509 Required Disclosures” and then input a year and school to receive school/year specific data or year and section to receive year-level data). Data was restricted to jurisdictions that used the UBE. If a jurisdiction started (or stopped) using the UBE, data was included only for those

characteristics (geographic region and tier) from three years before. The Lagged Base Model does not account for the variables we seek to understand—race, ethnic identity, and entering credentials—but it does provide a baseline to which we can compare other models that include the desired variables.

The Lagged Base Model, which includes only school characteristics and the exam year, explains 48.85% of the variation in pass rates throughout the sample, as noted by the Pseudo R-squared value.²²⁵ This explanatory power is improved when median entering LSAT from the entering class three years before is added (in the Lagged LSAT Model).²²⁶ Controlling for median LSAT increases the model's explanatory power by 2.35% (from 48.85% to 50% of the variability in pass rates explained).²²⁷ Again, a one-point increase in median LSAT score is associated with an increase in pass rates at the 99% level of confidence.²²⁸ While the Lagged LSAT Model adds median LSAT score for the class that entered three years before the bar exam to the Lagged Base Model, the Lagged Race & Ethnicity Model instead adds the proportions of students who identify with each racial and ethnic category as well as the proportion of non-resident alien students, also using the entering class three years before the bar exam. Adding the racial and ethnic category proportions increase the explanatory power by 0.78% (from 48.85% to 49.23% of the variation explained). Both the Lagged LSAT Model and the Lagged Race & Ethnicity Model suffer from omitted variable bias because they do not control for the relationship between median LSAT and the proportion of minority students.²²⁹ Moreover, in contrast to the models in Table 11, comparing these lagged models indicates that controlling for entering credentials is more important to increasing the Pseudo R-squared than controlling for racial and ethnic identities.

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

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

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

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

227. See *id.*

228. See *id.* (listing the Lagged LSAT Model's coefficient for LSAT 50th Percentile as 1.1134, where coefficients above 1.0 entail that increases in the related variable result in an increase in the bar passage rate).

229. See WOOLDRIDGE, *supra* note 190, at 61–63 (discussing omitted variable bias).

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

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

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

V. DISCUSSION: THE NEED FOR DATA

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

230. See *supra* Table 12 (listing the coefficient for percentage Black in the Lagged Full Model as 0.9929).

231. See *supra* Table 12 (listing the coefficient for percentage Asian, percentage Non-Resident Alien, and percentage Race Unknown as, respectively, 0.9788, 0.9680, and 0.9890).

232. See Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/post-everything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/> [<https://perma.cc/B92F-KS68>] (discussing the lack of diversity in the legal profession).

am may be a factor contributing to this lack of diversity. While students of color face obstacles throughout their tenure in primary and secondary education,²³³ our analysis shows that those who have made it through law school may be weeded out from the profession at the last possible moment. At the same time, young people from communities of color watch as their friends, siblings, parents, and mentors accumulate colossal debt to attend law school²³⁴ and then struggle to pass the bar exam. In that context, a legal career becomes too risky a venture to undertake, and students who would otherwise seek such a career focus their educational and professional efforts elsewhere.²³⁵

Additionally, bar examiners' characterizations of the bar exam as a test of minimum competence²³⁶ perpetuates racial and ethnic stereotypes given the lower pass rates of BIPOC examinees that stem from potential exam biases. Calling the bar exam a test of "minimum" competence, when there are evidenced disparities and so many BIPOC test takers fail, exacerbates an already fraught situation. While the exam is supposedly a minimally invasive final hurdle to becoming a lawyer, it instead, as noted above, disenfranchises racial and ethnic groups. By reinforcing the legal profession's lack of racial and ethnic representation through a bar exam that exposes greater percentages of BIPOC examinees than White examinees to the stigma and costs of failing, the bar exam feeds the racial and ethnic disparities prevalent in our society today.

233. See Jessika H. Bottiani, Catherine P. Bradshaw & Tamar Mendelson, *A Multilevel Examination of Racial Disparities in High School Discipline: Black and White Adolescents' Perceived Equity, School Belonging, and Adjustment Problems*, 109 J. EDUC. PSYCH. 532–45 (2017) (discussing disparate disciplinary action towards Black students in high school); David M. Merolla, *Completing the Educational Career: High School Graduation, Four-Year College Enrollment, and Bachelor's Degree Completion Among Black, Hispanic, and White Students*, 4 SOCIO. RACE & ETHNICITY 281–97 (2017) (exploring differing educational trajectories by race and ethnicity in the high school and college setting); Tachelle Banks & Jennifer Dohy, *Mitigating Barriers to Persistence: A Review of Efforts to Improve Retention and Graduation Rates for Students of Color in Higher Education*, 9 HIGHER EDUC. STUD. 118, 119–21 (2019) (exploring the various factors contributing to disparate graduation rates for students of color in college).

234. See, e.g., Valerie Fontenot, *Disparities in Student Loans: How Did We Get Here and What Can We Do?*, AM. BAR ASS'N (July 16, 2019), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-disparities-in-student-loans/> [<https://perma.cc/2FKJ-42GH>] (discussing disparities in student loan debt by race).

235. See Legal Skills Prof, *Is Law School a Riskier Investment for Minority Students?*, LEGAL SKILLS PROF BLOG (July 5, 2012), https://lawprofessors.typepad.com/legal_skills/2012/07/is-law-school-a-riskier-investment-for-minority-students.html [<https://perma.cc/UY9V-AA2Q>] (discussing Professor Deborah Jones Merritt's analysis indicating that BIPOC law graduates experience worse outcomes than White law graduates in terms of carrying more debt and passing the bar at lower rates).

236. See, e.g., Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS (Spring 2017), <https://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [<https://perma.cc/MJM7-GQSK>] ("Bar examiners tell us that the exam assesses 'minimum competence to practice law' . . .").

So, what should we do? First, as we have noted, our study can only demonstrate that the UBE may be racially and ethnically biased. While we have accounted for relevant factors that could mask the true relationship between race/ethnicity and bar passage, our analysis is still at too high a level of data (the level of the school, not the student) to precisely determine whether, and to what extent, race and ethnicity matter for bar passage rates. Determining the relationship between race/ethnicity and bar passage with certainty would require examining data at the individual student level. Our next step as a profession and as researchers must be to analyze individual student bar passage rates (both first-time and ultimate). We must take into account the factors we have seen, and expect to see, influencing bar passage rates—where those factors are properly normalized such that we compare apples to apples.²³⁷ Doing so will enable us to determine whether the difference we see at the school level is due to differences “unrelated” to race and ethnicity or whether the UBE is genuinely biased against students from communities of color.

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

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

We have begun reaching out to law schools to participate in this study and are also working to find institutional sponsors (like the ABA, LSAC, National Association for Law Placement, Society for American Law Teachers). We are encouraged by the fact that the law school deans we have spoken with have universally agreed that this study is im-

237. For example, we expected UGPA to be a relevant predictor of bar passage. But examinees come from a wide range of schools with differing grade curves and exclusivity. Moreover, one's major at a university also likely matters—a UGPA of 3.8 with a Chemical Engineering major likely provides different information than a UGPA of 3.8 with an English major.

portant and needed. Simultaneously, we are discouraged that, despite the recognition of the need for and importance of the study, very few deans have been willing, thus far, to provide the data. We hope that, through continued discussion and negotiation with law school deans, we will be able to acquire sufficient data to continue our work, although this is not guaranteed.

Conducting empirical research on this issue is imperative to narrowing the bar pass gap amongst racial and ethnic groups. And in support of that research and the public interest, we call on states to begin regularly releasing bar passage data by race and ethnicity. This type of scientific exploration into the bar passage disparities is essential to improving access and representation in the legal profession. Without this type of in-depth analysis, the legal profession is consciously ignoring a significant ethical problem that continues to perpetuate inequalities—a problem that the legal system is in place to protect against. The current study, and proposed future study, will aid in our efforts of making the legal profession accessible to all.

APPENDIX. EXAM STATISTICS REPORTING BY JURISDICTION

Jurisdiction	Bar Statistics Link	Statistics on Race?
Alabama	https://admissions.alabar.org/exam-statistics	No
Alaska	https://admissions.alaskabar.org/recent-bar-exam-results	No
Arizona	https://www.azcourts.gov/cld/Attorney-Admissions/Examination-Statistics	No
Arkansas	https://www.arcourts.gov/content/february-2020-bar-exam-results	No
California	https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics	Yes
Colorado	https://coloradosupremecourt.com/Future%20Lawyers/BarExaminationResults.asp	No
Connecticut	https://www.jud.ct.gov/cbec/stats.htm	No
Delaware	https://www.courts.delaware.gov/bbe/2019barresults.aspx/	No
Florida	https://www.floridasupremecourt.org/Bar-Scores/Florida-Bar-Exam-Results-Comparisons	No
Georgia	https://www.gabaradmissions.org/georgia-bar-examination-statistics	No
Hawaii	https://www.courts.state.hi.us/legal_references/attorneys/attorneys (Under "Successful Bar Applicants)	No
Idaho	https://isb.idaho.gov/admissions/bar-exam/bar-exam-results/	No
Illinois	Illinois does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
Indiana	https://www.in.gov/courts/ace/admissions/results/	No
Iowa	https://www.iowacourts.gov/opr/attorneys/admissions/admission-by-examination/	No
Kansas	Kansas does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
Kentucky	https://www.kyoba.org/Views/public/Content.aspx?page_id=31	No
Louisiana	https://www.lasc.org/Bar_Exam_Results	No
Maine	https://mainebarexaminers.org/exam/current-exam-feb-2015/	No
Maryland	https://www.mdcourts.gov/ble/examstatistics	No
Massachusetts	https://www.mass.gov/service-details/massachusetts-bar-exam-results	No

Michigan	https://www.courts.michigan.gov/administration/committees-boards/board-of-law-examiners/bar-exam-statistics-and-past-exams/	No
Minnesota	https://www.ble.mn.gov/bar-exam/bar-results/	No
Mississippi	https://courts.ms.gov/bar/baradmissions/barresults.php	No
Missouri	https://www.mble.org/past-exam-performance-statistics	No
Montana	Montana appears to have ceased publicly releasing summary data relating to the bar examination rate.	N/A
Nebraska	Nebraska does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
Nevada	https://www.nvbar.org/exam-results/	No
New Hampshire	New Hampshire does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
New Jersey	https://www.njbarexams.org/news.action?id=1921	No
New Mexico	https://nmexam.org/bar-exam/examination-results/	No
New York	https://www.nybarexam.org/examstats/estats.htm	No
North Carolina	North Carolina appears to have ceased publicly releasing summary data relating to the bar examination rate.	N/A
North Dakota	https://www.ndcourts.gov/news/north-dakota/legal-news/general-news/bar-passage-rate-up-on-july-2020-exam	No
Ohio	https://www.supremecourt.ohio.gov/AttySvcs/admissions/announcement/113020.asp	No
Oklahoma	http://www.okbbe.com/Bar-Exam-Statistics/default.aspx	No
Oregon	https://www.osbar.org/admissions/examresults.html	No
Pennsylvania	https://www.pabarexam.org/bar_exam_information/bestats.htm	No
Rhode Island	e.g., https://www.courts.ri.gov/PDF/BarExam-July2019-InfoResults.pdf	No
South Carolina	https://barapplication.sccourts.org/	No
South Dakota	e.g., https://www.ndcourts.gov/news/north-dakota/legal-news/general-news/bar-passage-rate-up-10-percent-on-july-2019-exam	No
Tennessee	https://www.tnble.org/?p=1007	No
Texas	https://ble.texas.gov/statistics	No

Utah	Utah appears to have ceased publicly releasing summary data relating to the bar examination rate.	N/A
Vermont	https://www.vermontjudiciary.org/attorneys/admission-vermont-bar	No
Virginia	https://barexam.virginia.gov/bar/barstats.html	No
Washington	https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/lawyers/bar-exam-results-and-admission	No
West Virginia	http://www.courtswv.gov/legal-community/Bd-of-Law/bar-results.html	No
Wisconsin	Wisconsin does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
Wyoming	Wyoming does not appear to publicly release summary data relating to the bar examination passage rate.	N/A
Federal Districts		
District of Columbia	https://www.dccourts.gov/court-of-appeals/committee-on-admissions	No
U.S. Territories		
American Samoa	American Samoa does not itself administer a bar exam. ²³⁸	N/A
Guam	Guam does not appear to publicly release summary data relating to the bar examination pass rate.	N/A
Northern Mariana Islands	The Northern Mariana Islands do not appear to publicly release summary data relating to the bar examination pass rate.	N/A
Puerto Rico	https://ecf.prd.uscourts.gov/barresults/default.aspx	No
U.S. Virgin Islands	The U.S. Virgin Islands do not appear to publicly release summary data relating to the bar examination pass rate.	N/A

238. See Rules of Admission: High Court of American Samoa, AM. SAM. BAR ASS'N, <https://new.asbar.org/rules-of-admission-high-court-of-american-samoa/> [<https://perma.cc/5AR2-AZ4K>] (requiring that applicants provide proof of having been admitted to practice law in either the United States or a foreign country to be admitted to practice in American Samoa).

2-7-2022

I Think I Can: How Self-Efficacy and Self-Regulation Impacts Black and Latinx Bar Examinees

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Erin Lain, I Think I Can: How Self-Efficacy and Self-Regulation Impacts Black and Latinx Bar Examinees, 10 Ind. J.L. & Soc. Equal. 113 (2022).

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I Think I Can: How Self-Efficacy and Self-Regulation Impacts Black and Latinx Bar Examinees

Erin Lain*

This study examined experiences of bar exam takers of color who passed on either the first or the second time. The theories of self-efficacy and self-regulation served as a conceptual framework for this study and were used to shape the interview questions as well as the data analysis. Eight participants were interviewed who graduated from law school within the last five years, passed the bar exam on either the first or second time, and identified as Black or Latinx. Through analysis of the participants' interviews, nine themes emerged. Participants who passed on the first time overcame academic insecurity early on, were mindful of study strategies that worked, and found support. Participants who passed on the second attempt were isolated in studying and experienced outside distractions, but when taking the exam the second time, found their familiarity with the bar exam relieved stress. Finally, both groups found balance in studying, were aware of their ethnic and racial background, and experienced nervousness and anxiety during the exam. Each of these findings had implications for the participants' self-efficacy and self-regulation while preparing for and taking the bar exam.

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INTRODUCTION

The legal profession has been identified as the least diverse profession in the United States, with 5% of all attorneys identifying as Black and 5% identifying as Hispanic.¹ The pipeline into the legal profession is equally unrepresentative, with Black first-year law students making up 7.9% and Hispanic law students making up 12.5% of all law students.² These statistics fall short when compared to the national population, of which Blacks make up 13.4% and Hispanics 18.3%.³ Table 1 provides ethnic demographic statistics for law school applicants over a ten-year period. Trends show that the number of minority applicants is increasing, yet it is not proportional to the national population.⁴

Table 1
Ethnic Makeup of Law School Applicants from 2004-2018⁵

Year	Black	White	Hispanic	Total Minority Applicants	Total Applicants
2008	9314	52758	4813	76299	82429 ⁶
2009	9843	54522	5154	79173	86074 ⁷
2010					87476 ⁸

- ¹ Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/> (discussing the lack of diversity in the legal profession); AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf (last visited Sept. 26, 2019).
- ² *ABA Law School Data: JD Total FY Class Enrollment Data, Aggregate, Fall 2018*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-fall-fyclass-enrollment-gender-race-aggregate.xlsx (last visited Sept. 26, 2019).
- ³ *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Sept. 26, 2019).
- ⁴ *See id.*
- ⁵ *Current Volume Summaries by Region, Race/Ethnicity, Sex & LSAT Score*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/data-research/data/current-volume-summaries-region-raceethnicity-sex-lsat-score> (last visited Sept. 26, 2019). Total minority applicants include applicants who identify as American Indian/Alaskan Native, Asian/Pacific Islander, Black/African American, Caucasian/White, Hispanic/Latino, and Puerto Rican. *See id.* at 2.
- ⁶ *Current Volume Summary: ABA Fall 2008 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080808.pdf> (last visited Sept. 9, 2021).
- ⁷ *Current Volume Summary: ABA Fall 2009 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080809.pdf> (last visited Sept. 9, 2021).
- ⁸ *Current Volume Summary: ABA Fall 2010 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080810.pdf> (last visited Sept. 9, 2021). The table line entry for 2010 reports only the total number of applicants because, for some reason not

2011	9101	43215	5456	66136	78881 ⁹
2012	9378	43756	7038	67486	67957 ¹⁰
2013	8508	38249	6469	62799	59426 ¹¹
2014	8118	34360	6239	57737	54527 ¹²
2015	8196	33431	6568	56724	53548 ¹³
2016	8496	35097	7371	59948	56126 ¹⁴
2017	8406	35264	7424	60263	56168 ¹⁵
2018	8956	38494	8061	65623	67226 ¹⁶

Despite increasing numbers of minority applicants, those who apply to law school are not admitted at a proportional rate. Over the past five years, the number of Black students who have matriculated to law school has decreased from 8.9% in 2013 to 7.9% in 2018.¹⁷ Hispanic and Latinx representation among law students has increased from 9.7% in 2013 to 12.5% in 2018.¹⁸ Although the increase in representation for Hispanics may be due to better admission practices, it should also be noted that the numbers of all individuals applying to law school has decreased sharply¹⁹. Additionally, neither of these percentages match general population data.²⁰

specified on the LSAC's website or in its *Fall 2010 Applicant and Application Counts* report, LSAC published only the total number of applicants, and did not break the numbers down by race or ethnicity.

⁹ *Current Volume Summary: ABA Fall 2011 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080811.pdf> (last visited Sept. 9, 2021).

¹⁰ *ABA Fall 2012 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080812.pdf> (last visited Sept. 9, 2021).

¹¹ *ABA Fall 2013 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2–3, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080813.pdf> (last visited Sept. 9, 2021).

¹² *ABA Fall 2014 Applicant and Application Counts*, LAW SCH. ADMISSION COUNCIL 1, 2, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080814.pdf> (last visited Sept. 9, 2021).

¹³ *Current Volume Summary*, LAW SCH. ADMISSION COUNCIL 1, 2–3, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080815.pdf> (last visited Sept. 9, 2021).

¹⁴ *Current Volume Summary*, LAW SCH. ADMISSION COUNCIL 1, 2–3, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080816.pdf> (last visited Sept. 9, 2021).

¹⁵ *Current Volume Summary*, LAW SCH. ADMISSION COUNCIL 1, 2–3, <https://www.lsac.org/system/files/inline-files/current-volume-summary-080817.pdf> (last visited Sept. 9, 2021).

¹⁶ *Current Volume Summary*, LAW SCH. ADMISSION COUNCIL 1, 4, <https://www.lsac.org/sites/default/files/media/VolumeSummaryOriginalFormat%208-8-2018.pdf> (last visited Sept. 9, 2021).

¹⁷ *See Statistics Archives*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ (last visited Sept. 26, 2019) (These figures were calculated from the matriculation data provided on this page).

¹⁸ *See id.* (These figures were calculated from the matriculation data provided on this page).

¹⁹ *See id.* (These figures were calculated from the application data provided on this page).

²⁰ *See id.*; *See Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Sept. 26, 2019). (Comparing calculated ABA data on matriculation based on race and ethnicity to U.S. Census data on race and ethnicity).

A. *The Bar Exam as a Factor in the Lack of Lawyer Diversity*

The bar exam also contributes to the lack of diversity among lawyers. Studies have shown that there is a significant gap in bar passage rates based on ethnicity.²¹ The gap between White test takers and their non-White counterparts is a significant barrier to diversifying the legal profession.²² This gap has been noted in multiple articles starting in the 1970s when schools were in the middle of desegregation.²³ In 1998, the Law School Admission Council conducted a longitudinal study of bar passage rates for the nation's law school class that started in 1991.²⁴ Table 2 demonstrates the first-time bar pass rates by ethnicity.

Table 2

Number and percentage of study participants by ethnic group and first-time bar examination outcome²⁵

Ethnic Group	First-time Bar Exam Outcome		
	Pass	Fail	Total
American Indian			
Number	71	36	107
Percent*	66.36	33.64	0.46
Asian Indian			
Number	776	185	961
Percent*	80.75	19.25	4.16
Black			
Number	840	528	1,368
Percent*	61.40	38.60	5.93
Mexican American			
Number	302	96	398
Percent*	75.88	24.12	1.72

²¹ Soc'y of Am. L. Teachers, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 450 (2002) (discussing a longitudinal study finding disparate bar results based on race. "The failure of the current bench and bar to be as diverse as they could be is partly attributable to the existing bar exam. The current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law. A six-year study commissioned by the Law School Admission Council indicates that first-time bar examination pass rates are 92 percent for whites, 61 percent for African-Americans, 66 percent for Native Americans, 75 percent for Latino/Latinas, and 81 percent for Asian-Americans"); see LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY iii (1998). *But see* Richard Cabrera, *Essay: Working to Improve: A Plan of Action for Improving the Bar Exam Pass Rate*, 27 WM. MITCHELL L. REV. 1169, 1174-75 (2000) (discussing disproportionate pass rates and how rigorous research is lacking in this area to fully understand the scope of the problem.).

²² See Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63, 64 (2005).

²³ Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 341-43 (1987); Symposium, *The Minority Candidate and the Bar Examination*, 5 BLACK L.J. 120, 123 (1976); see Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 784-85 (1996).

²⁴ WIGHTMAN, *supra* note 21, at 21.

²⁵ See *id.*, at 27.

Puerto Rican			
Number	89	39	128
Percent*	69.53	30.47	0.55
Hispanic			
Number	389	131	520
Percent*	74.81	25.19	2.25
White			
Number	17,728	1557	19,285
Percent*	91.93	8.07	83.54
Other			
Number	265	54	319
Percent*	83.07	16.93	1.38
Total			
Number	20,460	2,626	23,086
Percent*	88.63	11.37	100.00

The study also followed the class through a five-year period to determine overall bar pass rates, finding that the eventual overall pass rate for bar takers of color within a five-year span was 84.7%, compared to 96.7% for their White counterparts.²⁶ Specifically, at the end of the five-year period, 82.2% of American Indian, 91.9% of Asian American, 77.6% of Black, 88.4% of Mexican American, 79.7% of Puerto Rican, 89% of Hispanic, and 96.7% of White test takers passed the bar exam.²⁷

This study has been the only of its kind to examine a national cohort of bar exam takers for the purpose of analyzing the achievement gap based on race and ethnicity. The lack of empirical analysis on this issue has left a significant gap in understanding the pipeline to diversify the legal profession. Some have argued that reviewing and accrediting entities and test vendors have not compiled pass rates by race in order to avoid revealing disparities.²⁸ Specifically, Hunt argues that the lack of data stems from either not wanting to address a “volatile, social issue,” a concern for test taker privacy, or wanting to avoid the “appearance of impropriety or discrimination.”²⁹ Regardless of the reason for the lack of data tracking bar exam outcomes by race over time, the problem persists. Although some have argued that disparate bar passage rates are an indication of underqualified students being admitted to highly ranked schools, legal educators still have a responsibility to help students pass the bar.³⁰

²⁶ See WIGHTMAN, *supra* note 21, at viii. (84.7% is a combined calculated statistic from the results of bar takers of color)

²⁷ *Id.* at 32.

²⁸ See Cross, *supra* note 22, at 64.

²⁹ Hunt, *supra* note 23, at 727.

³⁰ See Erin Lain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal*, 45 J.L. & EDUC. 279, 282 (2016).

The bar exam also impacts admission to law school because schools are hesitant to admit students that they believe will not be able to pass the bar exam. This creates a multifaceted apparatus that prevents diversity and equity in the legal field. Not only is the bar exam a barrier that prevents some law school graduates from practicing because they cannot pass (or it takes multiple attempts for them to pass), but it also impacts the ability for students of color to be admitted to law school. Schools are faced with growing pressure to increase their bar pass rates not only for published rankings purposes but also to meet accreditation standards. Law schools are hesitant to admit students who may adversely impact their bar pass rates.³¹ Admitting an applicant from an underrepresented group with a lower Law School Admission Test (LSAT) score and Undergraduate Grade Point Average (UGPA) becomes a losing proposition for the school. Despite understanding the need to diversify the legal profession, or the value of admitting promising students that may not fit the median academic indicators for an entering class, law schools are pressured to protect their bar pass rates because they have such a bearing on the reputation and financial stability of the schools.

B. Factors Indicating Bar Exam Success

Scholars have not developed a definitive theory as to which factors predominantly impact test takers' performance on the bar exam. Law school academic support faculty have investigated the relationship between bar passage and LSAT score, UGPA, law school final GPA, law school first-year GPA, bar-exam-tested subject courses taken, and extracurricular activities.³² A recent study found that overall law school GPA, first-year GPA, and performance in the first-year Civil Procedure course were indicators of bar exam success.³³ Other studies focusing on entering credentials, including LSAT score and UGPA, found mixed results regarding the predictive power of those credentials in relation to bar pass rates.³⁴ Similarly, Austin et al. found a moderate correlation between law school performance and success on the exam.³⁵ These studies have not focused on external measures of success to exam performance, but there is a significant gap in exploring how social cognitive theories influence bar exam success.

³¹ See William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates' Competence: How a Standard Based on Students' Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. C.R. & SOC. JUST. 3, 62 (2017).

³² See Katherine A. Austin, Catherine Martin Christopher, & Darby Dickerson, *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 757–59 (2017).

³³ *Id.* at 768.

³⁴ See Nicholas L. Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews* 21 (Ind. U. Robert H. McKinney Sch. of Law Rsch. Paper No. 2013-30, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308341; Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 107–08 (2007).

³⁵ Austin et al., *supra* note 32, at 766, 783.

i. Conceptual Framework

The theories of self-efficacy and self-regulation have all been correlated with academic success for various types of students.³⁶ This study explores the nature of the participants' efficacy and regulation in relationship to their experience with preparing for and taking the bar exam. Themes were generated through the coding and analysis process for both bar exam takers of color who passed on the first attempt and bar exam takers who passed on their second attempt. This research addresses the substantial gap in the literature on student-of-color experiences on the bar exam, which is critical to understand in seeking to narrow the achievement gap.

Self-efficacy refers to a person's belief about their ability to control their functioning and events that impact their lives.³⁷ It relates to confidence in the ability to be successful in academic environments. Students' perception of their abilities influences what goals they set for themselves and how persistent they are in accomplishing those goals.³⁸ If self-efficacy is high, then a student will set ambitious goals and persist through adversity even when the tasks are hard.³⁹ Self-efficacy has been measured and correlated with student academic success throughout a host of different educational settings, including college and graduate schools.⁴⁰

Self-efficacy is developed through four sources: mastery experiences, vicarious learning, social persuasion, and physiological and emotional states.⁴¹ Mastery experiences, also known as previous authentic success, serve as one of four primary experiences that help boost self-efficacy.⁴² A person's previous experience with either success or failure helps to either raise or lower self-efficacy by changing levels of arousal. Those who have had success might feel excited by a challenge that

³⁶ See Pamela J. Gaskill & Anita Woolfolk Hoy, *Self-Efficacy and Self-Regulated Learning: The Dynamic Duo in School Performance*, in IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION 185, 194–95 (Joshua Aronson ed., 2002).

³⁷ Albert Bandura, *Perceived Self-Efficacy in Cognitive Development and Functioning*, 28 EDUC. PSYCHOLOGIST 117, 118 (1993).

³⁸ See Albert Bandura, *Toward a Psychology of Human Agency*, 1 PERSPS. ON PSYCH. SCI. 164, 170–71 (2006).

³⁹ See Gail Hackett, *Self-efficacy in Career Choice and Development*, in ALBERT BANDURA, SELF-EFFICACY IN CHANGING SOCIETIES 240 (1995).

⁴⁰ S. Joseph Dewitz, M. Lynn Woolsey, & W. Bruce Walsh, *College Student Retention: An Exploration of the Relationship Between Self-Efficacy Beliefs and Purpose in Life Among College Students*, 50 J. C. STUDENT DEV. 19, 19 (2009); Mui Vuong, Sharon Brown-Welty, & Susan Tracz, *The Effects of Self-Efficacy on Academic Success of First-Generation College Sophomore Students*, 51 J. C. STUDENT DEV. 50, 63 (2010); see Gunnar Bjornebekk, Age Diseth, & Robin Ulriksen, *Achievement Motives, Self-Efficacy, Achievement Goals, and Academic Achievement at Multiple Stages of Education: A Longitudinal Analysis*, 112 PSYCH. REP. 771, 773 (2013); Iryna Johnson, *Female Faculty Role Models, Self-Efficacy and Student Achievement*, 51 C. STUDENT J. 151, 161 (2017).

⁴¹ ALBERT BANDURA, SELF-EFFICACY: THE EXERCISE OF CONTROL 79 (1997).

⁴² *Id.* at 80; Abram D. Anders, *Networked Learning with Professionals Boosts Students' Self-Efficacy for Social Networking and Professional Development*, 127 COMPUTERS & EDUC. 13, 15–16 (2018) (explaining that the four primary sources of self-efficacy include mastery, vicarious learning, social persuasion, and affective states. Anders defines mastery as “authentic successes with specific situations and tasks”).

relates to their previous experiences, whereas those who have had failure might be worried.⁴³

Vicarious learning refers to looking to outside sources or models for self-efficacy development.⁴⁴ In vicarious learning, people can look to peers or role models to determine how capable they are of succeeding.⁴⁵ Additionally, the model's similarity to the individual (gender, race, ethnicity) or the number of models will have an impact on vicarious learning.⁴⁶

Social persuasion refers to the feedback given to an individual.⁴⁷ Depending on the role of and the relationship to the person, the social persuasion may have differing impacts on self-efficacy. Positive feedback or encouragement will increase self-efficacy while criticism will decrease self-efficacy.⁴⁸

Finally, physiological and emotional states can impact efficacy. A person's state of arousal, such as heart rate or respiratory rate, can impact their belief that they can succeed.⁴⁹ Moderate arousal can boost performance and efficacy because the task is seen as a challenge, whereas a high level of arousal can reduce efficacy because the task is seen as a threat.⁵⁰

A learner's self-regulation refers to an individual's confidence, diligence, and resourcefulness in studying, as well as the ability to evaluate their process of studying to accomplish their academic goals.⁵¹ This refers to the way a person interacts with the external environment and factors to accomplish their internal learning.⁵² Self-regulation includes how a student controls their learning and is able to adapt when their strategies are not working.⁵³ Researchers have found that in addition to self-efficacy, self-regulation also correlates with academic success.⁵⁴

⁴³ See Gaskill & Hoy, *supra* note 36, at 187.

⁴⁴ See Olga Kozar, Juliet F. Lum, & Phil Benson, *Self-Efficacy and Vicarious Learning in Doctoral Studies at a Distance*, 36 DISTANCE EDUC. 448, 450 (2015).

⁴⁵ *Id.*

⁴⁶ Nga Thi Tuyet Phan & Terry Locke, *Sources of Self-Efficacy of Vietnamese EFL Teachers: A Qualitative Study*, 52 TEACHING & TCHR. EDUC. 73, 74 (2015).

⁴⁷ Anders, *supra* note 42, at 15.

⁴⁸ See Megan Tschannen-Moran & Peggy McMaster, *Sources of Self-Efficacy: Four Professional Development Formats and Their Relationship to Self-Efficacy and Implementation of a New Teaching Strategy*, 110 ELEMENTARY SCH. J. 228, 229 (2009).

⁴⁹ *Id.* at 230–31; see SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41, at 106.

⁵⁰ Tschannen-Moran & McMaster, *supra* note 48, at 230-31.

⁵¹ Barry J. Zimmerman, *Self-Regulated Learning and Academic Achievement: An Overview*, 25 EDUC. PSYCHOLOGIST 3, 4–5 (1990).

⁵² See Dale H. Schunk & Barry J. Zimmerman, *Influencing Children's Self-Efficacy and Self-Regulation of Reading and Writing Through Modeling*, 23 READING & WRITING Q. 7, 8, 13 (2007).

⁵³ *Id.*

⁵⁴ Myron H. Dembo & Martin J. Eaton, *Self-Regulation of Academic Learning in Middle-Level Schools*, 100 ELEMENTARY SCH. J. 473, 474 (2000); Anastasia Kitsantas, Adam Winsler, & Faye Huie, *Self-Regulation and Ability Predictors of Academic Success During College: A Predictive Validity Study*, 20 J. ADVANCED ACAD. 42, 60–61 (2008); see Filiz Yalcin Tilfarlioglu & Aysel Busra Ozdinc Delbesoglugil, *Questioning Academic Success Through Self-Regulation, Self-Esteem and Attitude in Foreign Language Learning (A Case Study)*, 4 THEORY & PRAC. LANGUAGE STUD. 2223 (2014); Barry J. Zimmerman, *Attaining Self-Regulation: A Social Cognitive Perspective*, in HANDBOOK OF SELF-REGULATION 18 (Monique Boekaerts, Paul R. Pintrich, & Moshe Zeidner eds., 2000).

ii. Methodology

This study was conducted through the phenomenological research method, meaning that the participants' lived experiences of preparing for and taking the bar exam were recorded through in-depth interviews.⁵⁵ The researcher's institution granted approval for this study through the Institutional Review Board (IRB) process, and participants were recruited through a variety of methods including the snowball, criterion, and emergent techniques.⁵⁶ Various law school stakeholders, such as academic success professionals, associate deans, and attorneys of color from around the United States, were contacted in order to find participants who met the criteria and were interested in participating in the study. Participants had to identify as people of color, have passed the bar exam either on the first time or after multiple attempts, and have graduated within the last five years. These criteria were developed in order to be able to compare potential differences in experiences between those who passed on the first time and those who repeated the bar exam. The subjects had taken the bar exam and gone to law school recently enough to be able to remember their experiences with great detail. Additionally, the threshold for law school completion in the last five years (2014–2019) was selected so that the participants' law school experience was contemporary and aligned with the experience of present-day law students.⁵⁷

In accordance with phenomenological qualitative research best practices, eight participants were selected for the study.⁵⁸ Four of the participants passed the bar exam on their first attempt, and four passed the bar on their second attempt. The content from the participants' interviews provided data saturation, so it was determined that additional participants were not needed.⁵⁹ The participants' interview transcripts were coded through the process of bracketing the data into themes. These themes emerged through the iterative process of reading through the transcripts and looking for meaning that the participants assigned to their

⁵⁵ See JOHN W. CRESWELL, *QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* 76 (3rd ed. 2013).

⁵⁶ See *id.* at 158; Lawrence A. Palinkas, Sarah M. Horwitz, Carla A. Green, Jennifer P. Wisdom Naihua Duan & Kimberly Hoagwood, *Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research*, 42 *ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVS. RES.* 533, 535–36(2015). Snowball refers to finding participants through people who know people who could participate in the study. *Id.* at 535. Criterion refers to only using participants who meet the same criteria of the study in order to assure quality. *Id.* Emergent means that participants were identified and interview as they arose out of the advertisement of the study. *Id.* at 536, 540–41.

⁵⁷ The law school experience is changing with the new outcomes-based requirements, formative and summative assessment requirements, and other theory-based teaching requirements outlined by the ABA. See *ABA Standard 302*. These new requirements have inevitably changed the law school experience in ways that make the experiences of those who attended law school before them different than the students who have gone through school in more recent years. Additionally, the growing field of academic support and bar exam preparation have drastically changed the student experience. See *ABA Standard 309*. Many of the participants in this study refer to those types of programs, so comparing them to those who went to law school in a previous time would create a reliability and validity challenge.

⁵⁸ See CRESWELL, *supra* note 55, at 157 (noting phenomenological studies can have a wide range of participants but three to ten individuals are recommended).

⁵⁹ See *id.* At 88–89.

experiences. Specifically, themes emerged through the lenses of self-efficacy and self-regulation. Other types of themes were identified but not included in the analysis for this study. Nine themes resulted from this study through the coding and analysis process. Finally, validity and reliability strategies were implemented to assure the accuracy of the findings and consistency of analysis.⁶⁰ Specifically, an interrater was used to code a quarter of the collected data, the findings were distributed to participants to get their feedback on the accuracy of the analysis, a peer in academic support was consulted on the interview questions and the themes to determine accuracy, and discrepant information is provided in the findings for transparency.⁶¹ Additionally, the researcher spent time identifying her bias to determine how it might be impacting the analysis. All of these strategies helped ensure that the findings presented are accurate representations of the experiences of the participants.

iii. Description of the Participants

Eight participants who identified as people of color, graduated from law school within the last five years, and passed the bar exam either on the first or second attempts were interviewed for this study. Four of the participants passed the bar on their first attempt, and four passed the bar on their second attempt. The participants had a number of characteristics in common, including attending a Predominantly White Institution (PWI), being the first in their immediate family to go to law school, and reporting that they enjoyed their law school experience. All but one participant worked between undergrad and law school, and one received their master's degree before going to law school.

The participants reported having a variety of experiences while in law school. Some did extremely well, graduating in the top of their class, while others graduated in the mid-to-lower range of their class. Some participants reported being extremely isolated in law school because of their ethnicity. For example, Marcus was the only Black man in his law school class and the only Black student in his section. The participants who reported this type of isolation had to find support from non-traditional places and from outside the law school community to build self-efficacy.

⁶⁰ See JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 201 (4th ed. 2014).

⁶¹ See CRESWELL, *supra* note 55, at 251 (discussing reliability strategies including using an interrater to help code data).

Table 3
Descriptive Information of Participants

Name	Sex	Ethnicity	Year of Law School Graduation	Location of Law School	Type of Law School	Bar Passage	Location of Bar exam
Jade	F	Biracial	2016	Midwest	Private – PWI ⁶²	2nd attempt	Midwest
Tina	F	Black	2018	Midwest	Private – PWI	1st attempt	Midwest
Kat	F	Black	2016	West	Private – PWI	2nd attempt	West
Mya	F	Biracial	2017	Midwest	Public – PWI	1st attempt	Midwest
Kerri	F	Latina	2015	West	Private – PWI	1st attempt	West
Marcus	M	Black	2014	Midwest	Private – PWI	1st attempt	Midwest
Calvin	M	Black	2017	Midwest	Private – PWI	2nd attempt	West
Fiona	F	Biracial	2016	Midwest	Private – PWI	2nd attempt	West

II. FINDINGS

The analysis from the iterative phenomenological coding process produced three themes for participants who passed the bar exam on the first attempt, three themes for participants who passed the bar exam on the second attempt, and three universal themes that were present for all participants. These themes answered the overall research question: In relation to self-efficacy and self-regulation, what are the experiences of law students of color who passed the bar exam on the first attempt, and what are the experiences of law students of color who passed the bar exam on the second attempt?

A. Participants Who Passed the Bar Exam on the First Attempt

Three themes came from the experiences of the participants who passed the bar exam on their first attempt. They all had the experience of having academic insecurities early on in their education but found confidence through their performance in law school. The success they found in law school gave them confidence that they could pass the bar, though during the process they routinely felt anxiety and nervousness about the test. One participant stated, “I felt going in because I had done so well in my school that I wouldn't have an issue passing the bar.”⁶³

Additionally, each of the participants were mindful and utilized study strategies that went beyond what the commercial classes suggested as successful for study

⁶² Predominantly White Institution (PWI).

⁶³ Telephone interview with Kerri (Sept. 10, 2019).

methods. They heavily relied on strategies that worked for them in their law school experiences and were aware of when they needed differing strategies from what others were doing around them. Finally, each of the participants who passed on the first time found a support system that helped them while studying for the bar. Most found a group of friends that would study with them and allay their fears about the exam. Conversely, one participant had a very isolating experience in law school and found his support from the faculty and staff, specifically the academic support staff, to help him get through the bar exam process.

i. Theme #1: Overcoming Academic Insecurity Early

The participants who passed the bar exam on the first time demonstrated academic insecurity; however, they had success before the bar exam, in either their college or law school experience, that helped to boost their confidence before taking the bar exam. Although the boost in confidence around their academic abilities helped them pass the bar exam, it did not negate their extreme apprehension while taking the bar exam. The participants reported that overcoming academic insecurity increased their belief that they were meant to be a lawyer and improved their self-efficacy in accomplishing the steps required to become a lawyer.

Tina reported being an average student before coming to law school. She attended a large state school in the West, and before attending the small private law school in the Midwest, she was not sure she had what it took to be successful. She recalled:

Yeah, like I said, I use the word surprise a lot because I am really surprised that I did well [in law school], but I totally did not think I had what it took. And I was like, you know, if I don't do well my first semester, I would just quit and find some other type of program for me.⁶⁴

When asked when she started to recognize that law school was a good fit for her, Tina replied, "It was after we got our midterm grades from our first Crim midterm and I, that's when I was like, OK, what I think is translating into success."⁶⁵

Mya, who attended an Ivy League undergraduate institution, had a similar experience to Tina. She was an athlete during undergrad, and she felt that contributed to her getting into a prestigious school. She did not attribute her success to her academic ability.

Honestly, law school made me a lot more confident in my abilities just because I did better than I would have thought, you know, like, cause I went to [an Ivy League] undergrad, but I also know I was a Black lacrosse player, and I wouldn't have applied to [my undergrad] or probably gotten in . . . had I not been a lacrosse player. So, I think I've

⁶⁴ Interview with Tina (July 1, 2019).

⁶⁵ *Id.*

always kind of struggled with a slight bit of like the imposter syndrome or like, am I good enough?

Mya also cited the law school admission process as a source of insecurity and low self-efficacy. She explained, “I was just very nervous about going back to school. I mean, I've always been a pretty good student, [but I] was intimidated by law school and I didn't do amazing on my LSAT, like I underperformed.”

Like Tina, Mya gained a lot of confidence through her first-year law school performance. Similar to Tina, she was surprised by her performance, and she later cited her academic performance as a reason why she believed she could pass the bar exam. Mya remembered:

I did really well. And I think that kind of my first year, I remember getting my grades being like, oh my God. Like I never thought I would have done that well, I was just like, let me get As and Bs. Like, you know, they kind of told us at my undergrad like maybe you're a person of color and you have like a 3.3 like you'll be fine. And so that was just kind of my goal. Um, and so then after my first year I was top 15 after my 1L year and then got into the top 10 for the rest of my time at, at law school.⁶⁶

Kerri's insecurity in making it through law school had more to do with the length of time she took to complete undergrad and the birth of her child during that time. She explained:

But I had the significant gaps both between law school and undergrad and within undergrad because my husband and I, um, had an ‘oopsy’ baby at the end of our freshman year, so it took me 10 years to get through undergrad cause we decided to have a second as well. . . . So at times, I would say I didn't doubt that I could be a lawyer, but I doubted my ability to get there because of my life circumstance.⁶⁷

Kerri's path to becoming a lawyer was long, and there were times when she put off going to law school because of her husband's career and his schooling. Once she got to law school, she reaffirmed her confidence. She explained:

Once I got my first semester grades back and I landed a position for my first summer that was paid, I was like, okay, I've got this. But my first semester, I mean that was rough. I remember, I can still see myself in the parking lot at a grocery store, bawling hysterically because I was so stressed out and so anxiety-ridden and convinced I was going to fail all my finals and couldn't even get over the hump to start studying because I was just paralyzed.⁶⁸

⁶⁶ Interview with Mya (June 20, 2019).

⁶⁷ Interview with Kerri (June 24, 2019).

⁶⁸ *Id.*

Finally, Marcus struggled during his undergraduate experience and during the admissions process. He discussed never feeling like he would ever be a lawyer or thinking he had the ability. He specifically cited issues of self-esteem and self-efficacy that sometimes got in the way. He recalled:

Um, long story short, I was able to, after you know, my first semester's grades and I got to see my performance and, you know, I didn't really understand kind of a lot of the systems of government, you know, I think I got kicked out of my business law class at [my] college.⁶⁹

Marcus also discussed having struggles while applying for law school that impacted his self-esteem and self-efficacy. He remembered:

Um, in getting into law school, I actually applied to probably over 15 schools, spent a lot of money on applications, took the LSAT two, maybe even three times to get wait-listed here at [my law school]. Um, and the idea is that we don't know if you'll really be able to succeed here and based on your LSAT scores and my undergrad grades, which I had a lot of sort of changes in undergrad that kind of didn't really reflect my, my performance ability.⁷⁰

Marcus cited his self-regulation as what helped him realize success in law school. He utilized his faculty and the academic support programs to help him find a study strategy that worked, which ultimately resulted in him being able to overcome his academic insecurity. During his first year, he remembered handwriting all of his case briefs, which he later realized was a “waste of his time.”⁷¹ He started to find more efficient strategies that worked for him, and that helped boost his confidence. He suggested:

It really took me into my second year where I was actually studying some of the material that I wanted to study, specifically tax law. And that really helped me out a lot. Property law as well. I think my second year I was really kind of in the swing of things, kind of knowing the commitment that I needed to make for my studies, as well as knowing the level of, you know, uh, of test taker that I was, and I just continued to improve on that every semester, every year on, and my grades dramatically improved.⁷²

ii. Theme #2: Being Mindful of Study Strategies That Work

All four of the participants who passed the bar exam on the first time used a commercial bar prep course to help them study; however, they were mindful of how the materials and study structures were limited. These participants altered their

⁶⁹ Interview with Marcus (June 19, 2019).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

approach to find strategies that worked for them, which meant heavily relying on what worked for them in law school. Although most tried to stick to the commercial bar schedule, they altered their strategies by engaging in what they knew to be high-impact practices. The first-time passers' experiences differed from those who took the bar exam twice in that the second-time passers did not utilize strategies that worked for them in the past until their second time taking the bar exam.

Mya discussed knowing herself to regulate her studying and to find success. She used Barbri to study but supplemented the materials and strategies with other resources. She explained:

And then I also, I used the Critical Pass flashcards. And then I made my own state flash cards and I was most worried about memorizing. And so, I think starting like the end of June is when I started really working on the flash cards and memory and memorizing. I think like the first month or so, like I just pretty much was doing the [Barbri] assignments, um, and I wasn't really doing anything extra. But then once it got towards the end of June is when I started really working on like memorization, um, and doing other, doing [released essays].⁷³

Mya also recognized the importance of not being pressured by those around her to engage in study practices that were not effective for her. She explained:

I also, I think the biggest advice is like knowing yourself. So, like I don't like outlining, but I have friends who like outlining, so they should outline. And I should be okay that I don't outline, like, to know kind of what you do best and what works for you is not going to be what works for me. So, understanding that and also not letting, because I think a lot of times people get caught up in their like, well this person's doing this. And it's like, no, like focus on yourself and what works for you.⁷⁴

Tina also discussed following her commercial course's schedule but supplementing it with other materials and practices from different sources. She heavily relied on techniques that worked for her in law school. She suggested:

I loosely followed what Kaplan had. I got most of the work done that they wanted me to do. Um, I can't quite remember now, but like they'd have you fill in stuff sometimes I, I wouldn't go back and do that, and I would substitute in with, outlining, cause that works for me. And then I ended up making like a 300-page outline book for myself.⁷⁵

Tina remembered getting advice from others and using it to structure her study time. She recalled, "They're like, 'if you did something that worked in law school, why would you abandon it now?' Okay, well, that makes sense. I'm not going

⁷³ Interview with Mya (June 20, 2019).

⁷⁴ *Id.*

⁷⁵ Interview with Tina (July 1, 2019).

to just do what Kaplan says; I'm going to do the things that were helpful to me during law school, you know."⁷⁶

Marcus discussed not merely utilizing the lectures that Barbri provided because he determined that they were not useful for him. He talked a lot about developing a relationship with the material that helped him focus in on the concepts that he needed to review. Although he used the outline Barbri provided, he created his own study schedule that he tailored to his pace of review:

The Barbri course was, um, they went along too fast and I needed to have more time to kind of engage with the material and kind of develop a relationship with the new material, and it didn't really provide for that in the instructional manner. So, I ended up doing most of it at home. Um, I pretty much locked myself into my apartment at that time, uh, for hours upon the day.⁷⁷

Kerri discussed utilizing flashcards as a main strategy of study. Her primary strategy was to do the majority of the Themis materials assigned, but she supplemented her work with other tools that she knew worked for her. She remembered:

I completed I think 80% of the course. And I did everything that I was supposed to do. You know, in the beginning I found it a little bit [stressful] because I learned when I hand wrote things out and memorized them, cause I'm older than most students, and really quickly [I realized] that wasn't going to work. Um, so then I started creating Quizlet. I used Quizlet to create my flash cards because I do much better with flash cards. I don't get it from reading it. So it was in the beginning it was trying to figure out what was best for me and that caused a bit of panic because I felt like I was getting behind.⁷⁸

iii. Theme #3: Finding Support

All the first-time passers found social support through different people and various methods. This strong support helped to guide them through the bar exam study process. None of the first-time passers studied completely on their own. They found support from and studied with their law school friends, law school faculty and staff, and families. This support helped them to self-regulate their study habits and maintain high self-efficacy.

The first-time passers also found support that allowed them to focus most of their energy on their studies. Some had spouses taking care of the family, while others had firms paying for their bar exam preparation and the security of having a job starting after the bar exam. Study and financial support helped these bar takers be successful the first time.

⁷⁶ *Id.*

⁷⁷ Interview with Marcus (June 19, 2019).

⁷⁸ Interview with Kerri (June 24, 2019).

Tina found a job before graduating, which allowed her some relief while studying for the bar. She was also mindful of how this “privilege” helped her to be successful. She recalled:

I was like very aware of the fact that I was lucky that my firm paid for most of my costs. And I was thinking, oh my God, I don't know what I'd do without that. And I was also cognizant of the fact that my husband was very much supporting us last summer.⁷⁹

Tina also had a close group of law school friends that she kept in contact with every day to study. She incorporated work with them into her everyday study schedule. She explained, “I had a group of, uh, there was about three or four of us who stud[ied] together at the school doing the Kaplan stuff together. So, those were my supporters and also my best friend who I would talk to daily during our study.”⁸⁰ These long-term friends were people that she relied on to help her through the process. They were people who she had had relationships with during law school who helped her to be successful on the bar exam..

Marcus, in contrast, was very isolated in law school. He discussed how his peers were not interested in studying with him. He remembered during his 1L year trying to develop friends and study groups. He said:

I looked at my peers, and they were not available for me. They didn't want to study with me. They didn't want to make time, and they really didn't know what level of performance I really had at this point. You know, it was kind of a Who's Who and who knows it.⁸¹

Marcus described his law school experience as “isolating” and something that would “break” most people.⁸² He realized that he needed social support and persisted until he found it from the faculty and staff in law school. He cited that as the way he succeeded. He remembered, “I started to really start to develop a rapport with my professors. And that really helped me at least get to a point where I could ask questions and they would, you know, show me that I had the ability.”⁸³ Marcus maintained connections and relationships he had developed with the faculty and academic support staff while studying for the bar exam because that is what worked for him during law school. He recalled, “I was just spending time doing this, continuing to study, and then I would engage with [the academic support staff] you know, kind of along the way.”⁸⁴

Mya found a new group of friends to study with that also offered her social support during the bar exam process. They helped to reduce her anxiety and clarify the substantive legal concepts they were reviewing. She explained:

⁷⁹ Interview with Tina (July 1, 2019).

⁸⁰ *Id.*

⁸¹ Interview with Marcus (June 19, 2019).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

We had a good group of friends and people who I wasn't really friends with that I became really good friends with. And that was just helpful having that support. And like when there, there's times when you're like, I'm going crazy, like, can go for a walk or just like, you need a pick me up conversation. Uh, you know, when you're like, this was supposed to be a subject I was good at and it's just been horrible. Just like working through it, asking each other questions, and just really being like, it'll be okay. Like we're going to get through this.⁸⁵

Mya's group of friends came in part from her involvement with the Black Law Student Association (BLSA). She recalled that some of her friends studied harder than she did, which helped to motivate her to keep going. She was surprised to find out that the one friend whom she perceived as having studied harder than she did failed the first time. However, she was grateful for the support of the group and the shared experience.

Mya also had support from her employer who provided not only time to study but also financial support. She recalled, "My old firm paid for a class, so I just did Barbri because that's what most people did. And you know, I think most of the people I knew did Barbri. And since I didn't have to pay for it, I didn't mind that it was the most expensive."⁸⁶

Other participants discussed the cost of commercial bar exam preparation programs as a determining factor in the program they chose. Mya was able to choose what she thought was the best option for her success without the pressure of paying for it herself.

Kerri, in contrast, chose Themis specifically because it was the cheapest option. Although she did not have the support from a law firm paying for her studies, she had support with life obligations in other ways. She recalled her spouse increasing his work at home to support her during the time of the bar exam. She remembered: "My husband was a huge [supporter]. He did everything for the kids, and he always did everything for the cooking and everything else. But he really took over everything cause all I could do is study for the bar. I didn't really have bandwidth to do anything extra."⁸⁷

Kerri also remembered friends and family supporting her during the process of studying. They were a group that helped quiz her on substantive topics and helped to relieve her stress during the process. She recalled:

Um, and then it was my good friend from law school and another friend who we had summered together and she went to the [another law school] and we were going to start together at the firm. And so she was also, cause we would occasionally study together and it was just

⁸⁵ Interview with Mya (June 20, 2019).

⁸⁶ *Id.*

⁸⁷ Interview with Kerri (June 24, 2019).

nice. You had those people to compare, and vent, and freak out with, um, at the same time ‘we’re going through it with you.’⁸⁸

She also remembered: “[M]y partner and I would quiz each other, and my daughter would walk around, and we’d go for walks around the lake in [my city], and she would quiz me.”⁸⁹ These supporters not only helped Kerri in the act of memorizing material but also reducing her stress because she knew that she could rely on them for emotional support.

B. Participants Who Passed on the Second Attempt

Three themes came from the experiences of participants who passed the exam on the second time. Members of this group experienced isolation while studying because they either could not find groups to study with, or their natures were to study alone. They also experienced outside distractions while studying for the bar exam, resulting in loss of a significant amount of their cogitative capacity as they had to manage non-bar exam issues. Finally, these participants found that their familiarity with the process of taking the bar exam reduced their nervousness, stress, and anxiety. Surprisingly, lack of preparation was not a theme found among this group of participants. Three of the four participants reported doing the recommended number of practice problems assigned by the commercial bar prep course they used. One participant recalled doing “90% of the practice problems” and still not passing on the first time.⁹⁰ This participant decided to study without a commercial course while preparing for her second attempt in order to get a refund and save money.⁹¹ Despite not using a commercial course on the second time, she was able to pass.⁹²

i. Theme #4: Isolation in Studying

The participants who passed the bar exam on the second time all approached their studies alone when preparing for their first attempt. Although they might have called friends or family for social support or were living with family at the time, they were not studying with anyone else. In some cases, their isolation also extended to the day of the test during their first attempt and resulted in participants not being able to manage the stress and anxiety they were under during the exam.

Calvin talked about looking to his girlfriend for support but finding it difficult for her to understand the commitment he needed to put into bar exam preparation. He recalled:

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Interview with Kat (June 21, 2019).

⁹¹ *Id.*

⁹² *Id.*

Um, the first time I would say my girlfriend [was my biggest support] and as great as she is, that probably didn't work out for the best, in the sense that she just didn't understand what it took to do it and succeed. I mean, she tried but it just didn't, she just wasn't able to understand what it was.⁹³

When asked if he reached out to colleagues from law school while studying for the bar, Calvin said he did not.

Fiona felt she had some support from her mom in terms of taking care of her daily living needs, such as housing and food, but she approached studying for the bar exam alone. She reflected: "I was self-driven. I mean my mom helped by like, you know, paying my bills and feeding me. But then I also was [studying by myself]."⁹⁴

Jade discussed her upbringing and determined that she felt more comfortable studying alone. She noted:

So, the first and second time both, I studied by myself. Um, the first time I was home for the summer, um, cause I'd moved back to [my hometown]. So, I studied mostly at home. The second time around I actually was able to go up to [the college] and they allowed me to use our room at their library.⁹⁵

She further explained:

Being an only child, I'm very much the kind of person I'd rather just do things by myself. So, I think that played into the fact that I didn't study with a group for the bar exam. Um, but at no time did I ever even like meet with anybody that I can remember. I'm going to go over everything. It was just kind of doing it all by myself.⁹⁶

Kat recalled having a few people check on her while she was studying, but she found studying alone to be a preferable strategy because of her experience with conflicts that could occur when studying with others. She explained:

Well, the first time . . . I was on Moot Court so I looked up and found the Moot Court office completely deserted. So I was in the Moot Court office, and I studied by myself. Because I had some friends, but you know, sometimes things get a little testy and you know, when people argue about what this rule says or what that rule says and you know what, I would rather study alone.⁹⁷

⁹³ Interview with Calvin (Sept 16, 2019).

⁹⁴ Interview with Fiona (Sept 13, 2019).

⁹⁵ Interview with Jade (Sept. 17, 2019).

⁹⁶ *Id.*

⁹⁷ Interview with Kat (June 21, 2019).

ii. Theme #5: Outside Distractions

Three of the participants who passed the bar exam on their second attempt had significant outside distractions while studying for the bar during their first attempt. These distractions included moving across the country, starting a new job, still having schoolwork due, conflict with significant others, and financial stress. These significant outside distractions made it difficult for the participants to focus on the bar exam.

Calvin had significant distractions while studying for the bar exam the first time. He moved across the country, started living with his girlfriend for the first time, and started a new job, all while studying for the bar exam.⁹⁸ He noted each of these things as being a significant feature of his first bar exam experience. He explained:

I took it July, the first offering after graduation, and there were things that were out of my control that would come up within [that timeframe]. Other things that were in my control that in hindsight I regret, but at the same time I knew could make the task even more difficult. So, I moved to [the west coast] shortly after I graduated.⁹⁹

He described the impact of working full time while studying for the bar his first time. He remembered: “I took a job, and they were flexible and tried to accommodate me as much as possible in my preparation. But then at the same time, they had their needs and obligations that they had to fill. So, they couldn't necessarily wait two, three months at all.”¹⁰⁰

Calvin also described ineffectively setting boundaries with family and his girlfriend so that they would understand the type of space and support he needed to be successful.¹⁰¹ As he prepared for his second time, he was able to identify what he required to stay in balance, and he more effectively explained this to his family, coworkers, and significant other. He explained:

So, the first time . . . I was moving, getting settled, and then starting work. The second time I was familiar with my surroundings. I knew where I wanted to study and when I wanted to study. Um, and then it was just communicating to my boss, uh, what my plan was and communicating to my family, what the plan was, and then it was pretty easy to fall into place after that.¹⁰²

Fiona also moved across the country during her preparation for her first attempt at the bar exam.¹⁰³ She did not have a job but decided to move because during an internship she had during law school she discovered that she liked the

⁹⁸ Interview with Calvin (Sept 16, 2019).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Interview with Fiona (Sept 13, 2019).

location.¹⁰⁴ She remembered: “Yeah, I moved to [the west coast] three days after I graduated.¹⁰⁵ And I was in the [new state] studying for the bar exam.”¹⁰⁶ Fiona had the opportunity to live with her mom while studying, so moving consisted of packing up and moving her room and unpacking clothes and other bedroom items. Fiona had one law school class to finish while she was studying for the bar exam, which was another outside distraction.¹⁰⁷ She recalled: “[Kaplan] started delivering the material and started like certain courses, like certain reviews prior to me actually finishing classes. So, I still had a paper due when the bar review classes started, which was a really late paper.”¹⁰⁸ She had to decide how to split her limited time between her law school class and bar preparation.

Kat discussed worries about money being a significant distraction while studying for the bar exam. She remembered:

But I would just say, studying for the bar, most of, a lot of my energy went towards worrying about money. Because I didn't have, I had got a grant, but it wasn't enough. I had a car note that I was paying at the time. I had an apartment, you know rent. I had to pay rent, you know, I have to eat. So, I was worried, always worried about other things other than the bar. So, I was distracted.¹⁰⁹

Even after finding out that she did not pass the bar, she had to wait before she could register to take it a second time because she did not have the money to pay for registration. She recalled:

So, I had to have to take it again. But um, it was tough. I couldn't retake it, I didn't take it that February. I had to wait until the following July to take it again . . . I didn't have the time or the money to take it at that point.¹¹⁰

When planning for the next bar exam, Kat discussed how she worked on her financial situation, which eased the stress she was under while taking the exam.¹¹¹ She was able to teach at a local community college. She stated:

And so, I had some money because the teaching thing was working for me. I was getting more classes as actually, you know, you get paid per class and I was given the math classes that spring. And thankfully because of how professorships work is you're on a contract and the contract pays, pays six months . . . like I taught my five classes that spring [in between her two attempts at the bar exam].¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Interview with Kat (June 21, 2019).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Interview with Kat (June 21, 2019).

Kat discussed how earning money during the gap between the first and second bar exams assisted her in being able to focus solely on the bar, thus eliminating the distraction of worrying about finances.¹¹³

In contrast to the other participants, Jade categorized her outside distractions differently.¹¹⁴ She discussed having more outside distractions during her second attempt at the bar exam, but she described them as a welcome break in the process of studying.¹¹⁵ Jade had a retail job and talked about celebrating holidays and going to a wedding while she was studying the second time.¹¹⁶ She felt that those activities gave her balance, instead of stressing about the bar exam. She explained:

Well, the February bar exam is a lot different, because I was still trying to work. I worked part time at Express, here and there, to bring in a little bit of extra spending money. I was in [my friend's] wedding, we had the holidays and family coming up, plus you know the winter weather and everything. So, there was a lot of other elements that were also going on, outside of me studying for the bar exam. So, it kind of helped me balance my time and knowing like, this is what I have to do.¹¹⁷

iii. Theme #6: Familiarity with the Bar Exam Relieved Stress

Three of the four participants who passed the bar exam on the second time found their second attempts were much easier because of their familiarity with the bar exam process. Understanding the test's mechanics, logistics, and pacing greatly reduced their stress and anxiety. For example, knowing where to eat lunch and how tired they were going to get during the exam helped them prepare and be mentally, physically, and spiritually ready to successfully take the bar.

Jade shared that being familiar with the nature of the exam helped her to relax and focus during the second administration.¹¹⁸ She was able to significantly improve her performance, partially due to adopting different studying strategies and more persistence in reviewing practice questions but also due to her familiarity.¹¹⁹ She recalled, "When I passed the second, you know, the second time around I passed way above what I thought I was going to. Um, and the second time around I was a lot calmer because I knew what I was going into."¹²⁰ Jade also discussed not "going blank" during her second attempt at the bar exam because of

¹¹³ *Id.*

¹¹⁴ Interview with Jade (Sept. 17, 2019).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

her familiarity with the process and the confidence that came with it.¹²¹ She described:

I would say kind of almost buil[t] up a stamina when I was taking the exam. Like, you know, I got to keep going. Like, cause I did get tired during the first one. I remember significant feelings of tiredness, where I didn't feel that as much going into it the second time. It took a lot of it, you know, it's a mental thing. I mean, you can, you have to know the material. But that's, you know, I felt like I knew the material going into it the first time, but it was all mental and I, it, it broke me down and I just, I shut down and blanked out and I didn't let that happen to myself the second time.¹²²

Jade also mentioned that the setup of the February bar exam helped her tremendously.¹²³ She cited the smaller testing room as a significant factor in her reduced stress.¹²⁴ She commented: "Another thing I really liked about the second time around was that the amount of people taking the bar exam was a lot smaller. Um, we were in a smaller conference room. It didn't seem as intimidating the second time around."¹²⁵

Calvin also discussed the setup and familiarity of the exam as a source of his confidence in the second administration.¹²⁶ He recognized that he came to the second bar exam with more experience in studying, but also his experience with the logistics and pace led to his success.¹²⁷ He remembered:

The second time, having gained the experience of the preparation, and what I needed to change and what I needed to do. And then also, the day of, not being caught off guard by how long the, the two days can go. Um, the enormous room that you're in, what you need to do leading up to the exam. Even that day, the night before, lunch plans on the day out. So having all that experience on the second time and definitely made me more, more confident that I would pass the second time.¹²⁸

Fiona discussed her familiarity with the overall process as a source of confidence.¹²⁹ Although she did not cite the specific testing conditions, she did mention that being familiar with the process helped her to reduce her nerves.¹³⁰ She reflected:

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Interview with Calvin (Sept 16, 2019).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Interview with Fiona (Sept 13, 2019).

¹³⁰ *Id.*

At least I kind of knew what I was getting myself into again, because I've been through one, I knew, okay, here's this test, not as nervous this time around because I knew what to expect. Um, yeah. And I definitely, like I said, changed my, my working on my studying habits to be more aligned with what I actually knew worked for me. I think that definitely changed or helped me pass the second time.¹³¹

Kat was the only participant to report that she was less confident and more stressed during the second time she took the bar exam. Her familiarity with the bar exam did not help prepare her or allow her to ignore distractions. She described having an essay topic on the exam that had never been tested in her state. She described: "The second time, even though my, my studying, I felt better in my studying like, I don't know, because I actually had a breakdown the second time around during the exam. Um, so they tested this subject that they never tested on the bar ever, ever."¹³²

During her second attempt at the bar exam, Kat described using her friend and family networks better for support.¹³³ During a break in the exam, she reached out to her law school mentor after she experienced the essay question that she felt she was not prepared for.¹³⁴

I literally cried that first day. Between the morning session and afternoon session. And, you know, I talked to my mentor, she was a 3L when I was a 1L. And I called her crying, and she made me feel better. But, you know, she told me, you know, either way the stuff that you could do about it, at this point, is to go through [the] afternoon session and kill it. Because the afternoon sessions were a performance test and a performance test, [it] carries the weight of two essays. If I do really well on this performance test, that'll make up for it.¹³⁵

C. Universal Themes

There were three themes that arose from all of the participants' experiences, regardless of whether they passed on the first or second time. All of the participants found balance in their study practices and habits that allowed them the space to take care of their emotional, physical, and spiritual well-being. Some of the participants identified that a lack of balance may have contributed to failing their attempt at the bar exam. After readjusting, they were able to find healthy outlets to manage the stress and demand of the bar exam. Second, most of the participants expressed having a heightened awareness of their ethnic and cultural background during their legal education experience. They were mindful of the lack of lawyers of

¹³¹ *Id.*

¹³² Interview with Kat (June 21, 2019).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

color and that the bar exam has disproportionately lower pass rates for people of color. This awareness added a sense of responsibility and stress that the participants carried both during law school and on the bar exam. Finally, all participants reported experiencing extreme amounts of stress and anxiety during the bar exam. This was a universal experience, despite hours of preparation and regardless of the participants' level of success in law school.

i. Theme #7: Finding Balance

All of the participants found balance while studying for the bar exam. While the participants who passed the bar exam their first time practiced balance initially in their bar exam preparation, the participants who passed their second time also found balance in their second attempt. Balance meant prioritizing healthy activities, such as going to the gym, praying, and making time for friends and family. Jade found balance during her second attempt at the bar exam when she realized, “[she] could still step away from it, and [she] could still play volleyball, [she] could still do these things, and [she] could still devote [her] time to studying for the bar and everything.”¹³⁶ Similarly, Kerri took walks with her family.¹³⁷ Including self-care practices as a part of bar preparation was due to the participants being mindful that their health and well-being were important elements for their success.¹³⁸

Marcus discussed the importance of understanding that he should not get burned out, and he tried to find outlets to maintain balance.¹³⁹ He shared that in his first few weeks of studying for the bar exam, he pushed himself too hard, which caused him to second guess his answers on practice exams.¹⁴⁰ He reflected:

I was making sure that I was doing things that would sort of take care of my mental health. Because, you know, being an athlete really helped me out a lot as far as being able to learn the diligence of practice and repetition. So that helped a bit. But more importantly, just building some balance in that experience as well. Whereas, you know, the first few weeks I just burned myself out, you know, it was like eight hours a day doing this, and I didn't provide any breaks for myself, and when I didn't do eight hours, I would beat myself up and you know, those types of experiences.¹⁴¹

¹³⁶ Interview with Jade (Sept. 17, 2019).

¹³⁷ Interview with Kerri (June 24, 2019).

¹³⁸ *Id.*

¹³⁹ Interview with Marcus (June 19, 2019).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Marcus also determined that it was important for his balance to make time for friends and a social life.¹⁴² He scheduled extended hours of studying and then reserved the rest of the time at night to relax.¹⁴³ He remembered:

So really being able to find some outlets that were healthy for me. Exercise was one of them as well as, uh, just engaging with at this point a social life. But being, you know, okay with giving myself some time to, to have fun, but also knowing that, okay, I got to get back to work and so the fun can't carry over into the next day, you know. So that really helped me out. But by this point in time, you know, my social life really wasn't my law school peers at all.¹⁴⁴

Mya also discussed reliance on her experience as an athlete to find balance while studying for the bar exam.¹⁴⁵ She discussed finding that a highly regulated schedule helped her be successful.¹⁴⁶ She explained:

Like I just need to relax, and like do nothing, and sometimes allowing yourself to have those moments. I used to be an athlete and like in law school in my second and third year I didn't exercise as much. But I was doing kickboxing [while studying for the bar exam], and so I was like going to the class in the morning, and then I would go work out and then shower, go home, and then come back in school. I'm normally not a person with a lot of routines, but that summer I just really had a routine of like, I ate the same thing for breakfast every single day, like you go to school, like go workout or like at least like take a walk, do something outside, and then go back to school and study. So that helped.¹⁴⁷

Fiona also discussed finding balance through exercise and an exercise community.¹⁴⁸ She did CrossFit both her first and second time, but during her second experience, she changed gyms. She remembered using CrossFit to help her relieve stress.¹⁴⁹ She recalled:

And like the night before, my second time taking the bar I had, um, I just really wanted them to like kind of work me out, get me really exhausted, so that I could sleep well. And I kind of like, you know, get those endorphins, and they always told me how, you know, working out helps brain power, I was determined to get those.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Interview with Mya (June 20, 2019).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Interview with Fiona (Sept 13, 2019).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Finally, Kat discussed finding a different type of balanced schedule during the second time she took the exam.¹⁵¹ During her first attempt, she was attempting fifteen-hour study days, which resulted in her not being able to sleep.¹⁵² She was trying to push herself to maintain an unbalanced schedule.¹⁵³ She observed:

I listened to a lot of people, you know a lot of, a lot of advice. They would say “Oh, you're supposed to, you have to study, you know, 18 hours a day, seven days a week” you know, you don't sleep, you know, you don't go have fun, you don't know, do other things. It's the bar, the bar, the bar, the bar, and the bar. And I listened to that and it was to my own detriment because it didn't work for me.¹⁵⁴

During her second attempt Kat devised a more balanced approach which resulted in her living a healthier existence during this time.¹⁵⁵

And once I got back to that reality, the second time studying was even better. I was studying from nine to five and nine to four Monday through Saturday. And Sundays were my day to go to church, you know, sleep, or if I was wanting to do nothing, you know, go to church, come back home and just do nothing, or hang out with my mom and my dad, you know, do those things.¹⁵⁶

Finding life balance was a crucial step for all of the participants in their bar exam experience. Several discussed starting the process with a lack of balance that left them tired, burned out, and with little energy. Eventually, all of the participants found a way to engage in activities that revived them to make their study time more effective.

ii. Theme #8: Awareness of Background

Both those who passed on the first time and those who passed on the second expressed an awareness of their racial and ethnic background. Often this awareness manifested in a heightened consciousness of the few attorneys of color, or that people of color struggle in legal education. For some, it was a reminder that they were succeeding while many of their fellow students of color were not. This awareness not only served to add a sense of duty but also a sense of stress and pressure.

Mya attended a highly ranked law school where there was an awareness among the students of color that the bar exam was a particular challenge for their

¹⁵¹ Interview with Kat (June 21, 2019).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

group.¹⁵⁷ One of her professors spoke explicitly about the challenges for Black students on the bar exam.¹⁵⁸

She remembered: “One of our professors basically [came] to scare the shit out of us about the bar exam, especially for Black people. So, I think yeah, that kind of helped make sure we took it seriously.”¹⁵⁹ Although that faculty member addressed the challenges of the bar exam, Mya recalls that Black students in her class still had a disproportionate pass rate. She stated, “You know only like five of us passed from my BLSA class of like 17 the first time. It was really, it was really bad.”¹⁶⁰

Tina also was aware of how her fellow students of color were experiencing the bar exam and the opportunities she had that they did not. She mentioned: “I still think about this now, but when we walked into the room, we saw all of the hand takers [those not using a computer to take the exam], and I would say 80% of them were Black men.”¹⁶¹ Tina also discussed being mindful that her job was paying for her bar preparation course, and she was mindful that many other students of color did not have that opportunity.¹⁶²

Kat expressed awareness about her ethnicity when she was studying for the exam.¹⁶³ She was reminded that the law has historically been a White institution created by White people in positions of power.¹⁶⁴ She expressed that this trickled down into the very materials that she was using to study for the bar exam.¹⁶⁵ She explained: “Especially with Black and brown students. I mean, figure out what works for you because the bar exam, the bar prep programs are not, they're not for us. They weren't for us.”¹⁶⁶ Kat's awareness helped her to recognize that to support her wellbeing, she needed to set up different schedules to balance all of her responsibilities.

Both Kerri and Marcus felt pressure to be successful because of their backgrounds. Kerri's father immigrated from Guatemala, and she felt a sense of responsibility to make him proud and to honor the sacrifices he made for her.¹⁶⁷ These feelings followed her throughout her life and were present in all aspects of her educational and professional experiences. She commented:

I felt pressured to succeed because my dad had sacrificed so much for me to get to where I was, when I was younger. He worked three jobs. I mean, I remember my mom said we could spend time with him. He ran this billing company as one of his side jobs, and we would go in on

¹⁵⁷ Interview with Mya (June 20, 2019).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Interview with Tina (July 1, 2019).

¹⁶² *Id.*

¹⁶³ Interview with Kat (June 21, 2019).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Interview with Kerri (June 24, 2019).

the weekends and play around, and run and like do chair races and all these things, so that we can spend time with them, and my mom could help. And um, he worked so hard his whole life, like seven days a week, 10-hour, 14-hour days. And so I felt like I needed to take advantage of what he'd given me.¹⁶⁸

Marcus also felt a sense of responsibility to the community because of how few lawyers of color are in his community.¹⁶⁹ He recalled people from his community telling him how much he was needed as a Black man in the legal profession.¹⁷⁰ He remembered: “And, I think it was the community really needing this, you know, they’d say, man, we need you, in a sense, kind of made it so I couldn’t back away from it. . . . It was a heavy burden to carry.”¹⁷¹

iii. Theme # 9: Nervousness and Anxiety During the Bar Exam

Regardless of whether the participant passed the bar on the first or second attempt, the entire group felt unsure about whether they could pass at some point during the process. They all experienced nervousness and anxiety while studying for the bar exam. Anxiety permeated the experiences of the participants during the study period, during the bar exam, and while waiting for the bar results. No matter the participants’ level of preparation, performance in law school, or amount of time studying for the exam, all participants felt unsure and scared.

Kerri explained that she “was freaked out by it,”¹⁷² and Calvin stated he was “less confident.”¹⁷³ All the exam takers experienced stress, anxiety, and self-doubt during the bar exam, and it manifested in different ways. Kat talked about the number of topics and how not knowing which ones would show up gave her a lot of anxiety.¹⁷⁴ She explained:

You know you’re scared. These exams are scary because, I don't know. Because in [my state] there are 14 possible topics that show up and ... I took the three-day exam. So you have three days where, you know, you have to sit Tuesday, Wednesday, and Thursday. And we have essays on Tuesday and Thursday and there is no calm. There's no calm, you know? You know, well, there was property on Tuesday, so I shouldn't see property on Thursday, when in fact you can definitely see property on Thursday. So you are just feeling overwhelmed.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ Interview with Marcus (June 19, 2019).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Interview with Kerri (June 24, 2019).

¹⁷³ Interview with Calvin (Sept 16, 2019).

¹⁷⁴ Interview with Kat (June 21, 2019).

¹⁷⁵ *Id.*

Marcus discussed feeling scared and nervous both during the exam orientation and on the exam days. His nervous habits resulted in needing to use the restroom but not leaving for a restroom break due to fear of losing valuable time.¹⁷⁶ He explained:

The first day was intense and, um, the orientation was scary. Overwhelming. The first day I went there and I got, I was nervous, and for some reason I must've drank too much water or something, Gatorade, before I went. And they were like, hey, if you start the exam you got to turn your exam into the proctor before you can go there to the restroom.¹⁷⁷

Marcus chose to wait to go to the bathroom because he knew he needed all the time to finish his answers. He described running to the restroom during the break.¹⁷⁸

Mya described even feeling unsure during her best subjects. She remembered: "And there was times, but even like, I was on my best subject, but I still kind of froze during the bar."¹⁷⁹ Tina also felt really prepared but found the experience overwhelming. She stated, "Um, just the general, like anxiety of like there's so much information sometimes in the moment I would just be so overwhelmed... There was a moment when I was like, well, why am I doing this? And um, I was like fighting back tears, although I felt prepared."¹⁸⁰ Fiona stated, "I was nervous. I had that anxiety and I just, you know, was kind of worried."¹⁸¹ Her worry extended into waiting for bar results after both her attempts. Despite a change in strategy when preparing for her second attempt, she still lacked confidence that she passed after taking the exam a second time. She remembered:

Like I'm not sure if I passed the first time. I kind of thought, I, I think I definitely felt like unsure, but I kind of like had an inkling that I didn't pass. Um, and in the second time, I mean I still kind of felt the same way. Very unsure.¹⁸²

Finally, Jade talked about really struggling emotionally due to stress and anxiety the first time she took the exam after checking her answers on an essay question between exam days. She recalled:

I know that after the essay questions, I had a mental breakdown. I was falling in my room because I did one, the evidence, not evidence, the tort question I did completely wrong and I knew that I did it completely wrong. And it's at that point, you know, I had known that I messed up. And I think that also kind of, um, played into me going into the multiple choice question. And I kind of wished that I would've

¹⁷⁶ Interview with Marcus (June 19, 2019).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Mya (June 20, 2019).

¹⁸⁰ Interview with Tina (July 1, 2019).

¹⁸¹ Interview with Fiona (Sept 13, 2019).

¹⁸² *Id.*

never looked. And I mean that I would have just stayed blind to what it was.¹⁸³

Like some of the other participants, Jade was unsure about some of her answers, but she was the only participant to disclose that she checked an answer before the next phase of the exam.¹⁸⁴ She felt that this put her in a precarious emotional state for the rest of the exam, which may have been a factor in her failing the first time.¹⁸⁵

III. DISCUSSION OF FINDINGS

A. Findings for Participants Who Passed the Bar Exam the First Time

Participants who passed the bar on their first attempt expressed a higher efficacy and higher ability to self-regulate while studying for and taking the bar exam. Each of the three themes that developed out of their perceptions and experiences indicates this common attribute among these participants. When the participants previously overcame their academic insecurities, this exemplified the process of mastery, which helped to develop higher self-efficacy.¹⁸⁶ Additionally, the participants' mindfulness of the study strategies that worked for them suggested that they had strong self-regulation practices that helped them to practice metacognition and be successful.¹⁸⁷ Finally, navigating the bar exam process with social support and finding support within the legal community demonstrated the participants' high levels of self-regulation.¹⁸⁸

i. Discussion of Theme #1: Overcoming Academic Insecurity Early

The participants who passed the exam on their first time all felt unsure about their abilities at some point in their academic career.¹⁸⁹ Had they not had this previous success within the law school environment, developing a sense of their ability to pass the bar exam may not have been feasible. Tina, Mya, and Kerri all expressed that their success within their first year of law school helped to boost their confidence.¹⁹⁰ This direct example of their ability to be successful translated into their belief that they could study for and pass the exam.

¹⁸³ Interview with Jade (Sept. 17, 2019).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Gaskill & Hoy, *supra* note 36, at 187.

¹⁸⁷ See *id.* at 194.

¹⁸⁸ See *id.*

¹⁸⁹ See discussion *supra* Section II.A.i.

¹⁹⁰ See discussion *supra* Section II.A.i.

Mastery experiences have the most influence on a person's efficacy.¹⁹¹ These experiences influence the way a person thinks about a task in either a positive or draining way. Bandura explains that failure destabilizes efficacy, particularly if it happens before a person's sense of efficacy has formed.¹⁹² For the bar takers who passed on the first try, their self-efficacy was formed during law school as they saw success in achieving the grades that they wanted to achieve. The insecurities they expressed about being unsure whether law school and the legal profession was right for them were replaced by a sense that they could be successful within the field and on the bar exam.¹⁹³ This underlying efficacy did not completely inoculate these participants from feeling stressed or anxious about the exam, but it provided them with a sense of belief that they could pass, and they had the experience to support these beliefs.¹⁹⁴

Mastery as a source of self-efficacy is a noteworthy theme for the students who passed on the second time because it shifts the common perception that those who do not pass the bar exam do not have the ability or intellect to do so. These findings suggest that those who do not pass the bar on the first time do not necessarily lack capability, only that undertaking the task of taking the bar is extremely difficult when a person does not believe in their academic ability. A lack of self-efficacy makes the task of day-in and day-out studying extremely difficult to accomplish.¹⁹⁵

ii. Discussion of Theme #2: Being Mindful of Study Strategies that Work

The first-time passer group shared experiences of using study strategies that work in order to be successful on the bar exam.¹⁹⁶ This theme suggests that the participants had a high degree of self-regulation while studying for the bar. Self-regulation involves the metacognitive practice of planning, organizing, monitoring, and evaluating study practices.¹⁹⁷ It has been described as a feedback loop that helps to monitor how successful one is at studying and readjusting if need be.¹⁹⁸ All of the first-time passers discussed implementing strategies that worked for them in the past and only utilizing the strategies suggested by their commercial program

¹⁹¹ SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41, at 80; see Mimi Bong & Einar M. Skaalvik, *Academic Self-Concept and Self-Efficacy: How Different Are They Really?*, 15 EDUC. PSYCHOLOGY REV. 1, 28 (2003).

¹⁹² SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41, at 80.

¹⁹³ See discussion *supra* Section II.A.i.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See discussion *supra* Section II.A.ii.

¹⁹⁷ Paul R. Pintrich, *A Conceptual Framework for Assessing Motivation and Self-Regulated Learning in College Students*, 16 EDUC. PSYCHOLOGY REV. 385, 389 (2004).

¹⁹⁸ See Charles S. Carver & Michael F. Scheier, *Self-Regulation of Action and Affect*, in HANDBOOK OF SELF-REGULATION 3–5 (Kathleen D. Vohs & Roy F. Baumeister eds., 2016).

that were useful for them. This ultimately had to take a significant degree of self-regulation because the students had to monitor how successful their efforts were.

A part of high self-regulation includes engaging in metacognitive behaviors. Metacognition refers to the process of thinking about learning or thinking.¹⁹⁹ Metacognitive activity is essential in high self-regulation because it helps the learner to evaluate what processes are working and how to accomplish the tasks that need to be done to be successful.²⁰⁰ When Tina discussed creating her own 300-page outline and Kerri talked about using Quizlet as a tool to help memorize, they were using metacognitive skills to determine which strategies would help them to learn the material in a way that would help them be successful on the bar exam. Without this awareness of how they were learning and the process of evaluating their efforts in studying, the participants who passed the bar exam on the first attempt may have stuck to ineffective techniques. Several of the first-time passers discussed not finding the bar review lectures useful in their studying process.²⁰¹ Spending several hours each day watching lectures would not be an effective use of a person's time in the sensitive period before the bar exam. Marcus discussed ditching the lectures shortly after he started studying because he needed more time to "develop a relationship with the material."²⁰² This was the process of high self-regulation through a metacognitive practice.

iii. Discussion of Theme #3: Finding Support

Finding support throughout the process of studying for the bar also demonstrated that the first-time takers had high self-efficacy and high self-regulation. In addition to mastery, social persuasion factors into an individual's belief that they can accomplish a task.²⁰³ Social persuasion includes a reciprocal "giving and receiving feedback and social support."²⁰⁴ This practice helps the individual to monitor their studying as well as to model behaviors that result in higher self-efficacy.²⁰⁵ Social persuasion also includes the verbalization of others that one has the ability to succeed.²⁰⁶ This type of monitoring and receiving of feedback by the participants who passed on the first time was demonstrated by their interactions with others while studying for the bar. Positioning themselves around others that they could model their behaviors after and receive feedback and support from provided a resource for the participants to maintain high self-efficacy. Marcus mentioned reaching out to law school academic support faculty for feedback,

¹⁹⁹ Patti Alleva & Jennifer A. Gundlach, *Learning Intentionally and the Metacognitive Task*, 65 J. LEGAL EDUC. 710, 722 (2016).

²⁰⁰ See discussion *supra* Section II.A.ii.

²⁰¹ See discussion *supra* Section II.A.ii.

²⁰² Interview with Marcus (June 19, 2019).

²⁰³ See Anders, *supra* note 41, at 15.

²⁰⁴ *Id.* at 23.

²⁰⁵ See Dale H. Schunk, *Self-Efficacy for Reading and Writing: Influence of Modeling, Goal Setting, and Self-Evaluation*, 19 READING & WRITING Q. 159, 168-69 (2003).

²⁰⁶ SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41, at 101.

not only on his practice problems but also for reassurance that he was succeeding in his efforts. He was establishing his self-efficacy through social persuasion. This type of feedback, from someone he had already developed a relationship with, helped him to keep believing that he had the ability to pass. This practice, as opposed to getting anonymous feedback from commercial preparation program graders, provided meaningful support that contributed to high self-efficacy.

External support also assists with self-regulation because it helps provide the feedback loop necessary for high self-regulation.²⁰⁷ Self-regulation requires determining if efforts are satisfactory or need to be adjusted, thus studying in groups or seeking feedback from others assists with this assessment.²⁰⁸ Feedback is more easily attainable with an engaged support system that can reliably provide information about the individual's self-regulation.²⁰⁹ When Tina mentioned studying with her friends throughout the bar exam process, she was providing herself with an environment where she could monitor her efforts in relation to others and receive feedback from them.²¹⁰ Mya also described mirroring her study habits after a person whom she perceived to be studying harder than her.²¹¹ Self-reflection, observation, and external support, including a feedback loop, assisted the first-time passers in attaining a high level of self-regulation.

B. Findings for Participants Who Passed the Bar Exam on the Second Time

The common themes of studying alone and experiencing outside distraction suggest that the group that passed the bar exam on the second time potentially had lower self-efficacy and self-regulation. Studying alone did not provide them with the social persuasion that helps to maintain high self-efficacy because they did not have others who were tied to the legal community providing them with support and words of affirmation.²¹² Additionally, studying alone did not help them with high self-regulation because they could not compare their strategies for studying with other students taking the bar exam.²¹³ The outside stressors that members of this group experienced also potentially impacted their self-regulation and self-efficacy. The non-bar-exam-related stress served to distract their attention from their studies and thus left the participants unsure of whether they could pass.²¹⁴ Finally, the participants in this group experienced higher self-efficacy during their second attempt because they were familiar with their surroundings and the process of

²⁰⁷ See Gaskill & Hoy, *supra* note 36, at 194.

²⁰⁸ See Barry J. Zimmerman & Anastasia Kitsantas, *Comparing Students' Self-Discipline and Self-Regulation Measures and Their Prediction of Academic Achievement*, 39 CONTEMP. EDUC. PSYCHOLOGY 145, 145 (2014).

²⁰⁹ See, e.g., Gavin T. Brown, Elizabeth R. Peterson & Esther S. Yao, *Student Conceptions of Feedback: Impact on Self-Regulation, Self-Efficacy, and Academic Achievement*, 86 BRITISH J. EDUC. PSYCHOLOGY 606 (2016).

²¹⁰ Interview with Tina (July 1, 2019).

²¹¹ See discussion *supra* Section II.A.iii.

²¹² See Gaskill & Hoy, *supra* note 36, at 194.

²¹³ See *id.* at 1168.

²¹⁴ See Shahin Vaezi & Nasser Fallah, *The Relationship Between Self-Efficacy and Stress Among Iranian EFL Teachers*, 2 J. LANGUAGE TEACHING & RSCH. 1168, 1169 (2011).

taking the bar exam.²¹⁵ Not being distracted during the test by the size of the room or the number of people helped them to visualize success and maintain high self-regulation during the exam itself.²¹⁶

i. Discussion of Theme #4: Isolation in Studying

While those who passed the exam on the first attempt used others for feedback loops and social persuasion to help them maintain high self-efficacy and self-regulation, those who passed on the second time chose to study alone. This did not provide them with the tools necessary to monitor their studying and feedback to keep their self-efficacy and self-regulation high.²¹⁷ Jade's decision to look up information about an essay question in between test days was an example of not having the social persuasion she needed to maintain high self-efficacy during the exam.²¹⁸ In contrast, Kat discussed maintaining a better support system in her second attempt. After a comparable experience where she was unsure about her answer to an essay question, she reached out for support from a mentor who was able to use social persuasion to help her maintain confidence that she could successfully finish the bar exam.

While studying alone does not necessarily indicate lower academic performance,²¹⁹ social isolation has been correlated with lower academic self-efficacy.²²⁰ Isolation includes the practice of being alone in one's endeavors and has been found to contribute to the lack of student success in higher education, in addition to creating a variety of other challenges.²²¹ The participants who passed the bar exam on the second attempt all discussed studying for the bar exam on their own. Without the social persuasion feedback about topics and study techniques needed to boost a person's self-efficacy, it may have been difficult for the participants to maintain a sense of being able to successfully navigate the bar exam.²²² Although they reported talking to family and friends, discussions with

²¹⁵ See Muhammed Yusuf, *The Impact of Self-Efficacy, Achievement Motivation, and Self-Regulated Learning Strategies on Students' Academic Achievement*, 15 *PROCEDIA SOC. & BEHAV. SCI.* 2623, 2624 (2011).

²¹⁶ See discussion *supra* Section II.B.

²¹⁷ See Gaskill & Hoy, *supra* note 36, at 194.

²¹⁸ See discussion *supra* Section II.B.i.

²¹⁹ See Lana Al Shawwa, Ahmad A. Abulaban, Abdulrhman A. Abulaban, Anas Merdad, Sara Baghlaf, Ahmed Algethami, Joullanar Abu-shanah, & Abdulrahman Balkhovor, *Factors Potentially Influencing Academic Performance Among Medical Students*, 6 *ADVANCES MED. EDUC. & PRAC.* 65, 71 (2015) (finding that 79% of medical students with higher GPAs studied alone).

²²⁰ See Sara Connolly, David Oberleitner, & Joseph Guarneri, *Tracking Social Isolation, Academic Self-Efficacy and Adjustment to College: Self-Reported Perceptions Across the First Semester of College*, 25 *J.C. ORIENTATION & TRANSITION* 17, 23 (2018).

²²¹ See Maia Szalavitz, *Social Isolation, Not Just Feeling Lonely, May Shorten Lives*, *TIME* (March 26, 2016), <http://healthland.time.com/2013/03/26/social-isolation-not-just-feeling-lonely-may-shorten-lives/>; J. Elizabeth Norrell & Bron Ingoldsby, *Surviving Academic Isolation: Strategies for Success*, 40 *FAM. REL.* 345, 345-47 (1991); Vighnarajah & Lim Shing Yu Jolene, *Assessment of Diversity Through Student Isolation: Qualitative Investigation of Academic, Social, and Emotional Isolation*, 1 *INT'L J. TCHR. EDUC. & PRO. DEV.* 1, 3 (2019).

²²² See SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41.

those who were a part of the legal system, legal education, and those who had been through the bar exam were missing from the social support for this group of participants. As Calvin mentioned, his girlfriend, who was an outsider to the legal system, was not able to provide him with the type of support that would be meaningful.

ii. Discussion of Theme #5: Outside Distractions

The outside distractions experienced by the second-time passers imposed additional stress while studying for the bar exam. Stress is characterized as the amount of pressure and demand on a person or the “mismatch between the demands” and pressure and the person’s capacity to cope.²²³ While stress is a universal symptom for everyone when taking the bar exam, unexpected stress worked to derail the self-efficacy and self-regulation that the participants needed while studying. Stress correlates negatively with self-efficacy.²²⁴ The participants who did not pass on the first time had a variety of external stressors: moving, moving in with family and friends, starting a new job, or not having enough money.²²⁵ These stressors provided additional pressure on each of the participants as they were preparing for the bar exam. Calvin attempted to manage his new job and his new boss’s expectations about studying while working. He suggested that he would have been surprised if he had passed the bar on the first time because of how many work-life obligations he was trying to navigate.²²⁶ These additional expectations from his new job and stress left Calvin with lower self-efficacy in relation to the bar exam.

The outside stressors impacted the regulation the second-time passers were able to maintain during their preparation. Stress has been correlated with avoidance and the deterioration of self-regulation.²²⁷ When under stress, the process required for high self-regulation is difficult to attain because a person’s attention is directed elsewhere other than the iterative process of monitoring and attaining their goals.²²⁸ Kat discussed being distracted much of the time during her first bar exam attempt because she did not have enough money. She was constantly thinking about the funds needed to cover the expenses of food, living, and transportation. This distracted her from high self-regulation that was exhibited by those who passed the bar exam on the first attempt. During Kat’s second attempt, she waited to take the bar exam until she had enough money saved. Eliminating this financial strain helped boost her self-regulation practices.²²⁹

²²³ Chris Kyriacou, *Teacher Stress: Directions for Future Research*, 53 EDUC. REV. 27, 28 (2001).

²²⁴ Vaezi & Fallah, *supra* note 214, at 1171.

²²⁵ See discussion *supra* Section II.B.ii.

²²⁶ Interview with Calvin (Sept 16, 2019).

²²⁷ See Andrew J. Elliot, Todd M. Thrash, & Kou Murayama, *A Longitudinal Analysis of Self-Regulation and Well-Being: Avoidance Personal Goals, Avoidance Coping, Stress Generation, and Subjective Well-Being*, 79 J. PERSONALITY 643, 663–64 (2011).

²²⁸ See discussion *supra* Section II.B.ii.

²²⁹ See discussion *supra* Section II.B.ii.

iii. Discussion of Theme #6: Familiarity with the Bar Exam Relieved Stress

When taking the exam the second time, the participants maintained higher levels of self-efficacy due to their familiarity with the exam process and the facilities where they would be taking the exam. This may have been due to their different physiological and emotional states during the second exam administration. In the first attempt, the emotional and physiological state of the participants may have been heightened to the threat level, impairing their performance. In their second exam attempt, their physiological states may have reached the challenge phase that allows for increased efficacy.²³⁰ Jade discussed how the familiarity with the exam itself helped her to anticipate and navigate the actual process of the exam more confidently on her second attempt.²³¹ She felt that she was not as stressed during her second attempt by the size of the room, the number of people, and the intensity of the test days.²³² This finding suggests that the second-time passers were able to maintain higher levels of self-efficacy and self-regulation during the exam itself. Without this level of efficacy, maintaining momentum and focus during the long multi-day process would be difficult. Self-efficacy has been highly correlated with motivation, which is required to continue answering the hundreds of questions on the bar.²³³

The process of monitoring progress, adjusting the speed of answering the questions, and the manner of reading and analyzing the questions on the bar all were impacted by the participants' familiarity with their surroundings. Fiona discussed her higher degree of self-regulation during the second time when she commented that the familiarity left her less distracted.²³⁴ The "monitor progress, react, and adapt" cycle that is required of high self-regulation²³⁵ was easier for her because she was not distracted by unfamiliar surroundings or how tired she was. Without this ability to regulate their activities during the bar exam, maintaining momentum was difficult on the participants' first attempt.

C. Universal Themes

Both the first-time passers and those who passed on the second time similar themes of finding balance in their studying practices, being mindful of their ethnic and racial backgrounds, and experiencing nervousness and anxiety during preparation and taking the exam. The balance the participants found indicated high self-regulation because they were able to monitor their study practice and identify

²³⁰ See Tschannen-Moran & McMaster, *supra* note 48, at 231.

²³¹ See discussion *supra* Section II.B.iii.

²³² *Id.*

²³³ Yusuf, *supra* note 215, at 2625.

²³⁴ See discussion *supra* Section II.B.iii.

²³⁵ Gaskill & Hoy, *supra* note 25, at 194.

their needs of wellbeing.²³⁶ This finding also suggested that the participants had high self-efficacy because they were able to take a break from studying and still be confident in their ability to succeed.²³⁷ Second, the participants who indicated that they were aware of their ethnic background through law school and the bar exam indicated that—for some students of color who do not find self-efficacy through other channels—lacking role models may have a deleterious effect. Finally, all participants expressed feeling nervousness and anxiety during the process of the bar exam. This theme indicates that self-efficacy does not preclude bar exam takers from having nerves during their bar experience.

i. Discussion of Theme #7: Finding Balance

Both the first-time passers and those who passed on the second time found balance within their studying habits for the bar exam. The second-time passers reported finding more balance, setting more boundaries, and focusing more on their well-being in their second attempt. This balanced practice suggests that the participants had high self-efficacy and high self-regulation. When taking time off for other health practices, the participants were using the required self-judgment aspect of high regulation.²³⁸ In certain scenarios, taking a break from studying is not a sign of avoidance; it is a sign of judging the situation and determining what is needed for focus, motivation, and determination.²³⁹ In this case, this awareness of their needs helped them to focus more while they were engaged in the process of reviewing the material. When Marcus discussed burning out in the first weeks of studying for the bar because he was not taking breaks, this demonstrated an imbalance in self-regulation and a lack of self-judgment and awareness of what he needed to do to maintain momentum.²⁴⁰ He found balance in studying after evaluating his study practices and identifying needs.

Similarly, finding balance demonstrated high self-efficacy because the participants were confident in their ability to accomplish the tasks needed to pass the bar exam. The relationship between self-regulation and self-efficacy is a symbiotic one in which the use of reflective practices to regulate learning improves the belief that the person can learn and accomplish the task.²⁴¹ As the participants were finding successful practices for maintaining their well-being and studying, they were likely gaining confidence that they could be successful on the bar exam; otherwise, they would not stop for breaks and prioritize health.²⁴² When Mya made time to go to her kickboxing class, she demonstrated her belief in her ability to

²³⁶ See Barry J. Zimmerman, *A Social Cognitive View of Self-Regulated Academic Learning*, 81 J. EDUC. PSYCHOLOGY 329, 329 (1989).

²³⁷ See *id.* at 331.

²³⁸ See *id.* at 333–34.

²³⁹ See *id.*

²⁴⁰ See discussion *supra* Section II.C.i.

²⁴¹ See Gaskill & Hoy, *supra* note 36, at 194.

²⁴² See *id.*

schedule her time in a way that was effective and would help her to pass the bar exam.

ii. Discussion of Theme #8: Awareness of Background

Participants discussed being mindful of their ethnic background both during their law school and bar exam experiences. While some discussed being aware of their family situation, others mentioned being aware of issues of historic oppression for their racial and ethnic groups.²⁴³ This awareness has implications for self-efficacy, and some in the participant group expressed the facts that there are not many lawyers from their ethnic group and that their ethnic group has a hard time passing the bar exam. Vicarious learning is one of the boosting factors of self-efficacy.²⁴⁴ Self-efficacy can grow when individuals have role models who they identify with who have been successful. This modeling behavior helps them to believe that they too can be successful in the task.²⁴⁵

Part of vicarious learning can take place through monitoring peers; however, it can also manifest through appraising role models.²⁴⁶ Mya and Marcus discussed their awareness of the lack of diversity within the legal profession. Marcus talked about having added pressure because the African American community regularly told him that he was needed as an attorney because there were so few within the town. He discussed this having the impact of not only putting pressure on him to succeed and not back down but, more importantly, also making him hyperaware that he was alone in this endeavor. He was aware of his isolation and his lack of role models to build self-efficacy. Mya saw fellow students of color regularly failing the bar, and her professor made a point to draw the Black law students' attention to the differing bar passage rates. Mya reported that this awareness drew her attention to the struggles for students of color. For those who do not have other sources of self-efficacy, such as mastery, lack of vicarious learning may have a negative impact on their self-efficacy.

iii. Discussion of Theme # 9: Nervousness and Anxiety During the Bar Exam

Feeling nervousness and anxiety was a significant theme for all of the participants throughout their experience with the bar exam. This is not a surprising theme because the bar exam is such a high-stakes process based upon a significant investment of time, money, and effort. This finding suggests that no matter the level of self-efficacy and self-regulation of the participants, extreme emotion and

²⁴³ See Iris Marion Young, *Five Faces of Oppression*, in *READING FOR DIVERSITY AND SOCIAL JUSTICE* 35–44 (Maurianne Adams et al. 2013) (explaining how marginalized groups often are exploited and marginalized in majority communities).

²⁴⁴ See SELF-EFFICACY: THE EXERCISE OF CONTROL, *supra* note 41, at 86.

²⁴⁵ See Anders, *supra* note 41, at 15.

²⁴⁶ See Kozar et al., *supra* note 28.

nervousness is to be expected from those taking the bar exam. Self-efficacy and self-regulation work together to help individuals moderate their behaviors to accomplish academic goals that will help them maintain their confidence level in their ability to accomplish their task.²⁴⁷ This process was still functioning even for the participants crying due to setbacks, drinking too much water during the exam process, and second guessing their overall ability to be a good lawyer.

Tina reported that she felt like she was going to cry during the exam despite feeling “really prepared”.²⁴⁸ Her nervousness did not necessarily correlate with how she was feeling about her preparation and what that meant for her ability to pass. While anxiety, and specifically test anxiety, can negatively impact test performance, self-efficacy has been shown to moderate test anxiety.²⁴⁹ For the participants in this study, their anxiety was not necessarily a symptom of a lack of preparedness or lack of belief in themselves but rather a realization of the consequences of not passing the bar exam. The participants’ self-efficacy may have reduced the level of anxiety they would have experienced if they did not believe in the efficacy of their preparation and ability. Students who are preparing for the bar should note that nervousness and anxiety is a normal part of the process and not a symptom of lack of ability.

IV. IMPLICATIONS

This study demonstrates the importance of high self-efficacy and high self-regulation in preparing for and passing the bar exam. It also provides insight into the issue of disparities in bar passage rates for students of color when comparing them to their white counterparts. The participants’ experiences share insight into the nature of the bar exam and unique challenges for students of color while drawing out several implications for students who will take the bar exam, law school faculty and staff, and bar examiners.

A. *Students*

i. Take Advice with a Grain of Salt

It is natural for students to seek out advice about the bar exam from any and every willing source. What this study demonstrates is that relying too heavily on the advice of others may place students in a position of trying out study techniques that they have never attempted before. The bar exam is not the time to try something new; rather, it is the time to double down on previous successful strategies. The participants in this study struggled when they tried to implement

²⁴⁷ See Gaskill & Hoy, *supra* note 36, at 194.

²⁴⁸ Interview with Tina (July 1, 2019).

²⁴⁹ Jennifer Barrows, Samantha Dunn, & Carrie A. Lloyd, *Anxiety, Self-Efficacy, and College Exam Grades*, 1 UNIVERSAL J. EDUC. RSCH. 204, 204 (2013).

study schedules that were unrealistic or watch lectures when that was not a good use of their time.

ii. Find A Mentor in The Legal Profession

Finding a person involved in the law who can coach students through the process of the bar exam is crucial to their success. The person can be a fellow law student, established attorney, or anyone who has successfully navigated the bar exam. This does not mean that students need to study with others, but it does mean that they need someone to give them feedback on their efforts and study practices. Without this reliable source, it is difficult to know if what they are doing will help them pass. Students should make sure this a mentor that is comfortable with giving them pep talks when they are feeling low self-efficacy and can give advice on the amount of time to spend on a range of topics.

B. Law Schools

i. Provide Opportunities for the Students to Practice in a Real-Life Exam Situation

The participants who passed on the second time overwhelmingly commented on how much comfort they derived from being familiar with their surroundings and the process. As much as possible, law schools should attempt to relieve these stressors by providing opportunities to visit the spaces where the bar will be held and give practice exams that mimic the testing situation as closely as possible. Commercial courses provide some of these opportunities, but they are national companies without connections to the localities where the bar exams are offered.

ii. Provide Support for Isolated Students

It is relatively easy to identify students who may be lacking self-efficacy and support in the bar exam. Students who do not have any lawyers in the family may be studying without a mentor-coach. They may also lack strong connections within their law school class will struggle on the bar exam. The bar exam is an opportunity for the law school to engage its alumni by setting up mentorship pairs for the six weeks prior to the bar. These mentors can be on call to check in on students and give advice and pep talks.

C. Bar Examiners

iii. Administer the Bar Exam at Private Testing Facilities, Like the Boards for Medical Students

Medical students can register for their boards anywhere and take them at testing centers at any time.²⁵⁰ The bar exam should move to this model or other flexible models of testing. If the bar exam was administered by commercial testing facilities, those who fail the bar could retake it within weeks instead of waiting months for the next large administration. This would reduce cost for students and likely costs for the bar examiners to not have to rent large convention centers.

i. Break the Bar Exam into Multiple Parts

Many of the bar exam topics are taught in the first year of law school. Providing a two-part bar exam tested after students' first year and then again after their third would provide students with more autonomy. If after the first year the student does not pass an exam over the 1L subjects, the student can decide if a different career path is appropriate. Many professions have a staggered licensing exam structure instead of a cumulative one-time, three-day exam after three years of schooling, which is the structure of the bar exam.

D. Commercial Bar Prep Companies

i. Provide Tailored Support for Students

The commercial bar prep companies should provide tailored mentoring and coaching experiences that will help students of color be successful on the bar exam. These companies have a national footprint that would allow them to pair bar examinees with individual coaching, particularly when they see that an examinee is struggling to complete practice problems. This individual support could also extend to different methods for reviewing the material outside of the traditional video lecture. Providing an opportunity for one-on-one coaching on specific topics that an examinee is struggling with could help remedy disparate bar pass rates.

ii. Use Virtual Reality to Help Bar Takers Prepare for the Bar Exam

Virtual reality is used in the training of law enforcement, doctors, TSA, and a variety of other professions. Similar technology could be used to help bar examinees prepare for the bar exam. The technology could help examinees visualize the type of facilities they will be in for the exam, and connect the examinees with mentor-

²⁵⁰ See *Step 1*, U.S. MED. LICENSING EXAMINATION, <https://www.usmle.org/step-exams/step-1> (last visited Dec 13, 2021).

coaches throughout the study process. This type of technology will allay any shock that examinees experience when they take the bar exam for the first time.

iii. Run Statistical Analysis on Bar Pass Rates Based on Demographics

Unlike any other stakeholder in legal education, commercial bar prep companies have access to a wealth of data about the bar exam.²⁵¹ Data about preparation strategies and pass rates should be analyzed and published by the commercial bar exam companies so the profession can understand the scope of the disparate bar pass rates and the contributing factors. Additionally, commercial bar prep companies should work together with the bar examinees to recreate the 1998 LSAC bar pass study.²⁵²

CONCLUSION

The findings from this study provide insight into the disproportionate bar passage rate for students of color, both through the lens of those who passed the first time and those who passed the second time. While the lower pass rates for Black and Latinx test takers is a result of systems of oppression developed over centuries, this study provides insight into individual test takers' experiences in relationship to well established correlating factors with academic success. High self-efficacy and high degrees of self-regulation have been shown to have large impacts on people's ability to succeed.

This study found that those who passed the bar exam on the first time showed a high degree of self-efficacy and self-regulation because of their earlier success in law school, which gave them the mastery experience they needed to believe they belonged in law school and would become a lawyer. This group demonstrated high regulation practices by being mindful of the study strategies that worked for them, and they utilized them throughout the process even when it went against commercial bar prep, faculty, or other advisors' recommendations. Finally, this group found social support throughout the bar exam process, which provided them with a feedback loop required to maintain high self-efficacy and self-regulation.

The group members who passed the bar exam on their second attempt were engaging in practices that had impacts on their efficacy and regulation, such as studying alone. They also experienced outside distractions that created stress and reduced their ability to self-regulate their studying. Finally, this group found that during their second attempt their familiarity with the bar exam process and

²⁵¹ See, e.g., Data & Analytics, BARBRI LEGAL ED (2021), <https://legaled.barbri.com/data-analytics/> (last visited Dec 13, 2021).

²⁵² See LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY iii (1998) (a longitudinal study finding disparate bar results based on race. Specifically, 92 percent for whites, 61 percent for African-Americans, 66 percent for Native Americans, 75 percent for Latino/Latinas, and 81 percent for Asian-Americans passed the exam on the first time).

logistics helped them to maintain high self-regulation and self-efficacy throughout the exam itself.

Both groups practiced balance when they successfully prepared for the bar exam. This practice demonstrated high self-regulation because they engaged in practices that kept their motivation high and well-being prioritized. They also were mindful of their ethnic background throughout law school and the bar exam, which served to leave them without vicarious learning, one of the factors in developing high self-efficacy. Finally, nervousness and anxiety pervaded the bar exam experience for all participants. This finding demonstrated that self-efficacy and self-regulation do not prevent nervousness on the bar, yet they may have reduced the levels of nervousness the participants could have felt had they not believed that they could succeed.