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### The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams

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# The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams

JOAN W. HOWARTH\*

## ABSTRACT

*Title VII protects against workplace discrimination in part through the scrutiny of employment tests whose results differ based on race, gender, or ethnicity. Such tests are said to have a disparate impact, and their use is illegal unless their validity can be established. Validity means that the test is job-related and measures what it purports to measure. Further, under Title VII, even a valid employment test with a disparate impact could be struck down if less discriminatory alternatives exist.*

*Licensing tests, including bar exams, have been found to be outside these Title VII protections. But the nondiscrimination values that animate Title VII disparate impact analysis for employers apply just as fundamentally to attorney licensing through principles of professional responsibility and legal ethics.*

*This Article examines the civil rights cases from the 1970s that established bar examiners' immunity from Title VII. It then analyzes our professional duties of public protection, competence, and nondiscrimination that require valid, nondiscriminatory attorney licensing tests, suggesting that the Title VII framework be borrowed for this purpose. The Article then undertakes that scrutiny, presenting evidence of the disparate impact of bar exams and their unproven validity, and suggesting feasible, less discriminatory modifications and alternatives. In other words, core professional responsibilities require consideration and adoption of valid licensing mechanisms that can reduce any disparate impact in who we permit to enter our profession, and who we exclude.*

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INTRODUCTION

Valid and nondiscriminatory attorney licensing mechanisms are crucial for the legal profession and the public we serve. Valid bar exams test knowledge and skills important for competence as an attorney. Nondiscriminatory licensing is necessary to ensure fairness in entry to the profession. Yet serious criticism of bar exams on both grounds—questionable validity and racially disproportionate impact—is widespread and persistent. Principles of professional responsibility require us to address these enduring problems. Understanding why these issues exist helps to identify a meaningful solution.

Some argue that licensing tests play a protectionist, exclusionary role as an effective barrier to entry at the expense of their public protection functions of assessing competency in nondiscriminatory ways.<sup>1</sup> Lawyers justify self-regulation because of our special role as officers of the court and defenders of the rule of law,<sup>2</sup> but the profession is not immune from capture by self-interest, favoring protecting the profession over protecting the public.<sup>3</sup>

Another explanation for the persistence of such serious flaws in bar exams is that attorney licensing as public policy is not well-studied, either within or

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1. See, e.g., RICHARD ABEL, AMERICAN LAWYERS 62–68, 71–72, 229 (1989).  
2. See, e.g., GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 114–21 (2017).  
3. See, e.g., ABEL, *supra* note 1, at 72; Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115, 119 (2017); Debra Lyn Bassett, *Redefining the “Public” Profession*, 36 RUTGERS L.J. 721, 723 (2005).

beyond the world of examiners. Led by the National Conference of Bar Examiners (NCBE), licensers have developed test design and psychometric expertise to improve the quality of the questions and the reliability of the scores,<sup>4</sup> both fundamentally important. But bar examiners have not been as ambitious or successful addressing the harder questions of aligning licensing to the competencies required for minimal competence in today's profession.<sup>5</sup>

Academic attention has also been minimal. Labor and employment law scholars do not focus on licensing issues, and licensing is often neglected when regulation of attorneys is considered.<sup>6</sup> Statements about and study of professional responsibility and legal ethics have traditionally focused more on the responsibilities of the individual attorney to the client than on the obligations of the profession.<sup>7</sup> A growing army of academic support professors work to prepare students to pass bar exams, but very few law professors study or write about attorney licensing practices as public policy.<sup>8</sup> And, of course, most members of the profession are happy to forget about bar exams once they have jumped that hurdle, except, perhaps, to agree that the barrier remain high for those who follow.<sup>9</sup>

The most powerful explanation for persistent weaknesses related to disparate impact and validity of attorney licensing may be bar examiners' immunity from Title VII, which can be traced to a handful of cases from the 1970s. In the decades since, Title VII has remade the workplace by requiring countless employers to throw out discriminatory tests that are not sufficiently job-related. But the continuing authority of federal appellate decisions that dismissed challenges by African Americans to bar exams in Southern states has meant that bar examiners—and

4. These efforts are a regular component of THE BAR EXAMINER, a quarterly publication of the National Conference of Bar Examiners (NCBE), available at <https://thebarexaminer.org/>.

5. For a discussion of recent initiatives to address these concerns, see text accompanying notes *infra*, describing studies recently launched by the NCBE and the State Bar of California.

6. See, e.g., GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING, v. 1 & 2 (4th ed. 2015); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2018). But see RUSSELL G. PEARCE, DANIEL J. CAPRA, BRUCE A. GREEN, RENEE NEWMAN KNAKE & LAUREL S. TERRY, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 913–49 (2d ed. 2014); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 931–44 (5th ed. 2009).

7. See Bassett, *supra* note 3, at 723.

8. But see Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 414 (2019); Andrea Anne Curcio, Carol L. Chomsky & Eileen R. Kaufman, *Testing, Diversity & Merit, A Reply to Dan Subotnik and Others*, 9 U. Mass. L. Rev. 206 (2014) [hereinafter Curcio et al., *Testing*]; Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343 (2004); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 365 (2002) [hereinafter Curcio, *A Better Bar*]; Deborah J. Merritt, Lowell L. Hargens, & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 931–32 (2001) [hereinafter *Raising the Bar*].

9. See STATE BAR OF CAL., FINAL REPORT ON THE 2017 CAL. BAR EXAM STUDIES (2017), app. A, tbl. 3, <http://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf> [<https://perma.cc/N3N2-3UPN>] [hereinafter 2017 CAL. BAR EXAM STUDIES] (showing that 79.8% of the 34,295 attorneys who responded to a survey preferred to keep the current cut score, compared to 2.3% of the 4188 applicants).

other professional licensing entities—have enjoyed decades of freedom from litigation pressure related to validity and disparate impact problems.

Those early cases in which judges declared bar examiners immune from Title VII were based in part on the lofty rhetoric of law as a profession dedicated to public protection. Despite a record showing striking racial disparities in bar pass rates, questionable validity, and problematic scoring practices, bar examiners successfully defeated the challenges by asserting their own good faith and wrapping themselves in the aura of public protection. Whether or not Title VII reaches licensers, the same scrutiny currently required of employers under Title VII can and should be imposed on bar examiners pursuant to core principles of professional responsibility. Two roads lead to the same destination.

This Article proceeds in four parts. Parts I and II describe how we got to our current problematic position. Part I explains the well-established Title VII doctrine that limits the use of discriminatory tests by employers, unions, and employment agencies. Part II describes the decisions by which bar examiners became immunized from those Title VII requirements. Those cases included important but unsuccessful civil rights claims that tell compelling stories about a history of disparate impact, questionable validity, and indefensible scoring of bar exams.

Part III argues that even if Title VII does not control, the professional responsibility obligations of public protection, competence, and nondiscrimination require valid, non-discriminatory attorney licensing tests, and that the three-step process of Title VII should be the blueprint for licensing scrutiny. In other words, existing ethical principles and professional responsibilities require bar examiners and courts to eliminate racial and ethnic disparities in licensing tests that are not affirmatively shown to be sufficiently job-related or that can be prevented by reasonable alternative licensing mechanisms.

Part IV then applies those professional responsibility obligations to scrutinize the licensing process. This Part first describes the disparate impact of bar exams. Then it analyzes the difficulties in establishing job-relatedness of bar exams. Finally, it explores potentially valid alternatives with less discriminatory impact.

Lastly, the Conclusion considers our profession's willingness to take seriously our professed values.

## I. TITLE VII STRIKES DOWN EMPLOYMENT TESTS THAT COMBINE DISPARATE IMPACT WITH INSUFFICIENT VALIDITY OR JOB-RELATEDNESS

Since the landmark 1971 Supreme Court case *Griggs v. Duke Power Co.*,<sup>10</sup> Title VII of the 1964 Civil Rights Act<sup>11</sup> has been understood to constrain the use of employment tests that have a significant disparate impact on the basis of

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10. 401 U.S. 424 (1971).

11. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1964). This disparate impact theory of liability was subsequently codified in the new section 703(k) of Title VII in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k) (1991). The Supreme Court addressed affirmative action in the context of disparate impact theories in *Ricci v. DeStefano*, 557 U.S. 557 (2009) (discussed in Curcio et al., *Testing*, *supra* note 8, at 212–21).

race, color, sex, religion, or national origin. This aspect of Title VII has made it unlawful to use irrelevant test results to prevent African Americans from becoming police officers<sup>12</sup> or keep women from becoming fire fighters with unjustified upper body strength tests.<sup>13</sup>

Established Title VII doctrine creates a back-and-forth of shifting burdens, depending on the evidence presented.<sup>14</sup> First, plaintiffs who are challenging an employment test establish a *prima facie* disparate impact claim by demonstrating that the test or other standard, even if facially neutral, has a disproportionately adverse effect as to a protected category.<sup>15</sup> What is sufficient to constitute substantial disparate impact to make the *prima facie* case? No “minimal statistical threshold” exists.<sup>16</sup> One “rule of thumb”<sup>17</sup> is the “80% rule” from the Equal Employment Opportunity (“EEOC”) Uniform Guidelines that creates a presumption of significant disparate impact when the success rate for the protected group is less than 80% or four-fifths of the success rate for the majority group.<sup>18</sup> A showing of statistical significance is most useful to establish that the disparities did not occur by chance.<sup>19</sup>

If the plaintiff meets the burden of proving disparate impact, the burden shifts to the defendant employer to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>20</sup> The job-relatedness inquiry is about the validity of the test: “Validation is the scientific way of determining whether a selection device actually does what it is intended to do: to make reliable and meaningful distinctions between individuals on the basis of their ability to perform particular tasks with competence and/or to function successfully in particular jobs.”<sup>21</sup> Content validity is established when the test measures the knowledge, skills, and abilities of the work the applicant seeks to perform.<sup>22</sup>

12. *But see* Mark S. Brodin, *Discriminatory Job Knowledge Tests, Police Promotions, and What Title VII Can Learn from Tort Law*, 59 B.C. L. Rev. 2319 (2018) (arguing that Title VII validity requirements are too diluted to offer adequate protection from discriminatory tests).

13. *See, e.g., Taking the Heat: Gender Discrimination in Firefighting*, 17 J. GENDER, SOC. POL’Y & L. 713, 719–25 (2009) (transcript of symposium remarks of Title VII plaintiff and firefighter Brenda Berkman).

14. *See* BARBARA T. LINDEMANN, PAUL GROSSMAN, & C. GEOFFREY WEIRICH, I EMPLOYMENT DISCRIMINATION LAW 2.II.A.1 (5th ed. 2012) [hereinafter LINDEMANN ET AL.].

15. 42 U.S.C. § 2000e-2(k)(A)(i) (2012).

16. *Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135, 153 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1724 (2013); *see* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 980 (1988) (case-by-case analysis required, but no fixed standard).

17. LINDEMANN ET AL., *supra* note 14, at 3.III.A.1.

18. 29 C.F.R. §§ 1607.1, 1607.4(D) (1978). For a discussion applying the 80% rule to professional licensing, *see* S.E. Phillips, *Legal Issues in Credentialing Programs*, in *TESTING IN THE PROFESSIONS: CREDENTIALING POLICIES AND PRACTICE* 228, 231 (Susan Davis-Becker & Chad W. Buckendahl, eds., 2017) (citing to § 1607.4D) (“For example, if 90% of Whites and 70% of African-Americans pass a credentialing examination, there is a *presumption of disparate impact* because 70% is less than 80% of 90 = 72%”).

19. *See, e.g., Jones v. City of Boston*, 752 F.3d 38, 43 (1st Cir. 2014).

20. 42 U.S.C. § 2000e-2(k)(A)(i) (2012).

21. Barbara Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17, 18 (1979).

22. *See also* LINDEMANN ET AL., *supra* note 14, at 4.I.3.E.A.

Over the decades, the requirements of validation pursuant to Title VII have become more specific. Courts consider whether an employment test is supported by a suitable job analysis,<sup>23</sup> shows evidence of competence in test construction,<sup>24</sup> tests content related to job content,<sup>25</sup> tests content representative of job content,<sup>26</sup> and uses a scoring system that reflects job performance.<sup>27</sup>

Even if the defendant employer is able to establish that the test is job-related and consistent with business necessity, plaintiffs may prevail if they can prove the existence of “an alternative employment practice” with less disparate impact that the employer “refuse[s] to adopt.”<sup>28</sup> The EEOC Guidelines advise that, “the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible.”<sup>29</sup>

These are the disparate impact principles that were first established in *Griggs v. Duke Power Co.* and later codified in Title VII in the Civil Rights Act of 1991.<sup>30</sup> These substantive inquiries—disparate impact, validity, and less discriminatory alternatives—are the heart of Title VII law and should be equally important for the mechanisms that control access to the legal profession.

## II. THE CASES THAT PROTECTED BAR EXAMS FROM TITLE VII SCRUTINY ALSO REVEALED DISPARATE IMPACT AND VALIDITY TROUBLES

The protections and processes of Title VII would seem to be highly relevant to bar exams, which have persistent disparate results on the basis of race and ethnicity, questionable validity, and for which less discriminatory alternatives can be pursued. But the validity and job-relatedness of bar exams have not been seriously challenged in large part because courts have held that the Title VII principles applicable to employment tests do not reach licensing exams. Licensing entities currently live largely beyond the reach of Title VII because they are not employers, unions, or employment agencies as concerns bar applicants.<sup>31</sup>

Bar examiners’ immunity from Title VII rests on a collection of cases from the 1970s that upheld highly questionable practices of bar examiners from Georgia,

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23. *E.g.*, *Guardians Ass’n of N.Y.C Police Dep’t, Inc. v. Civil Serv. Comm’n*, 630 F.2d 79, 95–96 (2d Cir. 1980).

24. *Id.* at 96–97.

25. *Id.* at 97–98.

26. *Id.* at 98–99.

27. *Id.* at 100–06.

28. 42 U.S.C. § 2000e-2(k)(1)(A)(ii)(2012).

29. 29 C.F.R. § 1607.3 (1998).

30. 42 U.S.C. § 2000e-2(k) (2006); see BARBARA T. LINDEMANN, ET AL., 1 EMPLOYMENT DISCRIMINATION LAW 3-2 to 3-14 (5th ed. 2012); see also Curcio et al., *Testing*, *supra* note 8, at 214 n.26.

31. See Phillips, *supra* note 18, at 229–31. (Susan Davis-Becker & Chad W. Buckendahl, eds., 2017). *But see* Ass’n Mex.-Amer. Educ. (AMAE) v. California, 231 F.3d 572 (9th Cir. 2000) (holding that Title VII applies to a California teacher licensure test).

Alabama, South Carolina, and Virginia against challenges by African American applicants.<sup>32</sup> Although these cases immunized bar exams from Title VII scrutiny, their discussions of both job-relatedness and disparate impact are worth our attention. These cases provided bar examiners with immunity, but they should not offer bar examiners much comfort.

A. TYLER V. VICKERY (1975)

In *Tyler v. Vickery*,<sup>33</sup> a consolidated class action, the Fifth Circuit rejected the claims of African Americans who challenged the Georgia bar exam on equal protection and due process grounds. The record established significant disparate impact in that “[o]n the February and July, 1973, administrations, slightly more than one-half the black applicants were unsuccessful [] as compared to a failure rate of roughly one-fourth to one-third among white examinees.”<sup>34</sup> All forty African Americans who took the July 1972 Georgia bar exam had failed.<sup>35</sup>

Affirming summary judgment for the defendant bar examiners, the Fifth Circuit panel found no evidence of intentional discrimination, said that Title VII did not apply directly because the Georgia bar examiners were not an employer, employment agency, or labor organization, and refused to import the Title VII disparate impact theory into the constitutional equal protection analysis.<sup>36</sup> Notably, the court determined that “[s]ince it is undisputed that the Georgia bar examination has a greater adverse impact on black applicants than on whites and has never been the subject of a professional validation study, acceptance of appellants’ suggested standard of review would inexorably compel the conclusion that the examination is unconstitutional.”<sup>37</sup>

Finding no intentional discrimination and no fundamental right, the court instead used a rational basis standard to uphold the bar exam.<sup>38</sup> Under that relaxed standard, the court established that the bar exam was valid by relying on the fact that the bar examiners designed the test for the purpose for which it was used and that they set the passing score (“70”) for that same purpose, to determine minimum competency.<sup>39</sup> By this standard, bar exams are valid so long as bar examiners did not borrow tests originally used for some other purpose, such as to license doctors.<sup>40</sup>

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32. For an important critique of these and related cases, see Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 733–50 (1996).

33. 517 F.2d 1089 (5th Cir. 1975).

34. *Id.* at 1092.

35. *Id.*

36. *Id.* at 1095–96. In *Washington v. Davis*, 426 U.S. 229 (1976), a case about a District of Columbia police test with disparate impact against African Americans, the Supreme Court held that evidence of intentional discrimination is required to establish an equal protection violation.

37. 517 F.2d at 1096.

38. *Id.* at 1102.

39. *Id.*

40. *Id.*

The Fifth Circuit's extreme deference to the Georgia bar examiners allowed the Court to also reject any problem in the bar examiners' practice of sometimes using the "informal check" of comparing the law school grades of applicants whose initial bar exam scores were close to the passing line, even though whether to engage in such a review was entirely discretionary with a bar examiner, not based on any set standard or score.<sup>41</sup>

The Fifth Circuit also rejected the due process claim, determining that the opportunity offered by Georgia to retake the exam was a sufficient substitute for any process of review.<sup>42</sup> As support, the court cited a law review comment for the proposition that even if one in a hundred exams were wrongly graded to fail instead of pass, "the probability that the same individual would be the victim of error after two reexaminations is literally one in a million."<sup>43</sup> Anyone who has even thought about taking a statistics course—or who read the *Tyler v. Vickery* discussion of "Black English"<sup>44</sup>—should cringe at this conclusion.

The plaintiffs in *Tyler v. Vickery* succeeded only in securing a dissent. The dissenting judge agreed with the plaintiffs that the dismissal on summary judgment was inappropriate because the question of racial motivation was inherently fact-bound.<sup>45</sup> Specifically, the dissent noted that the testimony of a bar examiner clerk that he maintained the anonymity of test-takers during grading and the mixed evidence regarding identifiability of "Black English" made proof of purposeful discrimination difficult, but not impossible.<sup>46</sup>

The dissent also noticed potential problems with the bar examiners' setting of the cut score. In language equally applicable today, the dissenting judge found that "the selection of cut-off scores, especially when such selection is not subject to review, may be arbitrary. The legality of such decisions may not properly be resolved by mere reference to the good faith judgment of the bar examiners."<sup>47</sup> Yet the good faith of bar examiners is precisely what supports bar exam cut scores in many jurisdictions today.<sup>48</sup>

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41. *Id.* at 1103.

42. *Id.*

43. *Id.* (citing Comment, *Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?*, 52 BOS. U. L. REV. 286, 301 n.115).

44. Plaintiffs offered a deposition of Dr. J. L. Dillard, a linguist and author of *BLACK ENGLISH: ITS HISTORY AND USAGE IN THE UNITED STATES* (1972). *Id.* at 1094. "According to Dr. Dillard, many black persons tend to speak an English variant, characterized by structures such as the pre-verbal use of 'been,' which has been coined Black English." *Id.* Dr. Dillard also testified, however, that some White Southerners also used that pattern of speech and that expertise was required to determine the difference. *Id.*

45. 517 F.2d 1089, 1105 (Adam, J., dissenting).

46. *Id.* (Adam, J., dissenting).

47. *Id.* at 1106 (Adam, J., dissenting).

48. See, e.g., 2017 CAL. BAR EXAM STUDIES, *supra* note 9, at 45–46.

B. PARRISH V. BOARD OF COMMISSIONERS OF ALABAMA STATE BAR  
(1976)

Shortly after deciding *Vickery*, the Fifth Circuit returned to very similar issues in *Parrish v. Board of Commissioners of the Alabama State Bar*.<sup>49</sup> Once again, African American plaintiffs showed evidence of disparate impact (over ten administrations, African Americans passed the Alabama bar exam at 32% and Whites at 70%)<sup>50</sup> of a bar exam that had not been validated.<sup>51</sup> Following *Vickery*, once again the court found that the disparate impact analysis of Title VII had no application, leaving only constitutional challenges to the Alabama bar exam using a highly deferential standard in which the lack of validation of the bar exam was irrelevant.<sup>52</sup> However, *Parrish* resulted in a narrow victory for the plaintiffs on a discovery issue. Over a partial dissent, the court determined that the trial court incorrectly granted summary judgment without having ruled on the plaintiff's motion to compel disclosure of the score sheets and grading notes for the February 1973 exam.<sup>53</sup> The Fifth Circuit rejected the bold claim by the bar examiners that their own good faith and credibility in denying any wrongdoing made the documents irrelevant.<sup>54</sup>

C. RICHARDSON V. MCFADDEN (1976, 1977)

In *Richardson v. McFadden*,<sup>55</sup> African American applicants argued that their equal protection challenge to the South Carolina bar exam should incorporate Title VII's framework regarding disparate impact and job-relatedness. *Richardson* was an important victory for South Carolina's bar examiners with continuing impact today. But the Fourth Circuit in *Richardson* was impressed by neither the validity nor the quality of South Carolina's bar exams.

Regarding validity, or job-relatedness, plaintiffs argued that the state had failed to "demonstrate that the bar examination is job related as opposed to simply a measurement of general educational preparation."<sup>56</sup> The plaintiffs in *Richardson* argued that validity could not be sufficiently established by reference to law

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49. 533 F.2d 942 (5th Cir. 1976). In an earlier stage of the case, the Fifth Circuit had upheld denial of the plaintiffs' motion to recuse the trial judge. See *Parrish v. Bd. of Com'rs of St. B. of Alabama*, 524 F.2d 98 (1975). The motion to recuse rested on the facts that two years previously the trial judge had served as the president of the Montgomery Bar Association when its bylaws explicitly excluded African Americans from membership. The Fifth Circuit rejected the bar association allegation as "essentially an allegation based on the judge's background [that] states no specific facts that would suggest he would be anything but impartial" and that the "claim of bias is general or impersonal at best." 524 F.2d at 101.

50. 533 F.2d at 944.

51. *Id.* at 947.

52. *Id.* at 949.

53. *Id.* at 946-47.

54. The bar examiners asserted the circular argument that the documentation was irrelevant because no evidence had contradicted their own "positive affirmation . . . that they were not guilty of any improper conduct." *Id.* at 947.

55. *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976), *on reh'g*, 563 F.2d 1130 (4th Cir. 1977).

56. *Id.* at 746.

school grades, but that a job analysis was required.<sup>57</sup> Sadly, this serious criticism of bar exams is still apt. Bar exams today largely test knowledge of first-year subjects and first-year analytical skills rather than evaluating the broader range of job-related lawyering skills.<sup>58</sup> The *Richardson* plaintiffs were unsuccessful in their challenge, not because the Fourth Circuit was impressed by the validity of the exams, but because the Court held that Title VII standards did not apply:<sup>59</sup>

[W]e believe the record is inadequate to demonstrate either “criterion” (“predictive”), “content,” or “construct” validity under professionally acceptable methods. Thus, if we were to determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid.<sup>60</sup>

Without the ability to rely on Title VII’s disparate impact theory to prove discrimination, the plaintiffs attempted to prove intentional race discrimination. They introduced a historic timeline to show a pattern of South Carolina bar examiners making major changes to admissions policies to shut down access just as African Americans were in a position to use those paths into the profession.<sup>61</sup> The plaintiffs focused on three policy changes: elimination of the diploma privilege, which had provided automatic admission to the bar for graduates of the State’s one accredited law school; elimination of the option of “reading for the bar”; and abolishment of reciprocity. Plaintiffs produced evidence that South Carolina eliminated its diploma privilege “in 1950, three years (the normal law school term) after a ‘separate but equal’ law school was started at South Carolina State College, a black school.”<sup>62</sup> “Reading law” was “eliminated in 1957, ‘coincidentally’ shortly after a black applicant used this method.”<sup>63</sup> Reciprocity was “abolished in January 1972, not long after a black member of the Oklahoma Bar applied under the reciprocity rule.”<sup>64</sup> The court found this evidence circumstantial and not sufficient to prove intentional discrimination.<sup>65</sup>

Having failed in their claim of intentional discrimination, the plaintiffs sought to prove that the licensing test did not bear “a fair and substantial relationship” to the determination of minimal competency as a lawyer.<sup>66</sup> As with respect to

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57. *Id.* at 748.

58. For related criticism, see Howarth & Wegner, *supra* note 8, at 426 (bar exam tests mainly first-year subjects and skills).

59. *Richardson*, 540 F.2d at 748.

60. *Id.* at 746–47 (citation omitted).

61. *See id.* at 747.

62. *Id.* (parenthetical in original).

63. *Id.* at 746. For a history of the law school at South Carolina State College, see Alfred D. Moore III, *Turning the Tide of Segregation: The Legacy of the Law School at the South Carolina State College*, J. OF BLACKS IN HIGHER EDUC. (Sept. 7, 2017), available at <https://www.jbhe.com/2017/09/turning-the-tide-of-segregation-the-legacy-of-the-law-school-at-south-carolina-state-college/> [<https://perma.cc/7QXZ-MAFV>].

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

65. *Id.* at 747–48.

66. *Id.* at 749.

validity, the Fourth Circuit expressed little confidence in the South Carolina bar examiners' methods of determining their cut score or of scoring individual exams.<sup>67</sup> Witheringly, the Fourth Circuit described the evidence introduced to validate the cut score as "very subjective and general in nature and hardly acclaimed by the educational testing experts who testified."<sup>68</sup>

The court appeared even less impressed by methods used to score bar exams, which it described in detail. The court recounted the testimony of two examiners, one who appeared to read the whole exam and assign an overall grade, the other who assigned points for individual sections. The first described his grading method as assigning a number grade based on the "totality" of multiple questions and "the student's evidence of ability in answering the whole."<sup>69</sup> He explained that he did not use a point system, but, instead:

It is a matter, in the preliminary process, of giving a mental assessment of importance to this question, or lesser importance to this question, or lesser importance to that question. When I have finished grading a paper, what I would have is one grade that I put on there.<sup>70</sup>

Surprisingly, the Fourth Circuit found this "[p]erhaps the testimony most supportive of the validity of the cut-off score."<sup>71</sup>

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67. The court acknowledged that "[w]hether the passing score selected by the Bar Examiners bears 'a fair and substantial relationship' to the determination of minimal competency presents a much more difficult question." *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 749–50.

71. *Id.* at 749. The court's full description of this scoring method is worth considering:

My own approach is that, preliminary to the grading process, to go back to the exam question and in studying through them very carefully, I make a mental assessment of the importance to be attached to each one. I do not go through, for my own purposes: I feel that it's a mechanical process of assigning a point value to each question. I then read the examinations. I treat them not as questions to which so may [sic] points were assigned to this or to that issue of this question, but as a totality and assign to that paper a grade which I think is reflective of the student's evidence of ability in answering the whole.

Q. What form would that grade take, a letter grade?

A. It would be a numerical grade. And I think, for my own testing purposes, the magic passing point is 70, and I range upward or downward through that.

Q. All right sir, as I understand it, you read the entire paper and then assign a single numerical grade, with 70 as passing?

A. That is right.

Q. As I understand it, you don't attempt to assign points to any particular portion of the test?

A. Not in a numerical fashion. It is a matter, in the preliminary process, of giving a mental assessment of importance to this question, or lesser importance to this question, or lesser importance to that question. When I have finished grading a paper, what I would have is one grade that I put on there.

*Id.* at 749–50.

The court explained that other examiners “employed a very mechanical system, assigning points to particular parts of questions, summing those points, and then in some cases obtaining the 70 cut-off line simply by raising the highest score to an ‘A’ or perfect score.”<sup>72</sup> The court was not impressed by these methods, declaring that “[w]e tend to agree with appellants’ expert that, if this second system is utilized in the precise manner described by the Bar Examiners, it would be almost a matter of pure luck if the ‘70’ thereby derived corresponded with anybody’s judgment of minimal competency.”<sup>73</sup>

The court’s deference to the examiners was so great that “almost a matter of pure luck” was deemed sufficient. In essence, the court could not see any greater accuracy from either of the two contrasting grading methods:

[A]bsent professionally validated, administered, and evaluated examinations, it is not clear that to require grading along the lines discussed by [the gestalt examiner] rather than the more mechanical and arbitrary method [. . .] is anything more or less than to demand greater subjectivity. It is not at all certain which of these two, both of whom are competent lawyers but laymen at question design and evaluation, generates numerical scores which more accurately reflect their ‘true’ evaluation of competency.<sup>74</sup>

Ironically, these questionable methods of grading bar exam essays and performance tests probably continue today in part because of these decisions from the 1970s that combined rhetorical critique of the examiners’ methods with a legal affirmation and shield from Title VII.

After having noted that the examiners were not trained in test design, the Fourth Circuit upheld the tests because the bar exams were designed and scored by the bar examiners for the right purpose: “[i]n view of the fact that all Examiners both designed their exams and assigned scores so as to indicate their judgment as to minimal competency, we cannot find the results obtained so unrelated to the State’s objectives as to violate the Equal Protection Clause.”<sup>75</sup> Good faith controlled.

In addition to the claims made by the class of plaintiffs, two individual plaintiffs used a chart of borderline scores and pass or fail results to argue that the

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72. *Id.* at 750.

73. *Id.*

74. *Id.*

75. *Id.*

results were arbitrary and capricious.<sup>76</sup> Their claims did not challenge the method by which their exams were scored, because each person was failed in spite of having apparently achieved the points required to pass. Specifically, these two plaintiffs argued that each had met or exceeded the required score of 70 because they had scored 70.5 and 69.6 respectively, and the bar examiners standard practices included “rounding up.”<sup>77</sup>

The court was not persuaded by the bar examiners’ attempts to justify and reconcile the apparent inconsistency with which borderline cases were treated. The examiners asserted that an applicant could “fail” the bar exam, even with a cumulative passing score, based on “‘the configuration of scores’ and Examiners’ notes containing remarks on the general quality of papers” without any further review of the actual exam papers.<sup>78</sup> But the court found that the bar examiners’ explanations of their judgments about “the configuration of scores” did not actually explain the results on the chart and that “there [was] no consistently applied distinction between them.”<sup>79</sup>

76. “Kelly and Spain base their case on the following table of examination scores:

Applicant	Scores for each 6 examiners						Average	Pass/Fail
# 160 June, 1971	66	67	68	71	78	81	71.8	Fail
# 128 June, 1970	66	67	67	72	75	79	71.0	Pass
Spain June, 1971	66	66	68	71	72	80	70.5	Fail
#121 June, 1969	66	69	F(69)	71	73	73.8	70.3	Pass
Kelly Feb., 1971	63.5	66	69 +	70	71	78	69.6	Fail
# 17 Feb., 1970	60	67	71	72	73	74	69.5	Fail
# 10 Feb., 1971	63	66	70	71	73	73	69.3	Pass

*Id.* at 750–51.  
77. *Id.* at 751.  
78. *Id.*  
79. The court provided details:

But, appellants point out, individuals who had lower cumulative totals and not obviously different ‘configuration of scores’ were passed. As to Spain, the Examiners’ basic response is that one cannot expect perfection in the difficult borderline cases. As to Kelly, they argue that no one who failed three Examiners had a lower score and was judged to have passed the exam. They contend that individual # 10 ‘passed because he passed four examiners,’ indicating that passing would be automatic in such situations. Brief for Appellee at 63 n.37. That, at least, was their response before applicant # 17 was brought to their attention. He passed four Examiners, had a higher cumulative score than # 10, and still failed the examination.

*Id.*

The more the examiners attempted to describe their methods, the more arbitrary they appeared. The examiners explained at oral argument that two candidates with identical scores could pass and fail, or a candidate with a lower score could pass and one with a higher score fail, based on the “written comments [that] often accompany borderline scores and are employed to make these difficult decisions.”<sup>80</sup>

The court was skeptical about the bar examiners’ justification for having passed one applicant and failed another with an identical score:

The one who passed failed three Examiners and, in addition, failed the Multistate portion of the exam. The one who failed it also failed three Examiners but passed the Multistate portion. The Examiners told us that this was perfectly reasonable because comments on the grading sheets corresponded with the ultimate results. The one who failed was noted to be “poor in expressing himself” and “didn’t seem to have an understanding of legal principles.” The one who passed was “marginal plus” and “had some good answers.”<sup>81</sup>

The Fourth Circuit found this reliance on comments to be “irreconcilable” with the examiners’ claims about the precision of their numerical scores: “It is not possible to pursue the goal of objectivity and also put ultimate reliance on subjective notes as general and vague as those.”<sup>82</sup> The trial court concluded that “the correspondence of a score of 70 with even their own judgment of minimal competency was little more than fortuitous” and found in favor of the two individual plaintiffs on the basis of arbitrary and capricious scoring that violated due process and equal protection.<sup>83</sup>

In its first consideration of this case, the Fourth Circuit agreed and ordered that the matter be remanded to the district court to certify the admission to the South Carolina bar of the two African American men who had scored 70.5 and 69.6.<sup>84</sup>

That sole victory from the Fourth Circuit was short-lived. On rehearing *en banc*, the Court reversed that portion of the decision. Instead, the Court affirmed the district court that had denied relief, differing on whether the federal court lacked subject-matter jurisdiction (deferring to the Supreme Court of South Carolina’s authority over bar admission) or whether the claim had not been established.<sup>85</sup> The court seemed to say that proof that two defendants failed two plaintiffs who should have been passed was an insufficient basis for any remedy:

Significant also, with respect to Spain and Kelly, are the facts that of the aggregate 828 examinations given during the eight times that the bar examination

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80. *Id.*

81. *Id.* at 751–52.

82. *Id.*

83. *Id.* at 751.

84. *Id.* at 751–52.

85. *Richardson v. McFadden*, 563 F.2d 1130, 1130–32 (4th Cir. 1977).

was administered over a four-year period, *only these two examples of alleged discrimination were proved*, and that Spain and Kelly continued to fail on subsequent reexaminations. Succinctly stated, we simply do not think that Spain and Kelly proved their case.<sup>86</sup>

*Richardson v. McFadden* stands for the principle that claims of racial bias in bar exams require proof of intentional discrimination,<sup>87</sup> but it should also be remembered as a Fourth Circuit decision that prevented two African American men from being admitted to practice law in South Carolina because each passed the bar exam only once.

#### D. WOODARD V. VIRGINIA BOARD OF BAR EXAMINERS (1979)

The circuit decision that may be cited most often for the principle that bar examiners are not subject to Title VII is *Woodard v. Virginia Board of Bar Examiners*,<sup>88</sup> a 1979 Fourth Circuit per curiam opinion that upheld two district court rulings in favor of Virginia's bar examiners. In the first district court decision, the court ruled that Title VII did not apply to bar examiners because they were not employers within the meaning of the statute. Faced with Title VII authority that seemed to have expanded its reach beyond traditional employers, the district court distinguished bar exams:

The EEOC guidelines in this area were developed in the context of traditional employment practices. The employment tests utilized in the industrial setting are designed to measure an individual's ability to perform certain limited functions or operate particular machinery. The bar examination, however, serves a much broader purpose.<sup>89</sup>

In this way, the court explicitly drew on the profession's public role to justify immunity from Title VII.

After denying the plaintiff's efforts to certify a class, in its second opinion the district court held, following *Richardson*, that the court had no subject-matter jurisdiction because the case sought to challenge an individual's results, a matter for which only the Virginia Supreme Court or the U.S. Supreme Court had jurisdiction.<sup>90</sup>

On appeal, the Fourth Circuit issued a one-page per curiam opinion that upheld the district court decisions against the plaintiff. Following *Vickery*, the Fourth

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86. *Id.* at 1132 (emphasis added).

87. See *Pettit v. Ginerich*, 582 F.2d 869 (4th Cir. 1978) (per curiam decision rejecting claims of seven African American applicants to the bar in Maryland based on *Richardson*); see also *Delgado v. McTighe*, 522 F. Supp. 886 (E.D. Pa. 1981) (upholding Pennsylvania bar exams as "neutral on their face and rationally serv[ing] the purpose for which they have been designed," *id.* at 894-95, and noting that *Richardson* upheld bar exam essay questions with no model answer and multiple grading methods, *id.* at 897).

88. See generally *Woodard v. Virginia Bd. of B. Exam'rs*, 598 F.2d 1345 (4th Cir. 1979).

89. *Woodard v. Virginia Bd. of B. Exam'rs*, 420 F. Supp. 211, 214 (E.D. Va. 1976), *aff'd*, 598 F.2d 1345 (4th Cir. 1979) (citations omitted).

90. *Woodard v. Virginia Bd. of Bar Exam'rs*, 454 F. Supp. 4, 5 (E.D. Va. 1978).

Circuit held that governmental licensing boards are not employers and therefore, are not covered by Title VII.<sup>91</sup> Following a concurrence in *Richardson*, the Fourth Circuit found no subject-matter jurisdiction.<sup>92</sup> The court affirmed the denial of class action status without any discussion or citation.<sup>93</sup>

E. LIMITING THE OUTSIZED IMPACT OF *VICKERY, PARRISH, RICHARDSON, AND WOODARD*

Litigation that challenges bar examiners' immunity from Title VII based on these cases could be important, and analogous claims may exist under state non-discrimination statutes and constitutions. But that is not my purpose here. My argument is that the legal profession's rules of professional responsibility require a showing of validity and job-relatedness whenever bar exams have a disparate impact, and the simple structure established for Title VII cases can be borrowed for such inquiries.

III. PROFESSIONAL RESPONSIBILITY REQUIRES SCRUTINY OF THE VALIDITY OF AND ALTERNATIVES TO ANY LICENSING TESTS WITH DISPARATE IMPACT

Attorney licensing authorities should not continue to exploit the gap in Title VII created by *Vickery, Parrish, Richardson, and Woodard*, which has permitted bar exams to avoid legal scrutiny related to the lethal combination of disparate impact and unproven validity that stains bar exams.

One theme of the Title VII disparate impact cases is that unlawful discrimination can exist even without any intent to discriminate. Good faith and good intentions are no defense. Similarly, using unvalidated bar exams with known disparate impact violates ethical requirements related to public protection, competency, and non-discrimination. Good faith, best intentions, and hard work by bar examiners should not be sufficient to allow disparate bar passage rates to continue without serious scrutiny of the job-relatedness and business necessity of bar exams and investigation of less discriminatory alternatives. Professional responsibility for public protection, competence, and non-discrimination support the need for valid, nondiscriminatory bar exams, even in the absence of Title VII enforcement.

A. PUBLIC PROTECTION

Bar examiners and state supreme courts are correctly emphatic that their core responsibility in licensing is to protect the public.<sup>94</sup> Bar examiners claim that

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91. 598 F.2d at 1345.

92. *Id.* at 1345 n.1.

93. *Id.* at 1346.

94. See, e.g., Judith A. Gunderson, *President's Page*, 87 BAR EXAM'R (Winter 2018–19) ("By their very nature and purpose (public protection), licensing exams like the bar exam must be crafted to ensure that those who obtain the professional license can safely practice in their chosen field"); *Our Mission: What We Do*, STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/About-Us/Our-Mission> [<https://perma.cc/Q3RC-3RHP>]

specific role in the context of the entire profession's duties to the public. The Preamble to the *Model Rules of Professional Conduct* describes a lawyer as "an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>95</sup> Further, "[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."<sup>96</sup> Licensing, as an aspect of attorney regulation, should be undertaken in the public interest because "[a] lawyer should . . . help the bar regulate itself in the public interest."<sup>97</sup>

Some states have codified the organized bar's obligation to protect the public. For example, California's Business & Professions Code establishes that, "Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions."<sup>98</sup>

The principle of public protection means that licensing requirements should be valid, that is, closely related to competency as a new attorney. The commitment to public protection also means that licensing requirements should protect the entire public, including fair access to the profession for qualified candidates from diverse communities. The legal profession protects the diverse public better if it is itself diverse.<sup>99</sup>

## B. COMPETENCE

Any professional licensing test should protect members of the public by ensuring that new members of the profession possess minimal competence to practice that profession.<sup>100</sup> Thus the purpose of bar exams is to ensure that new lawyers

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(last visited May. 26, 2020) ("The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system"); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN COLORADO, PREAMBLE TO CHAPS. 8–12, *available at* <https://www.coloradosupremecourt.com/PDF/BLE/201%20-%20Rules%20Governing%20Admission%20to%20Practice%20Law%20in%20Colorado.pdf> [<https://perma.cc/CD97-RPY6>] ("In regulating the practice of law in Colorado in the public interest, the Court's objectives include . . ."); VIRGINIA BRD. OF BAR EXAMINERS, CODE OF CONDUCT, *available at* <https://barexam.virginia.gov/code.html> [<https://perma.cc/D77V-V9BM>] ("our top priority is to protect the public").

95. MODEL RULES OF PROF'L CONDUCT, pmbl. para. 1 (2018) [hereinafter MODEL RULES].

96. *Id.* at para. 6.

97. *Id.* "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." *Id.* at para. 12.

98. CAL. BUS. & PROF. CODE § 6001.1 (2019).

99. For one of many examples, clients of color may have difficulty finding attorneys of color to whom they can relate. See Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Disparities in Representation for Employment Civil Rights Plaintiffs*, 15 LEGIS. & PUB. POL'Y 705, 723 (2012).

100. See, e.g., Brian E. Clauser, Melissa J. Margolis & Susan M. Case, *Testing for Licensure and Certification in the Professions*, in NAT'L. COUNCIL ON MEASUREMENT IN EDUC. & AM. COUNCIL ON EDUC., EDUCATIONAL MEASUREMENT 720 (Robert L. Brennan ed., 4th ed., 2006).

are minimally competent to practice law.<sup>101</sup> A test is valid if it tests what it purports to test.<sup>102</sup> A test that bears a weak relationship to actual competence is not valid. Bar exams are valid, then, when they do a good job of distinguishing between applicants who are barely minimally competent to practice law and those who are below that standard.

Competency is also the underlying professional responsibility requirement that justifies bar exams in the first place.<sup>103</sup> A lawyer cannot take on representation for which he or she is not competent.<sup>104</sup> Under the *Model Rules of Professional Conduct*, the first duty owed by the lawyer to the client is competence. Rule 1.1 provides that, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>105</sup>

The *Model Rules* do not tell us much about what competence looks like, beyond this general description that rests on “reasonably necessary” knowledge and skills. But hints exist. Perhaps oddly in this age of specialization, the Comment to Rule 1.1 suggests that the default requirement for competence in many situations means the “proficiency of a general practitioner.”<sup>106</sup> The Comment also identifies “some important legal skills” including “the analysis of precedent, the evaluation of evidence and legal drafting” that are “required in all legal problems.”<sup>107</sup> The Comment identifies issue spotting (“determining what kind of legal problems a situation may involve”) as “[p]erhaps the most fundamental legal skill,” a “skill that necessarily transcends any particular specialized knowledge.”<sup>108</sup> This central professional responsibility principle of “competence” requires licensing requirements to measure competence in order to be valid.

### C. NONDISCRIMINATION

The legal profession has also adopted various principles, rules, and even statutory obligations related to nondiscrimination, diversity, and inclusion, many of which are directly relevant to the problems of disparate racial and ethnic impacts of bar exams.

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101. See, e.g., Michael T. Kane, *The Role of Licensure Tests*, 74 B. EXAM’R. 27 (2005).

102. See AM. EDUC. RES. ASS’N, AM. PSYCHOL. ASS’N, & NAT’L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUC. AND PSYCHOL. TESTING 11 (2014) [hereinafter STANDARDS, 2014]. For a discussion of credentialing tests including tests for professional licensure, see *id.* at 174–78, 181–83.

103. For a discussion of various understandings of competency that complicate attorney licensure, see Howarth & Wegner, *supra* note 8, at 398–406.

104. MODEL RULES R. 1.16 cmt. 1 (“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.”).

105. MODEL RULES R. 1.1.

106. MODEL RULES R. 1.1 cmt. 1.

107. MODEL RULES R. 1.1 cmt. 2.

108. MODEL RULES R. 1.1 cmt. 2. The Comment also reminds us that, “[a] lawyer can provide adequate representation in a wholly novel field through necessary study.” *Id.*

Since 2008, the American Bar Association has included as one of its four goals to “[e]liminate Bias and Enhance Diversity,” which includes two “objectives”: “1. Promote full and equal participation in the association, our profession, and the justice system by all persons” and “2. Eliminate bias in the legal profession and the justice system.”<sup>109</sup> Both objectives are undermined by licensing tests that disproportionately prevent potential attorneys of color from becoming licensed.

More recently, in 2016 the *Model Rules of Professional Conduct* were amended to explicitly prohibit discrimination.<sup>110</sup> Rule 8.4 now defines as professional misconduct conduct that the lawyer knows or reasonably should know is discrimination related to the practice of law.<sup>111</sup> Specifically, under the *Model Rules* it is now professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.<sup>112</sup>

By its express terms, this prohibition on discrimination is not limited to work with clients but extends to other activities “related to the practice of law.”<sup>113</sup> That certainly should include admissions activities determining access to the profession.

Importantly, the Comment to the Rule tells us to interpret the Rule’s meaning by looking at substantive antidiscrimination law: “The substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).”<sup>114</sup> Thus, even though Title VII by its own terms has been held not to reach attorney licensing, Rule 8.4(g) suggests that the legal profession should borrow the methods and approaches of Title VII to ensure that its admissions practices are nondiscriminatory.

109. *ABA Mission and Goals*, AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [<https://perma.cc/33BS-3MTJ>] (last visited Apr. 23, 2020); see Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 201–02 & n.25 (2017).

110. See Gillers, *supra* note 109, at 196–97; Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A. (2019), [https://www.americanbar.org/groups/construction/publications/under\\_construction/2019/spring/model-rule-8-4/](https://www.americanbar.org/groups/construction/publications/under_construction/2019/spring/model-rule-8-4/) [<https://perma.cc/UJ2Q-FKNR>].

111. MODEL RULES R. 8.4(g).

112. MODEL RULES R. 8.4(g).

113. MODEL RULES R. 8.4 cmt. 4. Some states have rejected or modified Model Rule 8.4(g). For example, California apparently adopted a more limited version of Rule 8.4.1 that prohibits discrimination “in representing a client” or in “law firm operations.” See CAL. RULES OF PROF. CONDUCT R. 8.4.1 (approved by the Supreme Court, effective Nov. 1, 2018) (“(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons\* on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.\* (b) In relation to a law firm’s operations . . .”).

114. MODEL RULES R. 8.4 cmt. 3.

The *Model Rules* are not the only source of ethical or professional responsibility obligations related to nondiscrimination in attorney licensing tests. California, again, recently added explicit statutory recognition that the State Bar's obligation to protect the public includes improved access to and inclusion in the profession.<sup>115</sup> The Colorado Supreme Court, as another example, has adopted the explicit purpose of "[p]romoting diversity, inclusion, equality and freedom from discrimination" as one of its objectives "in regulating the practice of law in Colorado in the public interest."<sup>116</sup> Disparate impact of the bar exam would be evidence that these goals of inclusion and nondiscrimination are not being accomplished.

#### D. FROM RHETORIC TO OVERSIGHT

Oversight matters. The persistent problems of attorney licensing have flourished in the absence of meaningful statutory or constitutional oversight. But well-established principles of professional responsibility and legal ethics also provide a mandate for scrutiny of licensing mechanisms that disproportionately prevent admission on the basis of race, ethnicity, gender, and other protected classes.<sup>117</sup> The privilege of self-regulation carries the responsibility to exercise that regulation in a manner that is aligned with the profession's stated goals. Therefore, whether or not Title VII applies, attorney licensing tests that disproportionately exclude protected groups should trigger the same scrutiny: they must be shown to be job-related and have no equally valid, less discriminatory alternatives.

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115. See CAL. BUS. & PROF'L CODE § 6001.1. "Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions." *Id.* (emphasis added) (the emphasized clause was added by Stats. 2018, c. 659 (A.B.3249), § 3, eff. Jan. 1, 2019).

116. See RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN COLO., pmbl. to chs. 18–20 (adopted and effective Apr. 7, 2016), available at <https://www.coloradosupremecourt.com/PDF/BLE/201%20-%20Rules%20Governing%20Admission%20to%20Practice%20Law%20in%20Colorado.pdf> [<https://perma.cc/3HUE-YUEZ>] ("In regulating the practice of law in Colorado in the public interest, the Court's objectives include: . . . [p]romoting diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice . . .").

117. Gender differences related to bar exam test components are also well-established. See, e.g., Susan M. Case, *Men and Women: Differences in Performance on the MBE*, 74 B. EXAM'R 44, 44 (May 2006) ("men outperform women on the MBE by about 5 points"); RESEARCH DEPARTMENT, NCBE, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK 117–24 (2019), available at <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/Y639-GWCQ>] [hereinafter N.Y. UBE IMPACT REPORT] (showing that men performed better on the MBE than women and also on the overall exam). Because men outscore women on the MBE, while women score better than men on the essays, decisions to give greater weight to the MBE and less to the essays are knowingly hurting women. My focus here, however, is race and ethnicity, where bar passage differences are more dramatic.

#### IV. PROFESSIONAL RESPONSIBILITY LICENSING SCRUTINY: DISPARATE IMPACT; VALIDITY; LESS DISCRIMINATORY ALTERNATIVES

Our professional obligations to protect the public by ensuring competence with non-discriminatory entrance requirements should be met with the same three-step scrutiny already well-established by Title VII for employment tests,<sup>118</sup> which could be called professional responsibility licensing scrutiny. Does the test have a disparate impact? If so, can the testers demonstrate sufficient job-relatedness (validity)? Even if a test with disparate impact is shown to be valid, is there a less discriminatory alternative with equal (or greater) validity?

##### A. DISPARATE IMPACT

The well-known and widely decried lack of diversity of the legal profession<sup>119</sup> has many causes, one of which is disparate results on our licensing tests.<sup>120</sup> Evidence of the disparate impact of bar exams is overwhelming. Many jurisdictions do not disclose bar passage rates by race or ethnicity, but the available information reveals persistent significant racial and ethnic disparities in bar exam passage.

##### 1. DISPARATE IMPACT IS ESTABLISHED

The most complete demographic information comes from California, which is unusual in that it provides race and ethnicity bar exam passage rates for every administration of its bar exam.<sup>121</sup> These results demonstrate persistent, consistent

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118. See *supra* text accompanying notes 10–30.

119. See, e.g., Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Are Not 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/H6NZ-WBRG>]. For further analysis, see Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 305–13 (2014) (providing data comparing the diversity of legal profession with the diversity of other prestigious professions). For updated data, see information collected by the American Bar Association, showing that in 2018, the legal profession was composed of 3% Asians, 5% Hispanics, 5% Blacks, and 85% Whites. See Am. Bar Ass’n, ABA NATIONAL LAWYER POPULATION SURVEY (2018), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/National\\_Lawyer\\_Population\\_Demographics\\_2008-2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf) [<https://perma.cc/LB57-ENKK>].

120. See, e.g., Alex M. Johnson, *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem and Affirmative Action is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 405 (2013) (“Almost all would agree that the individual state bar examinations act as a severe impediment to certain members of under-represented minority groups becoming practicing attorneys”); Glen, *supra* note 8, at 381–83 (discussing studies showing white applicants’ bar passage rates were 30% higher than black applicants’ bar passage rates); *id.* at 508–10 (discussing New York State Evaluation from 1992 showing similar pattern). Due to disparate impact concerns, American Bar Association entities focused on diversity have actively opposed efforts to ratchet up the bar pass rates required for law schools to retain ABA accreditation. See, e.g., Letter from Chairs of the ABA Goal III Entities in Response to Standard 316 (Jan. 11, 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/feb19/3-aba-diversity-entities-response-to-standard-316.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/feb19/3-aba-diversity-entities-response-to-standard-316.pdf) [<https://perma.cc/L5UX-T5DM>].

121. See STATE BAR OF CAL., CAL. BAR EXAM STATISTICS, <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics> [<https://perma.cc/AM6T-33N8>] (last visited Apr. 23, 2020).

disparities based on race and ethnicity. For example, [Table 1](#) lists the first-time July pass rates for graduates of California ABA accredited law schools in 2018, 2017, and 2016, broken down by ethnicity.<sup>122</sup>

**TABLE 1:**  
**FIRST TIME PASS RATES FOR GRADUATES OF CALIFORNIA ABA ACCREDITED LAW SCHOOLS**

	Asian	Black	Hispanic	White	Other Minority
July 2018	66.4%	45.1%	56.3%	69.5%	47.8%
July 2017	69.7%	48.9%	57.1%	75.1%	64.7%
July 2016	57.7%	42.3%	51.9%	69.3%	52.1%

The results for graduates of ABA accredited law schools from outside California, contained in [Table 2](#), for the same years show the same pattern.<sup>123</sup> The older statistics posted going back to 2006 show the same disparate results.<sup>124</sup>

**TABLE 2:**  
**FIRST TIME PASS RATES FOR GRADUATES OF ABA ACCREDITED LAW SCHOOLS FROM OUTSIDE CALIFORNIA**

	Asian	Black	Hispanic	White	Other Minority
July 2018	54.8%	25%	44.7%	67.5%	52.9%
July 2017	69.8%	44.8%	52.5%	74%	59.5%
July 2016	57.9%	22.2%	53.4%	67.9%	47.9%

Reports that have been occasionally released for New York bar exam pass rates also show wide disparities. The most recent statistics come from New York’s report on test results for the five administrations from July 2015 to July 2017, a report that studied the impact of New York’s adoption of the Uniform Bar Exam (“UBE”) in July 2016.<sup>125</sup> Disparate results preceded and followed adoption of the UBE. [Table 3](#) details that for each of the five bar exam administrations studied, for both all test-takers and domestic, first time test-takers, the pass rate for

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122. *Id.*  
123. *Id.* Pass rates for February administrations and for graduates of California Accredited and Non-Accredited law schools are similar. *Id.*  
124. *Id.*  
125. See N.Y. UBE IMPACT REPORT, *supra* note 117.

Caucasian/White was above the overall average.<sup>126</sup> The pass rate for each of the minority categories was below the average.<sup>127</sup> The statistics for the same administrations for domestic-educated, first time takers, listed in [Table 4](#), were similar.<sup>128</sup>

TABLE 3:  
NEW YORK OVERALL BAR PASSAGE RATES

	Caucasian/ White	Asian/Pacific Islander	Black/African American	Hispanic/ Latino
July 2017	79.6%	60.4%	48.6%	57.1%
July 2016	76.3%	51.0%	39.6%	53.8%
July 2015	75.2%	44.6%	41.0%	48.2%

TABLE 4:  
NEW YORK DOMESTIC-EDUCATED, FIRST TIME TAKERS BAR PASSAGE RATES

	Caucasian/ White	Asian/Pacific Islander	Black/African American	Hispanic/ Latino
July 2017	90.1%	85.0%	65.8%	77.6%
July 2016	87.5%	81.5%	57.8%	73.0%
July 2015	85.1%	73.0%	58.6%	65.6%

These disparities would establish the need for further scrutiny if Title VII applied.<sup>129</sup>

These disparate results are not new.<sup>130</sup> An earlier NCBE report analyzing the 2006 New York results explained that, of domestic-educated, first-time bar exam takers, “[t]he Caucasian/White group had an average total score of about 720, the Asian/Pacific Islander group had an average total score of about 703, the Hispanic/Latino group had an average total score of about 682, and the Black/

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126. *See id.* at 149 (Table 4.2.16).  
127. *Id.*  
128. *See id.* at 166 (Table 4.2.24).  
129. *See supra* text accompanying notes 14–19 (describing proof of disparities under Title VII).  
130. *See supra* text accompanying notes 31–93 (discussing Title VII cases from the 1970s concerning disparate racial impact of bar exams).

African American group had an average total score of about 671,<sup>131</sup> disparities the authors described as “large.”<sup>132</sup>

NCBE researchers also undertook a national study of racial and ethnic disparities, which showed that the average 2006 MBE score for Whites was 149.3, for Asians was 146.1, for Hispanics was 143.3, and for Blacks was 137.9.<sup>133</sup> These substantial disparities were described as consistent with studies from New York and Texas.<sup>134</sup>

The most authoritative national bar passage study was prepared by Linda F. Wightman for the Law School Admissions Council in the 1990s.<sup>135</sup> Based on 23,086 test-takers, the Wightman study showed first-time bar passage rates of 91.93% for Whites, 61.40% for Blacks, 66.36% for Native Americans, 75.88% for Mexican Americans, 74.81% for Hispanics, and 80.75% for Asian Americans.<sup>136</sup> Although Wightman’s analyses are more than two decades old, more recent analyses have shown little change in racial disparities.<sup>137</sup>

## 2. CUT SCORE DECISIONS CAN EXACERBATE DISPARATE IMPACT WHILE UNDERMINING VALIDITY

The science of testing has led professional licensers—of nurses, engineers, dentists, and others—to use a single, professionally developed multiple choice test as the anchor for those professions’ assessment of minimal competence.<sup>138</sup> For the legal profession in the United States, this function is performed by the NCBE’s Multistate Bar Exam (“MBE”).<sup>139</sup> But the legal profession veers away from psychometric standards and passing score (cut score) determinations in other professions in a very significant way. Other professions establish a uniform, national cut score for the multiple-choice test used to establish minimal

131. See ANDREW MROCH ET AL., NCBE, IMPACT OF THE INCREASE IN THE PASSING SCORE ON THE NEW YORK BAR EXAMINATION: FEBRUARY 2006 BAR ADMINISTRATION 5 (June 19, 2007), available at [https://www.nybarexam.org/press/nyrep\\_feb06.pdf](https://www.nybarexam.org/press/nyrep_feb06.pdf) [<https://perma.cc/7ECE-43UV>].

132. See *id.* at 46.

133. See Douglas R. Ripkey & Susan M. Case, *A National Look at MBE Performance Differences Among Ethnic Groups*, B. EXAM’R 21, 24 (Aug. 2007) [hereinafter *MBE Performance Differences*].

134. *Id.* at 26–28 & nn. 6–7.

135. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASS STUDY (1998). The authority of Wightman’s research is based on its unmatched combination of scale, research rigor, and transparency.

136. *Id.* at 27.

137. See *supra* text accompanying notes 121–29 (presenting race and ethnicity results from California and New York).

138. For an explanation of why multiple choice tests are used for this purpose and the scaling process by which written answers are scaled to the multiple choice tests, see Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. OF LEGAL PROF. 69, 72 (2017), citing to Susan M. Case, *Back to Basic Principles: Validity and Reliability*, B. EXAM’R 23, 23 (Aug. 2006). The scaling process permits the MBE cut score to determine the passing percentage for the entire exam, so the cut score could be called the bar exam cut score or the MBE cut score, as I prefer.

139. *Exams, MBE*, NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/exams/mbe/> [<https://perma.cc/4MYS-ZFK7>] (last visited Apr. 23, 2020) (showing that all U.S. jurisdictions but Louisiana currently use the MBE).

competence.<sup>140</sup> By contrast, due to deeply entrenched traditions and preferences in the legal profession, each jurisdiction has held on to its authority to set its own MBE cut score.<sup>141</sup> This tradition of strong local control has resulted in wide disparities in how states use the same test to assess the same thing: Minimal competence to practice law. The cut score is an important aspect of the validity of the licensing test.<sup>142</sup> The wide range of cut scores used for the MBE undermines confidence that any one of them accurately reflects minimal competence to practice law.

The setting of cut scores also plays a powerful role in the disparate impact of bar exams.<sup>143</sup> Selecting a different cut score is probably the easiest way for bar examiners and state courts to reduce the disparate impact of their exams. Bar examiners should understand that “[a]rtificially high bar passage standards are of special concern because those standards can have a disproportionate impact on minority applicants to the bar.”<sup>144</sup>

Some jurisdictions have pulled back from increasing their cut score in part because of the evidence that increasing the cut score would exacerbate pre-existing disparities in bar passage rates. In the midst of a movement in many jurisdictions to increase bar exam cut scores,<sup>145</sup> the Minnesota Supreme Court chose not to increase their cut score<sup>146</sup> and New York implemented only the first of three planned increases.<sup>147</sup> In both jurisdictions, proposed increases were rejected because of concerns that the justification for the increases was based on

140. Howarth, *supra* note 138, at 73–74.

141. *Id.* at 69–71.

142. *Id.* at 75 (citing AM. EDUC. RES. ASS’N., AM. PSYCH. ASS’N., & NAT’L COUNCIL OF MEAS. IN EDUC., STANDARDS FOR EDUC. AND PSYCH. TESTING at 100 (2014)); John Mattar et al., *Reviewing or Revalidating Performance Standards on Credentialing Examinations*, in SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS 399–400 (Gregory J. Cizek, ed., 2d ed. 2012).

143. See Johnson, *supra* note 120, at 419 (2013) (urging adoption of a uniform cut score, 130, to diversify the profession).

144. Merritt et al., *supra* note 8, at 965; see Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 6 B. EXAM’R 8, 8 (Nov. 1997) (discussed in Merritt et al., *supra* note 8, at 966–67).

145. See Merritt et al., *supra* note 8.

146. See Transcript, Public Meeting, Board of Bar Examiners, Supreme Court of Minnesota (Mar. 9, 2000) (on file with author); Letter from Minn. Board of Bar Examiners to Robert D. Langford (Aug. 31, 1999) (on file with author); MICHAEL T. KANE, REVIEW OF THE STANDARD-SETTING STUDY OF THE JULY 1997 MINNESOTA BAR EXAM (Aug. 2000) (criticizing Klein study that recommended higher cut score) (on file with author).

147. See MROCH ET AL., *supra* note 131. “On September 24, 2004, the New York State Board of Law Examiners (NYBLE) announced that the passing score on the New York Bar Examination would increase from 660 to 675 over a three-year period. The score was to increase five points a year from July 2005 to July 2007. The first of the three increases was implemented in July 2005. The second and third increases are currently on hold.” *Id.* at 2. The second and third increases were never made. See NCBE, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2015, at 30 (Chart 9: Grading and Scoring), available at <http://www.ncbex.org/pubs/bar-admissions-guide/2015/mobile/index.html#p=42> [https://perma.cc/NCM9-2M6L] (showing New York passing score at 665).

flawed methodology<sup>148</sup> and that the increases would exacerbate pre-existing racial and ethnic bar passage disparities.<sup>149</sup>

In their report regarding New York's possible cut score increase, NCBE psychometricians explained two reasons that raising New York's cut score would exacerbate racially disparate bar passage outcomes. First, the largest impact falls on groups "with average scores in or near the range over which the passing score is projected to vary."<sup>150</sup> African Americans and other minorities were the groups whose average scores were closest to the existing cut score and the proposed changes, so the possible cut score increases would have had a disproportionate effect on them.<sup>151</sup> Also, even an identical change across all demographic groups would be proportionately greater for any groups with lower original pass rates.<sup>152</sup>

California's study of its bar exam cut score provides more recent confirmation of the racial and ethnic impact of cut score decisions. This study used the scores of the actual 2016 California bar exam takers to calculate what the passage rates would have been with several lower cut scores.<sup>153</sup> The results showed that for each of the cut scores studied, ranging from the low of New York's to the high of California's, the higher the cut score, the larger the racial disparities in pass rates.<sup>154</sup> Dramatically, the report showed that of the 3248 people who passed the July 2016 California bar exam, 119 were African American.<sup>155</sup> If California had used New York's cut score, 301 African Americans would have passed.<sup>156</sup>

Lowering cut scores improves pass rates for every category of test-takers, but not evenly. If California had lowered its cut score to the score currently used by New York, Connecticut, the District of Columbia, Illinois, Iowa, Kansas,

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148. See, e.g., KANE, *supra* note 146; Merritt et al., *supra* note 8; ASSOC. OF THE N.Y.C. BAR, COMM. ON LEGAL EDUC. AND ADMISSION TO THE BAR, REPORT IN OPPOSITION TO THE BOARD OF LAW EXAMINERS' PROPOSAL TO INCREASE THE PASSING SCORE ON THE NEW YORK BAR EXAMINATION 8–18 (Jan. 2003), available at <https://www.nycbar.org/pdf/report/BARSCO~2.pdf> [<https://perma.cc/N4WU-7J7Q>] [hereinafter NYC BAR 2003 REPORT].

149. See, e.g., Merritt et al, *supra* note 8; NYC BAR 2003 REPORT, *supra* note 148; MROCH ET AL., *supra* note 131; Transcript, *supra* note 146.

150. "The current and proposed increases in the passing score tend to have the largest impact on groups with average scores in or near the range over which the passing score is projected to vary (660 to 675)." MROCH ET AL., *supra* note 131, at 85.

151. "Among the domestic-educated first-time takers, the Black/African American group and other minority groups tend to suffer sharper declines in pass rates than the Caucasian/White group as the passing score increases (see Table 4.2)." *Id.*

152. "[B]ecause the racial/ethnic minority groups have lower pass rates to begin, a decrease of a few percentage points in the pass rate has a larger proportional impact on the pass rates for these groups." *Id.*

153. See STATE BAR OF CAL., FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES App. A (2017), <https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf> [<https://perma.cc/VTU4-DQN6>] [hereinafter 2017 CAL. REPORT] (unnumbered pages but pdf 186/305).

154. *Id.*

155. *Id.*

156. *Id.*

Maryland, Montana, New Jersey, and South Carolina,<sup>157</sup> the bar passage rate of Whites in 2016 would have increased by 51.7%; of Asians by 71.7%; of Hispanics by 93.7%; and of Blacks by 142.3%.<sup>158</sup> In spite of this information, and the State Bar's acknowledgment that no evidence suggested that attorneys in California are more competent than attorneys in states with lower cut scores,<sup>159</sup> the California Supreme Court declined to decrease its unusually high cut score.<sup>160</sup>

Cut score decisions permit jurisdictions to choose to reduce or exacerbate the racial and ethnic disparate impact of bar exams. Under either Title VII or professional responsibility licensing scrutiny, choosing to keep a cut score with established disparate impact requires strong evidence that the increase in the cut score is job-related.<sup>161</sup>

Disparate impact having been established, jurisdictions should have to show evidence of job-relatedness to select any cut score above 130, the second-lowest cut score in the United States, which is currently being used successfully by Alabama, Minnesota, Missouri, New Mexico, and North Dakota.<sup>162</sup> These five states cover different regions of the country, and include a variety of practice areas, such as international firms in Minnesota and Missouri, rural practices in several of these states, and private practice, government, and nonprofit practice in all of them. No evidence suggests that the public suffers from lawyers in these states being less competent than in others.<sup>163</sup>

157. NCBE, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2019, at 32–33 (Chart 10: Grading and Scoring), <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [https://perma.cc/ZP5U-RL35].

158. 2017 CAL. REPORT, *supra* note 153, at App. A (appearing on p. 186 of the 305-page PDF).

159. *Id.* at App. A (appearing on pp. 56 and 57 of the 305-page PDF).

160. Letter from Cal. Supreme Court to Michael G. Colantuono, President, Bd. of Trs. & Leah Wilson, Exec. Dir. State Bar of Cal., (Oct. 18, 2017), *available at* <https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam> [https://perma.cc/HS7V-7M25] (discussing retaining existing cut score on California bar examination).

161. “[E]nforcement agencies and many courts have taken the position that sufficient proof of job relatedness must support the use of a cutoff score that increases disparate impact.” LINDEMANN, *supra* note 14, at 4–55 to 4–56 & n. 273.

162. A cut score of 130 is the lowest currently used by a cohort of states. *See* NCBE, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2019, at 32–33 (Chart 10: Grading and Scoring), *available at* <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [https://perma.cc/V7BJ-PR3Z]; *see also* Johnson, *supra* note 120, at 405–19 (recommending 130 as uniform cut score to diversify the profession). Wisconsin uses a 129, but Wisconsin's diploma privilege for all law graduates of Wisconsin and Marquette makes Wisconsin a weak example for a well-established cut score, although an important model for deeper reimagining of attorney licensing. *See* Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645–46 (2000).

163. Research to investigate this question could be very useful. For a discussion of complexities of such research, *see* Deborah J. Merritt, *Bar Exam Scores and Lawyer Discipline*, LAW SCHOOL CAFÉ (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/> [https://perma.cc/6RMS-F62L].

### 3. DISPARATE IMPACT RESPONSIBILITY

Bar examiners defend disparate results on bar exams by arguing that bar passage differences reflect prior differences, such as on the LSAT and in law school grades.<sup>164</sup> Bar examiners cannot be expected to eliminate preexisting differences at the licensing stage, the final step on the path to the profession. But bar examiners should be expected to eliminate *unnecessary* disparities in their test results. Unjustified disparities offend core professional responsibilities of the legal profession to eliminate discrimination. Beyond that, professional testing standards require careful scrutiny of disparate results. After explaining that fairness in testing does not mean eliminating all disparities in results, the most authoritative source of testing standards reminds test designers that “most testing professionals agree that group differences in testing outcomes should trigger heightened scrutiny for possible sources of bias.”<sup>165</sup> In the world of bar exams, that scrutiny has focused on item selection and question drafting.<sup>166</sup> Cut score scrutiny and increased focus on job-relatedness, or validity, are equally important. The responsibility to address these longstanding disparities falls squarely on the state supreme court justices and bar examiners who have the responsibility to ensure that the admissions processes they oversee are nondiscriminatory.

### B. VALIDITY

Following Title VII, once the disparate impact of a bar exam is established, the second step of professional responsibility licensing scrutiny requires bar examiners to show that the exam is valid, meaning sufficiently job-related. Bar exams are valid to the extent that they in fact measure minimal competence to practice law, as they are meant to do.<sup>167</sup> Potentially impressive studies relevant to the validity of bar exams may provide important answers in the future.<sup>168</sup> But criticisms of the validity of bar exams are widespread and longstanding,<sup>169</sup> and they ask the

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164. Ripkey & Case, *supra* note 133, at 26.

165. STANDARDS, 2014, *supra* note 102, at 54. “Examination of group differences also may be important in generating new hypotheses about bias, fair treatment, and the accessibility of the construct as measured; and, in fact, there may be legal requirements to investigate certain differences in the outcomes of testing among subgroups.” *Id.*

166. See, e.g., Joanne Kane & April Southwick, *The Testing Column: Writing, Selecting, and Placing MBE Items: A Coordinated and Collaborative Effort*, 88 B. EXAM’R (2019), available at <https://thebarexaminer.org/article/spring-2019/the-testing-column-writing-selecting-and-placing-mbe-items-a-coordinated-and-collaborative-effort/> [<https://perma.cc/GSG9-LKYG>].

167. See *supra* text accompanying notes 22–27 (explaining validity and job-relatedness).

168. See *infra* text accompanying notes 180, 184–85 (describing current studies).

169. See, e.g., Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS, ASSOC. AM. L. SCHS., No. 2017-2, at 11, [https://www.aals.org/wp-content/uploads/2017/05/AALSnews\\_spring17-v9.pdf](https://www.aals.org/wp-content/uploads/2017/05/AALSnews_spring17-v9.pdf) [<https://perma.cc/8473-DXJH>] (critiquing validity of bar exams); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 930 (1997) (summarizing earlier criticisms of bar examinations); *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446 (2002) (critiquing traditional bar examinations on three principal grounds: failure to adequately measure professional competence to practice law, negative effects on law school curricular development and the law school admission process, and creation

same questions concerning job-relatedness and validity that employers are required to answer pursuant to Title VII.<sup>170</sup>

#### 1. MISDIRECTION TO THE STUDY OF LAW, NOT THE PRACTICE OF LAW

One persistent criticism is that bar exams look backwards to law school rather than forward to law practice, testing the academic skills of law school rather than the professional skills required for minimum competence in practice.<sup>171</sup> This criticism carries weight because of the surprising distance between law school and practice. For one hundred and fifty years, law schools in the United States have been largely aligned with the “scientific” approach of Langdell that focused on dissection of appellate decisions in a university setting.<sup>172</sup> For this and other reasons, lawyering skills beyond core analytic skills are relatively recent additions to law school programs, and still peripheral at too many law schools.<sup>173</sup> Legal education requires substantially less clinical experience than other professional schools,<sup>174</sup> and nothing guarantees that law school graduates have ever seen a courthouse, a client, or a lawyer. In these circumstances, licensing tests that replicate the most traditional aspects of law school are not closely connected to legal practice.

#### 2. LACK OF JOB ANALYSIS

Employers facing Title VII use job analyses to validate employment tests with disparate impacts.<sup>175</sup> Licensing tests also rely on job analyses for validity: “The

of significant barriers to achieving a more diverse bench and bar); Curcio et al., *Testing*, *supra* note 8, at 225 (“As far back as 1992, the Committee on Legal Education of the New York City Bar Association identified problematic aspects of the bar exam and expressed the view that ‘the NYS Bar Exam does not adequately or effectively test minimal competence to practice law in New York.’”).

170. See, e.g., DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., *PROFESSIONAL RESPONSIBILITY AND REGULATION* (2002) (noting that critics of bar exams claim that “the skills existing exams measure do not adequately predict performance as a lawyer” (at 223) and that the “inadequate link between exam and job performance is of special concern because minority applicants have disproportionately low passage rates” (at 224, quoting DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 151 (2000)); Abel, *supra* note 3, at 115 (“As Weber noted, examinations became the dominant entry barrier in the twentieth century. These have an unproven – and arguably dubious – relationship to the knowledge lawyers actually utilize in their daily practice (in the language of psychologists: they have never been validated).”) (footnote omitted).

171. See, e.g., Curcio, *A Better Bar*, *supra* note 8, at 364–65 (urging reform to test additional skills required for law practice); Howarth & Wegner, *supra* note 8, at 430–31, 447–56.

172. See, e.g., RHODE & HAZARD, *PROFESSIONAL RESPONSIBILITY AND REGULATION*, *supra* note 174, at 201–03; Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007).

173. For explanations of legal education’s focus away from clinical lawyering skills, see Howarth & Wegner, *supra* note 8, at 428–31.

174. See *id.* at 428–31; Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 555 (2018) (other professional education typically include experiential education as one-quarter to one-half of required units).

175. *Guardians Ass’n of the N.Y.C. Police Dep’t., Inc. v. Civil Service Comm’n*, 630 F.2d 79, 95–96 (2d Cir. 1980).

standard and most useful device for representing the construct of professional competence is a *job* or *practice analysis*.”<sup>176</sup> Until very recently, job analysis research for bar exams has been almost non-existent. It is still lacking.

The NCBE did a job analysis in 2012.<sup>177</sup> Other than the addition of Civil Procedure to the subjects covered by the MBE, which may or may not have been in the works before that study,<sup>178</sup> little in the exam appears to have changed in response to NCBE’s research. The focus on testing memorized legal knowledge continues, although twenty-five skills were determined to be of greater importance than the most important knowledge domain, Civil Procedure.<sup>179</sup> The NCBE has recently undertaken a promising new practice analysis study using a different methodology than it used in 2012.<sup>180</sup>

California is also undertaking a long-overdue job study. In her 2017 report on the California bar’s standard setting study, Dr. Tracy Montez of the California Department of Consumer Affairs criticized the lack of a job study to provide the basis for California’s bar exam: “Given that a state-specific occupational analysis does not appear to have been conducted, it is critical to have this baseline for making high-stakes decisions.”<sup>181</sup> At the same time, Professor Deborah Merritt made the same criticism: “California’s bar exam—like the exams in other states—has never been validated. This means that no job analysis or other scientific study links the exam’s content to the skills and knowledge needed by new

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176. THOMAS M. HALADYNA & MICHAEL C. RODRIGUEZ, DEVELOPING AND VALIDATING TEST ITEMS 283 (2013).

177. See STEVEN NETTLES & JAMES HELLRUNG (AMP), NAT’L CONF. OF BAR EXAMINERS, *A STUDY OF THE NEWLY LICENSED LAWYER* (2012). For discussion of this job analysis, see Susan Case, *The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, B. EXAM’R 52 (Mar. 2013), <https://thebarexaminer.org/wp-content/uploads/PDFs/820113testingcolumn.pdf> [<https://perma.cc/SDK4-92CH>] The study relied on distributing surveys to more than 20,000 new admittees whose email addresses were provided by the National Conference of Bar Examiners. Only 1669 responses (8.4%) were returned and usable. See NETTLES AND HELLRUNG, *supra*, at 9.

178. See Case, *supra* note 177, at 53 (addition of Civil Procedure was planned prior to the study); NCBE, TESTING TASK FORCE, TESTING TASK FORCE FIRST YEAR REPORT 1 (Apr. 2019), available at [https://testingtaskforce.org/wp-content/uploads/2019/10/NCBE\\_TestingTaskForce\\_FirstYear\\_Report.pdf](https://testingtaskforce.org/wp-content/uploads/2019/10/NCBE_TestingTaskForce_FirstYear_Report.pdf) [<https://perma.cc/RGC8-CA2P>] (describing addition of Civil Procedure following evaluation of 2012 study results).

179. See Case, *supra* note 177, at 54–55.

180. See *From Practice Analysis to Test Redesign: Looking Ahead to Phase Three*, NCBE, TESTING TASKFORCE, <https://www.testingtaskforce.org/2019/09/10/from-practice-analysis-to-test-redesign-looking-ahead-to-phase-three/> [<https://perma.cc/RA3P-7ZE9>] (last visited Apr. 14, 2020); NCBE, TESTING TASK FORCE, TESTING TASK FORCE FIRST YEAR REPORT (Apr. 2019), available at <https://www.testingtaskforce.org/about/reports/> [<https://perma.cc/QML4-LRMJ>] (describing the Testing Task Force as having determined to start from scratch in determining requisite knowledge, skills, and abilities required for new lawyers).

181. Tracy A. Montez, *Observations of the Standard Setting Study for the California Bar Examination* 10 (Calif. Dept. of Consumer Affairs, July 2017), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf> [<https://perma.cc/4SRB-W7NK>]. Dr. Montez explained that such a study was needed for, among other purposes, “determining content to be measured on the [California Bar Exam]; creating a common frame of reference . . . when establishing passing scores; providing preparation and training information to candidates and schools.” *Id.*

attorneys.”<sup>182</sup> California’s own 2017 Content Validation Study also identified the need for a job analysis.<sup>183</sup> In response, California has recently begun a job analysis study that will be based on surveys, focus groups, and task sampling in which attorneys will receive randomly timed prompts to identify the tasks they are engaged in at the time of the prompt.<sup>184</sup>

The Institute for the Advancement of the American Legal System (“IAALS”) is also conducting ambitious research with Professor Deborah Merritt that should provide important insights about the meaning of minimum competence in law. This national project is using forty to sixty focus groups of both new lawyers and supervisors of new lawyers to determine the knowledge and skills used by the new lawyers and how those necessary knowledge and skills are obtained.<sup>185</sup>

The NCBE, California State Bar, and IAALS job analyses will bring important insights about what minimum competence looks like. Those insights should serve as the blueprint for designing a bar exam or other licensing requirements, but they are not currently in place to validate bar exams. Our rituals of bar exams are well-settled, but the appropriate foundations to show the validity of the tests have been absent.

### 3. PROFESSIONAL DESIGN

Title VII also requires that the test be professionally designed.<sup>186</sup> The multi-state components (Multistate Bar Exam, Multistate Essay Exam, and Multistate Performance Test) created by the NCBE are professionally designed, one important argument for the Uniform Bar Exam.<sup>187</sup> But state essays are typically written

182. Letter from Professor Deborah Merritt, John Deaver Drinko, Baker & Hostetler Chair in Law at the Ohio State Univ., Moritz College of Law, to California Supreme Court *In re California Bar Exam* (Oct. 1, 2017), available at [https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/5d64402118a0f70001180c43/1566851106501/2017.10.1+Merritt\\_Letter+to+Cal+Supreme+Ct.pdf](https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/5d64402118a0f70001180c43/1566851106501/2017.10.1+Merritt_Letter+to+Cal+Supreme+Ct.pdf) [<https://perma.cc/YGH6-2WPC>]. In the same spate of bar exam research, California also conducted a content validation study in which ten lawyers from diverse backgrounds and length of practice evaluated components of the California Bar Exam using the NCBE’s 2012 practice analysis. See CHAD W. BUCHENDAHL, CONDUCTING A CONTENT VALIDATION STUDY FOR THE CALIFORNIA BAR EXAM: FINAL REPORT (Oct. 4, 2017), available at [http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/CBEStudy\\_Attachment\\_A.pdf](http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/CBEStudy_Attachment_A.pdf) [<https://perma.cc/2TVY-T6VA>].

183. See BUCHENDAHL, *supra* note 182. This study found that the components of the bar exam aligned with knowledge and skills identified in the 2012 study but also identified the need for a design process that used a new job analysis as the blueprint for the exam. *Id.*

184. See CAL. STATE BAR, *Attorney Practice Analysis for the California Bar Exam*, [https://www.calbar.ca.gov/Portals/0/documents/Practice\\_Analysis\\_Fact\\_Sheet.pdf](https://www.calbar.ca.gov/Portals/0/documents/Practice_Analysis_Fact_Sheet.pdf) [<https://perma.cc/8X9G-TKST>] (last visited Apr. 28, 2020).

185. See Zachary Willis & Kelsey Montague, *New Effort Underway to Improve the Bar Exam and Lawyer Licensing*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (July 29, 2019), <https://iaals.du.edu/blog/new-effort-underway-improve-bar-exam-and-lawyer-licensing> [<https://perma.cc/272R-6TP9>] (last visited Dec. 23, 2019).

186. *Guardians Ass’n of the N.Y.C. Police Dep’t., Inc. v. Civil Service Comm’n*, 630 F.2d 79, 96–97 (2d Cir. 1980).

187. See Judith A. Gundersen, *MEE and MPT Test Development: A Walk-Through from First Draft to Administration*, B. EXAM’R 29 (June 2015) (describing creation of essay and performance tests); Kane & Southwick, *supra* note 166 (describing creation of MBE questions).

by accomplished lawyers without expertise in test design.<sup>188</sup> In this important respect, many bar exams suffer from the same critique offered by the Fourth Circuit in 1976: that the bar exam questions were written and graded by “competent lawyers but laymen at question design and evaluation.”<sup>189</sup>

#### 4. SCORING SYSTEMS THAT REFLECT PRACTICE COMPETENCE

Employers attempting to defend tests with disparate impact under Title VII also try to establish that their scoring systems reflect actual job performance.<sup>190</sup> *Richardson v. McFadden*, discussed above, presented a dismal picture of bar exam scoring, with some graders using detailed rubrics but adding points at the end, while another graded on overall impression.<sup>191</sup> The court upheld those exam practices even after declaring that the chance of a “70” score being meaningful was close to zero.<sup>192</sup>

Grading practices in many jurisdictions are much more professional today, but not everywhere. Grading details are often hidden. Some jurisdictions hold calibration sessions, and some do not. Some jurisdictions have elaborate regrading processes for close cases, and some do not. Some jurisdictions provide detailed sample grading rubrics or model answers, and some do not.

Another crucial aspect of validity in scoring relates to establishing the cut score that determines passing or failing. Unlike virtually all other professions using a national multiple-choice licensing test to establish minimal competence, bar examiners set cut scores jurisdiction-by-jurisdiction, often without any process for setting that cut score.<sup>193</sup> The disparity in cut scores itself, without any evidence that competence varies by jurisdiction, undermines the validity of bar exams. The questionable basis upon which cut scores are determined is especially problematic considering the data showing that higher cut scores exacerbate racial and ethnic disparities in bar passage results.

#### C. ALTERNATIVES

Even if a test’s validity is established, both Title VII and professional responsibility licensing scrutiny ask whether valid alternatives that are less discriminatory exist.<sup>194</sup> In the licensing context, this is the most important and promising

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188. See, e.g., MICH. SUPREME COURT, BD. OF BAR EXAM’RS, *Improved Scoring System for the Michigan Bar Examination Summary*, <https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/ImprovedScoringSystemSummary7-9-2014.pdf> [<https://perma.cc/A6UA-LP7B>] (last visited Apr. 28, 2020) (members produce or supervise the production of essay questions); STATE BAR OF NEV., *Board of Bar Examiners*, <https://www.nvbar.org/about-us/bar-committees/board-of-bar-examiners/> [<https://perma.cc/FYC7-PLJM>] (last visited Apr. 28, 2020) (the Board writes and grades bar exam questions).

189. *Richardson v. McFadden*, 540 F.2d 744, 750 (4th Cir. 1976), *on reh’g*, 563 F.2d 1130 (4th Cir. 1977).

190. See, e.g., *Guardians*, 630 F.2d at 9100–06.

191. 540 F.2d 744, 749–50 (4th Cir. 1976)

192. *Id.* at 750 (“almost a matter of pure luck”); *id.* at 751 (“little more than fortuitous”).

193. See *Cut Score*, *supra* note 138.

194. See *supra* text accompanying notes 28–29.

question. As Professor Deborah Merritt urges, “[i]f the exam tests the wrong things, we have a professional obligation to change it.”<sup>195</sup> Bar examiners wedded to conventional bar exams need to address the disparate impact and validity questions related to those exams, including the looming cut score problems, instead of continuing to rely on the effective impunity that came with immunity from Title VII. The future belongs to alternatives that assess minimal competence more effectively with less discriminatory impact. Several hopeful signs are worth describing.

#### 1. NEW HAMPSHIRE’S DANIEL WEBSTER SCHOLAR PROGRAM

Frustrated by the lack of competence of too many new lawyers, the New Hampshire Supreme Court and Committee of Bar Examiners took action and began an exciting collaboration with the University of New Hampshire School of Law.<sup>196</sup> In the resulting Daniel Webster Scholar Honors Program, students undertake a rigorous curriculum of a range of core lawyering skills in their second and third years of law school, assessed by law professors, practitioners, bar examiners, and judges.<sup>197</sup> Students who successfully complete the Daniel Webster program may be admitted to practice law in New Hampshire upon graduation from law school.<sup>198</sup> An IAALS study of focus groups and a simulated client interview established that the Daniel Webster graduates were evaluated more highly than other new lawyers and that Daniel Webster law students out-performed new lawyers on a standardized client interview.<sup>199</sup> That a two-year program would have greater validity than a two-day paper and pencil test is not surprising.

The IAALS study also established that participation in the Daniel Webster program was the only significant predictor of successful performance of the standardized client interview, and that neither LSAT nor law school class rank was a significant predictor.<sup>200</sup> This study of a single, albeit crucial, lawyering skill is suggestive. The greater significance of an academic lawyering program than either LSAT or law school grades suggests that testing a broader range of competencies may improve validity and reduce the persistent racial disparities of bar

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195. Merritt, *supra* note 169, at 11.

196. John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. LAW & SOC. CHANGE 101, 115–17 (2009), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1004&context=dfsc> [https://perma.cc/N7GN-FBT5].

197. See Univ. of N.H. Franklin Pierce School of Law, Daniel Webster Scholar Honors Program, <https://law.unh.edu/academics/experiential-education/daniel-webster-scholar-program> [https://perma.cc/C5FY-84DU] (last visited Apr. 28, 2020).

198. For descriptions of the program by its founding director, see John Burwell Garvey, ‘*Making Law Students Client-Ready*’ – *The Daniel Webster Scholar Honors Program: A Performance-Based Variant of the Bar Exam*, N.Y. ST. BAR ASS’N J. 44 (2013); Garvey & Zinkin, *supra* note 196, at 115–17.

199. ALLI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS 1 (IAALS 2015), [https://iaals.du.edu/sites/default/files/documents/publications/ahead\\_of\\_the\\_curve\\_turning\\_law\\_students\\_into\\_lawyers.pdf](https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf) [https://perma.cc/93K4-GRBA].

200. *Id.*

exams, which suffer from disparities endemic to standardized tests, including the LSAT. The active involvement of the bench and the bar in the Daniel Webster program, from the original instigation to the ongoing evaluation of student performance, is an excellent example of the public benefit from professional responsibility licensing scrutiny in action.

## 2. CANADA'S PRACTICE READINESS EDUCATION PROGRAM

The articling system in Canada by which law graduates must obtain law practice experience creates significant problems of unequal access to the profession,<sup>201</sup> as have similar systems in other countries.<sup>202</sup> But a newer aspect of licensure in Alberta, Manitoba, Nova Scotia, and Saskatchewan may suggest a more valid and less discriminatory future for attorney licensing in the United States. Each of those provinces now requires, instead of a traditional bar exam, a nine-month, part-time Practice Readiness Education Program (PREP)<sup>203</sup> undertaken during the law graduates' period of articling and offered by the Canadian Centre for Professional Legal Education ("CPRED"), a non-profit consortium led by representatives of the four provincial law societies.<sup>204</sup> PREP is a hybrid of in-person workshops and online modules that focus on "practical legal knowledge" and "competencies in lawyer skills, practice management, professional ethics, as well as the personal attributes needed to successfully practice law in Canada."<sup>205</sup> A consortium of U.S. jurisdictions could offer a similar program during the weeks following law school graduation currently spent in bar review courses. Rather than pay for bar review classes, participants could pay for classes teaching competencies that are clearly important to clients. Passing those classes would replace additional licensing testing.

## 3. NCBE'S TESTING TASK FORCE

Another reason for optimism about the future of bar exams in the United States is the NCBE's Testing Task Force, a three-year project started in 2018 that is

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201. See, e.g., Marlis Silver Sweeney, *Discrimination and Power Imbalances Plague Canada's Lawyer Training Process*, LAW.COM (Dec. 20, 2019), <https://www.law.com/americanlawyer/2019/12/20/discrimination-and-power-imbalances-plague-canadas-lawyer-training-process/> [<https://perma.cc/6K68-8YJE>].

202. See, e.g., Peggy Maisel, *The Education and Licensing of Attorneys and Advocates in South Africa*, 79 BAR EXAM'R 15, 21 (May 2010) ("Since it is the candidate attorney's responsibility to find the law firm or lawyer for articles, the practical effect of this requirement has been to make it more difficult for nonwhite law graduates to obtain admission as attorneys.").

203. See Aidan Macnab, *Nova Scotia Scrapping Bar Exam in Overhaul of Bar Admission Process*, Canadian Lawyer Magazine (Nov. 12, 2019), available at <https://www.canadianlawyermag.com/resources/legal-education/nova-scotia-scrapping-bar-exam-in-overhaul-of-bar-admission-process/321822#:~:text=The%20bar%20exam%20will%20be,Readiness%20Education%20Program%2C%20or%20PREP> [<https://perma.cc/5EBP-NAA2>] (last visited June 12, 2020); *Practice Readiness Education Program (PREP) Fact Sheet*, available at <https://cpled.ca/wp-content/uploads/2019/12/PREP-Program-Fact-Sheet.pdf> [<https://perma.cc/84D9-LXFV>] (last visited Dec. 22, 2019).

204. See *About CPLED*, <https://cpled.ca/about-cpled/who-we-are/> [<https://perma.cc/63Z6-R7WZ>] (last visited Dec. 22, 2019).

205. See *Practice Readiness Education Program (PREP) Fact Sheet*, *supra* note 203.

designed to “ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing profession.”<sup>206</sup> The first phase of the project was a series of “stakeholder listening sessions” intended to “solicit input from various stakeholder groups about characteristics and considerations for the next generation of the bar examination.”<sup>207</sup> Key findings include many that are consistent with professional responsibility licensing scrutiny, such as “[e]nsuring that the bar examination is free from racial/ethnic/gender bias is a priority”<sup>208</sup> and “[l]awyering skills should be emphasized over subject matter knowledge.”<sup>209</sup>

#### 4. FURTHER ALTERNATIVES

Possibilities abound for rethinking attorney licensing to bring it closer to the competence actually required in today’s practice of law.<sup>210</sup> Competencies that should be considered for testing include advanced subject matter, advanced thinking (including evaluation and strategizing), metacognition and reflection, focused in-depth inquiry in areas of expertise (specialization), and additional practice skills, such as fact-gathering or interviewing.<sup>211</sup> Potential test design changes include open-book tests to more closely approximate practice, reframing multiple-choice questions, such as those based on “case files” that could assess research skills and case theories, simulations and portfolios, and component-based testing.<sup>212</sup> Technology and advances in artificial intelligence permit testing methods that would have been impossible just a few years ago.<sup>213</sup> Our

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206. *About*, NCBE TESTING TASK FORCE, <https://testingtaskforce.org/about/> [<https://perma.cc/KBM8-NAVE>] (last visited Apr. 28, 2020).

207. NCBE TESTING TASK FORCE, *Testing Task Force Phase 1 Listening Sessions Executive Summary in Your Voice: Stakeholder Thoughts on the Bar Exam 1* (2019), available at <https://www.testingtaskforce.org/wp-content/uploads/2019/08/FINAL-Listening-Session-Executive-Summary-with-Appendices-1.pdf> [<https://perma.cc/G2PJ-JQ9N>].

208. *Id.* at 5. This priority is framed as scrutiny of any changes, suggesting complacency about current bar exam practices.

209. *Id.* at 3.

210. See, e.g., Howarth & Wegner, *supra* note 8, at 397.

211. *Id.* at 448–56.

212. *Id.* at 456–61.

213. For example, the NCBE has recently converted the Multistate Professional Responsibility Exam to a computer-based delivery system. See Mark A. Albanese, *The Testing Column: July 2019 MBE: Here Comes the Sun; August 2019 MPRE: Here Comes the Computer*, 88 BAR EXAM’R 33 (2019). Law School Admissions Council (“LSAC”) researchers have studied various aspects of computer-based testing. See, e.g., Bernard P. Veldkamp, *Some Practical Issues in Computerized Adaptive Testing With Response Times* (RR 14-06), LSAC, <https://www.lsac.org/data-research/research/some-practical-issues-computerized-adaptive-testing-response-times-rr-14-06> [<https://perma.cc/M465-XUCR>]. Computational psychometrics is the emerging field bringing big data to the science of testing. See, e.g., COMPUTATIONAL PSYCHOMETRICS FIELD GUIDE, ACTNEXT, [https://actnext.org/wp-content/uploads/FieldGuide\\_ePUB\\_v4.pdf](https://actnext.org/wp-content/uploads/FieldGuide_ePUB_v4.pdf) [<https://perma.cc/WZ3D-CGLV>] (describing assessment possibilities using new computational capacity and artificial intelligence). New technologies permit testing of new competencies. See, e.g., Vanessa R. Simmering, Lu Ou & Maria Bolsinova, *What Technology Can and Cannot Do to Support Assessment of Non-Cognitive Skills*, FRONTIERS IN PSYCHOL. (Sept. 25, 2019), available at <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.02168/full> [<https://perma.cc/W4CW-GSAP>].

professional responsibilities related to public protection, competence, and nondiscrimination demand that we take advantage of these new possibilities to improve the validity of attorney licensing.

### CONCLUSION

Borrowing the framework of Title VII disparate impact scrutiny provides a practical, feasible approach to ensuring that licensing tests are not wrongfully excluding people of color from the legal profession. But eliminating bias in the profession is largely a matter of will, not feasibility. Professional responsibility licensing scrutiny holds members of the profession, bar examiners, and state supreme courts to the values and goals we already claim as a profession. But principles of professional responsibility and legal ethics may be self-serving window dressing,<sup>214</sup> not even truly aspirational, let alone enforceable, without careful scrutiny and concrete action. Do we aspire to be a nondiscriminatory and inclusive profession dedicated to public protection and grounded in competence? Do we agree that the disparate impact of bar exams is a sufficiently serious problem to justify careful scrutiny regarding validity and less discriminatory alternatives? Or do we prefer to rely on our own good faith?

From today's perspective, the *Vickery*, *Parrish*, *Richardson*, & *Woodard* cases reveal lawyers dedicated to maintaining a racially restrictive profession through discriminatory bar exam practices. Those bar examiners prevailed with arguments that they were operating fairly and in good faith to protect the public by ensuring the competence of new lawyers. Their success has delayed for generations meaningful oversight of persistent racial disparities in passing rates for bar exams that suffer from unestablished validity. This is a problem with a solution.

Decades of Title VII experience has created a simple, workable framework that can be used to determine whether the disparate impact of bar exams can be defended based on the validity of the exams, or whether less discriminatory alternatives should be substituted. Principles of professional responsibility and legal ethics justify this long-neglected oversight. Acceptance or rejection of this professional responsibility licensing scrutiny is itself a high-stakes test for our profession. We have the tools to pass this test; do we have the will to use them?

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214. "Although professions portray self-regulation as a means of reducing client uncertainty, they deliberately draft ethical rules in vague and ambiguous language to preserve the indeterminacy that is a foundation of professional power." ABEL, *supra* note 1, at 38 (footnote omitted).