

Book Review

Joan Howarth, *Shaping the Bar: The Future of Attorney Licensing*, Stanford, CA: Stanford University Press, 2022, pp. 240, \$35 (Hardcover)

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Introduction

In *Shaping the Bar: The Future of Attorney Licensing*, Professor Joan Howarth issues a clarion call to the academy, the legal community, and the judiciary to reform how we license lawyers in the United States. In this book Howarth identifies the current crisis in law licensing, the history of racism that created this crisis, and the tools available to address it. *Shaping the Bar* challenges our entrenched notions of professional identity, and it forces us to confront vulnerabilities in attorney self-regulation. It does so in a manner that will stir even those not immersed in the current debate about law licensing.

What is the crisis in law licensing? Howarth answers that question and explains that the current crisis is twofold. First, the attorney licensing system fails at its stated purpose of public protection because it does not assess the skills and abilities new lawyers need to competently represent clients. Second, the attorney licensing system unjustifiably excludes people of color and those without financial resources. Throughout the book, Howarth connects the law licensing process to legal education, highlighting the symbiotic relationship between the two, and noting that as legal educators, we must accept responsibility for our part in creating, and hopefully now dismantling, this system.

In this review, we summarize some of the key issues Howarth raises about the problems with the current system of attorney licensure and the way we educate law students. We briefly expand upon some of her ideas and analyze the benefits and drawbacks of her suggestions for change. We do so without referencing the extensive sources she offers in support of her arguments. We use her work to provide a concise yet informative evolution of the systemic shortcomings in bar admission for those not conversant with the current crisis.

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Part I juxtaposes the purpose and reality of public protection through bar exams. Part II rolls back a curtain to much that is unknown and unexamined about assessing minimum competency for the practice of law. Part III explores exclusionary practices and outcomes in character and fitness assessments, and discusses Professor Howarth's solutions to improve the process. In Part IV, we recount Howarth's innovative, and eminently workable, suggestions to improve the current system of attorney licensure. It is here, specifically, that Howarth's creativity and practicality meet to make this book a road map for those seeking to implement a better process for bar admission, one that is both valid and fair.

I. Protectionism v. Public Protection

Throughout the book Howarth challenges the rhetoric of public protection that is used to justify the current law licensing process. She emphasizes the fundamental premise of licensure by bar examination: ensuring that new lawyers have the minimum competence to practice law. She then connects that foundational premise to the importance of acquiring and developing law practice skills during law school. As Howarth demonstrates throughout this book, for reasons that serve the perpetuation of status, exclusion, and profitability, practice readiness and public protection have not been at the forefront of the way we educate law students or the way we license attorneys.

A. Public Protection a Mask for Exclusionary Protectionism?

Howarth pulls together a wide array of sources and scholarly literature to trace the history of legal education and bar admission from the Colonial era to the present day. This history varies by jurisdiction and era but has an overarching commonality: The education and admission processes all sought to ensure the profession was largely limited to white men from elite families. She raises the key question: Has the phrase public protection historically been used to help obfuscate the goal of protecting the public status of insiders?

Howarth asserts that although the primary task of law professors and bar examiners is to understand and know how to recognize minimum competence, neither contingent has really figured out how to do so (51). Throughout the book, as she outlines the multifaceted disconnect between the desire for practice competency and the underemphasis on law practice skills in law school and on the bar exam, Howarth forces the reader to question the public protection mantra that remains at the center of the debate about retaining the status quo.

B. The Role of Legal Education in Public Protection

Shaping the Bar traces the advent and adoption of Christopher Langdell's case method of legal education. Langdell's model eschews teaching the wide array of skills new lawyers need, and focuses, instead, on the dissection of appellate opinions. Critical of the Langdellian model, Howarth examines

how the focus on analytical dissection of appellate opinions has come at the expense of clinical experience and exposure to law practice.

As she documents the development of the modern law school, Howarth exposes established traditions in legal education that reject the idea that law professors should have experience practicing law (59–62). She argues that the desire of law schools to pursue prestige is one of many ways in which the current system of legal education and licensing chooses to protect status over protecting the public (27). For example, she briefly references the current law school hiring model that values candidates who have earned both J.D.s and Ph.D.s but requires no lawyering experience (60).

Although Howarth takes a deep dive into the history of legal education and the criteria for admitting students to law school, she—perhaps intentionally—does not probe as deeply into the criteria for hiring law school professors and the role, if any, that the composition and background of law school faculty play in the licensing crisis that the book addresses. Given the relationship between legal education and the licensing process, the values the academy embraces when hiring law faculty have played a significant role in the development of the current licensing crisis. That message is embedded in this book but perhaps could have been stated more forcefully because, as an academy, we need to directly confront our role in the creation and perpetuation of the current crisis.

The protection of elite status has not been just about *who* is taught; it extends to *what* is taught in law school. Many law faculty members, particularly those at the more elite institutions, bristle at the idea that they should be teaching lawyering skills.¹ The view that skills teaching is “lesser than” manifests itself in the hierarchy in law school faculties, with doctrinal faculty and scholars at many schools paid more and higher in the pecking order than their academic support, clinical, and legal writing faculty colleagues. Caste stratifications remain embedded in legal education as law schools afford different statuses to faculty based on arbitrary delineations of doctrinal or skills instruction.² The great paradox, subtly addressed in *Shaping the Bar*, is that the skills faculty with lower status, or without status, are often the ones with the most law practice experience and are assigned to teach classes that offer direct or simulated experience with law practice skills.³ In this way, the structure of law schools perpetuates a false dichotomy of knowledge versus skills to elevate the status of some faculty members over others. This systemic legal education hierarchical structure plays out in how we prepare our students to represent clients immediately upon graduation and bar exam passage. It also plays out in how we assess students’ readiness to represent clients, both in law school

1 Steven Friedland, *Trumpeting Change: Replacing Tradition with Engaged Legal Education*, 3 ELON L. REV. 93 (2011).

2 See, e.g., G.S. Hans, *Clinical Fellowships, Faculty Hiring, and Community Values*, 27 CLINICAL L. REV. 253 (2021).

3 *Id.*

and on a licensing exam that purports to test competence in ways that mirror law school exams.

Howarth points out the irony that legal education is not structured to ensure that new lawyers will possess the wide array of skills necessary to represent clients, and yet it serves as the model for bar examiners who take most of their content and processes from legal education (59). Howarth shows that excellence in *learning* law is more important than experience in *practicing* law both for hiring law professors and for licensing lawyers (21). Howarth's description of the symbiotic relationship between legal education and bar exams forces the reader to confront the reality that historically, and even today, legal education may be better at protecting hierarchical structures and the prestige of insiders than it is at protecting the public from incompetent lawyers.

Shaping the Bar shines an unignorable spotlight on the great paradox of legal education and licensing. We have a system of bar admission that permits even brand-new lawyers to take on multiple cases, without supervision, immediately upon licensure. The purported competency of these newly licensed attorneys is based largely on their answers to multiple-choice questions, even though they may have never encountered a client, had to identify the best ways to achieve a client's objectives, engaged in factual discovery, grappled with the malleability of the law in context of ever-changing facts, or dealt with any of the myriad of ethical issues that arise in context of lawyering (33–35). For too long, members of the legal profession have equated competency to perform on an academic exam with competency to represent clients with real-world legal problems. Howarth calls us out on that false equivalency. Her book unveils a system of legal education that was built on disdain for the actual practice of law. According to Howarth, such a system should not also serve as the road map for the licensure exam (59). We agree.

II. Trust Us—Defining and Assessing Minimum Competence Cannot Be Done Any Better

Howarth correctly notes that we cannot assess minimum competence to practice law until we define what minimum competence is (51). Only then can we develop assessments to weed out the incompetent from the *barely* minimally competent—which is what Howarth tells us that testing experts believe a licensing exam should do (5). She reminds us that “legal education does not provide many answers related to minimum competence,” and it is a mistake for state bar examiners to assume that it does (65).

Historically, leaving minimum competence undefined freed legal educators and bar examiners from the burden of identifying ways to test the wide array of law practice skills that new lawyers need. Instead, educators and examiners defended the status quo by arguing that while not perfect, the assessment system was the best we could do. Throughout the book, Howarth demonstrates the fallacy of that claim.

A. Validity Concerns About the Bar Exam

In Part II, *Shaping the Bar* introduces the reader to the basic psychometric literature on high-stakes testing, which requires that tests be reliable, valid, and fair (5). While she notes that licensing exams are “highly reliable in that the same score means the same thing over different administrations” (5), she reviews the evidence that proves they are neither valid nor fair (5-9). In exposé fashion, Howarth captures and quotes prominent bar examiners and attorney regulators admitting that they have not examined whether the bar exam is a valid way to measure practice competency (56-57). In what she couches as doubling down on past mistakes, she matter-of-factly chastises us to not be surprised that a licensure exam based on faulty assumptions will yield results that admit some and exclude others on criteria not correlated to their potential competency in the practice of law (59-65).

Validity exists, as Howarth explains, when a test assesses what it purports to assess (5): in the case of the bar exam, minimum competence to practice law. Howarth readily acknowledges that critical reading, legal writing, and legal analysis are skills crucial to lawyering and that law schools teach, and bar exams test, these crucial skills. However, as she points out, these skills are not tested in the context of how they are used to represent clients. Moreover, they are not the only skills new lawyers need.

Shaping the Bar describes how, until very recently, the legal academy and the legal profession disregarded the research that flagged validity and fairness problems with the bar exam and the need to solve them. Instead, bar examiners simply declared that they were acting in good faith and doing the best that could be done (54-57). Howarth details how these shortcomings were front and center in 1970s civil rights litigation that challenged the discriminatory impact of the bar exam, arguing the exam lacked validity. She notes that despite clear evidence, multiple federal courts sided with state bar examiners and made lawyer licensing immune from Title VII even though they acknowledged the tests' fundamental flaws (35-38). Those decisions left us with a legal legacy that essentially eliminates judicial challenges to the bar admission process on the grounds of validity and fairness (38).

The courtroom was not the only place where validity and fairness flags were raised. Howarth recounts how a 1976 Black Law Journal Symposium at UCLA brought testing experts and bar examiners together and exposed the lack of validity of bar exams, the ignorance of bar examiners about tests, and the racial impact of these inadequate tests (55-56). She notes that the response to these points was to claim that both defining and assessing true minimum competence would be nice, but is impossible (55-57). In other words, the status quo was defended by claiming good faith and the existing exam's being the best that could be done—an argument made without even any effort to do better.

B. Fairness Concerns About the Bar Exam

Shaping the Bar offers an unfiltered and well-documented account of the historic and present-day disparities in bar admission rates by race and ethnicity. These disparities, which Howarth describes as “persistent” and “undisputed,” raise profound fairness concerns given the weak connection, if any, between the bar exam and the practice of law (7). This disconnect between law practice and licensing requirements, and the use of licensing requirements to limit entry of outsiders into the profession, began long ago.

Howarth describes the Pre-World War II rise of three national organizations: the American Bar Association (ABA), the Association of American Law Schools (AALS), and the National Conference of Bar Examiners (NCBE).⁴ These powerful groups joined together to establish law school accreditation standards to “improve” legal education. One way they sought to realize their envisioned improvements was to shut down many law schools created for working people, immigrants, and African Americans (24–25). She notes that the “ABA, by endorsing ever-more rigorous admissions standards, targeted racial, ethnic and religious outsiders and determined which law schools to approve or accredit, while staying committed to racial discrimination” (26).

Howarth details the massive hurdles faced by African Americans seeking to become lawyers. They include law schools' discriminatory admission processes, standards aimed at closing law schools founded to educate Black people, and the expansion of educational prerequisites for bar exam eligibility that were purposefully designed to identify and exclude Black examinees (26–27). These hurdles worked well, as Howarth demonstrates with this simple statistic: “[B]etween 1900 and 1940, the percentage of licensed attorneys who were Black was between 0.6 and 0.8 percent” (27).

She highlights exclusionary practices in the second half of the twentieth century, including the warm embrace of standardized tests such as the LSAT and the elimination of the diploma privilege after Black candidates became eligible for licensure (25–30). She notes that many states had glaringly discriminatory policies, such as making Black candidates endure “unusually lengthy and tough character and fitness interviews scheduled (for them only) the day before they took the bar exam” (31).

The practices of making it difficult for people of color to enter the profession are not just historical ones. As Howarth notes, today we have increasing race-based disparities in the cost of legal education—a situation that legal educators and law schools have sanctioned in their quest for prestige in the law school rankings game (40). We also have ABA accreditors who have enacted

4 The National Conference of Bar Examiners develops and produces the licensing tests used by most U.S. jurisdictions for admission to the bar: the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT) and the Multistate Professional Responsibility Exam (MPRE). Information about what they do, and how they do it, can be found at <https://www.ncbex.org/about/>.

standards that pose an accreditation threat to those schools that enrolled large percentages of working people and people of color (41-42).

Howarth also shines a fairness inquiry light on what she calls the “patchwork quilt of different cut scores” created by the widespread adoption of the Uniform Bar Exam (UBE) (7). The UBE allows multiple states to administer an identical exam but allows each state to set its own passing or “cut” score for the exam. She reviews the studies that demonstrate higher cut scores are not connected to competence but do produce greater racial disparities (8-9, 43-44). The racial disparities caused by higher cut scores are particularly pernicious given that we now have a uniform bar exam that multiple states have adopted – with varying cut scores for the same exam. As Howarth states: “our patchwork quilt of different cut scores operates as if crossing a state line makes someone competent to practice law, which is especially questionable now that bar exams test ‘general’ law, not the law of any one state” (7). She notes that if the bar exam were treated like an employment test subject to Title VII liability, a high cut score with known increased disparate impact would require evidence that score is needed to assess minimum competence—and no such evidence exists (9).

Howarth ably refutes bar examiners’ disclaimer that the disparities in pass rates are a result of long-standing or other educational disparities, and thus not attributable to characteristics or content of the bar exam. As she posits, “although bar examiners cannot be expected to eliminate all preexisting inequalities, we should be expected to eliminate unnecessary disparities in test results” (8). She argues that notwithstanding the judicially created immunity from Title VII liability, state supreme court justices and bar examiners have a “formal professional duty to ensure that the admissions process they oversee is nondiscriminatory” (8). This duty remains unmet.

Howarth also explains how systemic fairness issues have a negative impact on the public. Using existing employment data, Howarth explains that the unfair exclusion of people of color and those without adequate financial resources results in fewer lawyers available to represent individuals rather than business interests (13) and creates a lack of access to representation in communities of color (13). She notes that fairness concerns are exacerbated by the fact that legal education can be very expensive and that Black and Hispanic students pay more for law school and go deeper into debt (4, 9, 40). She argues that the financial ruin that may ensue from failure to pass the bar exam is particularly troubling because we cannot say with any level of confidence that those who fail the exam would not have been competent attorneys (9). She reviews a recent study that found that, “even after controlling for LSAT scores, candidates with more financial resources are significantly more likely to pass, and candidates who work for pay while studying for the bar exam are significantly more likely to fail the exam” (9) and postulates that this study suggests that bar passage is as much a result of financial resources as legal abilities (9).

In sum, in Part I and II of her book, Howarth’s historical and data-driven research makes a very strong case that those who have committed themselves

to building an antiracist legal system cannot turn a blind eye toward the need for law licensing reform.

III. Reshaping the Character and Fitness Process

A. *The Inherent Bias in Assessing Fitness*

Shaping the Bar also probes an aspect of the bar admission process that is not connected to education or examination: the character and fitness assessment process. Howarth champions the public protection goal of screening out unethical lawyers. At the same time, she critically explores whether the current process does in fact offer that crucial protection. Spoiler alert: It does not. “Sloppy office management, missing deadlines because of personal problems, and ‘borrowing’ client funds because of gambling issues are the kinds of things that lawyers do wrong,” says Howarth (79). While the character and fitness process, in theory, is designed to predict who will engage in the types of behaviors that can harm clients, Howarth presents the research that shows the current system fails in its preventive goals.

Howarth offers substantiated accounts to show that rather than identifying future wrongdoers, the character and fitness process historically has punished political dissenters; targeted sexual orientation and gender identity; excluded those with prior arrests and convictions—despite the documented biases in the criminal justice system; and used immigration status and mental health history to exclude certain people from the profession (86–89). She then reviews the empirical work that suggests that “current character and fitness practices—questionnaires and subsequent inquiries intended to predict future wrongdoing—are largely ineffective and not sufficient for the public protection role they are intended to play” (89). She highlights studies that shows that “being male was statistically significant for future attorney discipline; having a prior criminal conviction was not” (89). Howarth asks boldly whether the “red flags” that currently trigger a character and fitness investigation actually predict future attorney misbehavior or whether they are tools the profession uses to ensure it remains as “wealthy, white, and Christian as possible” (83). Again, who and what are we protecting?

B. *Proposed Changes to the Character and Fitness Process*

Howarth offers a bold and feasible proposal to address the problems that plague pre-licensure character and fitness inquiries. She suggests that state bar associations transfer some of their fitness scrutiny away from bar applicants and shift them to attorneys already in practice. She presents her readers with data showing that most sanctioned misconduct in the legal profession is done by seasoned attorneys and not those new to practice (95). She also suggests that states require law schools to engage in meaningful education about professional identity, require supervised practice as a student attorney, require a law office or project management course or certificate, and streamline the character and fitness application (91–94). All of these solutions, she argues, will better protect

the public than using categories of prior misconduct based upon biased views of undesirability or “unfitness” to try predicting future ethical wrongdoing, especially when such predictions are so often wrong (81-88).

IV. A Way Forward: Defining and Assessing Minimum Competence

A. Defining Minimum Competence

Despite the criticisms that were front and center in the 1970s, little empirical work existed to help identify what constituted minimum competence. Job analysis to determine the skills and knowledge necessary is neither a new nor a revolutionary concept. Job analysis theory began in 1900 and by the 1970s, multiple models for job analyses existed.⁵ Yet, until very recently, those charged with creating licensing exams never engaged in job analyses to determine what constituted minimum competence.

Nor was existing data used to try and more closely align the licensing exam to lawyering competencies. Howarth discusses how the MacCrater Report (published in 1992), the Shultz-Zedeck study (published in 2008), and other studies on minimum competencies were largely ignored by bar examiners (62-64). As she notes, it has taken decades for studies that address the minimum competence issue in a rigorous empirical format to be conducted and gain traction.

Howarth reviews a 2020 practice survey conducted by the NCBE that identifies a wide range of skills beyond knowledge of the law and ability to engage in legal analysis (67). She discusses a recent California Attorney Practice Analysis that not only identified a broad range of competencies but confirmed that lawyering tasks require cognitive complexity beyond memorization (70). Finally, she describes the advances to our knowledge of what constitutes minimum competence that can be found in the results of an ambitious focus group study led by Professor Deborah Merritt and the Institute for the Advancement of the American Legal System (IAALS) (71-74). All those studies confirm what we already know: The skills necessary to be a competent lawyer encompass much more than critical reading, legal analysis, and legal writing.

Howarth familiarizes the reader with the Merritt/IAALS study’s twelve building blocks of competence—competencies that encompass much of what we know from the other studies. She notes that this study conceptually advances our understanding of minimal competence in numerous ways, including its rejection of the false dichotomy of knowledge versus skills; an emphasis on understanding, rather than knowledge; a move from identifying legal concepts tied to practice areas to identifying an understanding of threshold legal concepts that allow one to learn and analyze new areas of the law; a

5 See Ch. 10, in THOMAS J. ATCHISON, *INTERNET BASED COMPENSATION ADMINISTRATION* (2000-), <https://www.eriery.com/dlc/onlinetextbook/job-analysis#:~:text=Job%20analysis%20as%20a%20management,his%20principles%20of%20scientific%20management>.

recognition that stress management is a competency; and explicit identification of the ability to learn continuously as a key lawyering competency (72–73).

Howarth aptly summarizes the available data that defines minimum competence. She celebrates the fact that we now have the data we need to know what it is we should be assessing. The question becomes: now what?

B. Changing How We Educate and License Lawyers

Part IV of *Shaping the Bar* is a virtual handbook or guided instruction manual for effectively improving legal education and law licensing. Howarth lays out discrete steps that can be taken to create a process that focuses on assessing and ensuring minimum competence to practice law. She lays out twelve guiding principles for doing that:

1. Use evidence-based licensing requirements rather than relying on gut instincts, good faith, and tradition;
2. Address racial, ethnic, and gender disparities as if required by law;
3. License no one who has not successfully practiced law under supervision, ideally in an academic clinical residency;
4. Align bar exams more closely with the minimum competencies new lawyers need;
5. Establish competence-based educational or training requirements;
6. Reduce the expense of becoming a lawyer;
7. Make law licenses portable from state to state;
8. Use uniform cut scores to protect the public and not to keep out competition—which encompasses eliminating unnecessary racial disparities;
9. Develop multiple forms of law licenses by creating new categories of legal service providers;
10. Reassess competency following licensure;
11. Design licensing requirements that change as the profession changes; and
12. Insist on greater jurisdictional leadership in the attorney licensing process rather than ceding control to the NCBE (100–109).

Following her guiding principles, Howarth explains how to implement each of her proposals. In Chapter 12, she introduces the concept of “clinical residencies”—akin to medical residencies—in which law students engage in client representation with significant attorney supervision. Under Howarth’s vision for clinical residencies, law student supervision encompasses “identified learning goals, purposeful inculcation of habits of reflective practice and self-regulation, and assessment of competencies learned” (112).

She sets out various methods states could use to ensure that all new lawyers have some form of supervised practice before licensing. She is resolute on her position that a novice attorney cannot attain minimal competence to practice law without some period of supervised practice (117). Howarth seems to prefer that law students enroll in an academically based clinical residency, but states that a period of post-graduation supervised practice can also lead to the attainment of the minimum competence required for public protection.

In Chapter 13, Howarth scrutinizes the licensure mechanisms currently available and proposes ways to enhance these mechanisms. Notably, she offers guidance to jurisdictions with regionally accredited law schools. The inclusive reach of Howarth's proposals is reassuring, as many states restrict bar admission to graduates exclusively from ABA accredited schools. Noting the symbiosis between the ABA and the AALS that she explained in earlier chapters, Howarth subtly and effectively makes the point that law schools and states can develop valid competency measures without outsourcing to the NCBE or relying on regulators who have become captive to the NCBE's multistate exam products.⁶ *Shaping the Bar* also highlights how the ABA accreditation process has not only served as a mechanism of exclusion, but how it also has been a driver of the cost of legal education in the U.S. The book cautions states that are concerned about access to the profession to pay attention to the mounting expense of an ABA-accredited J.D. followed by a bar exam. These states are guided to consider mandating state education accreditation, which will invite pedagogical and curricular innovation and potentially will reduce the distance between legal education and the profession (119).

C. Concrete Suggestions for Moving to a System that Actually Protects the Public

In a tone that would occupy the median on a spectrum from demanding to lofty, Howarth opines that law schools can and should do more. She laments that under our current structure, we ask too much of state licensing authorities, who are almost entirely dependent upon the NCBE for providing bar exam content and making determinations about what should and should not be tested. In the same vein, we ask too little of law schools.

According to Howarth, when we ask and expect more of law schools, the multiple alternative pathways to licensure come into focus. But perhaps we don't need more from law schools, we may just need something *different*. Howarth's points about truly immersing client representation experience into the delivery of the law school curriculum is well taken. But the notion of asking for *more* could suggest that Howarth's reasoned interventions occur on top of the overused Socratic and Langdellian models that keep legal education firmly planted in the soil of status quo. Asking for something different frees us to break away from the shackles of tradition that have created the sizeable

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

disconnect between learning the law and learning how to use the law in a manner that really does protect the public.

With increased confidence that a legal education will instill a wide array of law practice skills, courts, bar examiners, and the public can be more assured by curricular and clinical pathways to licensure that do not involve a bar exam. The Supreme Court of Oregon is exploring those pathways now. Once piloted in Oregon, other states are likely to follow with similar models. States could also use Howarth's proposed competency-based diploma privilege models for guidance (122-24). Howarth argues that "competence-based diploma licensure offers greater assurance of minimum competence to practice law, is easier for jurisdictions to administer, is less expensive for candidates, and avoids the discriminatory impact of the bar exam" (125). In the ultimate burn, she notes that the only real losers with a competence-based diploma licensing pathway would be the bar prep industry, of which the NCBE is a part, despite its nonprofit status (126).

Diploma privilege and supervised practice pathways to bar licensure are not novel developments, they have been around for centuries. But as Howarth recounts, these pathways fell out of favor when law school accreditors became distrustful of law schools and focused on elite status (24-26). *Shaping the Bar* gives us a history lesson about the early ABA's desire to limit admission to the bar to keep out the "unfit" (24). In fact, the existence of the NCBE and the national usage of bar exams as the single gateway to bar admission are the fruits of a brokered agreement between the ABA and the AALS. That brokered agreement set uniform standards for legal education, ostensibly to improve or ensure the quality of the legal profession. However, as Howarth chronicles, the use of a flawed competency exam as a precondition to bar admission has ultimately caused the profession to suffer from an appreciable lack of diversity and has subjected bar applicants to financial and career strain.

We note that although Howarth describes the crisis in legal education with reference to the specifically high costs of legal education (4), and later references the commercial bar preparation industry and its infiltration of legal education (42-43), she does not also focus on the deep financial strain caused by the bar admission process. The costs of applying and preparing for the bar exam are prohibitive for many applicants, especially first-generation college graduates and those who come from socio-economically disadvantaged backgrounds.⁷ Studies demonstrate that the socio-economic background of law school graduates is correlated to success on the bar exam.⁸ The high costs of passing a bar exam contribute to known disparate bar pass rates for those

7 Karen Sloan, *Does the Bar Exam Cost Too Much? These Law Profs Think So*, REUTERS (Apr. 22, 2022), <https://www.reuters.com/legal/legalindustry/does-bar-exam-cost-too-much-these-law-profs-think-so-2022-04-22/>.

8 Deborah Jones Merritt et al., *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG LAW (July 20, 2021), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> (discussing an AccessLex study finding that the bar exam is a test of resources).

without the higher economic statuses that a majority of law school graduates have.⁹ The addition of this discussion could have been helpful, to further demonstrate why we must move away from the current licensing model.

Shaping the Bar may paint Howarth as an idealist, but certainly not as an abolitionist. She does not advocate for the abolition of bar exams, should states decide to keep them as one pathway to licensure. However, she encourages states to look beyond the status quo to make the bar exam a better measure of competence. Howarth identifies exclusive use of performance tests as the “best way to protect the public with improved bar exams” (138). Relying on models used in the state of Nevada, she then lays out the content, format, and administration of those tests in ways that states could easily implement.

In Chapter 15, Howarth offers ways to improve existing bar exams. She notes that the NCBE’s NextGen bar exam has potential to be better than the current multistate exams, but it will continue to raise validity and fairness concerns unless the testers engage in the validity studies that Howarth describes in Part II of the book. Despite the opaquely described new format of the NextGen exam, “to the extent it perpetuates its current focus on memorized doctrinal rules, the NCBE will have missed a big opportunity to align the exam with twenty-first century practice” (137). At this point, little is known about the new exam scheduled to debut in 2026. But Howarth predicts that the exam may be unable to adapt to the changing realities of law practice, due in no small part to the constraints of maintaining the security of high-stakes exams with repeat-use equator questions (34, 137).

Finally, Howarth argues that cut scores should be used to determine minimum competence, not to exclude competition. She argues that following psychometric best practices, any cut score standard-setting process should start with having competent lawyers and judges “*take the test*—not just deliberate on what scores they want candidates to achieve” (143). She also urges that we stop using speeded multiple-choice testing as a proxy for competence; nothing is further from the realities of law practice than answering closed-book multiple-choice questions in 1.8 minutes (143).

Since Howarth’s book was published, ChatGPT and other AI systems have captured the attention of the country. Those systems will inevitably be incorporated into law practice. They have conclusively demonstrated that the kind of paper-and-pencil test bar examiners draft can be answered by a machine.¹⁰ We suggest that the inability of a bar exam to adapt to that kind of emerging change is a problem with a paper-and-pencil test. It also illustrates why other pathways that require actual interaction with clients and

9 *Id.*; Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. Legal Ed. 3, 15 (2010) (“Eventual [bar] passers are more likely to be unemployed [or] to be working part-time [during bar study]”).

10 MICHAEL JAMES BOMMARITO & DANIEL MARTIN KATZ, *GPT TAKES THE BAR EXAM* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4314839; Daniel Martin Katz, et al., *GPT-4 Passes the Bar Exam*, (March 15, 2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233.

human problem-solving, as Howarth suggests, may ultimately be much better assessments of new lawyer competence.

Howarth's conviction, and evidence-based approach to improved legal education and licensure, present a compelling case for change. However, it will take collective action from stakeholders and decisive redirection from law school accreditors if we are to see law schools move away from the deeply entrenched preference for status and elitism.

Conclusion

In *Shaping the Bar*, Howarth paves the way for a legal education and law licensing process that truly focuses on public protection. In doing so, she exposes the ways that the current system veils its protectionism and quest for status behind the rhetoric of public protection and bar exam reliability. She calls out our complacency with an outmoded model for legal education from 100 years ago. She asks us to confront the discriminatory impact of our bar admission process and awakens us to the reality that we cannot have an equitable profession without fixing or reshaping licensing—which cannot be done without substantial changes to legal education. We suggest that such changes will also require re-thinking faculty hiring and hierarchical policies in law schools.

Howarth discusses how the emergence of the COVID pandemic in 2020 shined a light on the crisis in attorney licensing (44-48). She also explains how the pandemic exposed the loss of state control over the bar admission process, the control exercised by the NCBE, and how some states began to balk at NCBE control.¹¹ Howarth's book offers a flicker of hope for the future of attorney self-regulation as she describes the activism of law students, recent law graduates, the practicing bar, and law school faculty and administrators who petitioned state supreme courts to develop and approve alternative licensing methods during the period of the pandemic when in-person exams were unsafe, unavailable, or both. Howarth's book raises another question: How do we continue with that seemingly unified momentum of 2020 to create a better system of bar admission? Howarth offers concrete solutions to the problems she identifies with the bar exam and the process of admitting new attorneys, but as for the bigger question of true and continued self-regulation, only we can answer what will come next. For only through our committed and decisive action will we see the needed change that Howarth prescribes.

We, too, believe change is possible. But only if people who read Howarth's book grapple with the hard questions it poses. Are we really committed to protecting the public? Are we truly committed to creating an equitable profession if making the profession more accessible means that we individually and collectively lose some level of prestige and status? Are we ready to stop simply espousing a belief in equity yet making decisions that perpetuate

11 For a more in-depth discussion of this issue, see Marsha Griggs, *An Epic Fail*, 64 HOWARD L. J. 1 (2020).

inequitable structures? Howarth's book makes us face those questions head-on. Her data-based arguments require us to move from a framework by which we claim that disparities in bar passage are unintentional and irremediable. *Shaping the Bar* compels us to no longer be complacent with a bar exam that fails to assess a range of competencies. Howarth envisions a future of attorney licensing in which we accept accountability for practices that have failed to truly protect the public and that have systematically disadvantaged particular groups. That future requires courage. We hope that courage exists.