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Do Black Lawyers Matter to the Legal Profession?: Applying an Antiracism Paradigm to Eliminate Barriers to Licensure for Future Black Lawyers

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DO BLACK LAWYERS MATTER TO THE LEGAL PROFESSION?: APPLYING AN ANTIRACISM PARADIGM TO ELIMINATE BARRIERS TO LICENSURE FOR FUTURE BLACK LAWYERS

*DeShun Harris**

Abstract

The legal profession has an anemic representation of Black lawyers. In 2020, the population of Black lawyers was 5% of the legal profession compared to White lawyers who made up 86% of the profession.¹ Drastic action is needed to change this disparity. The time for changing that disparity has never been clearer than now. The Black Lives Matter movement took hold of the nation in 2020 after the death of George Floyd and the protests that followed.² It now may be the largest movement in U.S. history.³ The movement has engaged the public by raising awareness about issues impacting Black Americans and by charging institutions with making change.⁴ Many have argued that the movement was aided by the disruption caused by COVID-19, which confined people to their homes giving them time to consider race issues and ways they could engage in changing those issues.⁵ Given the limited representation of Black lawyers in the profession, what can the legal profession do in this movement to eliminate barriers to licensure for future Black lawyers?

This Essay will explore how antiracism can provide a path for the legal profession to eliminate barriers to licensure for aspiring Black lawyers. Specifically, this Essay will examine the current licensing policies that promote racial inequities by applying an antiracism

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1. *2020 ABA Profile of the Legal Profession* 33, A.B.A. (July 28, 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> [https://perma.cc/5DE7-4JM6].

2. Mary Blankenship & Richard V. Reeves, *From the George Floyd moment to a Black Lives Matter movement, in tweets*, THE BROOKINGS INSTITUTION (July 10, 2020), <https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/> [https://perma.cc/J5P4-5FJL].

3. *Black Lives Matter May Be the Largest Movement in U.S. History*, HARVARD UNIV. (July 3, 2020), <https://carcenter.hks.harvard.edu/news/black-lives-matter-may-be-largest-movement-us-history> [https://perma.cc/Z8NZ-QHQJ] (explaining that at least 15 million people participated in the George Floyd protests, which is an unprecedented level of participation).

4. John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html> [https://perma.cc/UD38-7YRU] (“The speed at which the protests of the last three months have spread and the scale of support they have received speak to the foundation that the Black Lives Matter movement has laid over the past several years, academics said.”).

5. Lore Oxford, *Culture out of crisis: How armchair activism became a force for change*, CAMPAIGN (July 23, 2020), <https://www.campaignlive.co.uk/article/culture-crisis-armchair-activism-became-force-change/1689269> [https://perma.cc/PRK3-4GT8].

paradigm. But the antiracist paradigm requires more than identifying the problem, it requires dismantling policies and replacing them with policies that eradicate barriers. Thus, this Essay will evaluate solutions the legal profession can undertake to eliminate the barriers to licensure for aspiring Black lawyers.

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I. DO BLACK LAWYERS MATTER TO THE LEGAL PROFESSION?: APPLYING AN ANTIRACISM PARADIGM TO ELIMINATE BARRIERS TO LICENSURE FOR FUTURE BLACK LAWYERS

While Black Lives Matter has existed since 2013, the movement has seen a big shift in favorable public support and engagement throughout 2020 following the death of George Floyd and the protests that followed.⁶ It may now be the largest movement in U.S. history.⁷ Black Lives Matter's goal is to eliminate white supremacy and violence toward Black people and to create inclusive spaces for Black growth.⁸ The movement has been assisted by a pandemic where people now find themselves with more time to face these issues head on and to participate in the movement through protest and other actions.⁹ The Black Lives Matter movement has been praised for not only raising awareness but for seeking and getting concrete action, such as changing policing in some cities, and the removal

6. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/AFE8-68FM>].

7. *Id.*

8. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/HU2C-NDPK>] (last visited Sept. 21, 2020).

9. See Buchanan et al., *supra* note 6.

of symbols of white supremacy such as the Confederate flag.¹⁰ Some businesses, sports franchises, and other prominent structures are raising awareness of issues affecting Black Americans, and others have pledged to make changes to include more Black voices and bodies into traditionally White spaces.¹¹ One space where Black voices and bodies are disproportionately absent is the legal profession; for the year 2020, the American Bar Association (ABA) provides statistics showing that 86% of American attorneys are White and 5% are Black.¹² The percentage of Black attorneys has been virtually unchanged since 2010.¹³

Throughout the struggle in America for the rights and liberties of Black Americans, Black lawyers have been at the forefront. For example, Black lawyers like Charles Hamilton Houston and Thurgood Marshall led the NAACP's fight for modern civil rights.¹⁴ These lawyers strategized to bring an end to "the 'separate but equal' doctrine of *Plessy v. Ferguson*."¹⁵ Today, lawyers like Benjamin Crump lead the fight against the continuing assault on the bodies of Black Americans.¹⁶ While not every Black person aspiring to become a lawyer wants to pursue justice in this way, Black lawyers are important to the law, as they bring experiences, values, and knowledge that aid them in assisting clients and cases of all kinds.¹⁷ In a world that is consistently changing, Black voices and perspectives are necessary to the growth and changes in the legal profession. Further, not having Black attorneys and judges results in community distrust of the entire legal system.¹⁸ Unfortunately for Black people, the pathway to becoming a lawyer is paved with significant barriers.

10. *See id.*

11. *See* Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As big corporations say 'blacks lives matter,' their track record draws skepticism*, WASH. POST (June 13, 2020, 6:21 PM), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [<https://perma.cc/T93B-FC8Y>].

12. *ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf [<https://perma.cc/N825-8R6V>] (last visited Sept. 12, 2020).

13. *Id.*

14. *See* J. Clay Smith Jr., *Thurgood Marshall: An Heir of Charles Hamilton Houston*, 20 HASTINGS CONST. L.Q. 503, 511–12 (1993).

15. *See id.* at 506 n.16, 511 (citing 163 U.S. 537 (1896)).

16. *See generally* Nicquel Terry Ellis, *George Floyd's family lawyer Ben Crump has often been the man beside the mourners*, USA TODAY (June 3, 2020, 4:42 PM), <https://www.usatoday.com/story/news/2020/06/03/ben-crump-civil-rights-lawyer-also-man-beside-mourners/5274494002/> [<https://perma.cc/29UT-VFKA>].

17. Yolanda Young, *The story behind the Black Lawyers Matter slogan and why you should believe it*, ROLLING OUT (July 12, 2016), <https://rollingout.com/2016/07/12/story-behind-black-lawyers-matter-slogan-believe/> [<https://perma.cc/YR6Q-X7YD>] (last visited Sept. 21, 2020).

18. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 387 (2002).

After the death of George Floyd—an unarmed Black man killed by police—bar associations, law schools, and various legal organizations made public statements acknowledging the value of Black lives and committing to combat racial injustice.¹⁹ But the legal profession has long been aware of its lack of diversity and the injustice within it, which excludes aspiring Black Lawyers through a strict adherence to entrance exams for schooling and the bar exam for licensing.²⁰

This Essay focuses on the current bar exam as a licensing mechanism. It has been an effective gatekeeper for excluding many aspiring Black lawyers.²¹ The 2020 collision of the Black Lives Matter movement and COVID-19, a highly contagious disease at the center of a worldwide pandemic, has created a clear space to implement real change as it relates to pathways to licensure, particularly the bar exam. A shift in the paradigm used is needed to move the legal profession from simply acknowledging a problem and giving hollow commitments to eradicating the disparities.²²

The traditional view of racism, which does not recognize racial disparities as an injustice, is one reason why a paradigm shift is needed.²³ Traditional views of racism typically view racism as occurring when there is an overt or subtle racism that occurs through the use of symbols, words, or actions that are clearly racist (e.g., past policies of segregation or verbalized beliefs that Black lives are inferior to White ones).²⁴ Under traditional views of racism, as long as the system, policy, or structure is not designed for a racist purpose, it is not racist but is instead neutral and may continue.²⁵ But racism is not limited in this way, and antiracism offers a paradigm that recognizes that reality.²⁶

19. Vault Law Editors, *Law Firm & Law School Responses to the Black Lives Matter Movement*, VAULT (June 11, 2020), <https://www.vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/law-firm-law-school-responses-to-the-black-lives-matter-movement> [https://perma.cc/N5GB-4AEP] (last visited Sept. 21, 2020); *Statements on George Floyd Death and Protests*, A.B.A., https://www.americanbar.org/groups/bar_services/resources/resourcepages/floydstatements/ [https://perma.cc/SA2U-D8EU] (last visited Sept. 29, 2020).

20. See Curcio, *supra* note 18, at 367 (arguing that the LSAT and bar exam disproportionately exclude people of color from the practice of law).

21. See generally George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104 (2003) (arguing about the gatekeeping function the bar exam has had to exclude black lawyers).

22. See *id.*

23. George Lipsitz, *The Logic of "Illogical" Opposition: Tools and Tactics for Tough Times*, in ANTIRACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS, 273, 273 (2019).

24. See *id.* at 274 (arguing that responses to racism were based on assumptions that racism is "aberrant, irrational, individual, and intentional").

25. See IBRAM X KENDI, *HOW TO BE AN ANTIRACIST* 20 (2019) (arguing that neutrality is a racist movement).

26. See Lipsitz, *supra* note 23, at 274 (arguing that racism is collective).

Antiracism changes how we interpret racism.²⁷ Racism is defined as the support of policies that promote racism through action or inaction or by spreading racist ideas.²⁸ Antiracism is defined as the support of policies that promote antiracism through action and by spreading antiracist ideas.²⁹ The neutral ground of “not racist” does not exist in the antiracist paradigm.³⁰ Antiracism recognizes that racism “is structural, systemic, collective, and cumulative.”³¹ The antiracist paradigm forces the legal profession to classify its support of licensure pathways as either racist or antiracist and challenges the profession to make active change to support antiracist pathways. While this Essay focuses on race and the bar exam, it is incredibly important to note that “racism is always intersectional. It is *ever* present, but *never* present only by itself.”³² Thus, the struggle for racial justice also encompasses other struggles for justice, including both class and gender.³³ This Essay will first explore the bar exam and the issues that arose due to COVID-19 in 2020. It will then explain antiracism, how it applies in the context of bar examinations, and what it offers in creating solutions for increasing pathways to licensure for more Black aspiring lawyers.

II. THE BAR EXAM AND COVID-19

The bar exam, a standardized test, has the purported purpose of determining whether the test-taker is minimally competent to practice in a given jurisdiction.³⁴ The bar exam is often touted as a method of consumer protection against incompetence.³⁵ Proponents of the exam argue it is a fair exam.³⁶ They argue that no test is capable of measuring all lawyering skills and that the exam is one way to at least measure some of those important skills.³⁷ Critics of the bar exam have been quick to

27. Anna North, *What it means to be anti-racist*, VOX (June 3, 2020, 1:50 PM), <https://www.vox.com/2020/6/3/21278245/antiracist-racism-race-books-resources-antiracism> (last visited Sept. 12, 2020); KENDI, *supra* note 25, at 13.

28. KENDI, *supra* note 25, at 13.

29. *Id.*

30. North, *supra* note 27; KENDI, *supra* note 25, at 19.

31. Lipsitz, *supra* note 23, at 274.

32. *Id.* at 276.

33. *Id.*; see also BLACK LIVES MATTER, *supra* note 8.

34. See *Uniform Bar Examination*, NCBE, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/D67L-E3J7>] (last visited Sept. 25, 2020) (stating the purpose is to test skills and knowledge every attorney should have).

35. Shepherd, *supra* note 21, at 126.

36. Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, THE BAR EXAM’R 8, 15 (1997), <https://thebar-examiner.org/wp-content/uploads/PDFs/660497-Klein-Bolus.pdf> [<https://perma.cc/8QF9-PJH7>] (arguing that the test’s mechanics and grading have no effect on the differences of bar exam performance among racial groups).

37. Curcio, *supra* note 18, at 371.

point out the lack of evidence that it actually measures competency.³⁸ They also argue, since it is a closed-book and timed exam, that it does not test in a way that is reflective of what lawyers actually do.³⁹ The exam has also been criticized for incorporating racial bias.⁴⁰ Notwithstanding the arguments for and against the exam, the bar exam has a history of being used to protect the profession from minorities.⁴¹

The bar exam's rise to becoming a prerequisite to practice is rooted in racism.⁴² From around 1840 until before the Great Depression, admission to the legal profession evolved from being reserved for the wealthy to becoming more open for White men, with limited educational requirements and an easy bar exam.⁴³ These opportunities excluded most Blacks; for example, in 1910 only .7% of lawyers were Black despite comprising 11.1% of the U.S. population.⁴⁴ The ABA even rescinded the membership of three Black men it accidentally admitted (though ultimately they were admitted).⁴⁵ To exclude Black members in the future, the ABA required all recommendations for membership to include disclosure of race, which remained in place until 1943.⁴⁶

However, by the 1920s and 1930s, the legal profession's Black and minority populations expanded as access to legal education grew as a result of U.S. Supreme Court cases that prohibited the practice of state schools excluding Blacks, forcing those states to create separate programs or to integrate.⁴⁷ Access also grew as for-profit part-time programs arose.⁴⁸ These avenues resulted in doubling the Black population of lawyers, even though the population continued to remain relatively

38. *Id.* at 370 (arguing that states have not tested the exam to ensure it actually measures competence).

39. Stephanie Francis Ward, *A better bar exam? Law profs weigh in on whether test accurately measures skills required for law practice*, ABA J. (Jan. 8, 2020, 10:09 AM), <https://www.abajournal.com/web/article/building-a-better-bar-exam> [<https://perma.cc/9C2L-UP8U>].

40. Shepherd, *supra* note 21, at 126; see generally Christina Chong, *Battling Bias: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31 (2018).

41. Shepherd, *supra* note 21, at 126.

42. *Id.* at 104.

43. *Id.* at 108.

44. *Id.* at 109.

45. Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 754 n.193 (1996) (citing GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 17 & 19 (1983)); Alan Dershowitz, *Unequal Justice*, N.Y. TIMES (Jan. 25, 1976), <https://www.nytimes.com/1976/01/25/archives/unequal-justice-counselor-counsel-thyself.html> [<https://perma.cc/K74D-YNB2>]; see Shepherd, *supra* note 21, at 109.

46. Shepherd, *supra* note 21, at 109 (stating the exclusion of blacks from the ABA).

47. *Id.* (citing, for example, *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950)).

48. *Id.*

small.⁴⁹ “[T]he bar acted to stop the influx of new minority lawyers in two new ways that did not involve the overt discrimination that was becoming increasingly difficult: decreasing bar exam pass rates and tightening law school accreditation.”⁵⁰ The rationale for decreasing bar passage was to alleviate overcrowding.⁵¹

It was the ABA that worked during the Depression era to create a system that licensed only applicants from ABA-accredited law schools and that required an education before law school.⁵² Before 1920, law school was not the only pathway to the profession.⁵³ The ABA’s accreditation efforts, both present and past, have been successful in depressing the pathways to becoming an attorney for Blacks.⁵⁴ Blacks are effectively kept out of the profession due to ABA accreditation standards that regulate entering credentials like the LSAT and bar passage rates.⁵⁵ As Professor George Shepherd points out, “Other than a specific prohibition on [B]lacks’ receiving legal education, a dedicated racist could not have constructed standards that more effectively permit whites to enter the legal profession but filter out [B]lacks.”⁵⁶

By far the most common adaption of the modern-day bar exam is the Uniform Bar Examination (UBE).⁵⁷ As of August 2020, thirty-seven jurisdictions have adopted the UBE.⁵⁸ The UBE is not created by state bar examiners but is outsourced to the National Conference of Bar Examiners (NCBE).⁵⁹ The components of the exam include the Multistate Bar Exam, Multistate Essay Exam, and two Multistate Performance Tests.⁶⁰ The Multistate Bar Exam consists of 200 multiple-choice questions.⁶¹ The Multistate Essay Exams consists of six essays.⁶² And the Multistate Performance Test is a performance test that requires test takers

49. *Id.* at 110.

50. *Id.*

51. *Id.*

52. Shepherd, *supra* note 21, at 112.

53. *Id.* at 149.

54. *Id.* at 113, 120.

55. *Id.* at 104–05; see generally Erin Thompson, *Law Schools Are Failing Students of Color: Higher debt and lower employment rates create a “justice gap” that’s nearly impossible to escape*, THE NATION (June 5, 2018), <https://www.thenation.com/article/archive/law-schools-failing-students-color/> [<https://perma.cc/9FVZ-BV3T>].

56. Shepherd, *supra* note 21, at 119.

57. Ward, *supra* note 39.

58. Understanding the Uniform Bar Examination, NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> <https://perma.cc/FSE5-KXUW> (last visited Sept. 9, 2020).

59. *What Is the Uniform Bar Exam (UBE)?*, KAPLAN, <https://www.kaptest.com/bar-exam/what-is-the-uniform-bar-examination> [<https://perma.cc/C3XX-ELVF>].

60. NCBE, *supra* note 34.

61. NAT’L CONF. OF BAR EXAM’RS, *supra* note 58.

62. *Id.*

to draft a “lawyerly” document within time constraints.⁶³ The exam does not require test takers to know any state specific law.⁶⁴ States that have chosen to require applicants to learn state-specific concepts do so outside of the bar exam.⁶⁵ While there are still state-created tests with varying components in states like California, Florida, and Michigan, most have adopted the UBE.⁶⁶ Bar exams, whether UBE or state-created, typically occur in person during both February and July of each year.⁶⁷

COVID-19 displaced the July 2020 bar exam in many states.⁶⁸ COVID-19 caused a world-wide shutdown. It is highly contagious and affects varying communities differently, particularly the elderly, minorities, and those with pre-existing conditions.⁶⁹ Entire countries placed their populations under lockdown orders that required them to stay inside their homes with exceptions for necessities such as grocery shopping or traveling to a hospital.⁷⁰ Schools and businesses deemed non-essential were closed to contain the spread of the virus.⁷¹ Countries also implemented social distancing, mask wearing, and contact tracing.⁷² In the United States, the federal government left the individual states largely responsible for putting safety provisions in place to protect their own populations.⁷³

As a result of COVID-19, the legal profession had to adapt. Law schools across the nation shifted to online instruction by March 2020 and many schools adopted new grading policies, which included converting

63. *Id.*

64. *Id.*

65. *Id.*

66. *Comprehensive Guide to Bar Admission Requirements 2020* 28–29, NCBE (Judith A. Gunderson & Claire J. Guback eds., 2020), https://www.ncbex.org/pdfviewer/?file=%2Fassets%2FBarAdmissionGuide%2FCompGuide2020_021820_Online_Final.pdf [<https://perma.cc/MU2B-64EB>].

67. *Taking the Bar Exam*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/dept/dos/taking-the-bar-exam/> [<https://perma.cc/8QEC-6WSV>] (last viewed Sept. 9, 2020).

68. See Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020, 5:45 PM), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> [<https://perma.cc/XWM6-DD4H>].

69. *Who is most at risk of dying from coronavirus?*, WEBMD (Aug. 11, 2020), <https://www.webmd.com/lung/qa/who-is-most-at-risk-of-dying-from-coronavirus> [<https://perma.cc/JE3M-LTC9>].

70. Reality Check team, *Coronavirus: What measures are countries taking to stop it?*, BBC NEWS (Apr. 1, 2020), <https://www.bbc.com/news/world-51737226> [<https://perma.cc/7RL7-7MRM>].

71. *Id.*

72. Gavin Yamey & Dean T. Jamison, *U.S. Response to COVID-19 is Worse than China's*, *100 Times Worse*, TIME (June 10, 2020, 7 AM), <https://time.com/5850680/u-s-response-covid-19-worse-than-chinas/> [<https://perma.cc/J7ZJ-4PBB>].

73. *Two centuries of law guide approach to modern pandemic*, A.B.A. (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/> [<https://perma.cc/UTC6-V8EA>].

to pass/fail grading, in recognition of the differing conditions that students experienced.⁷⁴ As a result of the pandemic, two mainstays of legal education, namely in-person instruction and the traditional letter-based grading system, were adapted to meet the crisis. Yet, many state bar examiners took a wait-and-see approach to the bar exam. Because COVID-19 was spreading widely throughout the world, many considered an in-person exam—for which hundreds or thousands gather in one facility—to be a public safety issue.⁷⁵ Some states, nonetheless, chose to proceed with the exam, electing to implement social-distancing measures, asking applicants to wear masks, performing temperature checks, and even requiring applicants to sign waivers.⁷⁶ Other states were more cautious and implemented online exams, diploma privilege, or temporary practice measures.⁷⁷

To many, the states' insistence on administering bar exams seemed misplaced, unnecessary, and poorly planned in the midst of a pandemic that saw growing infection rates and loss of life. Petitions were signed and filed, letters were drafted, articles were composed, and social media was used to push state bar examiners towards eliminating the exam.⁷⁸ To some, the insistence on the exam served as evidence that the bar exam is antiquated and unjust, that those in charge of administering it were so tied to the tradition of the test that they put applicants at risk, or that they failed to recognize the disparities created in moving online.⁷⁹

The handling of the crisis should serve as a catalyst for a real conversation about what the profession is protecting and why it is worth sacrificing this class of bar-takers. The NCBE seemingly stood in defense of in-person exams by arguing that in-person exams are best.⁸⁰ While they

74. Karen Sloan, *Pass/Fail Grading in Law School Gets Mixed Marks from Students*, LAW.COM (June 17, 2020, 12:20 PM), <https://www.law.com/2020/06/17/passfail-grading-in-law-school-gets-mixed-marks-from-students/> [<https://perma.cc/MCT9-G488>].

75. Escontrías, *supra* note 68.

76. *Notice to Applicants Regarding COVID-19 Requirements, Protective Measures, and Assumption of Risk for July 2020 North Carolina Bar Examination*, BOARD OF BAR EXAMINERS OF THE STATE OF NORTH CAROLINA, 1–2, https://www.ncble.org/covid_19_requirements; *see also* Colin Campbell, *Hundreds will gather to take the NC bar exam next week. Is it safe?*, THE NEWS & OBSERVER (July 21, 2020, 12:47 PM), <https://www.newsobserver.com/news/coronavirus/article244353552.html>.

77. *July 2020 Bar Exam Jurisdiction Information*, NCBE (Sept. 13, 2020, 9:18 AM), <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [<https://perma.cc/9CXY-ZLRN>].

78. Brianna Bell, *Florida Bar Examiners: Consider All Other Options to an In-Person Bar Exam in July 2020*, JURIST (June 24, 2020), <https://www.jurist.org/commentary/2020/06/fl-bar-exam-petition-organizers/> [<https://perma.cc/8SGB-KWQZ>].

79. *See, e.g.*, Escontrías, *supra* note 68.

80. Joe Patrice, *NCBE Offers Online Bar Exam... Sort Of... Not Really*, ABOVE THE LAW (June 2, 2020, 1:45 PM), <https://abovethelaw.com/2020/06/ncbe-offers-online-bar-exam-sort-of-not-really/>.

“purported to accommodate” online exams by releasing an online exam that had half of the testing components, it made the administration of that exam more difficult by forcing state examiners to establish new passing scores, equate the exams, and negotiate reciprocity.⁸¹ Many state examiners, in rejecting diploma privilege, argued for protection of the public.⁸² This situation also shows that significant commitment is necessary to address the problems within these structures, policies, and systems.

III. ANTIRACISM: OVERVIEW OF THE PARADIGM

Antiracism is an idea that has existed since abolition.⁸³ Some scholars have argued that history often portrays colonialism and slavery as though they were uncontested, when there were indeed antiracist ideas.⁸⁴ Antiracism defines racism as supporting or expressing racist ideas.⁸⁵ Racist ideas are those that claim one race is superior or inferior to another race.⁸⁶ But an antiracist supports or expresses antiracist ideas.⁸⁷ An antiracist idea is one that racial groups are equal.⁸⁸ Antiracist ideas also recognize that racial inequity flows from racist policies.⁸⁹ In this paradigm, a person is not defined as an antiracist or as a racist, but rather is characterized as antiracist or racist based on what they are doing at that moment.⁹⁰ The neutral response of “not racist” is eliminated in the antiracist paradigm. Instead, “[a]ll policies, ideas and people are either being racist or antiracist.”⁹¹ The problem with the neutral position of “not racist” is that it is difficult to define and is utilized to defend policies, systems, and structures that produce inequities and oppose policies designed to correct inequities.⁹²

Indeed, the danger in today’s world is that racism is often clouded in antiracist discourse that has been appropriated, incorporated, and

81. *See id.*

82. Escontrías, *supra* note 68.

83. *See* Anna North, *What it means to be anti-racist*, VOX (June 3, 2020), <https://www.vox.com/2020/6/3/21278245/antiracist-racism-race-books-resources-antiracism>.

84. Gargi Bhattacharyya, Satnam Virdee & Aaron Winter, *Revisiting Histories of Anti-Racist Thought and Activism*, 27 IDENTITIES: GLOB. STUD. IN CULTURE & POWER 1, 3 (2020).

85. Ibram X. Kendi, *This is what an antiracist America would look like. How do we get there?*, THE GUARDIAN (Dec. 6, 2018), <https://www.theguardian.com/commentisfree/2018/dec/06/antiracism-and-america-white-nationalism> [<https://perma.cc/Y7HK-6C5X>] [*hereinafter Antiracist America*].

86. KENDI, *supra* note 25, at 20.

87. *Antiracist America*, *supra* note 85.

88. KENDI, *supra* note 25, at 20.

89. *Id.*

90. *Antiracist America*, *supra* note 85.

91. *Id.*

92. *See id.* (asking how many have used the words “I’m not racist” after expressing something that would be racist under antiracism).

neutralized to support racist agendas.⁹³ Those agendas work to maintain the status quo rather than seek reformation.⁹⁴ And they do so by reinterpreting racism.⁹⁵ “For example, conservatives critique protestors like Colin Kaepernick for highlighting patterns of systematic police violence against people of color by saying that stereotyping an entire group of people (i.e., white police officers) is racist.”⁹⁶ Another example is the term “racial discrimination,” which racists redefined in the 1960s to mean that all discrimination on the basis of race is inherently racist.⁹⁷ Under this definition, racial discrimination exists when it is done to create both inequity and equity.⁹⁸ Antiracism reclaims terms and looks at the outcomes with those producing equity being defined as antiracist and those producing inequity as being racist.⁹⁹ The use of language is powerful: affirmative action, which produces equity, is attacked as race conscious while standardized tests, which create racial disparities, are neutral.¹⁰⁰

The antiracism paradigm has a two-part course of action for social change. First, it requires that racial inequity causes are identified and, second, it requires dismantling those causes using antiracist policies.¹⁰¹ Education about racism is not enough, as it leaves in place policies and racist ideas.¹⁰² Rather, policy must be changed to eliminate racial disparities and racist ideas.¹⁰³ Thus, in evaluating the bar exam and the racial disparities, first there must be clarity about what those disparities are and the policies in place that create them. Then there must be an evaluation and implementation of antiracist policies.

IV. USING THE BAR EXAMINATION FOR LICENSURE IS A POLICY THAT CREATES LICENSING DISPARITIES FOR BLACK LAWYERS

State Bar Examiners often express that diversity is important for the profession.¹⁰⁴ Many have conducted studies that demonstrate disparities

93. Felice Blake & Paula Ionide, *Introduction, Part I: Antiracism Incorporated*, in ANTI-RACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS 20 (Felice Blake et al. eds., 2019).

94. *Id.* at 21.

95. *Id.* at 22.

96. *Id.*

97. KENDI, *supra* note 25, at 19.

98. *Id.*

99. *Id.*

100. *Id.* at 20.

101. *Id.* at 231–32 (providing a list of ways to engage in antiracism).

102. *See id.* at 230.

103. KENDI, *supra* note 25, at 230.

104. *E.g.*, *Diversity / Inclusion*, THE FLA. BAR, <https://www.floridabar.org/about/diversity/> [<https://perma.cc/G6PD-UT6Z>] (last visited Jan. 20, 2021).

in bar passage rates by race,¹⁰⁵ but most have continued to use the same instrument to determine licensing. Even if the exam is not deliberately racist, the disparities it creates can no longer be ignored. Supporting tests that have a disparate impact on Blacks (and other minorities) is racist under the antiracist paradigm.¹⁰⁶ The history of standardized tests is filled with racist attempts to demonstrate that Whites are intellectually superior.¹⁰⁷ College entrance exams, like other standardized tests, have been criticized for years because their use results in the exclusion of minority and lower income students from higher education.¹⁰⁸ Standardized tests have been questioned because they measure only one type of achievement, and the outcomes uncover disproportionate access to resources and opportunities.¹⁰⁹

The existing bar passage rate data shows that Black test-takers pass at a lower rate than White test-takers.¹¹⁰ In 1997, an article revealed that the first-time bar passage rate for White people was 30% higher than for Black people.¹¹¹ The California Bar published passage rates for ABA accredited law schools for July 2018 as follows: White 69.5%; Black 45.1%; Latino 56.3%; Asian 66.4%; Other 47.8% (designations by California).¹¹² California shares data on passage rates by race while most states do not publicly report or indicate if this information is collected.¹¹³ Yet, even where the data exists, racial disparities are explained away. For example, one article argued that minorities tended to have lower grade point averages (GPAs), which meant they were less likely to pass the first time because of a lack of preparedness.¹¹⁴ The California Bar Exam

105. See Klein & Bolus, *supra* note 36.

106. *Id.* at 102.

107. *Id.*

108. Eric Hoover, *Our Relationship With Tests Is Unraveling. Why Is Everyone So Conflicted About It?*, THE CHRON. HIGHER EDUC. (July 29, 2020), https://www.chronicle.com/article/crisis-is-changing-the-debate-over-standardized-exams-but-our-relationship-with-them-is-as-conflicted-as-ever?cid=gen_sign_in [<https://perma.cc/4VTC-L797>].

109. See KENDI, *supra* note 25, at 103 (arguing in the context of K-12, looking at other types of achievement and recasting achievement gap to opportunity gap in recognizing that funding is limited in Black schools).

110. Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, LSACRSCH. REP. SERIES 1, 78 (1998), <https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/44QN-WMAB>].

111. Klein & Bolus, *supra* note 36, at 8.

112. *General Statistics Report July 2018 California Bar Examination*, THE STATE BAR OF CAL. (2018), https://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [<https://perma.cc/2QY3-D3T3>].

113. Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, at 726, 726 n.9 (1996) ("California is the only state which regularly collects and analyzes data concerning the minority pass rate.") (quoting THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY-FIRST CENTURY—A BLUEPRINT FOR REFORM 12 (1992)).

114. Klein & Bolus, *supra* note 36, at 15.

Report similarly found that the gap between Whites and minorities closed when they had similar law school GPAs.¹¹⁵ The stated solution is often that closing the disparities between Blacks and Whites requires Blacks to study more.¹¹⁶ But such advice ignores the possibility that the test fails to measure alternative competencies that Black test takers can show but are not tested for.¹¹⁷ It also fails to recognize the disparities that may inhibit a Black test-taker's ability to study like White test-takers who may have access to more resources.¹¹⁸

It is well-documented that minorities incur more debt, on average, for their education and tend to attend lower ranked schools.¹¹⁹ This is not to suggest that all minorities suffer from financial disparities, but instead to recognize that at the intersection of race and class there arises an additional hurdle for some minorities.¹²⁰ A 1991 study found that 50% of Black students stated they were from the lowest socioeconomic group, compared to only 22% of White students.¹²¹ These two occurrences likely also mean that the conditions in which minorities prepare for the exam may be less than optimal if they are working, financially insecure, or have other concerns weighing on them in addition to preparing for the exam.¹²²

As a result, strict adherence to a test with clear disparities on the basis of race (and other intersections) is racist within the antiracist paradigm. It serves to reinforce the notion that Blacks are intellectually inferior to Whites,¹²³ who pass the bar exam at a higher rate.¹²⁴ It also perpetuates the historical racist intention of keeping Blacks out of the profession.¹²⁵ Thus, a change is needed to correct racial disparities for antiracist licensing policies that result in more Black lawyers.

115. Roger Bolus, *Performance Changes on the California Bar Examination: Part 2*, 1, 61 (2018), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf> [<https://perma.cc/N7YP-R4K8>].

116. Klein & Bolus, *supra* note 36, at 15.

117. *See* KENDI, *supra* note 25, at 103 (arguing achievement tests measure one type of achievement).

118. *Id.* (arguing in the K-12 context that standardized test reveal an opportunity gap).

119. Shepherd, *supra* note 21, at 136 n.136, 138 (citing Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 23 (1997)).

120. *See id.* at 135.

121. *Id.* at 134–35 (citing Wightman, *supra* note 119, at 25 tbl.N5).

122. *Id.* at 135.

123. KENDI, *supra* note 25, at 101.

124. *General Statistics Report July 2018 California Bar Examination*, THE STATE BAR OF CAL. (2018), https://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [<https://perma.cc/SB87-F4YX>].

125. *See generally* Shepherd, *supra* note 21, at 108.

V. DEVELOPING AND IMPLEMENTING ANTIRACIST POLICIES TO INCREASE THE LICENSURE OF BLACK LAWYERS

Researching and implementing reforms to licensure is hard work. But it is not unlike the work that state bar examiners have already done in moving from state created exams to the UBE, for which many have already invested time, money, and effort.¹²⁶ Those same investments can be committed to determining how to eradicate the disparities in bar passage for Black applicants (and other minorities). In particular, because these state bar examiners have entrusted the NCBE with developing the exam, they should put the onus on the NCBE to produce better bar passage rates for Black applicants. The New York Bar Association's Task Force recognized the issues with the NCBE and acknowledged the racial and gender disparities in the exam.¹²⁷ The NCBE has not been completely unresponsive to the disparity and has invested in better outcomes by partnering with organizations such as the Council on Legal Education Opportunity to increase the preparedness of Black and other minority applicants.¹²⁸ But that is not enough, as the exam itself needs to be evaluated again and modified.¹²⁹

A lot has been written about how the bar examination or the licensure process can change.¹³⁰ The NCBE is currently engaged in its own evaluation of what the next version of bar exam will look like.¹³¹ The options available for licensing fit into three broad categories: (1) replacing the exam with other mechanisms for licensing; (2) getting rid of the exam; or (3) changing the exam.¹³² For example, those who advocate for replacing the bar exam with alternative measures or adding

126. See Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 9 (2019) (stating states invested resources to determine if the UBE was a good fit for licensure in their state); see also Curcio, *supra* note 18, at 418 (arguing the hurdle to changing the bar exam is the time, money, and effort).

127. N.Y. STATE BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE NEW YORK BAR EXAMINATION 37 (2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf> [<https://perma.cc/3TUX-RY7B>].

128. NCBE and CLEO Announce New Collaboration, NAT'L CONF. OF BAR EXAM'RS (Oct. 26, 2018), <http://www.ncbex.org/news/cleo-collaboration/> [<https://perma.cc/LYA4-7TQN>].

129. See Shepherd, *supra* note 21, at 148 (“[Accreditation] should be removed as a barrier to the legal profession.”).

130. See generally Ward, *supra* note 39; Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action 1* (The Ohio St. U. Legal Stud. Working Paper Series No. 537), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060 [<https://perma.cc/WP77-S7GZ>] (arguing for changes during COVID-19); Griggs, *supra* note 126, at 2, 5; Curcio, *supra* note 18, 365–66.

131. NCBE Bar Exam Evaluation Status, NAT'L CONF. OF BAR EXAM'RS (2020), <https://testingtaskforce.org/about/>.

132. DeShun Harris, *Antiracist Strategies to Increase Licensure for Minorities*, RAISING THE BAR (forthcoming).

new measures for licensing, often refer to apprenticeship programs which allow for working in or observing a legal practice as a pathway for licensing.¹³³ Diploma privilege would eliminate the need for a bar exam.¹³⁴ Diploma privilege, which already exists in Wisconsin, allows graduates of a state to be licensed without taking a bar exam.¹³⁵ This pathway is often rejected by state bar examiners because of a perception that bar exams protect the public.¹³⁶ Changing the bar exam can take many forms, with some arguing it would be better to use different testing methods or to test different competencies.¹³⁷ Changing the exam is feasible. For example, dozens of states have neglected state-created exams and state-specific content to adopt the NCBE's UBE.¹³⁸ In fall of 2020, several states will forego an in-person exam and will instead administer an online exam in the homes of bar exam test takers.¹³⁹ The NCBE was able to accommodate this transition for those states that opted for a UBE-like exam.¹⁴⁰ Thus, while some may argue that the pandemic is a singular event, it is clear that changing the exam is not only possible but has been done. And permanent change is already occurring with California lowering its pass score, a move many believe is the result of the convergence of the Black Lives Matter movement and COVID-19.¹⁴¹ While changing, eliminating, or even creating alternatives to the bar exam causes some individuals concern about how to protect the public, attempting to eliminate the disparities in the exam can result in new innovations for protecting the public.¹⁴²

No solution to eliminating racial disparities in licensure will perfectly satisfy all stakeholders. Further, any newly adopted licensing framework will need to be studied to ensure it effectively eliminates racial

133. See Curcio, *supra* note 18, at 401–03.

134. See Griggs, *supra* note 126, at 65 (explaining diploma privilege).

135. *Id.*

136. See *In Re: Petition for Emergency Rule Waiver*, No. M2020-00894-SC-BAR-BLE (Tenn. 2020) (per curiam) (rejecting a petition for diploma privilege for 2020 after proceedings in which Tennessee Board of Law's argued that an exam is needed to "ensure[] that persons admitted to the bar will be able to service the public well and avoid harm").

137. See, e.g., Curcio, *supra* note 18, at 411 (suggesting how bar examiners might test legal drafting and research ability).

138. Griggs, *supra* note 126, at 3.

139. *July 2020 Bar Exam Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [<https://perma.cc/777K-LEAJ>] (last updated Sept. 1, 2020, 2:35 PM).

140. *NCBE COVID-19 Updates*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/ncbe-covid-19-updates/> [<https://perma.cc/C8JZ-JV5C>] (last updated June 1, 2020, 4 PM).

141. Maura Dolan, *California is easing its bar exam score, which critics argue fails to measure ability*, L.A. TIMES (July 26, 2020, 5 AM), <https://www.latimes.com/california/story/2020-07-26/california-lowers-bar-exam-score-coronavirus> [<https://perma.cc/534U-5E7K>].

142. Shepherd, *supra* note 21, at 148.

disparities.¹⁴³ But continuing to support a policy that creates a significant barrier to licensure for Blacks is racist even in its use of neutrality as a defense, especially given its rise based on racism.¹⁴⁴ It will also need to be studied to ensure that it is not creating new disparities.¹⁴⁵ Longstanding change to the bar exam is possible and needed to eliminate racial disparities in passage rates. But it will require stakeholders to invest in making these changes. It will require some significant mindset shifts in addition to the work needed to research and implement antiracist policies for licensing, as evidenced by the patchwork of state bar examiners responses to COVID-19.¹⁴⁶

While this Essay has focused on what state bar examiners and stakeholders can do in altering, eliminating, or changing licensing, there is one particular stakeholder that cannot be overlooked: law schools. Law schools, in admitting and graduating Black law students, have a responsibility to see them become licensed.¹⁴⁷ While part of that responsibility is to advocate for licensure that eliminates racial disparities, law schools also bear responsibility for the implicit and explicit messages they send to their Black students about their ability to succeed academically and on the bar exam.¹⁴⁸ If law school grade point average is a factor for minority students' ability to pass the bar exam,¹⁴⁹ what is keeping these students from achieving academically? Antiracism requires law schools to describe and understand what is keeping their Black students from achieving academically and passing the bar exam.¹⁵⁰ Antiracism also requires law schools to make changes to address the problems they identify and describe.¹⁵¹ In the quest to eliminate

143. KENDI, *supra* note 25, at 231–32.

144. Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge of Learning*, 8 U. MASS. L. REV. 332, 368 (2013); *Antiracist America*, *supra* note 85; Shepherd, *supra* note 21, at 108.

145. KENDI, *supra* note 25, at 231–32.

146. See generally Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. (2020), <http://dx.doi.org/10.2139/ssrn.3657379> [<https://perma.cc/NV6X-5PG8>] (forthcoming).

147. See *2020-2021 Standards and Rules of Procedure for Approval of Law Schools*, Standard 316 Bar Passage, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf [<https://perma.cc/XD39-AGSB>] (requiring law schools to have 75% of graduates pass the bar exam within two years of their graduation).

148. Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 384 n.164 (2003).

149. See Bolus, *supra* note 115, at 61.

150. Cf. Glen, *supra* note 148, (noting the lack of “open and direct discussions [“among many law school faculties”] which focus . . . on possible solutions to the problem [of minority bar passage]”) (citing Daniel O. Bernstine, *Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?*, 58 THE BAR EXAM’R 10, 10 (Aug. 1989), https://repository.law.wisc.edu/api/law_files/search?mediaID=25620?accessMethod=download [<https://perma.cc/5HWC-KXZS>]).

151. *Id.*

racial inequalities, every part of the profession will need to work toward implementing antiracist policies to open the profession to more Black lawyers.

In conclusion, the collision of the Black Lives Matter movement and COVID-19 in 2020 has created a profound opportunity for the legal profession to make needed changes to its licensing policies to make way for more Black lawyers. Antiracism provides a paradigm through which to enact radical change to licensing. If nothing else, it challenges the profession to affirm its commitment to racism through the use of racially-disparate licensing policies or to commit to antiracism and eliminate those barriers—by learning more about those disparities and disbanding the policies that create them.