Barring Diversity? The American Bar Exam as Initiation Rite and Its Eugenics Origin

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INTRODUCTION

According to the 2020 census, the U.S. population is over 42% minorities,[1] however, only 14% of the legal profession is.[2] In 2020, the first-time bar taker pass rate was 88% for Whites, 80% for Asians, 78% for Native Americans, 76% for Hispanics, and 66% for Blacks.[3] The COVID-19 pandemic has also thrown state bar exams into crisis. Some states allowed graduates a diploma privilege and many administered online exams. At the same time, anti-Asian violence, disproportionate COVID deaths in communities of color, Black Lives Matters protests, and the Capitol Insurrection have further exposed systemic racism in the U.S. This article will argue that racial disparities in first-time bar passage rates are not coincidental but rooted in the eugenics origin of the bar exam. The bar exam is an initiation rite that bars diversity in the legal profession. The exam requires costly isolated study for several months that privileges young White graduates with few family or financial obligations and those who have assimilated to such status.

Eugenics theory held that Whites were superior, and others should be denied access to property ownership, education, and the legal profession.[4] Therefore, to diversify the legal profession, we must acknowledge these origins in eugenics and institute the diploma privilege or create sequenced exams or other alternatives that do not require costly isolated study and bar preparation courses.

This article will first discuss what states did to administer the bar during the pandemic. Then, the article will discuss the state of racial diversity in the

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[1] Connie Hanzhang Jin et al., *What the New Census Data Shows About Race Depends on How You Look at It*, NPR (Aug. 13, 2021, 5:01AM), https://www.npr.org/2021/08/13/1014710483/2020-census-data-us-race-ethnicity-diversity (last visited Mar. 5, 2022).

[2] AM. BAR ASS'N, NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf.

[3] AM. BAR ASS'N, LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SUMMARY BAR PASSAGE DATA: RACE, ETHNICITY, AND GENDER, 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf.

[4] *See* Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. FOR SOC. JUST. 1, 11–14 (2013).

legal profession and chronicle the American Bar Association's ("ABA") efforts since the 1970s to diversify the profession. Then, we will delve into the history of the bar exam as an initiation rite. I will discuss how bar admissions standards arose amid teachings about Anglo-Saxon White supremacy in the late 1800s and early 1900s. Minorities were excluded from most law schools, and there was widespread fear of immigrants diluting the U.S. White population and the legal profession.

I will also discuss anthropological findings that initiation rites mark entry into a privileged group. These findings signify identity change through a costly, lengthy, communal, and painful event. They involve a separation from society, a liminal period, an ordeal, and then reincorporation into society. The bar exam follows this pattern. Many minority candidates cannot afford months of unpaid isolated study, much less multiple bar attempts. This is because of racial wealth gaps[5] fueled by eugenics-inspired federal redlining policies from the 1930s.[6] In pre-pandemic 2019, "the typical White family [had] eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family."[7] "The median young Black family has almost no wealth ($600). In contrast, the median young White family has a wealth of $25,400."[8] These wealth gaps will only be exacerbated by the pandemic.

I conclude that the pandemic and heightened awareness of systemic racism in the U.S. provide an opportunity to make permanent changes to bar admission and the diversity of the profession. Three years of law school are already a ritual liminal period with multiple ordeals. I propose either the diploma privilege or an open book exam focused on essential subjects for all candidates, and specialty exams for some. This can be administered frequently and online, and candidates, including current law students, need only retake subjects that they have not passed. All alternatives should not have a disproportionate financial and social burden on candidates of color, including costly bar preparation courses. Then, the bar exam can be part of a strategy to diversify the profession, and not a bar to it. Thus, this initiation rite can be liberating, transformative, and healing. Otherwise, we will continue to see huge racial disparities in first-time bar passage rates and

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[5] LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP: WHY PUBLIC POLICY MATTERS (Amy Traub et al. eds., 2015), https://www.demos.org/research/racial-wealth-gap-why-policy-matters; NEIL BHUTTA ET AL., DISPARITIES IN WEALTH BY RACE AND ETHNICITY IN THE 2019 SURVEY OF CONSUMER FINANCES, FEDS NOTES (2020), https://doi.org/10.17016/2380-7172.2797 ("White families have the highest level of both median and mean family wealth: $188,200 and $983,400, respectively …Black families' median and mean wealth is less than 15 percent that of White families, at $24,100 and $142,500, respectively. Hispanic families' median and mean wealth is $36,100 and $165,500, respectively.").

[6] In the U.S., homeownership is the chief means of generational transfer of wealth. Eugenic beliefs fueled federal redlining policies in the 1930's which denied federally subsidized home mortgages to non-Whites and ensured segregated neighborhoods and schools. Federal appraisal manuals stated that racially mixed neighborhoods had lower value. Education resources are based on property taxes, which are based on appraisal values. *See* Szto, *supra* note 4, at 11–14.

[7] BHUTTA, *supra* note 5, at 1, 4.

[8] *Id.*

crushing financial and familial burdens on minority candidates. Reform will also benefit all bar candidates.

I. PANDEMIC BAR APPROACHES

The COVID-19 pandemic has shown us that bold and swift changes can be made to bar admissions. Some states announced a diploma privilege, e.g, Washington,[9] Utah,[10] Oregon,[11] and Louisiana.[12]

Other states administered an online bar exam; however, there were issues not only with technology in general, but with racial discrimination in proctoring software. Future online bar exams must eliminate these proctoring flaws.

In a survey of New York online bar exam takers, 41% experienced internet or software issues.[13] The survey represented around ten percent of the 5,165 people who took the exam.[14] Twenty-nine percent thought that their personal data was compromised when they downloaded the exam software.[15] Seventy-one percent were concerned about cheating.[16] Anne Simon, disability rights attorney and New York State assemblywoman who co-sponsored the survey, stated,

> The profound lack of decency in this process and the unwillingness of the [New York State Board of Law Examiners] to consider equitable solutions for [New York] bar examinees this month has been appalling . . . From those who were forced to use urinals, or suffer embarrassing accidents to avoid leaving camera frame, we saw an utter failure to provide safe, responsible, and fair testing conditions to law school grads taking the most important test of their careers.[17]

With regard to racial discrimination, proctoring software could not recognize candidates with darker skin tones. For example, Areeb Khan, a

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[9] Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, Supreme Court of Washington (June 12, 2020).

[10] Stephanie Francis Ward, *Utah is First State to Grant Diploma Privilege During Novel Coronavirus Pandemic*, AM. BAR ASS'N (Apr. 22, 2020, 11:05 AM), https://www.abajournal.com/news/article/utah-first-state-to-grant-diploma-privilege-during-the-coronavirus-pandemic.

[11] Attorney General Rosenblum Statement on 'Oregon Emergency Diploma Privilege' for 2020 Oregon Law Graduates (July 6, 2020), https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-statement-on-oregon-emergency-diploma-privilege-for-2020-oregon-law-school-graduates/.

[12] Supreme Court of Louisiana Order (July 22, 2020), https://www.lascba.org/docs/News/2020_07-22_ORDER-EmergencyAdmission.pdf.

[13] Karen Sloan, *Test Takers Slam New York's First Online Bar Exam in New Survey*, N.Y. L.J. (Oct. 16, 2020, 12:47 PM), https://www.law.com/newyorklawjournal/2020/10/16/test-takers-slam-new-yorks-first-online-bar-exam-in-new-survey/.

[14] *Id.*

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.*

New York bar candidate, was told by his software, "[d]ue to poor lighting, we are unable to identify your face."[18] The problem was not the lighting in his room.[19] There is growing awareness of racial bias in facial recognition algorithms because they appear to take White males as normative. In one study, darker-skinned females were the most misclassified group (with error rates of up to 34.7%).[20] Apple iPhone's facial recognition system has also allowed Chinese users to unlock others' phones.[21] This perpetuates the stereotype that all Asians look alike. Proctoring software contains the implicit values of "discriminatory exclusion, the pedagogy of punishment, technological solutionism, and the Eugenic Gaze."[22]

This article will now focus on the state of racial diversity in today's legal profession and bar passage rates. The issues of racial discrimination in proctoring software and today's online bar exams harken back to the reasons for historic discrimination in the legal profession.

II. THE STATE OF RACIAL DIVERSITY IN THE LEGAL PROFESSION AND BAR PASSAGE

According to the 2020 census, the U.S. population was 57.8% White, 12.1% Black, 18.7% Hispanic, 5.9% Asian, and 7% Native American.[23] However, the attorney population does not reflect this racial diversity. In 2020, the U.S. attorney population was 86% White, 5% Black, 5% Hispanic, 2% Asian and 1% Native American.[24] Other professions are more diverse, e.g., in 2019 doctors were 72% White, 8.2% Black, 18.0% Asian, and 7.6% Hispanic; and social workers were 69.6% White, 23.0% Black; 3.7% Asian, and 14.3% Hispanic.[25]

It is estimated that in 1969, minority lawyers made up less than 1% of the profession,[26] although minorities were then 17% of the population.[27]

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[18] Avi Asher-Schapiro, '*Unfair Surveillance'? Online Exam Software Sparks Global Student Revolt*, REUTERS (Nov. 10, 2020, 7:24 AM), https://www.reuters.com/article/global-tech-education/feature-unfair-surveillance-online-exam-software-sparks-global-student-revolt-idUSL8N2HP5DS.

[19] *Id.*

[20] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 1, 8 (2018).

[21] Guy Birchall & Tom Michael, *Chinese Users Claim IPhone X Face Recognition Can't Tell Them Apart*, N.Y. POST (Dec. 21, 2017, 3:11 PM), https://nypost.com/2017/12/21/chinese-users-claim-iphone-x-face-recognition-cant-tell-them-apart/.

[22] Shea Swauger, *Our Bodies Encoded: Algorithmic Test Proctoring in Higher Education*, HYBRID PEDAGOGY (Apr. 2, 2020), https://hybridpedagogy.org/our-bodies-encoded-algorithmic-test-proctoring-in-higher-education/.

[23] Jin, *supra* note 1.

[24] AM. BAR ASS'N, *supra* note 3.

[25] BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2019), https://www.bls.gov/cps/aa2019/cpsaat11.pdf (explaining how other professions are also more diverse: architects are 82.6% White, clergy, 79.1%; electric engineers, 71.3%; and accountants and auditors, 77.1%).

[26] Henry Ramsey, Jr., *Historical Introduction*, *in* LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY iii, iv (L. SCH. ADMISSION COUNCIL ed., 1998).

[27] BRIAN GRATTON & MYRON P. GUTMANN, HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT, 1-177–1-179 (Susan B. Carter et al. eds., 1st ed. 2006).

After Dr. Martin Luther King, Jr.'s assassination in 1968, many law schools began affirmative action programs to admit minority students.[28]

As mentioned above, bar passage rates show striking racial disparities. In July 2015, the first-time taker California pass rate for Whites was 71.8% for California ABA-accredited schools; for Blacks, 53.4%; for Hispanics, 61.3%, and for Asians, 65.9%.[29] As mentioned above, in 2020, the first-time test taker pass rate across the nation was 88% for Whites, 80% for Asians, 78% for Native Americans, 76% for Hispanics, and 66% for Blacks.[30]

Racial disparities were studied years earlier in the 1998 Law School Admissions Council ("LSAC") Longitudinal Bar Passage Study. This study examined national bar passage rates for approximately 23,000 students who began law school in 1991.[31] This study found that among first-time bar takers, approximately 92% of Whites passed, 75% of Hispanics, 61% of Blacks, 81% of Asians, and 66% of "American Indians."[32]

Taking into account multiple attempts, Whites passed at a rate of 96.7%, Blacks, 77.6%, Asians 91.9%, Hispanics 89.9%, and Native Americans at 82.2%.[33] Of minority candidates who passed, 99% passed by the third attempt. However, many minority candidates who failed the first time never retook the bar.[34]

The study concluded that law school grade-point average ("LGPA") and Law School Admission Test ("LSAT") scores were the strongest predictors of bar examination passage.[35] Even though minority students entered law school with lower undergraduate GPA's and LSAT scores, the study also concluded that their eventual bar passage rates justified their law school admission.[36]

What is most striking, however, and not mentioned in the study's executive summary,[37] is that even Whites with LSAT scores below the mean passed at 86.9% on their first attempt.[38] Therefore, one's race appears to be more critical than one's LSAT score in passing on the first attempt. Age was another critical factor in bar passage. For all groups, the older the candidate,

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[28] Ramsey, *supra* note 26.

[29] STATE BAR OF CAL., JULY 2015 CALIFORNIA BAR EXAMINATION NUMBER OF TAKERS AND PERCENT PASSING BY RACIAL/ETHNIC GROUP (2015), https://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/JULY2015STATS.121715.pdf.

[30] AM. BAR ASS'N, *supra* note 3.

[31] Ramsey, *supra* note 26, at viii.

[32] *Id.* at 27. There were slight gender variations: among first-time takers, 91.5% of White females passed; 92.2% of White males passed; 81.8% of Asian females passed; 79.7% of Asian males passed; 71.2% of Hispanic females passed; 78.1% of Hispanic males passed; 62.5% of Black females passed; 59.7% of Black males passed; 65.8% of Native American women passed; and 66.6% of Native American males passed. *Id*. at 26.

[33] *Id.* at viii.

[34] Of those who failed and never retook the bar, 2% of Whites and Asians fell into this category; unfortunately, 5% of Hispanics and 11% of Blacks failed on their first attempt and never retook the bar. *Id.* at 56.

[35] *Id.* at viii.

[36] *Id.* at ix.

[37] *Id.* at viii–ix.

[38] *Id.* at 30.

the lower their bar passage rate.[39] Bar passage rates are highest for those under the age of twenty-two.[40] For older candidates, Whites fare the best.[41]

Black candidates had the highest percentage of persons who had full-time jobs for at least two years prior to law school, 45%, compared to 32% to 36% for the other groups.[42] Asians (83.5%) and Hispanics (77.8%) had very high percentages of candidates who grew up in homes where another language besides English was spoken.[43]

Also striking were data on socioeconomic status. Regardless of their socioeconomic status, first-time passers among Whites and Blacks passed at relatively the same rates.[44] In contrast, Asians and Hispanics at higher socioeconomic status levels did significantly better.[45] This possibly reflects how Asians and Hispanics in higher socioeconomic status levels can assimilate into White neighborhoods with educational practices that are ultimately tested on the LSAT and bar exam.

If White candidates under the age of twenty-two had the highest first-time pass rates and Black candidates over the age of twenty-nine had the lowest, then why are costly multiple bar attempts necessary for a large percentage of minority candidates? And why subject minority students to multiple ordeals?

We will now discuss, in general, American Bar Association strategies to diversify the legal profession since the 1970s, before discussing the history of admission to the bar. This history will explain that today's bar racial disparities are not coincidental. Fortunately, reform to the bar exam will not only benefit minorities, but all bar candidates.

III. STRATEGIES TO DIVERSIFY THE PROFESSION

The American legal profession has a long history of excluding minorities. The American Bar Association was founded in 1878 but did not remove all restrictions on Black membership until 1955.[46] Chinese students were barred from admission to law school and to the bar because of anti-siniticism and the Chinese Exclusion Act.[47]

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[39] *Id.* at 57.

[40] *Id.* For candidates under the age of 22, pass rates for Whites were 94.5%; Asian American, 85.8%; Blacks, 68.3%; and Hispanics, 79.8%.

[41] *Id.* For White bar candidates over 29 years old, their first-time pass rate was 86.5%, and only 6.5% never passed. The first-time pass rates and never pass rates for minority candidates over the age of 29 were respectively, Asian Americans 66.6% and 14.1%; Blacks, 54.9% and 28.4%; and Hispanics, 79.3% and 9.5%.

[42] Ramsey, *supra* note 26, at 60.

[43] *Id.* at 59.

[44] *Id.* at 58. The range for Whites was 91% for the lowest bracket to 92% for the highest. The range for Blacks was 61% to 65%.

[45] *Id.* The range for first time passers among Asians was 73% to 83% from the lowest to the highest bracket. The range for first time passers from Hispanics was 66% to 83%. *Id.*

[46] SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 3, 101 (AM. BAR ASS'N ed., 1993).

[47] Li Chen, *Pioneers in the Fight for the Inclusion of Chinese Students in American Legal Education and Legal Profession*, 22 ASIAN AM. L.J. 5 (2015).

In 1911, three Black lawyers were admitted to membership, but when their race was discovered, their membership was voided because the "settled practice of the Association ha[d] been to select only White men as members."[48] After dissent from some ABA leaders, the three Black lawyers were allowed to become members, but future Black candidates were not.[49] In 1912 the ABA passed a resolution to exclude Blacks.[50]

It was not until 1979 that the ABA began to make "a concerted effort to involve minority lawyers."[51] A Minorities in the Profession Committee was formed.[52] In 1980, the ABA adopted Standard 212, which required law schools to provide opportunities for law study and entry into the profession for racial and ethnic minorities.[53]

In 1986, the ABA formed the Commission on Opportunities for Minorities in the Profession.[54] It also adopted Goal IX to achieve diversity in "leadership, membership, programming activities and other objectives."[55]

In 2010, the Presidential Diversity Initiative of the American Bar Association issued its report and recommendations entitled "Diversity in the Legal Profession: The Next Steps." Among its new directions was #17, "[c]an, or should, the bar exam evaluate the skills necessary to deliver services in diverse legal environments?"[56] This question has apparently not been answered to this day. The ABA's 2011 Commitment to Diversity promotes "full and equal participation in the Association, our profession, and the justice system by all persons."[57] This is a noble commitment, because as stated at the beginning of this article, the legal profession is not representative of the nation's racial composition.

In 2016, the ABA Diversity & Inclusion 360 Commission reported that it had produced an online database of pipeline programs, prepared a template for strategic diversity plans, and developed implicit bias training materials.[58] The Commission acknowledged slow progress in diversifying the profession, but did not state why progress was slow.[59]

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[48] BOYD, *supra* note 46, at 101.

[49] *Id.*

[50] David Kenneth Pye, Legal Subversives: African American Lawyers in the Jim Crow South 46 (2010) (Ph.D. dissertation, University of California, San Diego).

[51] BOYD, *supra* note 46, at 101.

[52] *Id.* at 102.

[53] *Id.* at 104.

[54] *Id.* at 102.

[55] AM. BAR ASS'N, DIVERSITY PLAN 2 (2011).

[56] AM. BAR ASS'N, PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 16 (2010), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/next-steps-report.pdf.

[57] AM. BAR ASS'N, *supra* note 56, at 1.

[58] KAREN CLANTON, DIVERSITY & INCLUSION 360 COMMISSION: EXECUTIVE SUMMARY 2 (AM. BAR ASS'N ed., 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/di-360-commission-executive-summary.pdf.

[59] *Id.*

In 2018, the ABA established the Center for Diversity and Inclusion in the Profession.[60] The ABA Commission on Racial and Ethnic Diversity in the Profession's 2020 ABA Model Diversity Survey found that firm leadership "overwhelmingly consisted of White men," "representation of minority groups . . . is growing at the bottom levels of Associates, but is declining at the higher levels of Non-Equity and Equity Partners," and "[a]ttrition rates were substantially larger for non-White attorneys."[61]

This article seeks to address why progress is slow. To address obstacles to diversifying the profession, we must examine the history of admission to the American legal profession, the use of ritual, and the unfortunate role of eugenics and racial hierarchy theory. Unless these origins are addressed, progress will remain slow.

IV. THE HISTORY OF ADMISSION TO THE AMERICAN LEGAL PROFESSION

This section will first discuss the English ritual origins of the American legal profession, then the role of early apprenticeships in the U.S., before turning to the role of eugenics and racial hierarchy theory and the bar exam. With no apprenticeship requirement today, the bar exam is a critical ritual in admission to the bar.

The American legal profession can be traced to English professions and guilds, which had their origins in monastic rituals. In general, entry into English guilds involved apprenticeships and ceremonies, sometimes of a religious nature.[62] Apprenticeships included separation from families, which ended with incorporation into a guild with a common meal.[63]

A. English Inns of Court

"The origins of the English Bar are traceable to . . . monastic orders, whose members regularly acted as advocates in local disputes and whose legal advice was routinely heeded by potential litigants."[64] *Advocatus* denoted a person in the ecclesiastical courts[65] and lawyers were considered priests who imparted common law whose origin was divine.[66] Due to this divine origin, there were three daily masses in the Inns of Courts.[67]

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[60] AM. BAR ASS'N, *Center for Diversity and Inclusion in the Profession High-Level Overview 2021-2022 Bar Year 3*, available at https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2020-aba-diversity-high-level-overview.pdf.

[61] AM. BAR ASS'N, 2020 ABA MODEL DIVERSITY SURVEY 19 (Am. Bar Ass'n ed., 2020), https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/aba/credp_2020_mds_report.pdf.

[62] ARNOLD VAN GENNEP, THE RITES OF PASSAGE 103 (Monika B. Vizedom & Gabrielle L. Caffee, trans., 1960).

[63] *Id.*

[64] PAUL RAFFIELD, IMAGES AND CULTURES OF LAW IN EARLY MODERN ENGLAND: JUSTICE AND POLITICAL POWER, 1558–1660 11 (2004).

[65] *Id*. at 11–12.

[66] *Id*. at 9.

[67] *Id*. at 17.

"Communion rites were enacted during commons, at which senior and junior members shared a mandatory, frugal meal."[68] As in Benedictine practices, the law was supposed to be "spoken and eaten."[69] Therefore, the bread eaten during commons was equivalent to the sacred Host eaten in Holy Communion.[70] These common meals simultaneously symbolized the divine origin of law, and also the "Christian injunction against pride."[71]

After meals, students argued cases.[72] In fact, before being called to the bar, students had to engage in "twelve grand moots and twenty-four petty moots at the Inn of Chancery."[73] The moot was the most important exercise in their legal training.[74] Before readers delivered lectures they were isolated for a week in chambers; during lectures their status was "almost sacred," and they were incorporated with common meals and feasting.[75]

The Inns of Courts rites thus included rites of separation, transition, and incorporation for admission to the bar[76] where common sacramental meals and moots were key. I will discuss separation, transition, and incorporation rites further below.

B. U.S. Apprenticeship, Self-Study, and Bar Admission for White Male Citizens

Until the late 1800s, admission to practice law in the U.S. mainly involved apprenticeships, self-study,[77] and oral examinations with local judges.[78] The U.S. apprenticeship was the ritual equivalent of the Inns of Courts practices of separation, transition, and incorporation. As the 1790 Naturalization Act limited U.S. citizenship to free Whites, many states expressly limited bar admission to White male citizens. For example, in 1851, the Iowa Code stated, "[a]ny [W]hite male citizen . . . who satisfies any district court . . . that he possesses the requisite learning and . . . good moral character, may . . . be permitted to practice . . . ."[79]

The emancipation of Black slaves and mass immigration to the U.S. from Eastern and Southern Europe, however, led to changes in bar admission. In 1870, African descendants and African immigrants were

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[68] *Id*. at 9.
[69] *Id*. at 10–11.
[70] *Id*. at 14.
[71] *Id*. at 10.
[72] *Id*. at 20–21.
[73] *Id*. at 21.
[74] *Id*.
[75] David Lemmings, *Ritual, Majesty and Mystery: Collective Life and Culture Among English Barristers, Serjeants and Judges, c. 1500-c.1830, in* LAWYERS AND VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS 31 (W. Wesley Pue & David Sugarman eds., 2003).
[76] *Id.*
[77] *See* ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 22–23 (1938) (describing early apprenticeships).
[78] *See* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 346 (2006).
[79] IOWA CODE § 1610 (1851).

allowed to become citizens;[80]as mentioned earlier, they were not welcomed into the ranks of attorneys. Other minorities were excluded as well. Despite their contributions to building the transcontinental railroad and land reclamation in California, Chinese were scapegoated and excluded from immigration and citizenship from 1882 to 1943[81] and from becoming attorneys.[82] While large numbers of Jewish and Catholic immigrants from Eastern and Southern Europe did enter the U.S., fears of them flooding the legal profession led to calls for required legal study within universities, and standardized testing. These requirements disadvantaged Blacks and recent immigrants with few resources. In fact, less than 4% of the U.S. population attended college.[83] The calls for university based legal education, and standardized testing were steeped in eugenics theory which posited that intelligence and moral character were based on race. The Jim Crow South and professionalism barriers raised by the ABA and the American Association of Law Schools thus deterred African Americans and other minorities from entering the legal profession.[84]

C. Eugenics, Immigration, and Standardized Testing

Industrialization in the U.S. required more workers, and immigration filled this need.[85] In the 1880s, the U.S. saw a surge in immigration from Eastern and Southern Europe;[86] these immigrants were considered non-White.[87] Workers poured in from Italy, Poland, Greece, and other such countries.[88] To illustrate the magnitude of this influx, in 1882, 87% of European immigrants came from Northern and Western Europe, and only 13% from Southern and Eastern Europe.[89] In 1907, 81% came from Southern and Eastern Europe and 19% from Northern and Western Europe.[90] Unfortunately, this increased immigration brought fears that urban Catholic and Jewish lawyers would besmirch a White Protestant profession and represent injured workers and consumers against corporate interests.[91]

During this time, proponents of eugenics promoted theories of a racial hierarchy with Anglo-Saxons as the superior race, followed by northern

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[80] Naturalization Act of 1870, ch. 254, 16 Stat. 25 (1870).

[81] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

[82] *In re* Hong Yen Chang, 60 Cal. 4th 1169, 1170 (2015) (describing Hong Yen Chang, the first attorney of Chinese descent in the U.S., who was denied admission to State of California bar in 1890 but granted posthumous admission in 2015).

[83] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 29 (1976).

[84] Pye, *supra* note 50, at 59.

[85] JAMES MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 21 (2013).

[86] *Id.* at 20.

[87] *Id.* at 22.

[88] *Id.* at 21.

[89] CARL KAESTLE, TESTING POLICY IN THE UNITED STATES: A HISTORICAL PERSPECTIVE, (Gordon Comm'n on the Future of Assessment in Educ. ed., 2012).

[90] *Id.*

[91] MOLITERNO, *supra* note 85.

Europeans, Asians, Black, and Hispanics.[92] Eugenicists warned that unless the races were segregated and immigration was curtailed, the American population would suffer a decrease in intelligence.[93] Therefore, eugenicists promoted: breeding White babies, sterilizing the so-called feeble-minded,[94] prohibitions against miscegenation, racial residential and education segregation, and curtailing immigration from inferior groups, i.e., non-Anglo-Saxons. This curtailment of immigration culminated in the 1924 Immigration Control Act.

At the height of its influence in the U.S., the first part of the twentieth century,[95] eugenics was considered to be mainstream science. Eugenics was funded by J.H. Kellogg and the Race Betterment Foundation in Battle Creek, Michigan, and the Harriman railroad fortune, which helped create the Eugenics Record Office ("ERO") in Cold Spring Harbor, NY.[96] Belief in eugenics was so widespread that the Encyclopedia Britannica stated that "mentally the negro is inferior to the [W]hite."[97]

D. Eugenics and the Creation of Standardized Testing

The eugenicists promoted the IQ test and standardized testing in order to bolster their assertions that Whites were superior. Lewis Terman, Stanford psychology professor and one of Stanford's first nationally known scholars,[98] spread the term "intelligence quotient," and by 1916, had created the Stanford-Binet intelligence test.[99] He was an "eugenics enthusiast, favoring immigration restriction and sterilization of low IQ people to save society from the 'menace of the feeble-minded.'"[100] Achievement tests, which used multiple-choice questions, were also developed in the 1920s.[101] They were supported by the "same intellectual and institutional framework" as the IQ tests.[102]

In 1923, Carl Brigham, Princeton University professor, published "A Study of American Intelligence." Although he later recanted his views, this study was instrumental in the passage of the 1924 Immigration Control Act.[103] Based on an extensive study of members of the U.S. Army, Brigham

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[92] CHARLES A. GALLAGHER, HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 360 (Hernán Vera & Joe R. Feagin eds., 2007); Robert M. Yerkes, *Eugenic Bearing of Measurements of Intelligence in the United States Army*, 14 EUGENICS REV. 225, 242 (1923).

[93] *See* CARL C. BRIGHAM, STUDY OF AMERICAN INTELLIGENCE 210 (Humphrey Milford ed., 1923).

[94] *See* Daniel J. Kevles, *Eugenics and Human Rights*, 319 BMJ 435, 436 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127045/pdf/435.pdf.

[95] Steven Selden, *Transforming Better Babies into Fitter Families: Archival Resources and the History of the American Eugenics Movement, 1908-1930*, 149 PROC. OF THE AM. PHIL. SOC'Y 199, 202 (2005).

[96] *Id.* at 202.

[97] KAESTLE, *supra* note 89.

[98] Mitchell Leslie, *The Vexing Legacy of Lewis Terman*, STANFORD MAGAZINE, July/August 2000, https://alumni.stanford.edu/get/page/magazine/article/?article_id=40678.

[99] KAESTLE, *supra* note 89.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Carl C. Brigham, *Intelligence Tests of Immigrant Groups*, 37 PSYCH. REV. 158, 158–65 (1930).

wrote that the Nordic race was intellectually superior to the Alpine and Mediterranean races and the American Negro.[104] He proposed not only legal control of immigration but impeding propagation of the inferior races.[105]

In 1924, the U.S. enacted the Immigration Control Act, which created a quota system based on the national origin of the 1890 population make-up.[106] Future immigration was limited to 2% of the number of persons from a given country in 1890.[107] This meant that 70% of immigration would come from Northern Europe.[108] This quota based system did not change until 1965, with the passage of the Hart-Cellar Immigration Act.[109] At the time of the passage of the 1965 Act, President Johnson wrote that its goal was to "repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American nation."[110]

In 1926, eugenicist Brigham originated the SAT, the college admissions test.[111] In the 1930s, based on eugenics theory, the Federal government decided to subsidize home mortgages for only White families and required racial restrictive covenants in their deeds.[112] The Federal government accomplished this by drawing maps of neighborhoods around the country; and rating them on creditworthiness. Maps of minority neighborhoods literally had red lines around them and were shaded in red. This redlining prevented minority neighborhoods from receiving federally subsidized bank loans for home ownership, and federal appraisal standards were based on White ownership.[113] Home ownership is the chief means by which Americans create intergenerational wealth.[114] Thus, subsidizing mortgages for only White families led to generations of wealth transfer for White families and poverty for minority families and segregated neighborhoods and schools, which persist to this day.

Eugenics in the U.S. came into disfavor only with discovery of the cruel practices of Nazi Germany; however, sterilization of the mentally ill and racial minorities continued into the 1970s.[115] Unfortunately, eugenics teachings were the backdrop of exclusion of minorities from the legal profession at the end of the late 1800s and early 1900s.

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[104] *See* BRIGHAM, *supra* note 93, at 210.

[105] *Id.* at 210.

[106] MOLITERNO, *supra* note 85, at 21.

[107] *Id.* at 21.

[108] Jerry Kammer, *The Hart-Celler Immigration Act of 1965*, CTR. FOR IMMIGR. STUD. 1, (2015), http://cis.org/sites/cis.org/files/kammer-hart-celler.pdf.

[109] Immigration and Nationality Act §201, 8 U.S.C. § 1152 (1965).

[110] Kammer, *supra* note 108.

[111] Although the SAT is supposed to be an aptitude test, today many students benefit from expensive preparatory courses.

[112] *See* Szto, *supra* note 4, at 11–16.

[113] FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT (1936).

[114] Szto, *supra* note 4 at 11–14, *see also*, Sullivan, *supra* note 6.

[115] Leslie, *supra* note 98, at 15.

E. Bar Standards and Immigration

As mentioned earlier, before the Civil War, many states had restricted bar admission to White male citizens. In response to emancipation and increased immigration from eastern and southern Europe, bar associations also raised bars to entry to the legal profession and prohibited advertising.[116] "Although lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture. Professionalism and xenophobia were mutually reinforcing."[117] For example, bar associations excluded the new immigrants.[118] The first bar association was in New York, where most new immigrants arrived.[119] The new immigrant attorneys received their training in part-time law schools, or night schools, in urban centers.[120] Some of these were run by the YMCA.[121]

In 1879, these immigrant lawyers were described by the President of the New York State Bar Association as "slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling, crowding, [and] vulgarizing the profession."[122] In 1880, New Hampshire was the first state to have a state board of bar examiners.[123] Other states soon followed.

In 1915, esteemed statesman, Nobel peace prize winner, and then ABA president, Elihu Root, decried this development: 15% of New York lawyers were foreign-born, and another third had immigrant parents.[124] Root stated that foreign influences must be "expelled by the spirit of American institutions." [125] Root also "endorsed immigration restriction and the popular racist theories expounded in Madison Grant's The Passing of the Great Race in his attempt to return to the bygone age of Anglo-Saxon Protestant hegemony."[126]

Between 1890 and 1910, the number of day law schools increased by 60%, while night schools, which educated immigrants and their children, increased by 350%.[127] From 1900 to 1910, the number of immigrant attorneys in Boston increased by 77%; similar figures appeared across the country.[128]

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[116] MOLITERNO, *supra* note 85, at 19.
[117] AUERBACH, *supra* note 83, at 99.
[118] MOLITERNO, *supra* note 85, at 22.
[119] *Id.* at 22.
[120] *Id.* at 19.
[121] *See* Steven C. Bahls & David C. Jackson, *The Legacy of the YMCA Night Law Schools*, 26 CAP. U.L. REV. 235, 235–39 (1997).
[122] AUERBACH, *supra* note 83, at 51.
[123] Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, THE GARGOYLE 4 (1990), https://media.law.wisc.edu/m/ywq4n/gargoyle_21_1_2.
[124] AUERBACH, *supra* note 83, at 94.
[125] *Id.*
[126] *Id.* at 117.
[127] *Id.* at 95.
[128] *Id.*

Between 1905 and 1925, "the structure of the modern legal profession was designed and built. . . . These were . . . the peak years of the 'new' immigration from southern and eastern Europe."[129] At this time, as a result of industrialization, the corporate law firm came to prominence, and the Cravath model hired recent law school graduates so they could be "made to order."[130] Thus, a channel between law schools and law firms developed.[131] Although corporate lawyers were criticized for greed, other attorneys joined with them to block immigrants and minorities from the profession and to preserve the profession as an "Anglo-Saxon Protestant enclave."[132] This resulted in professional canons of ethics that held contingent fees suspect,[133] and requirements for an undergraduate education before law school. As mentioned earlier, only 4% of the population had finished college.[134] Thus, this requirement excluded racial minorities, children of immigrants, and women.[135] Immigrants, such as Italians, Polish or Greeks, and blacks and other minorities, had almost no chance of going to college.[136] Academic achievement standards thus "camouflage[d] prejudice."[137] The standardized legal curriculum also emphasized business practice.[138]

Chronicling this era, Susan Boyd, author of the ABA Section of Legal Education and Admission to the Bar's history, wrote,

> Bigotry and prejudice permeated the established bar and law school world. There clearly was egregious discrimination against African-Americans, Jews, Catholics, and immigrants from places other than Northern Europe. A great deal of the criticism of night and proprietary law schools stemmed from the fact that these institutions provided access for a vast section of the population.[139]

For example, the Dean of the University of Wisconsin stated,

> . . . night schools enrolled a very large proportion of foreign names . . . emigrants[sic] covet the title [of attorney] as a badge of distinction. The result is a host of shrewd young men, imperfectly educated . . . viewing the Code of Ethics with uncomprehending eyes.[140]

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[129] *Id.* at 5.
[130] *Id.* at 24.
[131] *Id.* at 28.
[132] *Id.* at 52.
[133] *Id.* at 50.
[134] *Id.* at 29.
[135] *Id.*
[136] *Id.* at 117.
[137] *Id.* at 27.
[138] *Id.*
[139] BOYD, *supra* note 46, at 16.
[140] *Id.* at 17.

Another Dean stated that "We have plenty of lawyers, and we do not need to sit up nights devising ways for poor and worthy individuals to get to the Bar."[141]

Immigrant lawyers were also soundly denounced as being "ambulance chasers."[142] In 1929, after seventy-four lawyers were disciplined in a New York investigation, the chief counsel stated that the attorneys "could not speak the King's English correctly . . . These men by character, by background, by environment, by education were unfitted to be lawyers."[143]

When the ABA Root Committee proposed requiring two years of college and three years of full-time law study, Dean Edward T. Lee of John Marshall Law school spoke on behalf of night schools.[144] He stated that such a proposal would allow "deans of a few large day law schools" to control legal education and would limit the law profession "to all save the leisure class of youth."[145]

F. The Bar Examination Designed to Bar Immigrant Ambulance Chasers and other Minorities

By 1928, all states except for Indiana required a bar examination.[146] In 1931 the National Conference of Bar Examiners was founded.[147] The examiners were advised to make test questions look like test questions from the "better schools."[148] This meant schools that were inaccessible to immigrants and minority candidates. However, in the 1930s commercial cram courses were already a concern. In 1936, H. Claude Horack, then Dean of Duke Law School, wrote that a graduate of a "good law school" should be able to pass the bar examination with little time in "special review."[149] He expressed concern that cram courses were necessary to pass the bar: "It is difficult to answer the boy who asks, 'Why is it necessary, after three years of hard study in a good law school, that I spend from six weeks to three months, and a considerable sum of money, in preparing for the bar examinations?'"[150] Horack wrote that bar examiners needed to write better exams, "With the right sort of an examination, the commercialized cram course would not long remain a profitable institution."[151] Unfortunately, this problem still exists today.

In a 1936 report by the Russell Sage Foundation, it was noted that the average bar examination covered nineteen subjects and was two to three

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[141] *Id.* at 26.
[142] AUERBACH, *supra* note 83, at 48–49.
[143] *Id.*
[144] *Id.* at 113.
[145] *Id.*
[146] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 174 (3d ed. 1983).
[147] Melli, *supra* note 123, at 4.
[148] STEVENS, *supra* note 146, at 177.
[149] H. Claude Horack, *The Bar Examiner and the Law Schools*, 8 AM. L. SCH. REV. 611, 612 (1936).
[150] *Id.*
[151] *Id.* at 613.

days long; questions usually took eighteen minutes to answer.[152] This format lends itself to promoting commercial cram courses.

In 1939, Dean Horack wrote that "the graduate of the better law school would pass [the bar exam] with flying colors while the office-trained man and the graduate of poor quality or of a commercialized law school would fail."[153] Also, that law schools developed curricula for training for the "high class lawyer."[154] The good bar exam would "protect the well-trained applicant and eliminate the memorizer who must become an ambulance chaser because he does not have the ability to be a real lawyer."[155] Horack also wrote that "There should be a standard everywhere which would be fair to the young man who has ability, a good educational background, has chosen his law school wisely and has put in three years of conscientious study."[156]

G. Other Racial Discrimination in Bar Administration

Unlike the young man that Horack described, minorities faced huge barriers to bar admission. Until the 1960s, many southern law schools did not admit Blacks or other minorities.[157] Black law students in the south thus had the expense of traveling to northern schools.[158] African Americans were also excluded from southern bar associations with law libraries and study courses, which made bar exam preparation even more difficult.[159]

Between 1933 and 1943, Pennsylvania did not admit any Black lawyers.[160] This was achieved through requiring prelaw students to register with the State Board of Law Examiners with three sponsors, at least two of whom were members of the bar, and to find a preceptor with at least five years' practice experience to give them a six-month clerkship after graduation.[161]

Black candidates also faced discrimination during the Georgia bar exam.[162] A White legal secretary who took the exam testified at a hearing that she saw White applicants during the bar exam using law books, obtaining aid from proctors on difficult questions, and taking extra time.[163]

In 1948, the LSAT came into use in law school admissions.[164] Professor Willis Reese, then chair of the Admissions Committee of the AALS and Dean Young Smith of Columbia Law School, wanted additional criteria to

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[152] ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 119–120 (1st ed. 1938).
[153] H. Claude Horack, *Admission to the Bar: Many Are Chosen* 33 ILL. L. REV. 891, 891 (1939).
[154] *Id.* at 892.
[155] *Id.* at 897.
[156] *Id.*
[157] Pye, *supra* note 50.
[158] *Id.* at 36.
[159] *Id.* at 38.
[160] AUERBACH, *supra* note 83, at 128.
[161] *Id.* at 126.
[162] Pye, *supra* note 50, at 40.
[163] *Id.* at 41.
[164] BOYD, *supra* note 46, at 52.

evaluate applicants who were not from Ivy League Schools.[165] Due to the G.I. Bill, they had begun to receive applications from graduates of other schools.[166] Columbia, Harvard, and Yale asked the Educational Testing Service ("ETS") to develop a test for law school admission.[167] Thus, the LSAT was designed to test if candidates had the equivalent of educational practices in an elitist White Ivy League school.

In 1958, the National Conference of Bar Examiners, in conjunction with the ABA Section on Legal Education and Admission to the Bar and the Association of American Law Schools, wrote a Code of Recommended Standards for Bar Examiners.[168] The Code "emphasized that the exam questions should be hypothetical fact situations requiring essay answers."[169] Standard 16 on "Purpose of Examination" stated:

> The bar examination should test the applicant's ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory, or experience.[170]

In general, from 1959 to 1968, bar passage rates varied widely from state to state, from as low as 28% to as high as 98%.[171] These reflected a "lack of uniformity of quality and grading of bar examinations among the states."[172] Eventually, 85% to 90% of takers passed after repeated attempts.[173]

Despite this progress, discriminatory bar exam practices persisted. In the 1960s, 75% of White applicants passed the bar exam, but only 50% of Black applicants did.[174] In Philadelphia, bar examiners photographed Black applicants and seated them in the same row to aid the grading of their exams.[175] From 1957 to 1974, Delaware did not pass a single Black bar applicant.[176] Ohio only passed one out of three Black applicants.[177] In South Carolina, while 98% of White applicants passed, only 50% of Blacks did.[178]

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[165] *Id.* at 51.
[166] *Id.*
[167] *Id.* at 52.
[168] Melli, *supra* note 123, at 4.
[169] *Id.*
[170] *Id.*
[171] Michael Bard, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 392, 417 (1970).
[172] *Id.* at 419.
[173] *Id.* at 420.
[174] AUERBACH, *supra* note 83, at 294.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*

H. Development of the MultiState Bar Examination and Current Bar Review Courses

In the 1970s, the National Conference of Bar Examiners ("NCBE"), with a grant from the American Bar Foundation, developed the Multistate Bar Examination.[179] This was composed of two-hundred multiple choice questions to be taken over six hours.[180] Each jurisdiction could still set its own passing score.[181] A machine-graded exam eased the burden of the increase of bar applicants from 16,000 in 1960 to over 58,000 in 1980.[182] In 1980, the NCBE introduced the Multistate Professional Responsibility Exam ("MPRE"), a two-hour, fifty-question exam.[183] In 1988, the NCBE introduced the Multistate Essay Exam ("MEE").[184] The MEE today consists of six essays to be answered in thirty minutes each.[185] In 1997, the NCBE introduced the Multistate Performance Test ("MPT").[186] As of 2021, thirty-eight jurisdictions had adopted the Uniform Bar Exam ("UBE"), which consists of the MBE, the MEE, and the MPT.[187]

State bar application fees are high, e.g., Illinois' fee is $950.[188] Commercial bar review courses are also costly. In 2021 the popular Barbri bar preparation course advertised courses ranging from $1,999 for the "Self Pass" course to $3,999 for the "Ultimate Pass" course.[189] Barbri states, "[Bar preparation] should be treated like a full-time job. You should plan on spending approximately 40 hours per week over 8 to 10 weeks studying for the bar exam.[190] Barbri also states how the bar exam differs from law school exams, and therefore why a commercial preparation course is necessary,

> In law school, students who know the most about a subject are typically those who achieve the highest grades on final exams. A detailed, thorough understanding of the course material is the goal of every top law student. This is not so when it comes to studying for the bar exam. In fact, using

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[179] Melli, *supra* note 123, at 4.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 5.
[184] *Id.*
[185] Judith Gundersen, *The MEE Marks a Major Milestone*, 82 THE BAR EXAMINER 17, 19 (2019).
[186] National Conference of Bar Examiners, *2016 Statistics*, 86 THE BAR EXAMINER 14, 48 (2017), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205.
[187] National Conference of Bar Examiners, *Jurisdictions That Have Adopted the UBE*, https://www.ncbex.org/exams/ube/ (last visited Feb. 12, 2022).
[188] Illinois Board of Admissions to the Bar, *Information & Applications: Filing Deadlines and Fees*, https://www.ilbaradmissions.org/appinfo.action?id=1 (last visited Feb. 12, 2022).
[189] BARBRI, *Enroll in Barbri Bar Review*, https://www.barbri.com/bar-review-course/bar-review-course-details/#enroll (last visited Apr. 5, 2021).
[190] *Bar Review FAQ's: Is the Barbri Course Flexible?*, BARBRI, https://www.barbri.com/barbri-bar-review-faq/ (last visited Apr. 10, 2021).

> this same approach to study for your bar exam can actually be hurtful.[191]

Barbri explains how the bar requires a "completely different mindset and preparation approach":

> To pass the bar, you don't have to be great in any one area. The key to passing is simply doing well enough, in enough areas, to land on the passing side of the bar exam curve. You want to build a base of knowledge that is wide and shallow rather than narrow and deep.[192]

Even essay writing is different on the bar exam. According to Barbri,

> Essay writing for the bar exam is different than the final exams you experienced in law school. It's an acquired skill you must strengthen. For example, on most bar exam essays, there's actually a "right" answer. Also, to maximize your point potential on bar exam essays, you'll need to provide an answer to the call of the question in the format the bar examiners want and expect to see.[193]

Also, Barbri acknowledges that the multiple-choice portion of the bar exam, the MBE, was originally designed to defy logic,

> BARBRI has helped students pass the MBE since it was first administered in 1972 and, once upon a time, this exam did have a well-deserved reputation as being tricky. There were bar exam questions that required leaps of logic through double-conditional hoops. Today, the MBE is much fairer and more straightforward.[194]

Bar review courses were necessary in the 1930s and today. The bar exam is different from law school exams. This is because the bar examination is an initiation rite that requires high stakes decoding and enormous expense in preparing for it, including the cost of bar review courses. It was designed to privilege young White candidates with economic means.

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[191] *U.S. Bar Exam Study Tips*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

[192] *How Hard is the Bar Exam?*, BARBRI, https://www.barbri.com/about-the-bar-exam/ (last visited Mar. 13, 2021).

[193] *Don't Wait to Develop your Bar Writing Skills*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

[194] *Approach the MBE Systematically*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

This article will now focus on initiation rites in general, and why the American bar examination is an initiation rite. Moreover, because the bar exam is an initiation rite birthed in eugenics theory, it is a very effective rite in maintaining a primarily White legal profession. It accomplishes this by requiring months of costly, isolated study. This is possible for those with vast economic resources and few familial obligations, but much more difficult for minorities with few economic resources. Retaking the bar is often not an option for minority candidates.

V. INITIATION RITES

Initiation rites are rites of passage. As mentioned earlier, apprenticeships often included ceremonies to mark entry into a guild or profession. The English Inns of Courts were modeled after monasteries and their rituals. The American bar examination bears remarkable resemblance to an initiation rite with a separation from society, a liminal stage, an ordeal, and reincorporation into society, as described below. However, because standardized testing was birthed in the eugenics movement, the bar examination as an initiation rite privileged, and still privileges a leisure class of young White candidates with deep financial resources and few familial obligations, and minorities who have assimilated to this lifestyle.

Ethnographer Arnold van Gennep, in his seminal book published in 1960, "The Rites of Passage," describes rites as parallel to periodicity in nature.[195] While daily and weekly rituals renew, rites of passage transform.[196]

Rites of passage can both promote an existing order or create new ones. According to structural functional theory, rituals reflect and reinforce social integration.[197] However, anthropologist Victor Turner posited that ritual creates sociocultural arrangements.[198] The American bar exam maintains an existing social order of White majority attorneys by requiring isolated study for several months. Due to the racial wealth gap, many minorities cannot afford this isolated study and must work during this period before the bar examination.

Rites of passage involve separation from society, transition, and reincorporation into society.[199] A prime example of a separation rite is a funeral; incorporation rites include weddings. Initiation rites are transition rites. Separation rites are pre-liminal, transition rites are liminal, and incorporation rites are post-liminal.[200]

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[195] GENNEP, *supra* note 62, at 3.

[196] RONALD L. GRIMES, DEEPLY INTO THE BONE 7 (2000).

[197] BOBBY C. ALEXANDER, VICTOR TURNER REVISITED: RITUAL AS SOCIAL CHANGE 28 (Susan Thistlethwaite ed., 1991).

[198] *Id.* at 29.

[199] GENNEP, *supra* note 62, at 11.

[200] *Id.*

A. Liminality

In an initiation rite, initiates, or novices, separate from society so they may enter a liminal period to receive sacred teachings and texts. After receiving such teachings, they reenter society with their new identities and corresponding powers.

Novices are sometimes considered dead.[201] They die to their former way of life and thinking, then are taught the law of their community before they are resurrected and reincorporated.[202] During this liminal period they are separated from family, particularly women and children.[203] They are in a sacred environment.[204] "[U]sual economic and legal ties are modified, sometimes broken altogether."[205] "Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial."[206] How long does liminality last? Around the world, transition ceremonies have lasted from two months to several years.[207]

Bar candidates enter a liminal period. They must isolate themselves for at least two months and separate themselves from family, especially any caregiving activities. They must refrain from working, thus breaking economic ties. Although they have received their J.D. degrees, bar candidates are not admitted to practice law. Many employers will not consider hiring them until they have passed the bar. They have no professional status. They are "betwixt and between."

Unfortunately, those who do not pass on their first attempt must repeat this isolation and economic deprivation on each attempt. Liminality and lack of employability lengthens with each bar failure. Such isolation, or repeated isolation will not be possible for bar candidates with limited financial resources, and deep familial and financial obligations. This disproportionately affects minorities because of the racial wealth gap described in the introduction to this article.

B. Sacred Learning and Instructors During Liminality

During the liminal period, initiates master sacred learning. They must submit to rigorous instruction as they are molded into a uniform state. Instructors possess complete authority and neophyte's absolute submission.[208] Neophytes must accept "arbitrary punishment without complaint."[209] Novices are also subject to negative rites or taboos; they may

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[201] *Id.* at 75.
[202] *Id.*
[203] *Id.* at 76.
[204] *Id.*
[205] *Id.* at 114.
[206] VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969).
[207] GENNEP, *supra* note 62, at 82.
[208] VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 99 (1967).
[209] TURNER, *supra* note 206 at 95.

speak a special language or eat a special diet.[210] However, the authority of the elders is based on the common good.[211]

Barbri's description of why their training is necessary, even if candidates have done well on law school exams, invokes a sacred instruction in a liminal period. Bar review courses also dictate how time should be spent for at least two months in order to pass the bar. During bar review courses, the sacra candidates are taught are hundreds of rules, multiple choice questions, and dozens of performance tests and bar essays. In bar review, candidates memorize pneumonics, songs, and other methods to retain law. Most troubling, however, is that while bar review content is related to the bar, in the legal academy there is much speculation that bar study does not correlate well with the proper practice of law.[212]

Thus, the bar examination is an initiation rite. It involves liminality, i.e., a separation from society, family, and economic limbo, learning sacred texts, an ordeal, and then reincorporation into society. Due to the bar exam's origins in eugenic theory, this initiation rite successfully maintains an existing White majority attorney population. This is accomplished by requiring months of familial isolation and economic deprivation that many minority candidates cannot afford. This is not coincidental; the racial wealth gap was also framed by eugenics theory in the 1930s with residential racial segregation. Residential racial segregation enabled White families to pass on intergenerational wealth.[213] Mortgage policies and redlining prevented minority families from owning homes. Can the bar exam be a transformative ritual instead, that promotes racial diversity in the profession? The answer is yes, if we remove its familial isolation and economic deprivation aspects.

VI. PROPOSALS

To counter the economic and social barriers that the ritual bar examination presents, I propose the formation of a joint committee of organizations such as the American Bar Association, the Association of American Law Schools, Society of American Law Teachers, the National Native American Bar Association, National Bar Association, the Hispanic Bar Association, the Asian Pacific American Bar Association, and student bar associations to present alternatives to the current bar examination format. Ritual experts should also be on this committee. This Committee should issue a report that will first tell the history of the bar examination; a history that was birthed in the climate of closing the profession to recent immigrants and minorities. Then this committee must examine the content of the current

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[210] GENNEP, *supra* note 62 at 82.

[211] TURNER, *supra* note 206 at 100.

[212] *See, e.g.*, Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS 11 (2017); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47 (2015); Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to 'MacCrate' Entry to the Profession*, 23 PACE L. REV. 343 (2003); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002).

[213] Szto, *supra* note 4 at 11–14.

exam and decide which subject matter every lawyer must master, and which subjects a specialist should master.

These study committees may consider proposing reinstating the diploma privilege in more states than Wisconsin, which not coincidentally is the home state of the National Conference of Bar Examiners. After deciding which subjects should be required for all attorneys, the Committee may consider additional exams and certifications for specialists in criminal law, administrative law, commercial law, family law, etc.

Lawyers do not practice law by memorizing statutes, therefore, all exams should be open-book. Additionally, if a candidate does not receive a passing score in one subject, that candidate may retake that subject only, without having to retake all other subjects. The bar exam should be administered more frequently, or even online, so there are not long gaps when a person must wait for results and cannot practice law. Such gaps disproportionately affect candidates who must support extended families.

Law students may take parts of the bar examination, as they master subjects in school. By changing the bar examination's format, we thus eliminate the financial and social barriers to preparing for it. Of course, other formats may be considered, as long as they do not place undue financial and familial burdens on communities of color and other economically deprived communities, and require expensive bar preparation courses. Three years of law school are an initiation rite in itself, without requiring an additional liminality for the bar exam.

The test of any helpful bar examination reform is whether commercial bar review courses will become superfluous. If, however, changes to the bar examination do not make commercial bar review courses superfluous, then the revised bar exam will still advantage economically privileged candidates.

CONCLUSION

The coronavirus pandemic and heightened awareness of systemic racism provide an opportunity to make permanent changes to bar admission. During the pandemic, states temporarily enacted the diploma privilege and online exams. I propose that these changes become permanent because, among other reasons, the bar exam has been a ritual that has barred diversity to the profession.

In this article I first discussed the state of diversity in the legal profession today, diversity initiatives within the American Bar Association, and the history of admission to the bar. I then discussed initiation rites, and how studying for the bar exam closely resembles the pattern used in many initiation rites: separation and isolation from family and society, liminality for several months, an ordeal, and reincorporation into society. However, it is precisely this pattern that disadvantages many minority candidates.

Today, the American legal profession does not reflect the racial diversity of the US population. Despite diversity initiatives within the ABA

and elsewhere since the 1970s, although over 42% of the U.S. population is composed of racial minorities, only 14% of the legal profession is.[214] Minority candidates pass the bar at significantly lower rates on the first attempt and must retake it to pass. Unfortunately, this is not a coincidence, but part of the sad legacy of eugenics theories from the late 1800s and early 1900s. Eugenicists not only limited U.S. immigration in 1924 from outside northern and western Europe, but instituted standardized testing. Their teachings also led to racial residential segregation, which through redlining and governmental policies helped create today's huge racial wealth and achievement gaps.

As a result of this legacy, the bar examination's ritual aspect privileges those who have the economic means not to work for several months while preparing for the bar; and those who do not have or can postpone significant social and family commitments. Due to today's racial wealth gaps, this disproportionately affects minority candidates and other economically deprived populations.

How can the bar examination be an aid and not hindrance to diversity? Initiation rites can be transformative by creating community and reflection on sacred texts. If we have a bar exam, it can be transformative as well. In order for this to happen we must acknowledge its origins in eugenics theories of White superiority. We must also decrease the financial, familial, and social cost of the bar exam. We must focus the period of reflection not on legal minutiae but on principles of access to justice.

Both the diploma privilege and online exams can help eliminate the structural barriers of the bar exam. I have proposed a multi-organizational task force, including ritual experts, that will issue a report on the history of the bar exam, and structural changes such as an open-book exam with required essential subjects for all candidates, and additional certification exams for specialties such as criminal law, family law, securities law, etc. Subjects may be taken as students master them in law school, and a candidate need only retake subjects that that candidate has failed. These exams should be administered frequently, and even on-line, so there are not long gaps between when a candidate can take the exam and when they can be admitted to practice law.

We may also consider the incorporation rituals of the Inns of Court, which focused on communal eating, moots, and discussion.

With these and other changes, we will hopefully see a bar admission process that welcomes candidates of color and does not bar them from the profession. Then, bar admission can be a transformative ritual that creates diversity; and not one that bars it. These changes will benefit all bar candidates, the profession, and the public. The pandemic has shown that we

[214] *See* Jin, *supra* note 1; *see also* AM. BAR. ASS'N, *supra* note 2.

can make swift changes to bar admission. Let's appropriate these lessons to truly make the legal profession diverse.