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Re: Grievance for Violations of Rules of Professional Conduct by Wisconsin Attorneys
National Conference of Bar Examiners
Standards for Educational and Psychological Testing (2014) ("*Standards*")

Dear Mr. Sellen, Dr. Levine, Dr. Shullman, and Dr. Tong,

My California-based office represents attorney applicants against the State Bar of California and National Conference of Bar Examiners (the "NCBE") for their discriminatory and fraudulent business practices. In the course of my representation of attorney applicants in California, I have observed numerous violations of the Supreme Court Rules, Chapter 20, Rules of Professional Conduct for Attorneys ("Rules of Professional Conduct") by numerous Wisconsin attorneys in connection with the NCBE's operations. Accordingly, I am filing the grievances listed below against each and every attorney subject to your jurisdiction that was a willing participant or otherwise assisted in the NCBE's discriminatory and fraudulent business practices as further detailed below.

None of the complaints or contentions set forth below are made in my representative capacity, and this letter represent my views alone. But in the event your

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office seeks to arrange for restitution to respondent attorneys' victims, I respectfully request you contact my office to coordinate such restitution. Where victims enter into restitution agreements arranged by your office, their rights may be impaired as putative class members in future actions against the NCBE and/or its partners.

Because the Wisconsin Supreme Court's attorney licensing program relieves the Court from dependency or dangerous entanglement with the NCBE, the Court's Office of Lawyer Regulation ("OLR") is uniquely situated to protect and provide relief to the public and judiciaries of all 50 states.

I am also directing this letter to the leadership of the American Psychological Association ("APA"), American Educational Research Association ("AERA"), and National Council on Measurement in Education ("NCME"), the coauthors of *Standards for Educational and Psychological Testing* (2014) ("*Standards*").[1] Attached to this letter is the NCBE's relevant white paper claiming its discriminatory and fraudulent business practices are endorsed by the APA, AERA, and NCME, and/or its publication. While I detail why this must not be the case given the plain English interpretation of *Standards*, I have also included the leadership from the APA, AERA, and NCME to correct me if there is an agreement with the NCBE as to the purported endorsement.

I am also copying on this letter the attorney admissions agencies in each of the 50 states. To the best of my knowledge, it is not permissible in any state to falsify information to a tribunal or assist the NCBE in falsifying information to tribunals. Upon the OLR's investigation and prosecution of the NCBE attorneys, the court officers of each admissions agencies may become bound by ethics requirements to refrain from further business arrangements with the NCBE. Accordingly, this communication is further made to each such agency which may have an interest in seeing the ORL prosecute the NCBE attorneys' ethics violations.

Your immediate investigation and prosecution of these violations is requested. As further detailed below, the NCBE attorneys' violations of the Rules of Professional Conduct has substantially impaired the integrity of judiciaries in every state in the country, as well as their relations with the public and attorney applicants. The NCBE attorneys' ethics violations have resulted in incalculable financial damage, the exclusion of minorities and women from the legal profession, suicide, and serious bodily injury through novel virus infection. In the State of California, the extent of the NCBE's fraudulent conduct would warrant criminal prosecution. Your office is requested to immediately refer this matter to the appropriate law enforcement agencies upon identifying criminal violations.

[1] AERA, APA & NCME, *Standards for Educational and Psychological Testing* (2014) ("*Standards*").

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Executive Summary

The NCBE conceals its origins and older volumes of *The Bar Examiner* on its website, and instead presents a vague purported mission statement of "protecting the public." The reason for the NCBE's concealment is that "protecting the public" is a euphemism for its original purpose of "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar," a vigorous 1930s international movement. That movement was initiated in response to the American Bar Association's ("ABA") accidental admission of three Black lawyers to its ranks in 1912. The NCBE continues to serve and achieve this white supremacist mission today, its euphemistic mission statement reworded to deceive gullible minorities and women into thinking the NCBE somehow serves to benefit them.

The NCBE hired "psychometricians" Stephen P. Klein, Ph.D. and Roger E. Bolus, Ph.D. to prepare reports defending the bar exam and promoting its use. In 1982, Drs. Klein & Bolus were assigned to research "Assessment Centers" and compare them to the traditional bar exam the NCBE uses today. The Assessment Centers would measure "the kinds of skills that should and could be measured by a bar examination, especially those that were important in actual legal practice… [because] it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law."[2] The 1982 data overwhelmingly showed that the Multistate Bar Examination ("MBE") used today was a "poor" or "very poor" measure of legal skills, and that the Assessment Centers were a far better measure of legal skills.[3] However, the data also showed that Blacks and Asians performed better at the Assessment Centers than expected, while whites did not perform as well as expected.[4] In keeping with the NCBE's white supremacist mission, the Assessment Centers and the 1982 report were abandoned to history.

In the decades that followed, respondent attorneys used the NCBE and directed Drs. Klein, Bolus, and Susan M. Case, Ph.D. to assist them in their white supremacist mission and defraud every tribunal in the United States. Drs. Klein & Bolus invented their own racist version of psychometrics where minorities were blamed for "differences" from before the bar exam, most of which was supported by self-citations if there were any citations at all. They would only speak of validity—"the most fundamental consideration in developing tests and evaluating tests… [a] necessary condition for the justifiable use of the test"[5]—in a manner that suggested the bar exam's very high validity had already been established in the past, or at live conferences that could not be verified. But Drs. Klein, Bolus, and Case

[2] Klein & Bolus, *Clinical Legal Skills*, *infra*, at 1.
[3] *Id.* at 66.
[4] *Id.*, at iv.
[5] *Standards*, *supra*, at 11.

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would never acknowledge the 1982 study's findings that the MBE's validity for measuring legal skills was overwhelmingly "poor" or "very poor." Instead, they would switch to the term "relevancy" to conceal the exam's ulterior motive, which is not a recognized psychometric property. In every instance they could, they attributed the bar exam's faults to minority attorney applicants, usually self-citing studies where they purportedly established minority groups' preexisting deficiencies. (Indeed, the NCBE attorneys and Drs. Klein, Bolus, and Case would have us believe that minorities are responsible for the NCBE's 2015 addition of Civil Procedure to the MBE.) This pseudoeugenicist methodology used by the NCBE and its "psychometricians" shall hereinafter be referred to as racist and fraudulent gaslighting.[6]

The 1982 study's findings that the NCBE's products lack psychometric validity were confirmed again in 2013, when the NCBE's lifelong psychometrician Dr. Case admitted that the bar exam was not relevant to attorney competence. Instead, she taunted attorney applicants who opposed the requirement. "[S]ome of the complaints expressed… *The bar exam is irrelevant*. Complaining about the relevance of the bar exam distracts from the examinee's job, which is to pass the bar exam. (Besides, current examinees who suggest eliminating the bar exam entirely would not succeed in doing so within a window of time that is relevant to them anyway.)"[7] The bar exam's deficient psychometric validity for a purpose other than racial discrimination was confirmed again in 2019, when Chad Buckendahl, Ph.D. was hired by the NCBE to assess the bar exam. His report stated that the bar exam "tests arcane, obscure, or trivial aspects of the law that new practitioners should not be expected to know and are not reflective of minimum competence… does not mimic real practice because lawyers would look up the law and not rely only on memory in representing clients… tests only memorization and no skills… questions are full of red herrings and intentionally tricky… written in such a way that there is not a clearly correct answer choice… not realistic or an effective way to test what lawyers do."[8]

Nevertheless, the NCBE persisted in its racist and fraudulent gaslighting, repeatedly asserting to every tribunal in the United States that the bar exam was a very, very valid test.[9] The NCBE's persistent and relentless ethics violations enabled it to become a nearly

[6] As admitted to by the NCBE in the attached white paper, its conduct also disparately impacts women. This term shall also mean to include the NCBE's sexist intentions, even if the evidence of such intent is not as expressly and loudly stated as the NCBE's racist intentions.
[7] Case, *Who's at Fault, infra*, at 34.
[8] NCBE Testing Task Force, *Phase 1 Report, infra,* at 9–10.
[9] *Standards*, *supra*, at 11 ("It is incorrect to use the unqualified phrase 'the validity of the test…' [s]tatements about validity should refer to particular interpretations for specified uses." But as further discussed below, the actual use of the bar exam is to "protect the public" from the "overcrowded condition of the bar," thereby "keeping pure the Anglo-Saxon race." Accordingly, the NCBE uses the term incorrectly to avoid revealing its

invulnerable—until now—monopoly over the entire nations' attorney admissions systems. The NCBE has persisted in requiring attorney applicants across the nation to use its bar exam products, even in the face of financial ruin, suicide, and a global pandemic. The NCBE attorneys do so in bad faith, knowing through their own diploma privilege that the bar exam does not serve a prosocial purpose. The NCBE attorneys have even threatened opponents to chill their valid free speech by giving opponents adverse character and fitness determinations, indicating their intention to provide false information in connection with attorney applications.

The NCBE attorneys are prohibited from presenting false evidence to tribunals. Had the NCBE honestly and transparently presented its corporate mission of "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar," and honestly stated the bar exam's "poor" or "very poor" validity, it is improbable that any tribunal would have agreed to use the NCBE's services. As a result of the NCBE attorneys' violations of the Rules of Professional Conduct, minorities and women have been wrongfully excluded from the legal profession. The NCBE attorneys' violations have also resulted in the massive infliction of monetary, physical, and emotional harm to the public.

While my office intends to take other actions as necessary to terminate the NCBE's unlawful objectives, the Wisconsin OLR is uniquely situated to protect the national public from the NCBE's discriminatory and fraudulent conduct where it violates the Rules of Professional Conduct. Your office is respectfully requested to take immediate action to investigate and prosecute the violations set out below.

Historical Summary & Factual Background

Question of Keeping Pure the Anglo-Saxon Race: Overcrowded Condition of the Bar

Following the abolition of Black slavery in the United States, slavery's proponents and beneficiaries sought other ways to enforce racial and socioeconomic stratification. Without BIPOC and women to perform the fundamental tasks and duties that ensured society's survival, those persons responsible for slavery would cease existing without a new low-cost labor class. Accordingly, they took extreme measures to prevent BIPOC and women from entering professions where those persons could capitalize upon their unrestricted powers. But as would prove to be the case again in 2020 and every other year in history, the innovation and ingenuity of minorities would always succeed in subverting

true purpose. Where the NCBE is referring to the bar exam's validity as a measure of legal skills, such as the 1982 and 2019 reports, the validity is completely deficient).

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their white supremacist overlords.[10]

In 1912, the ABA accidentally admitted three Black lawyers into its membership.[11] In this case, the three Black lawyers appear to have done so merely by adopting the boring and redundant names often worn by their supremacist counterparts. The ABA panicked at the admission of the three Black lawyers, considering this their most serious existential threat. They had previously been unaware of the possibility that Blacks might attend or even graduate from such institutions as Harvard Law School.[12] Upon discovering the admission of the three Black lawyers, the ABA membership chairman noted that this posed "a question of keeping pure the Anglo-Saxon race."[13] The ABA's executive committee declared that "the settled practice of the association has been to elect only white men as members."[14] Having their application process's security thwarted by something so fundamental as not asking applicants what their races were, the ABA added that question to their application going forward.[15] However, the three Black lawyers remained members, a persistent reminder of the supremacists' continued existential threat. In the decades that followed, the ABA, its progeny, and its partner agencies[16] would take extensive measures to preserve white male supremacy in the legal profession.

But first, the supremacists would need to find a new way describe their racist mission. Openly discussing efforts to keep BIPOC and women out of the profession might offend one or more of the three Black lawyers the ABA had now admitted, and these supremacists would spend the following century terrified of the three Black lawyers, as white supremacists do. Accordingly, the term "overcrowded condition of the bar"[17] became the international battle cry for white supremacists seeking to protect the profession from

[10] *See generally* Jules Lobel, *Transformational Movements: The National Lawyers Guild and Radical Legal Service* 72 NLG Rev. 193 (2015).
[11] Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Changes in Modern America* 65 (1976).
[12] Auerbach, *supra*.
[13] Auerbach, *supra*, at 66. *See also* F. M. Finch, *Legal Education*, 1 Colum. L. Rev. 102–03 (1901). *See also* Franklin M. Danaher, *Some Suggestions for Standard Rules for Admission to the Bar*, A.B.A. Rep. 34, 785 (1909). *See also* Henry M. Bates, *Address of the President*, Ass'n. Am. L. Sch. Proc. 29 (1913). *See also* George W. Kirchwey, *American Law and the American Law School*, Ass'n. Am. L. Sch. Proc. 8, 10–11 (1908).
[14] Susan K. Boyd, *The ABA's First Section: Assuring a Qualified Bar* 100 (1993).
[15] Auerbach, *supra*.
[16] *See* Letter from Julian Sarkar, SarkarLaw, to Melanie J. Lawrence, St. B. Cal. Interim Chief Trial Couns. (Jul. 30, 2020) (detailing crimes and ethics violations by State Bar of California's directors, officers, etc. in NCBE business arrangements, summary history of State Bar of California's rise as unauthorized fourth branch of government for purpose of wealth generation and excluding minority and low-income applicants from legal profession, under false pretense of "public protection," also note Susan M. Case, Ph.D. misspelled as "Pace"). *See also* Letter from Sarkar to Chesa Boudin, S.F. Dist. Att'y, et al., (Jul. 31, 2020) (notice to District Attorney of intention to effect citizen's arrest upon culpable State Bar of California's directors, officers, etc. for illegally reducing attorney applicants' previous exam scores in system).
[17] *Editorial*, 1 B. Exam'r 211 (1932).

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a fourth, or even a fifth Black lawyer. It was "a question of keeping pure the Anglo-Saxon race."[18]

By 1928, Wisconsin lawyers had adopted the phrase "overcrowded" as a replacement for discussing the "question of keeping pure the Anglo-Saxon race."[19] Publications across the country utilized the same code phrase, claiming that there was a problem of the bar being "overcrowded" as a pretext for keeping BIPOC out of the profession.[20] No specific justification was ever offered for initiating and perpetrating a massive, nationwide, fraudulent, and racist—but also lucrative—gatekeeping scheme. For example, no data showed that the number of lawyers exceeded the number of humans.[21] But this was irrelevant, as the supremacists' trauma from discovering the three Black lawyers from 1912 remained an ongoing motivation to exclude them from the profession. In a concerted effort reflected across bar associations all over the United States,[22] and even as far out as Australia,[23] would take action against "[t]he most difficult problem confronting the legal profession today… the overcrowded condition of the Bar…" and "the evils which flow from unethical and unauthorized practice as well as from an overcrowded condition of the Bar."[24]

[18] Auerbach, *supra*, at 66. *See also* F. M. Finch, *Legal Education*, 1 Colum. L. Rev. 102–03 (1901). *See also* Franklin M. Danaher, *Some Suggestions for Standard Rules for Admission to the Bar*, A.B.A. Rep. 34, 785 (1909). *See also* Henry M. Bates, *Address of the President*, Ass'n. Am. L. Sch. Proc. 29 (1913). *See also* George W. Kirchwey, *American Law and the American Law School*, Ass'n. Am. L. Sch. Proc. 8, 10–11 (1908).
[19] Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 St. Mary's L.J. 413–14 n. 352 (2008).
[20] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 177 (1983). *See* James G. Rogers, *The Overcrowding at the Bar and What Can Be Done about It*, 7 Am. L. Sch. Rev. 565 (1932).
[21] H. C. Horack, *Supply and Demand in Legal Profession*, 14 A.B.A. J. 567, 568–69 (1928) (conjecture, hypothesis, and even poetry, but no legal analysis, ultimately concluding need to restrict legal profession).
[22] Howard T. Michell, *The Practice of the Law! Business or Profession?*, 3 St. B. J. St. B. Cal. 4 (1928). Milton Yeats, *Need for Regulating the Practice of Law in Florida, and the Power and Duty of Our Supreme Court in the Premises,* 12 Fla. L. J. 104 (1938) ("effective regulation of the practice of the law so that the public, the courts and the profession may be protected from the evils which flow from unethical and unauthorized practice as well as from an overcrowded condition of the Bar"). A.B.A., Proceedings of the Section of Legal Education and Admissions to the Bar, 55 Annu. Rep. A.B.A. 651 ("Mr. John L. Darrouzet, of Texas, spoke of the overcrowded condition of the bar in Houston and stated that an attempt was going to be made in Texas to rid themselves of the proprietary night schools and to prevent the unauthorized practice of law"). Henry B. Witham, *Some Observations on Legal Education*, 16 Tenn. L. Rev. 435 (1940) ("We find many lawyers complaining about the lack of business and blaming it on the overcrowded condition of the bar"). Emma E. Dillon, *Minutes of the Mid-Winter Meeting*, 4 N.J. St. B. Assn. 86–87 (1937) ("…the Association has been remiss in its failure to grapple with the problem of the overcrowded condition of the Bar…"). *Proceedings of the Annual Meeting of the New York State Bar Association*, 61 Annu. Meeting N.Y. St. B. Assn. (1938).
[23] *The Legal Profession Overcrowding and Admissions*, 7 L. Inst. J. L. Inst. Vict. 279 (1933).
[24] *Proceedings of the Annual Meeting of the New York State Bar Association*, *supra*, at 71. Yeats, *supra*.

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In 1931, the ABA founded the National Conference of Bar Examiners ("NCBE") in order to eliminate the "overcrowded condition of the bar."[25] The racist inference is apparent. The NCBE was not expressly developed to remedy the "incompetent" condition of the bar. The NCBE was not initially developed to "protect the public" from a specified or evidence-based harm. The NCBE was designed to attack "crowding," or numerosity in the legal profession. Although the phrase "overcrowded condition" omits the specific type of "crowding" that was being challenged, this had already been specified by the ABA's prerogative of "keeping pure the Anglo-Saxon race."[26] The series of events that triggered the formation of the NCBE did not involve a malpractice claim against one of the three Black lawyers who were—at the time—the greatest threat to the "pure… Anglo-Saxon race." Much to the dismay of the ABA, at least one of those three Black lawyers was a Harvard Law graduate, further indicating competence was not the issue in "overcrowding." This historically proliferated belief of there being too many lawyers—which still has surviving vestiges today—was referring specifically to there being too many *Black* lawyers. "Most of [the ABA's] members and substantially all of its leaders were members of the corporate bar. No black lawyers were members. No progressive union lawyers were members. And few lawyers in general practice with working-class clients were members."[27]

In 1931, most of the white supremacists involved in creating the NCBE were still struggling with shattered worldviews upon learning that Blacks could attend and even graduate from Harvard Law School.[28] They continued to cower in fear of the three Black lawyers who had been admitted to the ABA, and this would be their primary motivation in eliminating the "overcrowded condition of the bar," the "question of keeping pure the Anglo-Saxon race."[29] However, they would refrain from expressly mentioning their Anglo-Saxon purity-based motives again, given the risk of offending these three Black ABA members.[30] Those lawyers must no longer be with us presuming the average life expectancy. Nevertheless, the NCBE remains horrified at the prospect that some Blacks might learn of the NCBE's true purpose. Like their embarrassed former slave-owning counterparts, the NCBE conceals all volumes of the Bar Examiner before 2008, publishing only self-selected "Older Popular Articles."[31] However, this is futile, because some

[25] *Editorial*, 1 B. Exam'r 211, *supra*. *See also* Philip J. Wickser, *Ideals and Problems for a National Conference of Bar Examiners,* 1 B. Exam'r 4, 7 (1931). *See also* Boyd*, supra,* at 38.
[26] Ariens, *supra*.
[27] NLG, *A History of the NLG: 1937–1987* 8 (Victor Rabinowitz & Tim Ledwith eds., 1987).
[28] Auerbach, *supra*.
[29] *Editorial*, 1 B. Exam'r 211, *supra*. Auerbach, *supra*.
[30] *But see* NLG, *supra*.
[31] NCBE, *The Bar Examiner Older Archives*, https://thebarexaminer.org/magazine/archives/older-archives-2/ (last visited Aug. 1, 2020).

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minorities keep archives of publications and are also able to cross-reference them through other publications discussing the NCBE's true purpose. As further detailed below, the NCBE does not think very much of minorities or their ability to obtain information. This belief of the NCBE, as with all of its other beliefs, are unjustified.

(Eventually, the NCBE seemed to realize that the "overcrowded condition of the bar" euphemism had potential implications for antitrust laws enacted almost half a century earlier.[32] It's not clear what precipitated the change in euphemism from "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar" to "protecting the public" from the "overcrowded condition of the bar" by "keeping pure the Anglo-Saxon race."[33] But it must be quite embarrassing if the NCBE and its nationwide partners try to conceal it. Perhaps, for example, the NCBE hired a woman of color as a researcher paralegal. And perhaps this individual promptly pointed out the antitrust implications of presenting the "overcrowded condition of the bar" as the NCBE's purpose to the NCBE's diploma privileged executives. Since many members of the bench had joined the bar's attorneys attacking the "overcrowded condition of the bar," it's not clear that there was ever a real threat of antitrust laws being seriously enforced in this context anyways.[34] Perhaps there was a concern that the public might infer that white supremacist lawyers and judges joined forces to thwart application of antitrust laws in this context, rendering the legislature ineffective. But in any event, "protecting the public" sounds nicer and more ambiguous, and some of those naïve and gullible minorities might even believe they benefit from the NCBE's "protection" as members of the public.)

To continue gaslighting the public as to the purported "overcrowded condition of the bar," the ABA created a Special Committee on the Economic Condition of the Bar in 1937.[35] After keeping up this farce for an entire eight years, the committee was finally dissolved.[36] The white supremacists were finally safe from the threat of an eighth or ninth Black lawyer joining their ranks. (Even though, frankly, most of those Black Harvard Law

[32] Sherman Antitrust Act of 1890, Pub. L. No. 94-435, 26 Stat. 209.
[33] *See also* NCBE, *About Us*, http://www.ncbex.org/about/ (as of Mar. 29, 2020) (previously listing year founded). *Cf.* NCBE, *About Us*, http://www.ncbex.org/about/ (last visited Aug. 1, 2020) (removal of year founded to obfuscate racist origins and purpose, but founding date is still available elsewhere on the website).
[34] Will Shafroth, *Modern Tendencies in Preparation for the Bar*, 7 St. B. J. St. B. Cal. 212, 215 (1932) ("Chief Judge Benjamin N. Cardozo of the New York Court of Appeals… brought out the contrast between the overcrowded condition of the bar of today and the situation two hundred years ago" [before risk of Black Harvard Law graduates slipping into profession's ranks]). Yeats, *supra*, at 103 ("…overcrowded condition of the Bar, and are becoming more and more the concern of the enlightened members of both Bench and Bar. The Judicial Department, better than any other, can… limiting admissions"). *Proceedings of the Annual Meeting of the New York State Bar Association*, *supra*, at 71. ("Justice Francis Martin: …The most difficult problem confronting the legal profession today is the overcrowded condition of the bar…").
[35] Ariens, *supra*, at 418.
[36] Ariens, *supra*.

graduates probably would have just told the truth on their ABA application for the new "race" question, so creating an entire ABA "Economic Condition" committee for nearly a decade seemed a little much.) As it turned out, persistently defrauding and gaslighting the public and judiciaries in every state proved an effective strategy, one that the progeny NCBE would also adopt. Indeed—if one succeeds in "keeping pure the Anglo-Saxon race" and suppressing other demographics, those demographics will be disempowered to use the legal system and enforce antitrust restrictions or other laws affecting their rights. And as the NCBE's longtime psychometrician Dr. Case would later write in 2013, "[S]ome of the complaints expressed… *The bar exam is irrelevant*… current examinees who suggest eliminating the bar exam entirely would not succeed in doing so within a window of time that is relevant to them anyway."[37]

Because the only thing the NCBE was "protecting the public" from at the time was the admission of a tenth or eleventh Black lawyer to the ABA, as well as Jews and women,[38] the NCBE would rely upon a two-tiered system of admission to the practice of law. For our racist overlords who controlled and promulgated the system, diploma privilege would protect them from usurious loans and capriciously designed exams.[39] Had aspirant NCBE attorneys been subject to the risk of strict sanctions for possession of separate erasers, pencil sharpeners, or feminine hygiene products at exam centers, their careers could have been prematurely terminated. And in any event, there was clearly no need to test the NCBE's attorneys on the trivial nuances of medieval Anglo-Saxon estate conveyances.[40] Their competence in such matters was readily apparent from their ancestral heritage.[41] But to "protect the public" from the "overcrowded condition of the bar,"[42] "a question of keeping pure the Anglo-Saxon race,"[43] all others would be excluded from the legal profession unless they completed the bar exam. Diploma privilege would persist for our racist masters who ensured the others achieved what would eventually be coined "minimum competency." For those of us separate, less equal attorney applicants, there was the NCBE's bar exam.

[37] Case, *Who's at Fault*, *infra*, at 34.
[38] Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 Akron L. Rev. 552 (citing Milton S. Gould, *The Witness Who Spoke with God, and Other Tales from the Courthouse* ix–xx (1975)).
[39] *See* Wis. Sup. Ct. R. rule 40.03 [diploma privilege].
[40] *See* Cal. Dept. Real Est., *Reference Book* 45 (2010) (summarizing English history of modern American real estate laws).
[41] Auerbach, *supra*.
[42] *Editorial*, 1 B. Exam'r 211, *supra*.
[43] Ariens, *supra*.

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The Science of Supremacy Is Selected

In 1954, the American Psychological Association ("APA") prepared and published *Technical Recommendations for Psychological Tests and Diagnostic Techniques*, the first edition and predecessor of the *Standards for Educational and Psychological Testing* (2014) ("*Standards*").[44] Because the first edition of *Standards* was not jointly produced by the APA, American Educational Research Association ("AERA"), and National Council on Measurement in Education ("NCME") until 1966, it is unlikely that the NCBE "carefully developed and vetted" the bar exam "to meet professional testing standards promulgated by the [AERA, APA, and NCME] set out in the [*Standards* (2014)]."[45] As discussed above, the NCBE designed the bar exam to handle the problem of the "overcrowded [by a twelfth or thirteenth Black lawyer] condition of the bar."[46] It would be an extremely strange coincidence if a system designed for a racist purpose also happened to achieve the 232 standards for "validity, reliability, and fairness" which were not published until many decades later.[47]

But during the pre-internet era where the NCBE was monopolizing the entire nation's attorney admissions systems, it would be very unlikely for anyone to figure out what the authoritative sources in psychometrics were saying. If someone wanted to disprove the psychometric—or pseudoscientific—claims of a wealthy white supremacist attorney admissions gatekeeping corporation run by diploma-privileged attorneys, they would first have to learn the actual science itself to verify the NCBE's claims. And as history would reveal, anyone audacious enough to repeat the words of the NCBE's multiple-choice questions outside of a test center would have the NCBE unsuccessfully try to destroy them and everything and everyone they love through litigation.[48] So who would ever dare challenge the NCBE if it tried to fool the entire world regarding the "validity" of the bar exam? Sure, it was the "degree to which evidence and theory support the interpretations of test scores for proposed uses of tests… therefore, *the most fundamental consideration in*

[44] AERA, APA & NCME, *Standards for Educational and Psychological Testing* vii (2014) ("*Standards*").
[45] NCBE, *Pandemic Bar Exams*, *infra*, at 5.
[46] *Editorial*, 1 B. Exam'r 211, *supra*.
[47] *Standards*, *supra*, at 11.
[48] *See* John Eckler & Joe E. Covington, *The New Multistate Bar Examination*, 57 A.B.A. J. 1117, 20 (1971) ("Questions Must Be Kept Under Lock and Key"). *See NCBE v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34 (N.D. Ill. 1980). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 1433 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 66974 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1989). *See also NCBE v. Saccuzzo*, 2003 WL 21467772 (S.D. Cal. 2003). See also *NCBE v. Multistate Legal Studies, Inc.*, 413 F.Supp.2d 485 (E.D. Pa. 2005). *See also NCBE v. Multistate Legal Studies, Inc.*, 458 F.Supp.2d 252 (E.D. Pa. 2006). (Collectively, reflecting proposition that if you ever dare speak the contents of the NCBE's multiple-choice questions outside of a test center, the NCBE will unsuccessfully try to destroy you and everything and everyone you love.)

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developing tests and evaluating tests… [a] ***necessary condition for the justifiable use of the test***."[49] But who would ever bother to look that up? Probably not the minorities, who had "differences in performance level… that are *already present* in law school,"[50] and that were, "evident from… LSAT scores… less well prepared for law school than their classmates,"[51] whose "difference in passing rates… stem from *difference in their legal skills and abilities*."[52] And "[b]esides, current examinees who suggest eliminating the bar exam entirely would not succeed in doing so within a window of time that is relevant to them anyway."[53]

And thus, during the NCBE's rise to power as a national monopoly with hundreds of millions of dollars in untaxed assets,[54] they would develop their own version of psychometrics best suited for deceiving the public into believing the bar exam served some purpose other than "protecting the public" from the "overcrowded condition of the bar" by "keeping pure the Anglo-Saxon race." This presented a significant challenge for the NCBE in explaining the bar exam's validity, because the NCBE would have to admit that the exam's objective was to keep out the Blacks. This is because "[i]t is incorrect to use the unqualified phrase 'the validity of the test…' [s]tatements about validity should refer to particular interpretations for specified uses."[55] The NCBE would either have to reform the bar exam to make it measure something that wasn't completely racist, or it would have to lie and pretend that this was the case.

The NCBE decided to lie and pretend that the bar exam was not only psychometrically valid, but as psychometrically valid as any exam could possibly be. They wouldn't say what exactly it was a valid measure of, of course, since that would lead to its white supremacist objectives. The NCBE hired persons who held themselves out as psychometricians, but would be willing to deceive the entire country as to the exam's validity. After all, validity, reliability, fairness, correlation, and causation were all basically the same thing, and in the end, ultimately the fault of those minorities for attending law schools like Harvard in the first place. For this task, the NCBE hired Stephen P. Klein, Ph.D. and Roger E. Bolus, Ph.D.[56] The unspoken rules would be as such. To give the public and our courts the impression that the bar exam tested something other than the ability to

[49] *Standards*, *supra*, at 11.
[50] Klein, *How to Respond to the Critics, infra,* at 20.
[51] Klein & Bolus, *Differences Among Racial and Ethnic Groups, infra*, at 15.
[52] *Id.*
[53] Case, *Who's at Fault*, *infra*, at 34. *But see generally,* Lobel, *supra* (proposition that the innovation and ingenuity of minorities always succeeds in subverting their racist masters).
[54] *See* NCBE, IRS Form 990, l. 20 (2016). *See also* NCBE, IRS Form 990, l. 20 (2018).
[55] *Standards, supra*, at 11.
[56] *See* Stephen P. Klein, Ph.D. & Roger E. Bolus, Ph.D. *An Analysis of the Relationship Between Clinical Legal Skills and Bar Examination Results* (1982) ("Klein & Bolus, *Clinical Legal Skills*").

keep out a fourteenth or fifteenth Black lawyer, the NCBE's "psychometricians" would reference "validity" only in passing and in such a way to suggest that it had already been established in the past. For example, Dr. Klein explained in *How to Respond to the Critics*, "Some complain… whether either of these measures are *material to the practice of law*… Thus, rather than working *against the validity of the test*, guessing actually improves its ability to discriminate between the more or and less able student."[57] Another tactic would be to refer to evidence that either never existed or that could never be verified. "There is also ample evidence that the MBE measures important legal reasoning skills.[1] [Endnote: Klein, S. P. An evaluation of the (MBE). (NCBE), Chicago; August, 1982… (followed by 10 more self-citations to Dr. Klein's own work, some coauthored with Dr. Bolus)] In fact, it usually assesses these skills at least as accurately (and certainly more efficiently) than the essay portion of the exam. This conclusion is supported by independent expert panels, extensive empirical data, and experimental studies."[58]

Indeed, this would become the NCBE's instructional manual for *How to Respond to the Critics*. After all, who would ever go back in time to a live Chicago conference where Dr. Klein supposedly proved the very high accuracy and efficiency with which these multiple-choice questions measured important legal reasoning skills? Probably not the minorities, whose preexisting "differences" accounted for any "differences" in their ability to pass the bar exam.[59] Perhaps one could always ask Dr. Klein whether he was telling the truth about whether those conferences had indeed proven the MBE's very high validity for measuring legal reasoning. Then Dr. Klein could show one of his many other studies showing that the minorities were to blame for not being able to pass the exam designed to exclude minorities,[60] or have the NCBE sue you into oblivion for trying to discuss exam

[57] Klein, *On Testing: How to Respond to the Critics* 55 B. Exam'r 16 (1986) ("Klein, *How to Respond to the Critics*").
[58] Klein, *How to Respond to the Critics, supra,* at 18, 24 n. 1–13.
[59] *Id.* at 23 (using law school grades and LSAT scores that nobody asked for to prove minorities were already "different" before the bar exam).
[60] *Id.* at 24 ("3. Klein, S. P. Factors associated with the difference in passing rate between Anglo and Hispanic applicants… Klein, S. P. An analysis of the relationships between bar examination scores and an applicant's law school, admissions test scores, grades, sex, and racial/ethnic group…"). Klein & Bolus, *Differences Among Ethnic Groups, infra*, at 9 ("Klein, S. (1980) An analysis of the relationships between… scores… sex, and racial/ethnic group… Klein, S. P. (1981c) Factors associated with the difference in passing rate between Anglo and Hispanic applicants… Klein, S. and Bolus, R. (1987) Minority group performance on the California bar examination… Klein, S. (1989) Does performance testing on the bar examination reduce differences in scores among sex and racial groups? Paper presented at the meetings of the American Educational Research Association… Klein, S. (1991) Disparities in bar exam passing rates among racial and ethnic groups… Klein, S., Bell, R., and Bolus, R. (1992a) An analysis of the fairness of the Florida bar examination to racial and ethnic minority groups…").

questions outside of a test center.[61] Eventually, the NCBE would come to grant awards for researchers who could prove that the bar exam "protected the public" from something other than "overcrowding" of Anglo-Saxon impurity.[62] Unfortunately, all the studies which were given research awards by the NCBE are not available to the public.[63] But surely, the public would infer that the award-winning research studies supported everything the NCBE had been saying about its own exam's validity for a non-racist purpose. For the national clan of diploma privileged bar examiners, responsible for determining the moral character of the nation's attorney applicants, would never violate their duty of candor… right?

The NCBE had learned the ugly truth in 1982 about their exam's validity for a purpose other than racist gatekeeping—it was a "poor" or "very poor" measure of legal skills.[64] "…In short, it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law."[65] (Meaning every statement after 1982 by Drs. Klein and Bolus supporting the MBE's validity was a lie.) The first edition of *Standards* by the AERA, APA, and NCME would have been published for over a decade by this time.[66] In the white supremacist minds of the NCBE, its diploma privileged masters thought that because the bar exam tended to show that white men were the most worthy, it must satisfy the psychometric standards promulgated by the AERA, APA, and NCME. In Drs. Klein & Bolus's 1982 study, they also compared "Assessment Centers" to try and test "the kinds of skills that should and could be measured by a bar examination, especially those that were important in actual legal practice."[67] The Assessment Centers involved, for example, "trained actors [that] played the roles of clients and witnesses for the oral tasks…"[68] Unsurprisingly, the data collected showed that the

[61] *See* Eckler & Covington, *The New Multistate Bar Examination*, *supra* ("Questions Must Be Kept Under Lock and Key"). *See NCBE v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34 (N.D. Ill. 1980). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 1433 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 66974 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1989). *See also NCBE v. Saccuzzo*, 2003 WL 21467772 (S.D. Cal. 2003). See also *NCBE v. Multistate Legal Studies, Inc.*, 413 F.Supp.2d 485 (E.D. Pa. 2005). *See also NCBE v. Multistate Legal Studies, Inc.*, 458 F.Supp.2d 252 (E.D. Pa. 2006). (Collectively, reflecting proposition that if you ever dare speak the contents of the NCBE's multiple-choice questions outside of a test center, the NCBE will unsuccessfully try to destroy you and everything and everyone you love.)

[62] Mroch, Andrew A., *The Joe E. Covington Award: Twelve Years of Encouraging Research on Testing for Licensure*, 79 B. Exam'r 31 (2010).

[63] NCBE, *Statistics and Research: Covington Award*, http://www.ncbex.org/statistics-and-research/covington-award/ (last accessed Aug. 11, 2020).

[64] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 66.

[65] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1.

[66] *Standards, supra*, at vii.

[67] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1.

[68] Klein & Bolus, *Clinical Legal Skills*, *supra*, at ii.

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Assessment Centers were a far better measure of legal skills and abilities than the MBE.[69] The MBE was a "poor" or "very poor" measure of legal skills, and virtually none of the data supported it having any benefit to anyone.

If the purpose of the bar exam had been to measure minimum attorney competency, the MBE would have certainly been abandoned in favor of the Assessment Centers, which were a far more valid measure of legal skills and abilities.[70] But the NCBE's top priority is the "protection of the public" from the "overcrowded condition of the bar," thereby "keeping pure the Anglo-Saxon race." And the data was showing that "Asian and especially Black applicants did slightly better on the AC [Assessment Center] type tasks than would be expected on the basis of their GBX [General Bar Examination] scores. Anglo and Hispanic applicants did slightly less well than would be expected."[71] By the time this study was performed in 1982, there had been many Black lawyers who had managed to thwart their former slave masters' exclusionary process, and it would have been silly to try and prevent a sixteenth or seventeenth Black lawyer from being admitted… right? No. The existential threat to the "pure Anglo-Saxon race" was too high by measuring actual legal skills where Blacks were now performing better than expected, and their former owners were performing more poorly than expected. The Assessment Centers were abandoned in favor of the "typical bar exam," which was "questionable… [as] a sufficiently good indicator of the degree to which an applicant is prepared to practice law."[72] The findings of the study were abandoned in the depths of the UC Hastings Law Library, and Drs. Klein & Bolus would never again disappoint their racist masters by assessing the bar exam's validity as a measure of legal skills or referencing the Assessment Centers. The report on the study's findings would collect dust until 2020, when a minority lawyer would cleverly duplicate the whole thing using a portable book scanner, rendering it futile for the NCBE or its "psychometricians" to destroy the original physical copy.

The Assessment Centers, which measured "the kinds of skills that should and could be measured by a bar examination, especially those that were important in actual legal practice," presented another problem for the NCBE.[73] The "oral tasks are far more costly"[74] and would have harmed the NCBE's ability to generate profits from the attorney applicant

[69] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 66 (Data reflecting MBE's ability to measure legal skills and abilities were "Very Poor: 29%, Poor: 30%, Fair: 29%, Good: 9%, Very Good: 2%" compared with the Assessment Centers two days at "Very Poor: 4%/3%, Poor: 12%/9%, Fair: 44%/40%, Good 28%/35%, Very Good: 12%/14%").
[70] *Id.*
[71] Klein & Bolus, *Clinical Legal Skills*, *supra*, at iv.
[72] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1.
[73] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1.
[74] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 33.

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population through its commercial business partners in each state. It is a poor business strategy to only have attorney applicants pay for the bar exam one time. It would prove far more profitable to require applicants to pay for the bar exam twice a year for year after year, surprising them each time with questions about the Rule Against Perpetuities and the medieval requirement that burglaries occur during nighttime.[75] Accordingly, secrecy was of the utmost importance, and the NCBE would threaten to annihilate anyone who ever dared repeat the words of its multiple-choice questions outside of a test center.[76] Perfecting the test of "arcane, obscure, or trivial aspects of the law… only memorization and no skills… questions [that] are full of red herrings and intentionally tricky"[77] would ensure applicants—especially minority applicants[78]—had to pay for the bar exam over and over again. And the diploma privileged overseers of the Anglo-Saxon purity program were rewarded handsomely.[79] So too were the NCBE's white supremacist partner agencies. In California, the State Bar had ambitions of becoming a powerful, though unauthorized fourth branch of government, and would require extensive lobbying funds to achieve this goal…[80]

The NCBE and its "psychometricians" would have to lie very hard to gaslight the public and prevent them from considering the possibility of adverse evidence, such as the 1982 report suggesting Blacks made much better lawyers than expected. If the Blacks had to keep retaking and repaying for the bar exam, the problem would be clear—the Blacks

[75] NCBE, *MBE Subject Matter Outline*, 3–4 (2015).
[76] *See* Eckler & Covington, *The New Multistate Bar Examination*, *supra* ("Questions Must Be Kept Under Lock and Key"). *See NCBE v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34 (N.D. Ill. 1980). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 1433 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 66974 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1989). *See also NCBE v. Saccuzzo*, 2003 WL 21467772 (S.D. Cal. 2003). See also *NCBE v. Multistate Legal Studies, Inc.*, 413 F.Supp.2d 485 (E.D. Pa. 2005). *See also NCBE v. Multistate Legal Studies, Inc.*, 458 F.Supp.2d 252 (E.D. Pa. 2006). (Collectively, reflecting proposition that if you ever dare speak the contents of the NCBE's multiple-choice questions outside of a test center, the NCBE will unsuccessfully try to destroy you and everything and everyone you love.)
[77] NCBE Testing Task Force, *Phase 1 Report*, *infra*, at 9.
[78] Klein & Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups* 66 B. Exam'r 15 (1997) ("Klein & Bolus, *Differences Among Ethnic Groups*").
[79] *See* NCBE, IRS Form 990, l. 20 (2016). *See also* NCBE, IRS Form 990, l. 20 (2018). (Reflecting compensation for CEOs Erica Moeser & Judith Gundersen from $342,007 to $405,005).
[80] *See* Cal. St. Auditor, *The State Bar of California: It Needs Additional Revisions to Its Expense Policies to Ensure That It Uses Funds Prudently*, 2017-030, 2 (2017) ("the State Bar identified alcohol purchases totaling $156,900 for events, meetings… does not require its lobbyists to justify the amounts they bill, which totaled $768,000 from 2014 to 2016"). *Cf.* St. B. Cal., *Agreement Between the State Bar of California and Grader for the California Bar Exam* (2019) (compensating exam graders at a rate of $3.25 per essay and $3.75 per performance test in addition to low flat fees). *See* St. B. Cal., *2017 Financial Statement and Independent Auditor's Report of the State Bar of California* 12 (2018) ("St. B. Cal., *2017 Financial Statement*") ("OPERATING REVENUES… Examination application fees… 20,077,228").

didn't have the "legal skills and abilities" necessary to pass the exam.[81] After the NCBE had taken the minorities' money enough times, they "can pass if they are given enough opportunities to demonstrate their abilities… [they] simply need more time [and exam fee payments] than their classmates to make up for shortcomings in their educational backgrounds before entering college or law school."[82] Wait, but how was it established that the exam measured "legal skills and abilities" in the first place? "The exam works about the same way for everyone," explained the NCBE's pseudoeugenicists Drs. Klein & Bolus.[83] It was all the minorities' fault, all of the time. By 2007, the exam was still serving its original purpose.[84] "[T]he MBE average for the Black group was about 11.4 points less than the average for the White group."[85]

To date, the bar exam has not autonomously become a valid measure of attorney competence. After a lifetime of assisting the NCBE deceive the public about the exam's validity, "the most fundamental consideration in developing tests and evaluating tests… [the] necessary condition for the justifiable use of the test,"[86] "psychometrician" Susan M. Case, Ph.D. relented and admitted that the whole thing had been a bluff. However, she followed the strategy that she and her colleagues had now developed, using the word "relevancy" instead of "validity" to conceal the exam's psychometric deficiency. "[S]ome of the complaints expressed… *The bar exam is irrelevant.* Complaining about the relevance of the bar exam distracts from the examinee's job, which is to pass the bar exam. (Besides, current examinees who suggest eliminating the bar exam entirely would not succeed in doing so within a window of time that is relevant to them anyway.)"[87] But the NCBE was not to blame for the exam's lack of "relevancy," and resulting lack of validity. In keeping with the strategy developed by Drs. Klein & Bolus, Dr. Case explained in *Failing the Bar Exam—Who's at Fault?* that "Some of the Fault of Failure Lies with the Examinees… Some of the Fault of Failure Lies with the Law Schools."[88] Having completed her extensive journey of racist and fraudulent gaslighting on the NCBE's behalf as its psychometrician, Dr. Case retired at the end of that year.[89] Sure, it might be awkward years later to explain to the AERA, APA, and NCME where she had come up with that new psychometric property

[81] Klein & Bolus, *Differences Among Ethnic Groups, supra*.
[82] *Id.*
[83] *Id.*
[84] Douglas R. Ripkey & Case *A National Look at MBE Performance Differences Among Ethnic Groups*, 76 B. Exam'r 23 (2007).
[85] *Id.*
[86] *Standards*, *supra*, at 11.
[87] Susan M. Case, Ph.D., *The Testing Column: Failing the Bar Exam—Who's at Fault*, 82 B. Exam'r 34 (2013) ("Case, *Who's at Fault*").
[88] *Id.* at 33–34.
[89] Case, *The Testing Column: Final Musings*, 82 B. Exam'r 23 (2013).

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of "relevancy," or the psychometric standards that made minorities responsible for the 2015 addition of Civil Procedure to the MBE and all the exam's other problems. But it was good money.[90]

The whole thing might have unraveled in 2017 one day if the highest court in California asked the NCBE's partner agency there to investigate "(1) identification and exploration of all issues affecting California bar pass rates; (2) a meaningful analysis of the current pass rate and information sufficient to determine whether protection of potential clients and the public is served by maintaining the current cut score…"[91] Surely the State Bar of California's executive attorneys and Dr. Bolus wouldn't lie to the Supreme Court of California in publicly available reports? Unless they did. In an effort to prevent the public from learning the truth about these decades of racist and fraudulent gatekeeping, the State Bar of California fired the executive director for testifying to the Legislature that "there's no good answer" why California's cut score was set as high as it was.[92] The State Bar's new Executive Director, Leah T. Wilson, would be willing to say whatever it took to protect the State Bar's $20 million annual revenue machine that "protected the public" from the "overcrowded condition of the bar," "keeping pure the Anglo-Saxon race." To bury the truth lost in Dr. Bolus's 1982 report,[93] Ms. Wilson pretended the State Bar of California had only worked with the "independent" Dr. Bolus for the preceding four years.[94] The mostly meaningless 305-page report would pretend that Civil Procedure hadn't been added to the MBE in 2015, coinciding with the dropping pass rate.[95] Why include that information in the report when the minorities' changing "mix" could be made to blame instead?[96]

[90] *See* NCBE, IRS Form 990 7 l. 15 (NCBE reportable compensation of $209,952 and other compensation of $26,432),
[91] Letter from C.J. Tani G. Cantil-Sakauye to President James P. Fox & Exec. Dir. Elizabeth R. Parker, S. Bar. Cal. (Feb. 28, 2017).
[92] Letter from Assemb. Mark Stone to C.J. Cantil-Sakauye 2 (Mar. 2, 2017).
[93] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1, 66 ("…In short, it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law…" at 1, data showing MBE overwhelmingly "poor" or "very poor" measure of legal skills at 66).
[94] Letter from President Michael G. Colantuono and Exec. Dir. Leah T. Wilson, St. B. Cal. letter to C.J. Cantil-Sakauye 5, 149–184 (Dec. 1, 2017) ("*2017 Final Bar Exam Report*") (St. B. Cal. Exec. Dir. deceiving Supreme Ct. of Cal. by describing Dr. Bolus as "independent" and identifying only four out of the 38 or more years Dr. Bolus had worked for the State Bar, Dr. Bolus's own report beginning at 149 not correcting Supreme Court, blaming "change in '*mix*' of test takers," while also feigning ignorance of 2015 addition of Civil Procedure to MBE. Page numbers refer to overall digital document, not those printed on page).
[95] Joe Palazzolo, *The Bar Exam Is About to Get Harder*, Wall St. J., Mar. 7, 2013. Staci Zaretsky, *California Bar Exam Results Reveal Worst Pass Rate In Nearly 30 Years — But It's Not All Bad News*, Above the Law, Nov. 20, 2015. Staci Zaretsky, *California Bar Exam Passage Rate Reaches 32-Year Low*, Above the Law, Nov. 21, 2016.
[96] *Id.* at 151.

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And as for the bar exam's validity? The "degree to which evidence and theory support the interpretations of test scores for proposed uses of tests… therefore, the most fundamental consideration in developing tests and evaluating tests… [a] necessary condition for the justifiable use of the test"?[97] The bar exam must have been extremely valid, since the "independent" Dr. Bolus "who has been responsible for assessing the validity of each administration of the CBX for the last four years."[98] The only way the bar exam would not be valid is if the State Bar of California President and Executive Director were flagrantly lying to the California Supreme Court. And surely Dr. Bolus would have corrected the Supreme Court and public if the State Bar President and Executive Director had misstated their 38-or-more-year relationship and his purported four years assessing the exam's validity.

Actually, Dr. Bolus didn't do that. Instead, he went along with the lies, as he had for the past 38 or more years. He did not correct the California Supreme Court as to only having worked for the State Bar of California for the previous four years. He then made only one mention of validity in his whole report, and did so in a footnote. (That had become his favorite place to hide information that didn't blame minorities for not being able to pass an exam designed to exclude minorities.) Buried in one of his footnotes hundreds of pages into the overall report, "Validity is *another* major psychometric property of a test. Data available to this study precludes an evaluation of any changes that may have occurred since 2008 in any of the various measures of validity that are used."[99] Although he determined that minorities changing "mix" and "other factors" contributed to the declining passage rate, but not the 2015 addition of Civil Procedure to the MBE[100] omitted from all 305 pages, he also admitted there wasn't evidence of the exam's relevancy.[101] "Finally, this study did not address whether the content of the [California Bar Examination] remains relevant to assessing the minimum competency to practice law, or whether the current standard remains appropriate in today's practice environment. These are issues that would also require different data and study methods." [102] Hmm, some psychometricians might call that validity, but not Dr. Bolus, the NCBE and State Bar of California's psychometrician of at least 38 years. Despite its flagrant lie, the State Bar of California had not assessed the exam's validity since 1982 when it learned that its racist gatekeeping tool was still not useful for a purpose other than racist gatekeeping.

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[97] *Standards*, *supra*, at 11.
[98] *2017 Final Bar Exam Report, supra*, at 50.
[99] *Id.* at 159 n. 8 (emphasis added). *Cf. Standards*, *supra*, at 11 ("the most fundamental consideration in developing tests and evaluating tests… [a] necessary condition for the justifiable use of the test").
[100] Palazzolo, *supra*.
[101] *2017 Final Bar Exam Report, supra,* at 151–52.
[102] *2017 Final Bar Exam Report, supra,* at 152.

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Meanwhile, diploma-privileged attorney Judith Gundersen had completed her decades-long ascension to apex leadership of this national clan of bar examiners, accepting promotion to CEO from her previous role as Director of Test Operations.[103] As the new CEO in 2017, Ms. Gundersen could explain how the 2015 addition of Civil Procedure to the MBE's[104] coinciding with the national decline in pass rates was not a causal factor. Or in the alternative, she could just blame it on the minorities and avoid acknowledging the fact that the exam had changed at all, the same racist and fraudulent gaslighting strategy used by NCBE & State Bar of California psychometrician Dr. Bolus against the Supreme Court of California. "I understand the concern, when there are dropping pass rates. It isn't the exam… But if scores continue to drop I would expect there to continue to be concern over, 'Is the exam somehow changing?'" Ms. Gundersen asked a reporter in an interview about her own new role as the top diploma-privileged racist gatekeeper overseer.[105] Although the factually accurate answer to her own question would have been "yes, we added a new subject of law to the exam two years ago," Ms. Gundersen then stopped talking after her own posed question of "Is the exam somehow changing?" She then pivoted the interview to her claim that she wished she had taken the bar exam.[106] "…I don't know. I'd have to see what our validity studies show us. I need to let the evidence unfold."[107]

Given that Ms. Gundersen, like her psychometrician and California counterparts, knew to gaslight the public about the most material change to the exam two years prior, it is likely she was also aware of Drs. Klein & Bolus's 1982 study showing the MBE was an overwhelmingly "poor" or "very poor" measure of legal skills. But disclosing this would not have been a good public relations move, particularly given the NCBE's reliance upon repeat business. Two years later in 2019, Ms. Gundersen would indeed hire a psychometrician to assess the bar exam's validity, which would backfire and further draw attention to the NCBE's true purpose of "protecting the public" from the "overcrowded condition of the bar," a "question of keeping pure the Anglo-Saxon race." Someone at the NCBE forgot to give Chad Buckendahl, Ph.D. the memo about not studying the exam's

[103] *See* Karen Sloan, *New Bar Exam Leader Looks to Future of the Test*, Legal Intelligencer (Sept. 7, 2017). (After accepting promotion from Director of Test Operations to President and CEO of NCBE in 2017, Ms. Gundersen feigning ignorance as to 2015 addition of Civil Procedure to MBE, "Is the exam somehow changing? …when there are dropping pass rates. It isn't the exam").
[104] Palazzolo, *supra*.
[105] Sloan, *supra*.
[106] *Id.* ("I didn't take a bar exam. I was born here. I went to school here. I never practiced outside of Wisconsin, so I never needed to. I suppose if I were my 25-year-old self and I could see where I was right now, I'd say, 'Hmmm, Judy, maybe you should take a bar exam just for street cred 30 years from now.' But of course, I would have never foreseen that").
[107] *Id.*

validity and blaming everything on the minorities.

As a result, Dr. Buckendahl determined that "tests arcane, obscure, or trivial aspects of the law that new practitioners should not be expected to know and are not reflective of minimum competence… does not mimic real practice because lawyers would look up the law and not rely only on memory in representing clients… …tests only memorization and no skills… questions are full of red herrings and intentionally tricky… written in such a way that there is not a clearly correct answer choice… not realistic or an effective way to test what lawyers do."[108] The report did not provide a shred of evidence for the bar exam's validity as a measure of attorney competence or legal skills. But as a means of keeping out an eighteenth or nineteenth Black lawyer from the legal profession? The data indicated that the NCBE needed to "[c]onsider the impact of any changes on all groups of candidates (e.g., gender, race, culture, socioeconomic background, etc.); the bar exam has to be fair to everyone… [stakeholders were] [c]oncerned about racial/ethnic and gender bias on the MBE/MCQs based on research, past exam content, and reports of performance gaps by test takers from historically underrepresented racial/ethnic groups" and the NCBE should be "[e]nsuring that the bar examination is free from racial/ethnic/gender bias [a]s a priority," there was an "[u]rgent need for NCBE to do more research into issues of bias and the performance gap by test takers from historically underrepresented racial and ethnic groups."[109] In other words, the NCBE's exam for "keeping pure the Anglo-Saxon race" and "protecting the public" from the "overcrowded condition of the bar" was still very much accomplishing its job, or a psychometrically valid measure of the legal profession's whiteness. But the public wasn't supposed to know this. Dr. Buckendahl wasn't invited back for the NCBE's second phase of "research."[110] The NCBE would have to lie extra hard to distract from Dr. Buckendahl's findings, possibly even involve the entire psychometrics community in their lie.

The NCBE Revisits and Further Reveals Its Fraudulent Lack of Justification

In the same way it pretended Drs. Klein & Bolus's 1982 study showing the MBE was a "poor" or "very poor" measure of legal skills didn't exist,[111] the NCBE would never draw attention to Dr. Buckendahl's 2019 report again. But it was no longer 1982, and the internet would never forget. In an increasingly transparent world that now rejected the

[108] NCBE Testing Task Force, *Phase 1 Report of the Testing Task Force* 9–10 (2019) ("NCBE Testing Task Force, *Phase 1 Report*").
[109] *Id.* at 4, 9, 10, 21.
[110] *See* NCBE Testing Task Force, Phase 2 Report of the Testing Task Force (2020).
[111] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1, 66 ("…In short, it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law…" at 1, data showing MBE overwhelmingly "poor" or "very poor" measure of legal skills at 66).

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NCBE's white supremacist objectives, the lack of evidence justifying the NCBE's existence was becoming more and more apparent. With the NCBE's gatekeeping activities having fraudulently gaslit aspiring attorneys to suicide,[112] the purpose of it all was being called into question.

Until now, the NCBE had managed to evade material questions about its exam. Anyone who spoke the words of a multiple-choice question outside of a test center would face years of mortal combat in our trial courts.[113] But what if someone tried to challenge the NCBE's nonexistent "validity," wouldn't that unravel the truth of it all? Not if the judiciary had the NCBE's back, notwithstanding nobody checking the truth of anything the NCBE was saying. "Failed bar examination applicants are continually looking for ways to bring their grievances to a court other than the admitting authority. This is one of those back-door attempts, plaintiff being a failed applicant for the California bar examination," wrote one federal district judge.[114] He wasn't alone—judges across California would similarly humiliate and annihilate any applicants or public members seeking to challenge the bar exam's accuracy or validity through the courts, even for something constitutional like public records.[115] But being backed by the judiciary does not mean being backed by the internet.

But by 2020, a pandemic was spreading across the globe, and this would pose an existential threat to the NCBE's tradition of revealing its secreted exam questions only in test centers packed like slave trading ships. The NCBE would nevertheless continue to push

[112] Staci Zaretsky, *Recent Law School Graduate Commits Suicide After Failing Bar Exam*, Above the Law, Nov. 29, 2016. Staci Zaretsky, *Bar Exam Suicides Are Disturbingly Common Among Recent Law School Graduates*, Above the Law, Dec. 2, 2016.

[113] *See* Eckler & Covington, *The New Multistate Bar Examination*, *supra* ("Questions Must Be Kept Under Lock and Key"). *See NCBE v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34 (N.D. Ill. 1980). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 1433 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 1981 WL 66974 (N.D. Ill. 1981). *See also NCBE v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1989). *See also NCBE v. Saccuzzo*, 2003 WL 21467772 (S.D. Cal. 2003). See also *NCBE v. Multistate Legal Studies, Inc.*, 413 F.Supp.2d 485 (E.D. Pa. 2005). *See also NCBE v. Multistate Legal Studies, Inc.*, 458 F.Supp.2d 252 (E.D. Pa. 2006). (Collectively, reflecting proposition that if you ever dare speak the contents of the NCBE's multiple-choice questions outside of a test center, the NCBE will unsuccessfully try to destroy you and everything and everyone you love.)

[114] *McEldowney v. NCBE*, 837 F. Supp. 1062, 1063 (C.D. Cal. 1993).

[115] *See Jane Does v. State Bar of California*, CPF-19-516803, (S.F. Super. Ct. 2019) (Nov. 25, 2019 order denying motion to proceed anonymously, "Petitioners failed the [bar exam]. Alleging a 'history of unfair admissions practices,' their lawyer sent document demands to the State Bar of California regarding the examination…"). *See also Christine Tuma v. State Bar of California*, CPF-20-517092, (S.F. Super. Ct. 2020) (files, records, and July 23, 2020 hearing transcript showing trial court judge described plaintiff's opposition to St. B. Cal.'s incorrect usage of Fed. R. Civ. P. in state law demurrer as "verg[ing] on frivolous," trial court responded to question about lack of legal citation or specific fact pattern by stating "I was referring to your entire opposition, sir," and subsequently prohibited counsel from asking questions).

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and push for the administration of bar exams as gatekeeping mechanisms, for everyone except for its own white-and-diploma privileged attorneys. More and more people began to question the true purpose of the exam, especially the strange coincidence that the NCBE was located in the one state that produced the most diploma-privileged attorneys. This in turn drew additional public attention to the NCBE's massive tax-exempt wealth, which was readily available across the internet.[116] And no one could find evidence of the bar exam's validity as a measure of attorney competence or legal skills. A diploma privilege movement exploded across the country, extending even as far as Puerto Rico.

The NCBE would have to lie extra hard to survive. In response to the diploma privilege advocacy, the NCBE released a white paper stating, "NCBE is confident in the validity, reliability, and fairness of the bar exam because the bar exam has been carefully developed and vetted to meet professional testing standards promulgated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education and set out in the *Standards for Educational and Psychological Testing* (AERA, APA, NCME, 2014)."[117] Surely, no one would check to see if these three professional associations actually endorsed the NCBE, as its public contention suggested. No one had actually checked the NCBE psychometricians' many self-citations for the propositions that minorities were to blame for their performance on this exam because of their preexisting "differences"—so what were the odds that anyone might purchase this psychometrics treatise to see if it supported what the NCBE's claims about the bar exam's validity as a measure of attorney competence or "public protection"? The NCBE only published select articles from *The Bar Examiner* from a relatively safer time period starting in 1997, believing this would prevent the public from learning the truth. But it was no longer 1982, and in any event, some clever minority had located that very painful 1982 report and duplicated the whole thing using a portable book scanner.[118]

On the face of it, there appears to be no evidence that even of the three professional associations listed, the AERA, APA, or the NCME agreed to be involved in the NCBE's massive fraud in any way whatsoever. Also, it was extremely unlikely that all 241 pages of the cited book or the 232 standards described therein supported the "validity, reliability,

[116] *See* NCBE, IRS Form 990, 1 ll. 12, 20, 34 l. 7 (2016). *See also* NCBE, IRS Form 990, ll. 12, 20, 37 l. 1 (2018) (Growth in total annual revenue from $22,742,038 to $25,682,598, growth in total assets from $103,152,195 to $122,482,374, growth in Ms. Gundersen's compensation from $156,614 to $342,007).
[117] NCBE, *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020* 5 (2020) ("NCBE, *Pandemic Bar Exams*").
[118] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 1, 66 ("…In short, it is questionable whether the typical bar exam is a sufficiently good indicator of the degree to which an applicant is prepared to practice law…" at 1, data showing MBE overwhelmingly "poor" or "very poor" measure of legal skills at 66).

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and fairness of the bar exam,"[119] especially considering the exam's original design as a means of keeping out a twentieth or twenty-first Black lawyer from the legal profession.[120] Perhaps the NCBE assumed those diploma privilege advocates would never bother to obtain a copy of *Standards*, let alone read it without the assistance of a psychometrician.[121] Certainly the minorities with their preexisting "differences" in "legal skills and abilities" would not be able to understand the words of *Standards*. But it is no longer 1982. And with the advent of the internet, it is extremely dangerous for a national clan of discriminatory and fraudulent gatekeeping lawyers to cite a reference that completely contravenes the clan's position. The NCBE's racist presumption about whether the minorities were able to verify the NCBE's claims would be thwarted once more.

First, the very psychometrics treatise cited by the NCBE's expressly said, "It is incorrect to use the unqualified phrase, 'the validity of the test.' …Statements about validity should refer to particular interpretations for specified uses."[122] The NCBE was originally created in response to the "question of keeping pure the Anglo-Saxon race,"[123] but its founders used the phrase "overcrowded condition of the bar"[124] because they were afraid of the three Black lawyers, at least one Harvard-educated, who thwarted the ABA's application security by having names similar to their white counterparts. The NCBE still uses it for this purpose—they continue to cower in fear of those three Black lawyers from a century ago, demonstrated by its concealment of its first few volumes of *The Bar Examiner* on its website. (The later ones are still racist, too.) Accordingly, the NCBE must decide whether it admits the bar exam's purpose is still for "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar." If it did so, it could indeed argue that the bar exam is a very valid measure of its applicants' white privilege. However, the NCBE occasionally contends that the bar exam's purpose is to "protect the public" by measuring the minimum competence for entry-level practice.[125]

Even if the NCBE is assisted by given the benefit of the doubt about its defective statements regarding the bar exam's "validity," the NCBE's own data shows it is a completely invalid measure for minimum competence for entry-level practice. Amongst the 232 *Standards* set forth by the AERA, APA, and NCME, 26 of the standards pertain to

[119] NCBE, *Pandemic Bar Exams, supra* at 5.
[120] Since Black lawyers had now making it to the U.S. Supreme Court bench by this point in time, the original purpose of the bar exam had long been obviated.
[121] Again, California law does not set forth restrictions on who can perform psychometrics evaluation based upon a psychometrics minimum competency requirement. This appears to be true in all other states as well.
[122] *Standards*, *supra*, at 11.
[123] Auerbach, *supra*, at 66.
[124] *Editorial*, 1 B. Exam'r 211, *supra*. *See also* Wickser, *supra.*
[125] NCBE, *Pandemic Bar Exams, supra* at 6.

a test's validity, "the most fundamental consideration in developing tests and evaluating tests… [a] necessary condition for the justifiable use of the test."[126] However, the NCBE does not use any of those standards, so they need not be analyzed individually. Also, there is no separate psychometric property called "relevancy." A test that is completely irrelevant to the thing it claims to measure lacks "validity." In 1982, the MBE was a "poor" or "very poor" measure of legal skills.[127] At the end of psychometrician Dr. Case's career, after a long life of working for the NCBE, she said of the bar exam's validity, "[S]ome of the complaints expressed… *The bar exam is irrelevant*. Complaining about the relevance of the bar exam distracts from the examinee's job, which is to pass the exam. (Besides, current examinees who suggest eliminating the bar exam entirely would not succeed in doing so within a window of time that is relevant to them anyway.)"[128] In 2019, Dr. Buckendahl determined that the bar exam "tests arcane, obscure, or trivial aspects of the law that new practitioners should not be expected to know and are not reflective of minimum competence… does not mimic real practice… tests only memorization and no skills… full of red herrings and intentionally tricky… written in such a way that there is not a clearly correct answer choice… not realistic or an effective way to test what lawyers do."[129] The NCBE would have to compensate the AERA, ARA, and NCME very handsomely to explain how a test that is completely irrelevant to its specified use can simultaneously be very, very valid.

A minimally or reasonably competent national clan of bar examining lawyers would cite to the specific place that supports its position, or in the case of *Standards*, the specific standard or standards that supported its stated positions. It does not appear from the NCBE's white paper that any of the attorneys—subject to the Wisconsin OLR's jurisdiction—ever actually picked up the book it was citing. In its 2020 white paper, the NCBE wrote, "this is not the place to respond to the unfounded and unsubstantiated criticisms that some commentators are directing at the bar exam…"[130] Indeed, the place to establish the bar exam's validity for a specified purpose would have been at the NCBE's inception in 1931, not in a 2020 white paper urging all states to proceed with bar exams through a pandemic. But in any event, bar exam opponents need not bring their own evidence for their criticisms. When Dr. Buckendahl measured the bar exam's actual psychometric validity the year before,[131] it completely backfired and revealed that the

[126] *Standards*, *supra*, at ch. 1.
[127] Klein & Bolus, *Clinical Legal Skills*, *supra*, at 66.
[128] Case, *Who's at Fault*, *supra*, at 34.
[129] NCBE Testing Task Force, *Phase 1 Report*, *supra* at 9–10 (note NCBE, *Pandemic Bar Exams* white paper's omission of any reference to the Phase 1 Report by Dr. Buckendahl, instead linking to NCBE Testing Task Force, *Phase 2 Report*, containing 72 pages of meaningless information).
[130] NCBE, *Pandemic Bar Exams, supra* at 6.
[131] NCBE Testing Task Force, *Phase 1 Report*, *supra*.

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diploma privileged gatekeepers' industry was a complete fraud. Accordingly, it does not appear that the NCBE's products satisfy any of the 232 psychometric *Standards* developed by the AERA, ARA, and NCME. (But perhaps they will contend otherwise.)

It further appears that the NCBE has not read the first few pages of *Standards*. Had the NCBE done so, it would have encountered the warning that *Standards* "has been repeatedly recognized by regulatory authorities and courts as setting forth the generally accepted professional standards that developers and users of tests and other selection procedures follow. Compliance or noncompliance with the *Standards* may be used as relevant evidence of legal liability in judicial and regulatory proceedings."[132] Because validity is a "necessary condition for the justifiable use of the test," and the NCBE had learned of the MBE's overwhelmingly "poor" or "very poor" validity as a measure of legal skills, the NCBE lacked the necessary condition and justification for the harm it has inflicted and the money it has accepted. By its own admission, the NCBE has prevented minorities and women from entering the legal profession. "[I]t is true that differences in average performance on the bar exam tend to be observed across racial/ethnic groups…"[133] Indeed, the NCBE was founded to answer the "question of keeping pure the Anglo-Saxon race,"[134] and to eliminate the "overcrowded condition of the bar."[135] The NCBE admits that the effects of its work end up fulfilling this purpose, though they have quietly changed their motto to "protecting the public," along with white supremacist attorney associations across the country. The NCBE has fraudulently gaslit attorney applicants into taking their own lives in addition to taking those applicants' money.[136] In encouraging attorney admissions agencies across the country to administer and enforce the bar exam as a requirement, the NCBE caused attorney applicants to suffer exposure and infection by COVID-19, though this admittedly responds to its original problem of the "overcrowded condition of the bar."[137]

Upon being confronted with the NCBE's lack of justification and good faith in continuing to administer the bar exam through the pandemic, Ms. Gundersen published a video recording her nationwide threat intended to chill the speech of the diploma privilege

[132] *Standards*, *supra*, at 2.
[133] NCBE, *Pandemic Bar Exams, supra* at 6.
[134] Auerbach, *supra*, at 66.
[135] *Editorial*, 1 B. Exam'r 211, *supra*. See also Wickser, *supra*.
[136] *Recent Law School Graduate Commits Suicide After Failing Bar Exam*, *supra*.
[137] *Id*. Morgan Gstalter, *Law graduate tests positive for coronavirus after taking in-person bar exam*, The Hill, Aug. 4, 2020. E-mail from examinee to Wis. Bd. B. Exam'rs (Aug. 9, 2020). Taylor Soule (@TaylorOSoule), Twitter (Aug. 9, 2020, 3:35 PM), https://twitter.com/TaylorOSoule/status/1292590230479024129 ("Just got word that somebody who also took the Wisconsin bar exam has COVID symptoms and is getting tested. It NEVER had to come to this, and we should not have had to take an in-person bar exam in the middle of a global pandemic").

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movement. "I shared this Tweet with a group of administrators before our panel today because we had a meeting, and when I shared it with them, they have—they've been subject of extreme lack of civility and professionalism in the communications that they have received from some students or some graduates and in some cases conduct that borders on harassment, and so the administrators were talking about that this seems like this might come up as a result of the pandemic, I think something that was unforeseen, character & fitness issues arising for the way that, um, examinees are communicating with board staff and board volunteers, so I think that was surprising to hear that…"[138] However, the Wisconsin definition of harassment—like here in California and probably most of the nation—actually pertains to courses of conduct which serve no legitimate purpose, not individual instances of constitutionally protected speech about judicial-corporate relations.[139] Ms. Gundersen, a former criminal prosecutor, must have known that constitutionally-protected speech is not "harassment." She intentionally misstated the law for the improper purpose of chilling an entire demographic's constitutional rights, albeit unsuccessfully.

As a result of the NCBE attorneys' violations of the Wisconsin Rules of Professional Conduct, the nation's legal profession has largely remained "pure… Anglo-Saxon." And as admitted by the NCBE in the white paper attached herein, the bar exam unsurprisingly impacts women, requiring privilege (such as Wisconsin's diploma privilege) to surpass it. The NCBE attorneys' ethics violations have resulted in incredible financial distress, emotional distress, suicide, and other physical harm, for an evil white supremacist objective as well as tax-exempt enrichment. The ethics violations in this complaint have and will continue to cripple the judiciaries in each state, by impairing public trust in the judiciary as well as relations between attorney applicants, attorneys, and members of the bench. The list below is not an exhaustive list, and there are very likely many more attorneys subject to the Wisconsin OLR's jurisdiction that will avail themselves through your investigation:

[138] MiamiLawOfficial, *Miami Law/AALS JLE Online Legal Ed. Symposium: Panel 3 – Regulatory Views*, YouTube (Aug. 12, 2020, 39:54), https://www.youtube.com/watch?v=5pujygn3o4g?t=2394.
[139] *See* Wis. Stat. § 947.013 (Harassment: "with intent to harass or intimidate another person, [e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose").

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Brad C. Gilbert

Cherry Beth Hill

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Kenneth E. Kraus

Tracy K. Kuczenski

Sonja Alice Olson

April M. Southwick

Annie T. Walljasper

Erica Moeser

The attorneys listed herein have identified the NCBE as their employer as of August 1, 2020. If such identification was made in error by the attorney or the State Bar of Wisconsin, the attorney may not have violated the respective Rules of Professional Conduct described herein. Further, I have not cross-referenced the NCBE's IRS filings and the State Bar of Wisconsin's records to determine which other attorneys may previously have violated the Rules of Professional Conduct in connection with the NCBE's operations. It is unlikely that the only Wisconsin attorneys who violated the Rules of Professional Conduct in connection with the NCBE's operations are those who are presently listed. If my investigation and prosecution of other claims against the NCBE reveals other attorneys who have violated the Rules in Professional Conduct, I will update your office accordingly.

Again, your office is very uniquely situated to protect the nation's public from the ethics violations of the NCBE attorneys, which permitted white supremacy and fraudulent evidence to corrupt every tribunal in the country, and persist in threatening the rights and harms of future attorneys. Your immediate investigation and prosecution of these matters is greatly appreciated. There is an immediate, widespread, and overwhelming need to obtain restitution for members of the public from respondent attorneys. However, individual restitution agreements may impair the rights of individual victims. I would greatly appreciate the Wisconsin ORL coordinating any efforts to provide victim restitution with my office.

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I have not analyzed the applicability of the Wisconsin penal statutes to the above-detailed conduct, with the exception of Ms. Gundersen's frivolous claim of harassment to describe her opponents' political speech. In California, the NCBE's extensive fraudulent conduct would warrant criminal prosecution. It would warrant proportionate punishment for their crimes, which could never be satisfied by any of the NCBE attorney's life expectancies. Your office is requested to immediately refer this matter to the appropriate law enforcement agencies upon identifying criminal violations.

Violations of Rules of Professional Conduct

Wisconsin's Rules of Professional Conduct for Attorneys
Supreme Court Rules, Chapter 20

In nearly all if not all of the below-listed rules, there is a potential defense that the NCBE attorneys' conduct was not in a representative capacity and therefore not applicable. Without my further analyzing the decisional law on the Wisconsin Rules of Professional Conduct, I cannot assert with certainty whether this defense should constitute a safe harbor. In determining whether any attorney-client relationship elements should serve as a complete safe harbor for respondent attorneys, I request you consider the outrageous indifference to human rights, health, life, truth in science and evidence, and integrity of our courts the NCBE attorneys have displayed in their racist and fraudulent gaslighting.

Rule 5.2: Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

As you know, an attorney's claim that they acted at another's direction constitutes neither excuse nor justification for their conduct. Each attorney subject to your jurisdiction had an opportunity to independently verify each claim and position made by the NCBE and the "psychometricians" compensated and controlled by the NCBE as set out above. The evidence set forth above was obtained through publicly available documents and other resources that are not in the NCBE's unique control. The NCBE may—and probably does—have evidence indicating their historical conduct is even worse than is set out above. Each attorney subject to your jurisdiction that was admitted through Wisconsin's diploma privilege program was placed on notice that the NCBE's activities might not serve a proper purpose, and therefore that the attorneys' furtherance of those activities might violate the Rules of Professional Conduct. But they did it anyways, and were handsomely rewarded

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for it.

Rule 3.3: Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

…

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

…

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

As detailed above, each of respondent attorneys is and was responsible for making false statements of fact and law to every tribunal in the country, the American Bar Association's proceedings, and other adjudicative proceedings. At no point did respondent attorneys correct the falsity of the information they provided or hired "psychometricians" to hire. The NCBE expressly directs its false information at every tribunal in the country. "We serve admission authorities, courts, the legal education community, and candidates…"

As early as 1982, if not earlier, the NCBE was placed on notice that the MBE's validity as a measure of legal skills was overwhelmingly "poor" or "very poor," and that the Assessment Centers were a far superior measure of legal skills. But because Blacks and Asians fared better at the Assessment Centers than expected, whites did not fare as well with the Assessment Centers, and the Assessment Centers were not as profitable due to cost and lower prospects of repeat business, the NCBE abandoned the Assessment Centers as well as the report of their study's findings. This is not necessarily a violation of the duty of candor in of itself. It would not have been dishonest for the NCBE attorneys from openly

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pursuing their true mission of "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar." The NCBE attorneys' duty of candor would not have been violated if they admitted that another prevailing objective, in addition to their white supremacist mission, was their endeavor to ensure repeat business by requiring attorney applicants to repeatedly take the bar exam. The NCBE attorneys accomplished this by abandoning a testing method that was consistent with the practice of law, and using a method that would punish those working individuals who applied the skills they learned on the job—Blacks and single mothers, for example.

Specifically, that method was one that "tests arcane, obscure, or trivial aspects of the law that new practitioners should not be expected to know and are not reflective of minimum competence… does not mimic real practice because lawyers would look up the law and not rely only on memory in representing clients… tests only memorization and no skills… questions are full of red herrings and intentionally tricky… written in such a way that there is not a clearly correct answer choice… not realistic or an effective way to test what lawyers do." While utilizing such a method is not dishonest in of itself, the NCBE attorneys repeatedly and persistently presented this as a psychometrically valid measure of attorney competence. In reality, it was created to exclude a fourth or a fifth Black lawyer from the profession. It continued to serve that purpose, especially after the NCBE discovered and abandoned an alternative, more valid measure of legal skills that was more favorable to Black applicants.

Not only did the NCBE attorneys persistently make false statements to every tribunal in the country and the public, they hired other people to do it for them. The sophistication of the NCBE's racist and fraudulent gaslighting reveals no respect for truth whatsoever. I shall avoid an extensive discussion about the fact that these attorneys are responsible for assessing the "moral character" of applicants across the nation, because I know you will draw the overwhelmingly disgusting and repulsive inference. It would be one thing if Dr. Bolus made a one-time mistake and confused validity and reliability, though that would be quite strange for someone with a doctorate that holds themselves out as a psychometrician. No, the NCBE and Drs. Klein, Bolus, and Case engaged in an extensive and elaborate racist and fraudulent gaslighting scheme to deceive every tribunal in the country and the public at large. They claimed that live conferences showed how the bar exam was a very, very valid measure of whatever it was the NCBE was testing at the time—anything but whiteness. Of course, there would be no way for critics or the public to verify what had occurred at the purported conference, if it had happened at all. They relied primarily on self-citations to studies they claimed showed the "differences" of minorities from before the bar exam were responsible for the disparate pass rates. Much to the chagrin of these white supremacist pseudoeugenicists, a very clever minority

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thwarted their system with a $10,000 Sallie Mae bar prep loan that costs a $15,000 finance charge. He obtained licensure in two states, and also a portable book scanner that allowed him to duplicate their 1982 study findings about the Assessment Centers.

It was not enough for the NCBE attorneys and their "psychometricians" that they had fraudulently gaslit an attorney applicant into taking his own life. The following year, they deceived the California Supreme Court into thinking it must have been the minorities "mix" that caused the declining passage rate. It must not have been the NCBE's 2015 addition of a new subject of law to the MBE that caused the decline, because they omitted any acknowledgment or reference to it in the entire 305-page report, despite making and presenting lists about how bar exams from different years and periods were "similar." There appears to be no limitation as to how far the NCBE and its "psychometricians" are willing to go to attribute blame on minorities for anything and everything. Indeed, the NCBE is very much achieving its original mission of "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar," overcrowded by individuals such as myself.

In order to attack this "overcrowded condition of the bar" and pressure states into require applicants' novel virus exposure for attorney admission, the NCBE has now invoked the AERA, the APA, and the NCME in its extensive, racist, and fraudulent gaslighting business scheme. A reasonably honest lawyer would not reference an entire legal doctrine or treatise for a specific position. For example, a reasonably honest lawyer would not cite the entirety of the United States Constitution for a proposition that is unlikely to support their position. In this case, the attached white paper shows the NCBE doubling down on its fraudulent claims by contending that the AERA, APA, NCME, all 232 testing standards, and all 241 pages in *Standards* supports the NCBE's "confiden[ce] in the validity, reliability, and fairness of the bar exam because the bar exam has been carefully developed and vetted to meet professional testing standards promulgated by the [AERA, APA, and NCME] set out in the [*Standards* (2014)]." No, the bar exam was "carefully developed and vetted" to stop a fourth or fifth Black lawyer from entering the profession. (Fortunately, minorities always find a way, and the NCBE's white supremacist mission has been thwarted countless times over by individuals such as me.) Again, I have included the leadership of the AERA, APA, and NCME to correct me if my reading of *Standards* is incorrect, and the bar exam really does satisfy all 232 of the *Standards*.

On that note, it is a violation of Ms. Gundersen's duty of candor to intentionally misstate the law defining "harassment" in order to chill the valid free speech of an entire movement. Before her rise to CEO of her national clan of bar examiners, Ms. Gundersen was a criminal prosecutor. Ms. Gundersen knew or should have known the definition of "harassment" as defined by the Wisconsin statutes, and that it did not restrain political speech. Even if she did not know the definition of "harassment" despite her former

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profession, she could have inferred that political discussion was protected by the United States Constitution, knowledge available to most individuals with no formal legal education. (I imagine you might have something similar in the Wisconsin Constitution as well.) In Ms. Gundersen's defense, it does not appear as if she has experience with expressing her own honest opinions. In this context, it might be understandable that she would expect the same of others, and seek to punish them through falsifying their character and fitness applications. In either scenario, it is a violation of her duty of candor. Given Ms. Gundersen's extensive career in designing multiple-choice questions that were "intentionally tricky" with "red herrings, your office should take preventative measures to ensure she does not attempt to claim the vagueness of her anti-constitutional threat showed her lack of intent. She has spent decades deceiving applicants as to her intentions, and will likely try to do the same to you.

Ms. Gundersen's former career as a criminal prosecutor further demonstrates her knowledge that the bar exam was unrelated to minimum competence. Although it appears Wisconsin abolished the death penalty before her time, Ms. Gundersen was empowered to deliver the next highest penalty authorized by law to human beings she had never met. I suspect this is life without parole, which would be the case in most jurisdictions. In other words, every time she successfully fined or jailed an individual, she knew through her own diploma privilege that the public was not being protected by the bar exam. It is more probable that she spent those years putting Blacks in jail, and then pursued this career through the NCBE "protecting the public" from the "overcrowded condition of the bar," "keeping pure the Anglo-Saxon race." Sure, there were a lot of her own kind that she held back as well, like Anglo-Saxon single mothers trying to pursue a career in law. And this whole thing was pretty pointless by the time she started working at the NCBE, there were definitely at least twenty-two or twenty-three Black lawyers who had thwarted their racist masters and gained admission by this point. In terms of lawyers of color, there were so many of us at that point that we were definitely overcrowding the bar of her slave-owning ancestors' dreams. It's unclear what kind of sick and disgusting motive drove Ms. Gundersen and her colleagues to engage in the above-detailed conduct anyways. There are certainly other honest jobs in Wisconsin. Ms. Gundersen admitted to a news reporter that she lacked the "street cred" necessary to be the respected overlord of this racist gatekeeping system, but didn't give an explanation as to why she was going to do it anyways. At no point has she or any of her colleagues provided any reasonable explanation for their conduct.

I am sure that in enacting this rule, the Legislature only contemplated some lawyers misrepresenting facts, law, or evidence to one, maybe two courts in the course of their

careers. The NCBE attorneys have provided false facts and evidence to each and every tribunal in the country. The punishment for these outrageous violations should be proportionate.

Rule 3.1: Meritorious claims and contentions.

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

I incorporate by reference each point and authority set forth above. In order to prevent respondent attorneys from escaping justice, your office should make every effort to find that the "in representing a client" clause does not result in a safe harbor for the NCBE attorneys' discriminatory and fraudulent conduct. Each of the NCBE's violations of their duties of candor were unwarranted under law and available facts. At no point has the NCBE attorneys shown factual support or good faith for any of their conduct. All of the NCBE attorneys' conduct has served no other purpose than to harass and maliciously injure the public, but especially Blacks, Jews, women, inter alia. They should be punished accordingly.

Rule 3.5: Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;

(c) communicate with a juror or prospective juror after discharge of the jury if:

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(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Again, I incorporate by reference each point and authority set forth above. Most or all of the NCBE's communications and conduct has been directed to the nation's tribunals. I have not analyzed the relevant Wisconsin penal statutes to see whether the NCBE attorneys' conduct would warrant criminal sanctions. In California, they would likely have already been sentenced to several life sentences without parole. Also, in California, the State Bar likes to revoke certain attorneys' licenses and make them retake the California Bar Examination. Almost none of those attorneys ever pass the exam, so it is quite lucrative for the State Bar. I imagine it is within your office's power to issue such a sanction. If such a sanction is granted, examination security will be of the utmost priority. Respondent attorneys have repeatedly and persistently lied to every court and person about the exam and may be able to unfairly subvert the process to obtain their licenses back, placing the nation at great jeopardy. I have a number of clients who will happily proctor respondent attorneys' exams to ensure they are fairly administered, so please contact my office if this sanction is issued.

Rule 4.1: Truthfulness in statements to others.

(a) In the course of representing a client a lawyer shall not knowingly:

(1) make a false statement of a material fact or law to a 3rd person; or

(2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.

I incorporate by reference each point and authority set forth above.

Rule 4.4: Respect for rights of 3rd persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the

document or electronically stored information was inadvertently sent shall promptly notify the sender.

(c) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently shall:

(1) immediately terminate review or use of the document or electronically stored information;

(2) promptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

I incorporate by reference each point and authority set forth above. Note that the nearly all of NCBE's partner agencies have required attorney applicants to sign waivers of some sort. In many cases, those waivers ask attorney applicants to agree to die as an acceptable risk of participating in the NCBE's discriminatory and fraudulent business scheme. Clearly the "moral character determination" process has failed our profession, permitting these attorneys to allow law school graduates to agree to ***die*** without liability to them as a condition of pursuing careers in social justice. Should you choose to accept it, the burden falls to your office to terminate these repugnant attorneys who do not respect life.

Rule 8.1 Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by SCR 20:1.6.

I incorporate by reference each point and authority set forth above. I must admit

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that when this rule was enacted, the Legislature probably hadn't contemplated that this national clan of bar examiners would make false statements of material fact in connection with every attorney application in the country. If your office decides to prosecute on such grounds, I will make myself available to testify as to the extent of the NCBE attorneys' misrepresentations regarding all applications, especially the minority applicants' applications. In the event that this rule is interpreted to include statements made to the public, each and every racist and fraudulent gaslighting statement the NCBE attorneys made or paid a "psychometrician" to make in *The Bar Examiner*, the punishment and restitution should be appropriate. I'm sure Wisconsin's legislators aren't completely sick in the head, and didn't contemplate white supremacists making an entire publication about attorney admissions and creating an entire pseudoscience to blame everything anyone didn't ever like on minorities. Civil Procedure is a new subject on the MBE? Minorities did it. Minorities can't pass an exam designed to exclude them? Minorities did it. In prosecuting respondent attorneys' respective violations, your office should consider their overwhelmingly disgusting incentives and intentions in committing the violations. I am sure that your ordinary complaints involve people who lie about getting fired to avoid embarrassment, or about having been caught cheating on an exam one time. The NCBE attorneys went out of their way to hire social scientists for fraudulently inciting racial animosity and turning the American people against one another. Meanwhile, the NCBE's diploma-privileged attorneys sat back and enjoyed their cake. Deliver them to justice.

Rule 8.4 Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers;

(g) violate the attorney's oath;

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(h) fail to cooperate in the investigation of a grievance filed with the office of lawyer regulation as required by SCR 21.15 (4), SCR 22.001 (9) (b), SCR 22.03 (2), SCR 22.03 (6), or SCR 22.04 (1); or

(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).

I incorporate by reference each point and authority set forth above. I am sure that the NCBE attorneys did not individually and coincidentally perpetrate a lucrative nationwide scheme that succeeded based on racist and fraudulent gaslighting of every tribunal in the country and the public. Around the same time the NCBE was created for "keeping pure the Anglo-Saxon race" from the "overcrowded condition of the bar," the ABA made a farcical committee about the nation's "economic condition." The ABA shut it down after eight years when there was really no point in keeping up the deception.

The NCBE's diploma-privileged attorneys have kept up this fraud for nearly a hundred years. It is requested that your office take every measure possible to terminate their discriminatory and fraudulent activities.

Conclusion

By and through its partners, the NCBE attorneys have asked a generation of aspiring social justice advocates to agree to die and waive liability as a condition of participating in their lucrative and white supremacist system. I respectfully request that you prosecute these attorneys to the maximum extent of the law.

Your response is requested **no later than August 17, 2020**. Please do not hesitate to contact me with any requests for assistance. Thank you for your anticipated work protecting the public from this repugnant attorney conduct.

Sincerely,

Julian Sarkar

Enclosure

cc: President Robert G. Methvin, Jr., Board of Bar Commissioners, Alabama State Bar
cc: Chairperson of Committee of Law Examiners, c/o Executive Director Deborah O'Regan,

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Alaska Bar Association
cc: Chairperson David Lunn, Committee on Examinations, State Bar of Arizona
cc: Chairperson Kathryn L. Griffin, State Board of Law Examiners, Arkansas Judiciary
cc: Chairperson Robert S. Brody, Committee of Bar Examiners, State Bar of California
cc: Chairperson Sunita Sharma, Board of Law Examiners, Colorado Supreme Court Office of Attorney Regulation Counsel
cc: Chairperson Anne C. Dranginis, Connecticut Bar Examining Committee
cc: Chairperson Jennifer Wasson, Board of Bar Examiners, Supreme Court of Delaware
cc: Director Shela Shanks, Committee on Admissions, District of Columbia Court of Appeals
cc: Michele A. Gavagni, Executive Director of Florida Board of Bar Examiners & Chair of NCBE Board of Trustees
cc: Chairperson Sally B. Akins, Georgia Board of Bar Examiners
cc: Chairperson Gregory K. Markham, Board of Examiners, Supreme Court of Hawai'i
cc: Chairperson Lane V. Erickson, Committee on Bar Exam Preparation, Idaho State Bar
cc: President Andrew M. Raucci, Illinois Board of Admissions to the Bar
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cc: Chairperson Carol M. Park, Kansas Board of Law Examiners
cc: Chairperson Gerald F. Dusing, Board of Bar Examiners, Kentucky Office of Bar Admissions
cc: Executive Director, Louisiana Supreme Court Committee on Bar Admissions
cc: Chairperson Ann M. Courtney, Maine Board of Bar Examiners, State of Maine Judicial Branch
cc: Chairperson Jonathan A. Azrael, Maryland State Board of Law Examiners
cc: Chairperson Robert L. Harris, Massachusetts Board of Bar Examiners
cc: President Jeffery V. Stuckey, Michigan Board of Law Examiners
cc: President Douglas R. Peterson, Minnesota State Board of Law Examiners
cc: Chairperson Marcie F. Baria, Mississippi Board of Bar Admissions
cc: President Sandra L. Schermerhorn, Missouri Board of Law Examiners
cc: Chairperson Gary W. Bjelland, Board of Bar Examiners, State Bar of Montana
cc: Chairperson Mary J. Hewitt, Nebraska State Bar Commission
cc: Chairperson Richard M. Trachok, II, Board of Bar Examiners, State Bar of Nevada
cc: Chairperson Mary E. Tenn, New Hampshire Board of Bar Examiners
cc: Chairperson John Mills, New Jersey Board of Bar Examiners
cc: Chairperson Howard R. Thomas, New Mexico Board of Bar Examiners
cc: Chairperson Diane F. Bosse, New York State Board of Law Examiners
cc: Chairperson Kimberly Herrick, Board of Law Examiners of the State of North Carolina
cc: President Jane L. Dynes, North Dakota State Board of Law Examiners
cc: Chairperson, Mark K. Wiest, Board of Bar Examiners, Supreme Court of Ohio

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cc: Chairperson Juan Garcia, Oklahoma Board of Bar Examiners
cc: Chairperson Angela M. Franco Lucero, Oregon State Board of Bar Examiners
cc: Chairperson David R. Fine, Pennsylvania Board of Law Examiners
cc: Chairperson David A. Wollin, Board of Bar Examiners, Rhode Island Supreme Court
cc: Chairperson Michael A. Timbes, Board of Law Examiners, South Carolina Supreme Court
cc: Chairperson Susan M. Sabers, South Dakota Board of Bar Examiners
cc: President Bill Harbison, Tennessee Board of Law Examiners
cc: Chairperson Augustin Rivera, Jr., Texas Board of Law Examiners
cc: Co-chairpersons Mark Astling & Tanya N. Peters, Bar Examiner Committee, Utah State Bar
cc: Chairperson Keith J. Kasper, Vermont Board of Bar Examiners
cc: Chairperson Anita O. Poston, Virginia Board of Bar Examiners
cc: Chairperson Monica S. Wasson, Washington State Bar Association Board of Bar Examiners
cc: President Jason C. Pizatella, West Virginia Board of Law Examiners
cc: Chairperson Marc A. Hammer, Board of Bar Examiners, Supreme Court of Wisconsin
cc: Chairperson Brenda T. Wylie, Board of Law Examiners, Wyoming State Bar
cc: Melanie J. Lawrence, Interim Chief Trial Counsel, State Bar of California
cc: Assemblymember Mark Stone, Chair of Assembly Committee on Judiciary
cc: President Patricia Lee Refo, American Bar Association
cc: Press

National Conference
of Bar Examiners

Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020

April 9, 2020

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National Conference of Bar Examiners

Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020

The class of 2020 faces unprecedented challenges as a result of the COVID-19 pandemic, as does the American public. These challenges are especially being felt by low income and vulnerable populations. Decisions about how to meet the anticipated increased need for legal services, while ensuring public protection through the licensure process, are vested with each court. Tied up in such decisions, however, is the issue of how to minimize the financial impact on law school graduates resulting from potential delays in licensure. NCBE offers this paper to provide courts and admissions boards with information to assist them as they weigh options for allowing the class of 2020 to become licensed in the event the traditional bar exam cannot safely be administered.

CURRENT STATUS OF THE JULY BAR EXAM

The July bar exam is still scheduled to be administered on July 28–29, 2020. While the status of the exam administration might be in question at this time because of COVID-19 stay-at-home orders and social distancing measures, the scheduled administration date is still over three months away. The class of 2020 will complete law school coursework in early May.

As of April 7, 2020, six jurisdictions have postponed their exams—New York, Massachusetts, Connecticut, Hawaii, New Jersey, and Vermont—but the other 50 jurisdictions have not made any such announcements. Many of these jurisdiction administrators have told us that their boards intend to proceed with administering the July exam

as long as doing so is in compliance with public health guidelines and state or local orders in effect at that time.

NCBE will do everything we can to support these jurisdictions, their courts, and their graduates; we've committed to providing July bar exam materials to those jurisdictions that go ahead with the exam, *provided* there are enough examinees nationally to properly score and grade the exam. NCBE will assess the state of jurisdiction decisions about the July exam in early May to get a better idea of whether this is the case.

We understand the urgency of the situation and the plight of 2020 law school graduates. NCBE is actively exploring additional opportunities for them to become licensed in 2020. We have committed to provide bar exam materials for two fall bar exam administrations—September 9–10 and September 30–October 1—both of which will include the Uniform Bar Exam (UBE) and the opportunity for examinees to earn portable scores. We are serving as a central repository for up-to-date jurisdiction decisions and announcements about the July and fall exam administrations on our website at http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information.

Additionally, we are actively consulting with outside testing, technology, and exam security experts to evaluate alternative methods of testing, including options such as online, remote-proctored testing, if the traditional group setting must be canceled or modified.

DIPLOMA PRIVILEGE

Several courts have been asked to implement diploma privilege on an emergency basis in light of the uncertainty about whether the bar exam can be administered. Diploma privilege allows law school graduates to secure a license to practice without taking a bar exam. Those advocating for emergency diploma privilege present it as a solution to permit law graduates to become licensed so they can begin working and reduce the financial impact of the crisis on themselves as well as serve the millions of people whose lives have been upended as a result of the pandemic. These are worthy goals that NCBE applauds and shares. However, diploma privilege is not necessarily the best way to achieve them.

In Wisconsin, the only jurisdiction that grants diploma privilege, diploma privilege is limited to graduates of its two in-state law schools who comply with an extensive required curriculum as well as undergo a character and fitness investigation. (See https://law.wisc.edu/studenthandbook/04.0.html.)

Some of the various emergency diploma privilege petitions put forth in light of the pandemic have proposed granting temporary diploma privilege to in-state ABA-approved law school graduates to practice under supervision *until they can take and pass a bar exam*, which might be better categorized as "temporary limited practice" and is a solution NCBE supports. At least one petition has had no provision for requiring subsequent bar exam passage, and some have included a provision for a period of supervised practice under a licensed attorney in lieu of bar exam passage. Some are silent on the requirement of approval of character and fitness as a precondition to licensure. (Every US jurisdiction requires completion of a character and fitness investigation prior to being licensed.) And at least one petition for diploma privilege has included sharp criticism of the bar exam as an additional reason, beyond the current COVID-19 crisis, for implementing diploma privilege on a permanent basis.

It probably goes without saying, but diploma privilege-licensed lawyers gain *a local admission only*, so diploma privilege affects lawyer mobility. If graduates are not required to take a bar exam, they obviously would not have the benefit of earning a portable UBE score. Great strides have been made with the UBE in supporting mobility by allowing newly licensed lawyers to seek admission in multiple jurisdictions without having to repeat the bar examination. Moreover, some jurisdictions do not permit diploma-privilege lawyers to be admitted on motion, and new graduates admitted by diploma privilege might find themselves having to later take a bar exam should they relocate or seek to practice in multiple jurisdictions. (See http://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf, Chart 13.)

As those charged with the important responsibility of regulating the legal profession understand, public protection remains a priority even in this time of crisis. Diploma privilege in effect removes the public protection function vested in the courts and places it with the law schools, but with no independent, vetted, objective, or consistent final check on whether graduates are in fact competent to provide legal services. The public, and certainly legal employers, rely on passage of the bar examination as a reliable indicator of whether graduates are ready to begin practice.

Many law schools would take the responsibility of public protection seriously were diploma privilege to be instituted. That said, some law schools could feel pressures to pass large numbers of their students and/or individual students. Diploma privilege removes or curtails one of the criteria--bar passage--used by the ABA Council on Legal Education and Admissions to the Bar to determine compliance with accreditation standards. The accreditation of law schools serves a critical function of protecting prospective law students, as well as protecting the public.

Diploma privilege would create inconsistency in the qualifications of new lawyers (dependent on which school they attended) and introduce subjectivity into the standards for minimal competence to serve the public, with each ABA-accredited school deciding whether an individual student is qualified. This creates an extraordinary conflation of roles for law schools—to be both educator and licensing authority.

Academic assessments used in law school classes are prepared and graded by individual professors and are naturally of varying degrees of quality and rigor from one professor to the next and from one law school to the next. In contrast, the bar exam meets the professional standards for testing at the level of quality and reliability needed for a *licensure exam* and ensures consistent standards are applied to all who earn the privilege of practicing law.

Some of the petitions urging diploma privilege have suggested requiring a period of supervised practice (in lieu of passage of a bar exam) before licensing graduates under diploma privilege. This is viewed as offering an additional check on competency to practice. Supervised practice can provide valuable, real-world practice experience, but it can also be fraught with limitations and challenges that courts and admissions offices should be aware of. The problems mentioned above, in the context of law schools, of inconsistency in the qualifications of new lawyers and the subjectivity of standards applied for minimum competence would be present to an even greater extent due in part to the number of supervising attorneys that would be needed. Additionally, supervised

practice can create conditions for unequal opportunity, as students must find licensed attorneys to supervise them in order to qualify. Well-connected students might not struggle to find a licensed supervising attorney, but first-generation law students from socioeconomically disadvantaged families might find it difficult to do so. The courts need only look at the increasing difficulty faced by bar applicants seeking to secure sponsors in countries that have required periods of "articling" to observe this disparate impact. (See https://lsodialogue.ca/wp-content/uploads/2018/05/lawyer_licensing_consulation_paper_bookmarks-weblinks-toc.pdf.)

BETTER OPTIONS TO HELP THE CLASS OF 2020

It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic. Many jurisdictions are adopting or modifying temporary practice rules to permit graduates to work under the supervision of a licensed attorney until they are able to take the bar exam and obtain their results. Despite the potential problems noted above, supervised practice can be a good option to temporarily alleviate the financial hardships experienced by graduates facing delayed admission due to the pandemic. The courts in Tennessee, Arizona, and New Jersey have already issued orders implementing such measures to address the crisis. NCBE maintains a list of these orders and COVID-related bar admissions news on its website at http://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information. And the ABA recently adopted a policy resolution urging states to consider temporary admission pending bar exam passage. (See https://www.abajournal.com/files/2020_law_grad_limited_practice_resolution.pdf.)

Jurisdictions are also making other modifications to support students through the bar examination and admissions process, including extending application deadlines, relaxing refund policies, and relaxing or replacing notarized document and fingerprint card requirements. Such modifications are in addition to preparing to administer a fall exam in addition to or instead of the July exam. These and other measures should be considered and implemented to the extent possible to support law students.

PROFESSIONAL LICENSURE EXAMS—PUTTING THE BAR EXAM IN CONTEXT

The law is not unique in requiring a licensing exam before individuals are allowed to serve the public. Medicine, accounting, nursing, dentistry, piloting, architecture, and engineering are examples of other professions that require passage of one or more standardized examinations before an individual is permitted to work unsupervised in a profession.

All of us recognize the unprecedented need for nurses and doctors in this pandemic. We have not, however, seen calls to waive licensure exam requirements for medical or nursing students to become doctors or nurses. At the time of this writing, medical licensure exams have suspended testing because of COVID-19. For example, the USMLE Step 2 Clinical Skills (CS) test has been suspended with a tentative reopen date of June 1, 2020 (i.e., over a month before the first of the three scheduled bar examinations) (See https://www.usmle.org/announcements/). The licensure exam for nursing (NCLEX) is not being suspended nor the requirement to pass the exam

waived. Rather, testing is happening as of the time of this writing on a limited basis (only at certain test centers, with a limited number of test-takers per day.) (See https://www.ncsbn.org/14496.htm.)

THE BAR EXAM

Some of the proponents of diploma privilege argue not only that it is necessary because of uncertainty about whether the bar exam can be administered, but they also assert that the bar exam does not measure competence to begin practice. In fact, the exam is designed for exactly that purpose (a claim that can't be made regarding law school curricula) and has been used for decades to make licensing decisions.

The UBE consists of three exam components, many or all of which are also used by non-UBE jurisdictions. The Multistate Bar Exam (MBE) consists of 200 practice-centered, multiple-choice questions in seven core areas of law. Multiple-choice formats permit objective grading and sampling of a broad array of content contributing to the high reliability of scores. The Multistate Essay Exam (MEE) is a six-question essay exam that also covers core practice areas and offers assessment of candidates' ability to identify and analyze legal issues and show their analyses in writing. The Multistate Performance Test (MPT) consists of two 90-minute case simulations that require candidates to create a written product for a supervising attorney using a case file and a closed universe of legal resources. Samples of MBE questions and past MEE and MPT questions are available on NCBE's website at www.ncbex.org.

NCBE is confident in the validity, reliability, and fairness of the bar exam because the exam has been carefully developed and vetted to meet professional testing standards promulgated by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education and set out in the *Standards for Educational and Psychological Testing* (AERA, APA, NCME, 2014). NCBE has a professional and highly credentialed staff of psychometricians who ensure that NCBE's exams meet or exceed the *Standards*. NCBE's psychometricians have a collective 150 years of academic, testing, measurement, and test security experience. NCBE also consults regularly with a panel of outside testing experts and the Center for Advanced Studies in Measurement and Assessment (CASMA), a preeminent educational measurement organization (https://education.uiowa.edu/centers/casma).

The claim that individuals who pass the bar examination have mastered the knowledge and skill of newly licensed lawyers may not be immediately self-evident. Validation is the process by which testing organizations such as NCBE gather and evaluate the evidence to support such claims. The content tested on the bar examination has been validated through practice analyses conducted by independent measurement firms, most recently in 2012 and again in 2019 as part of NCBE's Testing Task Force study. Information about that study and the results of the practice analysis can be found at https://testingtaskforce.org/research/phase-2-report/. The job responsibilities identified through a practice analysis serve as an anchor point in the validation process. Although NCBE periodically evaluates other types of validity evidence (e.g., internal structure of tests, relationship of test scores to other relevant outcomes, studies of test fairness), a practice analysis serves as the primary source of validity evidence for the use of scores on licensure examinations. No such validation process is done on law

school curricula or course work, and the purpose of law schools is to educate, not to protect the public by ensuring competence to practice under a general license.

Some arguing for diploma privilege have erroneously remarked that NCBE created the Testing Task Force because of recognized deficiencies with the bar exam and to study *whether* the exam tests the knowledge, skills, and abilities needed for practice. In fact, NCBE has confidence that the current exam is a valid measure of minimum competence for entry-level practice. NCBE created the Testing Task Force in January 2018 to ensure that the bar exam *continues* to test the necessary knowledge, skills, and abilities in the face of a changing profession and world. It would be irresponsible if licensing authorities did not periodically conduct such studies. NCBE is undertaking this significant three-year study for the benefit of the jurisdictions that rely on us to provide a bar exam that is of the highest quality and appropriate for licensure.

NCBE TEST DEVELOPMENT AND SCORING

The bar exam components developed by NCBE are created largely through the efforts of volunteer drafters/lawyers who are experts in the legal subjects being tested. Faculty members from 32 law schools serve on our test drafting committees, and every drafting committee also has members who are practicing lawyers and judges. There is also widespread jurisdiction participation on all of our policy committees, including our test policy committees. In short, the jurisdiction bar admission offices and courts that we serve are heavily involved in setting policy and ensuring the appropriateness of bar exam questions for licensure purposes.

NCBE's test development process is lengthy and thorough. All items that appear on the UBE are pretested, reviewed by outside content experts, and subject to bias review. All MEE and MPT items are reviewed in depth by test policy committee members well in advance of administration. Test development is also guided by best practices in measurement science for reliability and validity. (See https://thebarexaminer.org/wp-content/uploads/PDFs/BE-860317-TestingColumn.pdf; https://thebarexaminer.org/wp-content/uploads/PDFs/750306-testing.pdf; https://thebarexaminer.org/wp-content/uploads/PDFs/740105-kane.pdf.)

CRITICISMS OF THE BAR EXAM

While this is not the place to respond to the unfounded and unsubstantiated criticisms that some commentators are directing at the bar exam, we feel compelled to make two important points. One relates to charges that the bar exam disproportionately burdens and disadvantages people of color and women. The second relates to recent declines in bar passage rates.

Regarding disproportionate impact, it is true that differences in average performance on the bar exam tend to be observed across racial/ethnic groups. However, the same or greater differences in average performance across racial/ethnic groups also tend to be observed in performance in law school (law school GPAs), on the LSAT, and in undergraduate GPAs. Similarly, gender differences in average performance observed on the bar exam are also observed in law school and on the LSAT: men tend to perform better, on average, on multiple-choice exams (like the MBE and the LSAT), and women tend to perform better, on average, on essay exams (like the MEE and MPT portions of the bar exam). To say that the bar exam disadvantages particular racial/

ethnic groups ignores the bigger picture of educational pipeline-related differences in performance that are observed in law school and prior to law school. These differences are not eliminated, nor are they exacerbated, by the bar exam. They are the result of deeply rooted societal problems that create unequal educational (and other) experiences and opportunities. NCBE cannot erase the problems that contribute to the performance gap, but we are committed to contributing to solutions, such as through our partnership with the Council on Legal Education Opportunity, Inc. (CLEO), and taking every measure to ensure the bar exam is free from bias.

Regarding the decline in bar passage rates, performance of graduates on the bar exam has declined since 2014. That decline has been of great concern to NCBE, as we know it has to all courts and bar admissions offices. It has been well documented by NCBE and others that the decline in bar exam performance correlated with a decline in the credentials of law students, such as undergraduate GPAs and LSAT scores that began with the recession of 2008. (See https://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/incoming-law-students-have-weaker-exam-credentials; https://excessofdemocracy.com/blog/2018/9/mbe-scores-drop-to-34-year-low-as-bar-pass-rates-decline-again; https://excessofdemocracy.com/blog/2018/4/february-2018-mbe-bar-scores-collapse-to-all-time-record-low-in-test-history; https://lawprofessors.typepad.com/legalwhiteboard/2016/01/in-late-december-2014-i-posted-a-blog-analyzing-how-the-distribution-of-matriculants-across-lsat-categories-had-changed-si.html.)

Further, those declines have been shown to reflect actual declines in demonstrated proficiency by examinees on the bar exam. When MBE scores in July 2018 hit what we hope is their low point, we looked at those MBE questions that had been used in a previous July exam. We found a performance decrease on those questions that was consistent with the decrease in the mean scaled score, indicating that the July 2018 examinees performed less well than previous July examinees. Looking at the LSAT scores of the examinees who had entered law school in 2015 and were the primary group of first-time takers of the July 2018 bar exam, we found that the group's LSAT scores were the lowest they had been since at least 2010. The entering class of 2015 also had the fewest LSAT takers, the fewest applicants, and the lowest first-year enrollment since at least 1995. (See https://thebarexaminer.org/article/fall-2018/the-testing-column-july-2018-mbe-the-storm-surge-again/.)

While law schools are not obliged to hold their entering classes to the exact same standards year after year, there should be no compromise in ensuring that students' competence to enter practice meets the jurisdictions' determination of minimum competence. The bar exam is the most important reliable, independent, objective assessment of graduating student competence. Law schools are student-centric and understandably have an interest in seeing *all* their graduates authorized to practice law. A court's interest, in contrast, is to ensure that the public can rely on the fact that the individuals who receive a license are, in fact, proficient to represent the public.

CONCLUSION

There are good reasons the jurisdictions have relied upon the bar exam for decades as a fair, objective, valid, and efficient method for making licensing decisions, rather than relying upon diploma privilege. Those reasons are still compelling in the

face of the current crisis. That is why NCBE has been working diligently to offer solutions to jurisdictions that will enable them to maintain a bar admissions process that ensures the public is served by competent and ethical lawyers while also considering the financial impact of the crisis on law graduates seeking admission.

We are developing webinars and FAQs to prepare bar administrators for administrative issues and questions from applicants related to the three exam administrations (July and two fall dates). And we are providing information, like this white paper, to assist courts and admissions offices in making difficult decisions about the bar exam and licensure.

Of course, none of us knows for sure what will happen with COVID-19 or when in-person testing can be safely carried out. That is why NCBE is also exploring alternative methods for jurisdictions to conduct testing of bar applicants. One method being used for academic tests in law schools and for some *admissions* tests like the LSAT and the GRE is online testing with remote proctoring. Just as licensure testing is different from academic testing, it is also different from admissions testing. While licensure tests are designed to protect the public, admissions tests are designed to protect prospective students from embarking on educational pursuits for which they might not be suited, and to provide educational institutions with objective, reliable test scores to evaluate potential students' aptitude as part of enrollment decisions. Students are not awarded their degrees on the basis of admissions tests, however; they are only given the opportunity to earn the degrees. That is not to suggest that online testing cannot be used for the bar exam; rather, it is to emphasize that careful study is needed before jumping to a decision. NCBE is working with outside technology, testing, and exam security experts who have experience with online testing to carefully but expediently evaluate the many technical, logistical, legal, administrative, and measurement issues that online testing creates. We will share the results of our exploration with the jurisdictions as soon as possible.

NCBE remains committed to supporting the jurisdictions, as we have since 1931, in carrying out their licensing responsibilities during these difficult times. We hope we have earned your confidence in our expertise and trust in our integrity over our many years of service. Know that we never take it for granted and will continue to work to deserve it.