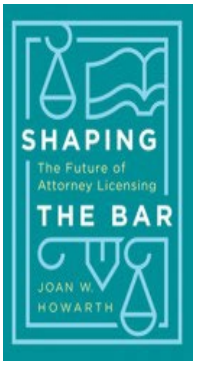
author meets readers:

Racism at the Heart of Legal Education & Licensing

AALS Annual Meeting, San Diego 1/7/22



Claudia Angelos – NYU
Danielle Conway – Penn State Dickinson Law
Ashley London – Duquesne
Marsha Griggs – Washburn
Joan Howarth – UNLV & MSU

discussing:

SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING
(Stanford Univ. Press 2022)

Joan Howarth's Introduction to SHAPING THE BAR

This magnificent panel and each of you being here today is such an honor, especially because I am eager to get the book into the hands of decisionmakers, that is, you, law professors, law deans, and bar examiners, and supreme court justices.

The book has four parts.

Shaping the Bar
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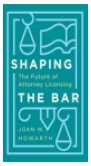
Part I: The Attorney Licensing Crisis and How We Got Here



Part 1 described the current crisis in licensing and provides some history.

Attorney licensing is in a crisis, the heart of which is that our licensing system fails to protect the public but does a very good job of excluding people of color and people without money.

Law school can be very expensive. Bar pass rates are down.

Bar exams are outmoded, at best, and not sufficiently closely connected to the minimum competence to practice law they should be assessing.

We all know that bar pass rates show "Persistent, terrible racial disparities." Much of the profession – including legal educators and bar examiners, treats these disparities as inevitable, and someone else's problem, if they're even acknowledged as a problem.

Black and Latinx students pay more for law school and go deeper into debt.

Expensive legal education without passing a bar exam creates financial ruin for too many, especially from underrepresented groups, and deprives the public of talented potential lawyers.

And, also on the public protection side, a person can go hundreds of thousands of dollars in debt, spend three years in post-graduate fulltime law school, pass a paper & pencil test and be unleashed on the public to handle any legal matter without necessarily ever having seen a law office or a lawyer with a client.

And again, related to public protection, "The racial and ethnic disparities in bar passage, and the fact that lawyers of color are more likely than white lawyers to represent clients of color, means that people of color suffer a disproportionate lack of lawyers in their communities."

So how, exactly, is the public being protected? And, who is the public being protected?

That's the crisis. And our history explains it. I'll provide just some snippets this morning.

Article 7, Section 21 of the Indiana Constitution, enacted 1851

Open Admissions

"Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."

Open admissions – In the 1800s many states enacted laws allowing all citizens who were eligible to vote to practice law.

Article 7, Section 21 of the Indiana Constitution, enacted 1851

Open Admissions

"Every [white, male] person of good moral character…."

Open admissions was really "Every [white, male] person of good moral character" and there's nothing neutral, equitable or inclusive about our profession's notions of "good moral character."

"The first bar exams of the 1800s were oral exams. These were very similar to interviews to be considered for membership in an exclusive, private men's club—convivial lunches for friends and sons of members, but very difficult, hostile and impossible, for outsiders.

Pre-WWII 20 th Century

- National organizations (ABA, AALS, NCBE)
- from apprenticeship or school or bar exam to school and bar exams to accredited school & bar exam
- standardization of legal ed in Langdellian model
- Licensing for Cravath

HARVARD LAW SCHOOL

In the early 20th century the enduring alliance of elite corporate law firms like Cravath and elite law schools took hold. That alliance continues to shape what counts as success in legal education.

1920-1950

Accreditation pressure on part-time, night, & Black law schools (fueled by anti-immigrant, & anti-Jewish, and racial prejudice)

Pictured right - Columbus Law School, one of 19 law programs established across the country by the YMCA (now Capital Law School)

In the early 20th century access law schools sprung up in cities across the country. At one point there were 19 YMCA night law schools, including this one in Columbus.

Collectively appalled by the threat of the parttime law schools, the ABA, the AALS, and the NCBE combined efforts to "improve" legal education by ratcheting up educational and accreditation requirements.

Escalating education and accreditation standards had the purpose and effect of shutting down many night schools and other law schools created for working people, immigrants, and Blacks.

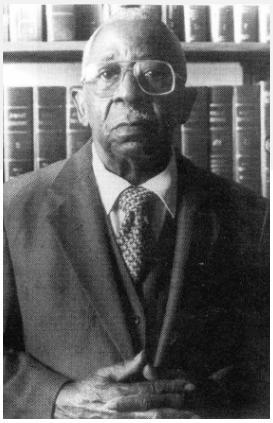
lawful discrimination by law schools & bar examiners; accreditation closures of Black law schools

Between **1900 and 1940** the percentage of licensed attorneys who were Black was always between **0.6 and 0.8 percent**

The Jim Crow laws plus these efforts to shut down "poorer" law schools and keep "poorer" candidates out of the profession combined to keep Black out of the legal profession, resulting in almost the same shockingly low percentage of Black lawyers for the first four decades of the 20th century. This was what the leaders of the profession wanted and achieved.

Bar examiners played their part, too. Louisiana rejected every Black applicant between 1927 and 1947.

Virgil D. Hawkins



Hawkins was academically qualified for the University of Florida Law School but was rejected on account of race. He successfully challenged this at US Supreme Court. In response Florida started requiring the LSAT, and subsequently rejected Hawkins for not having a sufficiently high LSAT score.

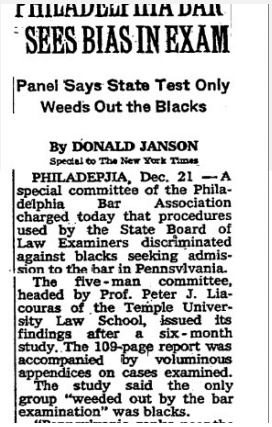
The second half of the 20th century began the era of standardized tests for law. Virgil Hawkins was fully qualified for admission to the University of Florida school of law in 1948 but was denied because he was Black. He took that to the U.S. Supreme Court and won in 1956. After Hawkins' Supreme Court victory, the governor put together a committee of lawyers to figure out how to continue segregation lawfully. Their solution was to require the LSAT. They instituted the test, required Hawkins to take it, and then rejecting him on the basis of his test score.

Similarly, bar examiners in Georgia, Alabama, South Carolina and Mississippi erected new barriers – eliminated diploma privilege, for example, after Blacks candidates became eligible for licensure.

1970s era of bar reform activism

BLACK LAWYER SHORTAGE *Continued*

American Civil Liberties Union (ACLU) and numerous pri
neys have sponsored suits during the past four years chargin
tionally or otherwise, bar exams are being used to block bl
law practice. While no instance of overt discrimination ha
proved in court, lawyers know that a given set of facts can
permissible inference, that, indeed, a sequence of circumst
sometimes be so compelling as to warrant a presumption
doing. Such a presumption exists on the question of whether
procedures discriminate against blacks.



PHILADELPHIA BAR
SEES BIAS IN EXAM

Panel Says State Test Only Weeds Out the Blacks

By DONALD JANSON
Special to The New York Times

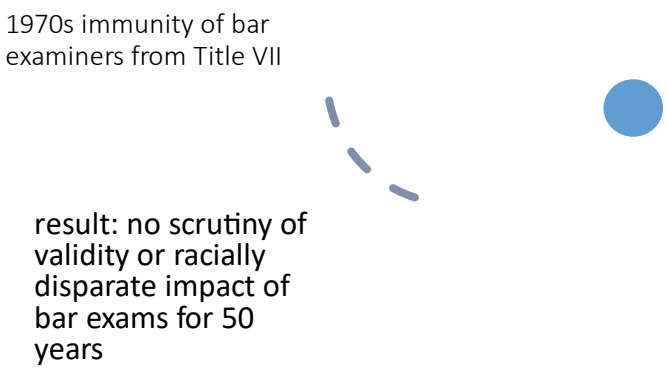
PHILADEPHIA, Dec. 21 — A special committee of the Philadelphia Bar Association charged today that procedures used by the State Board of Law Examiners discriminated against blacks seeking admission to the bar in Pennsylvania.

The five-man committee, headed by Prof. Peter J. Liacouras of the Temple University Law School, issued its findings after a six-month study. The 109-page report was accompanied by voluminous appendices on cases examined.

The study said the only group "weeded out by the bar examination" was blacks.

(pictured left, Ebony Magazine, Dec. 1974); N.Y. Times (1974)

The 1970s deserved their own chapter because it was a time of activism, advocacy, litigation and visibility. The NY Times and Ebony and other outlets covered the scandal that bar exams lacked validity while discriminating against Black applicants.



But in horrifying decisions that are still good law, federal courts sided with bar examiners in civil rights litigation brought by the NAACP and others on behalf of Black applicants in many states.

Licensers have ignored racial disparities for the past fifty years because the courts said they could. Good faith is sufficient to uphold whatever the licensers are doing.

Shaping the Bar
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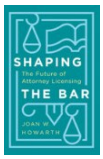
Part I: The Attorney Licensing Crisis and How We Got Here

The last chapter of this first section describes **our** 21st century history, another momentous time. Contemporary pressure points include NCBE consolidation, bar industry incursion into legal education, pandemic & activism, and the increasing race-based disparities in the cost of legal education. The ABA accreditors went from requiring law schools to keep bar prep out of the curriculum to inviting it in, and then enacting Standard 316, threatening loss of accreditation to law schools with poor bar passage rates, with predictable renewed pressure on law schools that enroll large percentages of working people and people of color.

Part II: Slouching Towards Minimum Competence



50 years ago civil rights groups including MALDEF and the NAACP and Black and Latino and Third World Coalitions of law students tried to fix the lack of validity of bar exams by pointing out that licensing examinations need to determine what minimum competence to practice law is in order to assess it. And, they argued that racial disparities based on unvalidated tests is unlawful.

Black law students at UCLA through the 1976 Black Law Journal Symposium brought in testing experts and bar examiners and exposed the lack of validity of bar exams, the ignorance of bar examiners about testing, and the racial impact of these inadequate tests.

Bar examiners and the courts largely ignored those efforts, and we waited fifty years for the serious research about minimum competence that testing experts and civil rights advocates sought back in the 1970s.

This section also describes the important research about minimum competence that was finally undertaken in 2020, including the most impressive study, *Building a Better Bar*, led by Debby Merritt.

Part III:
Character and Fitness: The Right Stuff

[T]he history of character and fitness inquiries is a summary of exclusionary passions in American history, whether aimed at women, immigrants; people of color; those who are poorly

educated; those with criminal convictions; LGBT candidates, or people with mental illness." P. 82.

Today, "Criminal records and juvenile adjudications are a major focus of character and fitness inquiries that provide little benefit to the public but impose a significant disparate impact on African American and Latinx applicants and those from less economically secure backgrounds."

Leslie Levin's research showed that "being male was statistically significant for future attorney discipline; having a prior criminal conviction was not." P. 89

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Part IV: The Future: Competence-Based Alignment of Experience, Education, and Exams

Part IV is the handbook, the instruction manual, for how to change licensing.

The most important directives are to focus on assessing and ensuring minimum competence to practice law (using the current research instead of relying on instinct and tradition), and **"Address racial, ethnic, and gender disparities as if required by law."** P. 100-01.

Chapter 12 recommends clinical residencies in law school.

Chapter 13 – ask more of law schools. One theme of the book is that we ask too little of law schools and too much of bar exams.

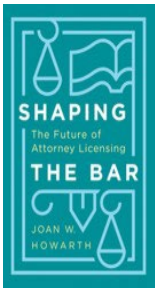
Chapter 14 – the conceptual mistakes on which current bar exams are based.

Chapter 15, on bar exams, suggests that the NextGen should be better than the UBE, but the looming question is standard setting. If the cut score is too high, the NextGen could exacerbate racial and ethnic disparities and take us backwards.

I suggest that performance tests, with adequate time, are the best form of a licensing test.

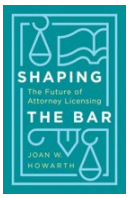
themes:

- We protect the profession more than the public
- Rhetoric of public protection hides protectionism and status goals
- The identity of the profession is determined by who is excluded
- Law schools and bar examiners share exclusionary goals & lack of focus on public protection
- We are complacent about discriminatory impact
- We love standardized tests, and love to misuse them
- Good faith is not sufficient



lessons from SHAPING THE BAR:

1. We are still stuck in the [elitist, racist, sexist, ablist] Langdell/Cravath model of 100 years ago.
2. Too many bar examiners understand & rationalize everything as good faith efforts to protect the public.
3. Too many law schools are driven by prestige goals.
4. We cannot have an equitable profession without fixing licensing, including legal education.
5. Change is finally possible.

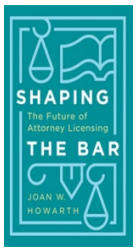


That optimism is also imbedded in book's title, in which I boldly claim that the changes for which I am advocating are the future of attorney licensing.

Thank you. [end of Howarth presentation]

Discussion Moderated by Claudia Angelos

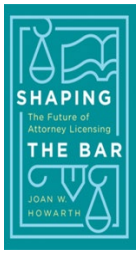
Commentator Question #1:



Regarding the history of the development of bar licensing as presented in Joan's book, what most struck you?

What would you like to say to or to know from Joan about her research and this history?

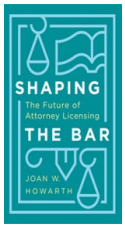
Commentator Question #2:



What comments or questions do you have about the disconnect between legal education and licensing and the emerging evidence on the minimum competence lawyers need to practice?

Or on the problem of the racism in current character and fitness processes?

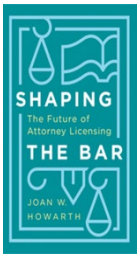
Commentator Question #3:

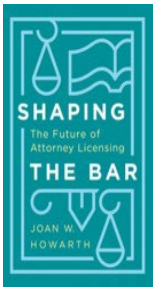


What comments or questions do you have about Prof. Howarth's suggestions for licensing alternatives to written bar examinations? What resistance and challenges do you anticipate will face them?

five topics for all of us:

- The history of racism that got us to this crisis in law licensing
- The failure of legal education and bar licensing to identify or produce minimum competence
- Evidence-based determination of competence and its impact on legal education and licensing
- The problem of racist character and fitness processes
- Current developments toward better assessment of professional readiness





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