The Emperor (Still) Has No Clothes: Reflections on Joan W. Howarth's *Shaping the Bar*

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INTRODUCTION

It is no exaggeration to say that Dean Howarth's *Shaping the Bar: The Future of Attorney Licensing*[1] is a must-read volume for bar examiners, legal educators, judges, lawyers, law students, and anyone else who cares about the structure of the legal profession and its stated goals of ensuring attorney competence and protecting the public. Dean Howarth sets forth, succinctly, the ugly history of attorney licensing that has had exclusionary goals and discriminatory results. She explains the abject failure of the profession to ensure that the licensing process provides any measure of comfort that licensed attorneys are minimally competent. She demonstrates that the profession, until recently, has steadfastly failed to engage in empirical work to justify its approach to licensing and that the entire approach to ensuring that lawyers have the necessary character and fitness to practice law "may be fundamentally misguided."[2] Against this bleak and disturbing backdrop, Dean Howarth offers twelve guiding principles "as a framework for thinking about how attorney licensing can protect the public more effectively moving forward,"[3] with implications for law schools, bar examiners, and the profession as a whole.

Dean Howarth provides an immense service by setting out the flaws of our approaches and offering concrete ideas as to how the profession can move ahead by fixing the problem. My reflections confirm how accurate her critique is of the profession and legal education and underscore how important it is that we move toward positive change quickly and

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[1] JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING (2023) [hereinafter SHAPING THE BAR].

[2] *Id.* at 79.

[3] *Id.* at 99.

thoughtfully. The first part of this reflection focuses on my experience as a faculty member at New England Law | Boston. In my view, the effort to train law students to be able to practice law competently is undermined by a curriculum that prioritizes memorization and abstract thinking as opposed to the development of the necessary skills to ensure that our graduates are minimally competent to practice law. The second section focuses on my role on the Massachusetts Access to Justice Commission. We proposed a modification to the bar examination with an eye toward steering future law students toward clinics, externships, and simulation courses that would provide the instruction and experiences they desperately need to become competent lawyers. Traditional curricula steer students away from the experiences that will teach them the necessary skills and will inspire them to want to help those who cannot afford to pay for counsel. Potential clients, law students, the public, and the profession suffer the consequences of our determination to resist change. Dean Howarth is not naïve about the challenges ahead. To the extent her volume informs and guides the discussion, she has provided an important service.

I. Using *Shaping the Bar* to Understand New England Law | Boston's Curriculum

One consistent theme in *Shaping the Bar* is that our current construction of legal education is failing law students and the public. "The combination of three years of post-graduate law school and passing a bar exam do not adequately protect the public because law schools and bar exams share the same whopping weakness."[4] Legal education remains focused on the Langdellian methodology and, as a result, lawyering abilities beyond core analytical skills "are still peripheral at too many law schools."[5] The bar examination focuses on the "traditional academic skills of law school rather than the professional proficiencies required for minimum competence in practice."[6] "In combination, this system permits new lawyers to be licensed without demonstrating that they can practice law at a minimum level of competence."[7]

Chapter 7 illustrates how legal educators have failed to reshape law school to focus on producing law graduates minimally competent to practice law. Rather, "the law school curriculum continues to emphasize thinking

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[4] *Id.* at 4.

[5] *Id.*

[6] *Id.*

[7] SHAPING THE BAR, *supra* note 1, at 4–5.

about the law outside of the context of learning to practice the law."[8] This is not surprising since "[m]ost law school professors know little about practicing law" and the curriculum is built around the "[f]alse hierarchy of knowledge over skills."[9] Legal educators have doubled down on the traditions of legal education, to the extent that they rely on uniform and stable curricula that focus on doctrinal subjects, hiding "the truth that these courses may have methodological goals—skills being taught—that are at least as important as the goals related to doctrinal knowledge."[10] What passes for "law school curricular reform has been said to consist of moving constitutional law in and out of the first year."[11]

The result is that law schools (and bar examiners) ignore "most lawyering skills and abilities," beyond skills such as legal analysis, critical reading, and lawyerly writing.[12] Law schools ignore studies of attorney competence which identify through a variety of methodologies:

- the "'skills and values' essential to members of the legal profession" (MacCrate Report);
- the "eight clusters of twenty-six abilities that are necessary to be effective in legal practice" (Schultz and Zedeck);
- the "very important/critically important competencies" essential for "the development of professional identity as students transition from law school into the profession" (Hamilton).[13]

Not surprisingly, surveys show that employer expectations about "the competence and skills of entry-level attorneys" include many skills that fall outside the core skills that are the focus of traditional legal education.[14] While the "consistent results from multiple studies show that we *can* identify important lawyering competencies. . . . both legal education and bar exams have remained notably untouched by this research."[15]

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[8] SHAPING THE BAR, *supra* note 1, at 59.

[9] SHAPING THE BAR, *supra* note 1, at 60 ("The new tenure system law professor today is more likely to have a PhD than to have practiced law for more than a minute. Although the most highly acclaimed medical school professors also treat patients, law school faculty who practice law—in law school clinics—are often relegated to non-tenure system positions with more work, less money, less status, weak job security, and limited voting rights.").

[10] SHAPING THE BAR, *supra* note 1, at 59, 61.

[11] SHAPING THE BAR, *supra* note 1, at 129.

[12] SHAPING THE BAR, *supra* note 1, at 62.

[13] SHAPING THE BAR, *supra* note 1, at 62–65 (listing and summarizing the skills, values, abilities, and competencies identified in the reports and students as "necessary for competence in the practice of law").

[14] SHAPING THE BAR, *supra* note 1, at 64.

[15] SHAPING THE BAR, *supra* note 1, at 64.

These observations describe the curriculum at New England Law | Boston and the limits of efforts to reform the curriculum.[16] The most significant curricular reform, occurring over twenty years ago, involved merely shaving a credit or two off Torts and Constitutional Law to allow for the creation of a standard third semester of legal research and writing, and to allow Criminal Law to move back into the first year.[17] Twenty years since the "major" curricular reform, little has changed in the required and strongly recommended curriculum. Civil Procedure was reduced from a two-semester, six-credit course to a one-semester, four-credit course. Evidence, Criminal Procedure, and Law and the Ethics of Lawyering remain required, upper-level courses. Students are also "strongly recommended" to take Family Law, Business Organizations, Wills Estates and Trusts, and UCC (Uniform Commercial Code): Sales because those courses are heavily tested on the bar exam. The school strongly recommends both Administrative Law and Personal Income Tax, viewed as important for general legal education.

Those courses alone total sixty of the required eighty-six credits to graduate. What about professional skills training, or any other initiatives to train our students to be minimally competent to practice law? In the wake of the publication of the MacCrate Report (1992),[18] New England Law adopted a two-course "Professional Skills" requirement for graduation.[19] When the ABA adopted the current version of Standard 303(a)(3), requiring "each student to satisfactorily complete . . . one or more experiential course(s)

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[16] I have described elsewhere our law school's efforts to respond to the MacCrate Report in the 1990s. *See generally* Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 124–43 (2001).

[17] The observation quoted above about how curricular reform is often limited to moving Constitutional Law in and out of the first-year is illuminating and seems painfully apt. I learned from one Criminal Law professor that both Criminal Law and Procedure had been one semester, first-year courses at New England Law in the early 1970s. Constitutional Law faculty subsequently engaged in a "power" play—moving their courses at New England Law into the first-year and shifting the criminal courses into the second. My colleague viewed it as payback that the space for Criminal Law in our first-year came at the expense of two-credits of Constitutional Law in the first-year.

[18] *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter *MacCrate Report*].

[19] The school strongly recommended, but did not require, clinics and externships, since the reality of having a part-time/evening division and the determination to have uniform graduation requirements regardless of whether students are enrolled in the full-time or part-time program has meant that simulation courses play a heavy role in helping students get their professional skills exposure in the curriculum.

totaling at least six credit hours."[20] New England Law replaced the two-course Professional Skills requirement with a six-credit Experiential Education requirement as mandated by the ABA.

This is a startling illustration of Dean Howarth's points about the failure of curriculum design at law schools to play a role in preparing lawyers who are minimally competent to practice law. At our law school, less than 7% of a graduate's credits (six of eighty-six) are required to be allocated to professional skills training. In stark contrast, the school still requires two-semesters (five-credits) of Contracts in the first-year, and strongly recommends an additional three-credits of UCC: Sales after the first-year, for a whopping total of eight credits of traditional doctrinal classroom instruction focused on Contracts, or 4/3 the amount of the requirement for professional skills or experiential education. The school does offer a popular Contracts Drafting course which counts toward the Experiential Education requirement. The school nowhere suggests to students that the Contracts Drafting course could be considered in lieu of the strongly recommended UCC: Sales course, and it certainly may not replace any of the five required credits for the first-year doctrinal Contracts. These decisions occur without any data indicating whether two-credits of Contract Drafting might be superior preparation for the bar exam than two doctrinal credits, let alone which is better for preparing future law graduates to handle contract issues in practice more competently.[21]

Any effort to re-examine the curriculum is invariably met with anxiety about our Bar Passage Rate. While no school can or should ignore the licensing requirements in designing its curriculum, the anxiety over the subject occurs without the benefit of meaningful data.[22] The Bar Passage Rate looms large, but seems to ensure that change can never occur. If we are happy with our bar pass rate, why would we risk success by changing the curriculum? If our bar pass rate seems low, how can we deprive our students of the courses they "need" to be prepared for the bar exam, despite the absence of data indicating that more credits allocated to traditional law school teaching better prepares students for the bar examination (even if not the practice of law)?

Even if the sole goal were to prepare students to perform well on the

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[20] STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17, 18 (Am. Bar Ass'n 2022), https://perma.cc/NW5S-P24Z [hereinafter STANDARDS AND RULES].

[21] For a presentation and analysis of the sparse data that exists regarding the connection between curriculum and bar pass rate, *see* Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623, 623–49 (2019).

[22] *See generally* SHAPING THE BAR, *supra* note 1, ch. 6 at 51.

bar examination—something typically denied by faculty who claim their courses serve many goals in legal education—the assumption that more credits in a traditional classroom leads to a greater bar passage rate defies logic. Given the unyielding correlation between LSAT scores, first-year grades, and bar pass rate, why would we assume that students who have proven they perform less well than others in the large, doctrinal classroom would benefit the most from being consigned to more courses with the same methodology?[23] For a student whose grade was comparatively weaker in Contracts, would that student benefit more from an upper-level UCC: Sales course or a Contracts Drafting course, even if the entire goal were to shore up an understanding of Contract principles? Would students gain a better understanding of Family Law by taking a clinic/externship in the area or sitting in the traditional classroom? Would students learn Evidence better through Clinical Evidence or Trial Practice, having to practice evidence in context, or by the traditional approach relying on memorization and time-pressed exams?

Dean Howarth focuses heavily on clinical residencies, so that law students can gain the minimum competency needed for new lawyers:

> The major deficit of the majority approach—ABA-accredited law school degree plus bar exam—is the lack of any supervised practice requirement, such as a clinical residency. New educational requirements—the clinical residency and beyond—could improve public protection, with or without a post-graduation bar exam.[24]

The current ABA Standards and structure of the bar exam do little to incentivize law schools to change their curriculum. Chapter 13 explores ways in which law schools and the states can focus on minimum competencies and actual practice experience, so they "can safely resist the impulse to require that long lists of doctrinal courses be completed."[25] Meaningful curricular reform, focusing on skills beyond legal analysis,

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[23] *See, e.g.*, Kuehn & Moss, *supra* note 21, at 628. In one study, the "authors concluded that simply forcing lower-performing students to take more upper division bar-subject courses 'will not solve the bar examination failure problems.'" Kuehn & Moss, *supra* note 21, at 628 (citing Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 236 (2007)). A different study "concluded that 'requiring these [bar-related] courses will not increase the likelihood that law school graduates, at risk of failure, will pass rather than fail the exam.'" Kuehn & Moss, *supra* note 21, at 628 (citing Phillips Cutright et al., *Course Selection, Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience*, 27 J. LEGAL EDUC. 127, 136 (1975)).

[24] SHAPING THE BAR, *supra* note 1, at 118.

[25] SHAPING THE BAR, *supra* note 1, at 121.

various versions of diploma privileges, experiential pathways, like those being explored by Oregon, and even post-graduation curricula, are among the options Chapter 13 explores.[26]

The relationship between law school curricula and the current structure of the bar exam remains a powerful force in reinforcing one another, again without empirical proof that either does anything to guarantee minimal competence or protect the public. As *Shaping the Bar* makes clear throughout, law schools point to the bar exam as a reason to structure their curricula around the subjects tested on the bar, while the bar examiners point to the law schools as justification for what they test. Even assuming the ABA has a consumer-protection justification for protecting law students from incurring crushing debt without the realistic hope of gaining the license to practice law, the wording of ABA Standard 316 underscores the problem: "[a]t least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation."[27]

Despite the fact that the bar exam neither protects the public nor guarantees minimal competence, the ABA focuses solely on bar passage, as opposed to obtaining a license to practice law. Dean Howarth is clear that "[n]ew educational requirements—the clinical residency and beyond—could improve public protection, with or without a post-graduation exam."[28] Yet the ABA, while focusing only on the bar exam in its licensing regulation, incentivizes the bar examiners and the law schools to double down on their failed strategy of a licensing system that harms law students, potential clients, and the public without any promise of guaranteeing minimal competency.[29]

II. Access to Justice, *Shaping the Bar,* and the Massachusetts Access to

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[26] SHAPING THE BAR, *supra* note 1, at 118–26.

[27] STANDARDS AND RULES, *supra* note 20, standard 316.

[28] SHAPING THE BAR, *supra* note 1, at 118.

[29] *See generally* SHAPING THE BAR, *supra* note 1, at 99–126. Dean Howarth's Twelve Guiding Principles function "as a framework for thinking about how attorney licensing can protect the public more effectively moving forward." SHAPING THE BAR, *supra* note 1, at 99. The principles include basing "every licensing requirement on evidence about understanding, ensuring, and assessing minimum competence" and establishing "competence-based educational or training requirements." SHAPING THE BAR, *supra* note 1, princs. 1, 5 at 100, 102. Chapter twelve focuses on Clinical Residences, while Chapter thirteen focuses on the need for law schools to do more. SHAPING THE BAR, *supra* note 1, at 110–26 ("Licensing today asks too much of bar exams and too little of legal education.").

Justice Commission's Initiatives

Among the many negative consequences Dean Howarth identifies that flow from our dysfunctional system of licensing attorneys is the negative impact on Access to Justice. The introduction highlights many failings of our current system, including "high barriers to entry,"[30] "[p]ersistent, well-known, terrible racial disparities,"[31] and the fact that "[h]igh cut scores exacerbate racial disparities and reduce bar exam validity."[32] The result? "High law school debt plus low bar passage equals financial ruin for too many, especially from underrepresented groups."[33]

This is devastating enough for applicants trying to obtain their license to practice law. "Racial disparities in bar passage rates mean that the worst return from the financial investment of attending law school—hundreds of thousands in debt with no law license to show for it—is a burden that falls disproportionately on people of color."[34] "Record numbers of recent law graduates have failed bar exams after racking up massive law school debt;"[35] this debt, of course, is on top of any debt accumulated while pursuing undergraduate degrees. Not surprisingly, "students of color pay more for law school and go deeper into debt than white students."[36] In this regard, the legal profession, while promising equal justice for all and relying on the balanced scales of justice as its calling card, is no different from the larger picture of debt in our society where people of color routinely pay more to obtain less and accumulate far more debt than white consumers.[37]

Yet the harm caused by the unconscionable and unjustified restrictions on licensing extends far beyond the harm to those seeking their law license. The failures to tie licensing to minimum competence, to ensure that law school graduates have actual experience with clients and the practice of law,

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[30] SHAPING THE BAR, *supra* note 1, at 3.

[31] SHAPING THE BAR, *supra* note 1, at 7.

[32] SHAPING THE BAR, *supra* note 1, at 8.

[33] SHAPING THE BAR, *supra* note 1, at 9.

[34] SHAPING THE BAR, *supra* note 1, at 9.

[35] SHAPING THE BAR, *supra* note 1, at 9.

[36] SHAPING THE BAR, *supra* note 1, at 9.

[37] *See, e.g.*, Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1 (2022); Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://perma.cc/BP6N-P7SM; Mass. Access to Just. Comm'n, *Massachusetts Justice for All Strategic Action Plan*, MASSA2J 57 (Dec. 22, 2017), https://perma.cc/566Z-9KXV ("Debt collection cases pit sophisticated businesses that have attorneys against everyday consumers—who are disproportionately people of color—without counsel.").

and the disparate impact of high debt and barriers to practice ensure that the public is harmed as well. "A diverse legal profession will serve the entire public better."[38]

"To best protect a diverse public, especially underserved communities, licensing authorities should audit every policy decision—educational and practice requirements, tests, and cut scores—to determine whether they exacerbate or reduce our longstanding racial disparities in licensing."[39]

Not surprisingly, legal resources and lawyers are readily available for corporations and wealthy individuals, but not for many with urgent legal problems that impact their basic human needs. "Low-income and middle-class individuals handle legal problems without lawyers in complicated systems created by lawyers for lawyers."[40] Noting that "[e]ighty percent of the legal needs of the poor are unmet, as are roughly half the legal needs of middle-income people," Dean Howarth points out that as a result, in many courts, "most individuals are not represented by counsel, although litigation . . . is arguably the area of legal practice in which licensed attorneys are most important."[41]

Study after study points out the vast numbers of litigants forced to appear in court without counsel in eviction, family, and debt collection matters.[42] The litigants disproportionately are women and people of color, lacking power inside and outside the legal system.[43] The litigants not only are forced to navigate complicated systems without representation, but often face an opposing party represented by counsel and familiar with the forum,

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[38] SHAPING THE BAR, *supra* note 1, at 101.

[39] SHAPING THE BAR, *supra* note 1, at 101.

[40] SHAPING THE BAR, *supra* note 1, at 105.

[41] SHAPING THE BAR, *supra* note 1, at 105.

[42] *See, e.g.*, Mass. Access to Just. Comm'n, *supra* note 37, at 27–28 ("[H]ousing, consumer debt, and family law were the case types that most urgently required study because they are the areas of essential civil legal needs where the demand for legal assistance is most widespread and pressing in Massachusetts, and where we find the most unrepresented litigants."). *See generally* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39–41 (2010).

[43] *See* Engler, *supra* note 42, at 41; *see also, e.g.*, Brito et al., *supra* note 37, at 1244–45

("While the dearth of race-based data from state civil courts has made it difficult to construct a full picture, existing data show that racialized individuals and communities are impacted disproportionately by civil justice issues. Racialized litigants are less likely to have access to critical resources and more likely to receive negative results. And, as in all systems, the ability to access justice in the civil legal system is influenced by multiple factors, including societal discrimination, economic inequality, and race-based behaviors of individual system actors. The civil court system is characterized by racial disparities in access, treatment, and outcomes, all of which deserve increased attention.").

procedures, and substantive law.[44] Yet, one of the many reasons that lawyers often object to performing pro bono work, let alone supporting a system of mandatory pro bono, is that they do not have the training or competence to handle the relevant matters.[45]

Over a decade ago, while I was serving on the Massachusetts Access to Justice Commission, then Associate Justice—and later Chief Justice—Ralph D. Gants, co-chair of the Commission, tasked me to develop a proposal for the Commission directed at the law schools and legal education that might increase access to justice. Justice Gants made clear only that he was not interested in a proposal along the lines New York State has adopted, to require fifty hours of "pro bono" work as a condition of eligibility (he did not say why).[46]

My proposal surprised him. I suggested that the Commission urge the Board of Bar Examiners (BBE) to recommend the addition of the topic of Access to Justice to the Bar Examination in Massachusetts and to recommend further that the number of other topics tested on the Bar Examination be reduced. This idea flowed from my experience at New England Law, as I watched students avoid clinics and externships, feeling obligated to take a seemingly endless number of doctrinal courses that included topics that might appear on the Bar Examination.

Shaping the Bar underscores the many ways in which these curricular decisions lead many students astray. There is minimal correlation between what is covered in a law school classroom and what is needed for the practice of law. Even the question of whether performance on the bar examination is impacted by coverage in doctrinal courses, as opposed to experience practicing in certain areas, is tenuous at best. The failure to accumulate meaningful data until recently,[47] combined with the well-

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[44] Brito et al., *supra* note 37, at 1244–45.

[45] *See, e.g.*, Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 434, 441 (2003) ("A further objection to mandatory pro bono requirements is that lawyers who lack expertise or motivation to serve underrepresented groups will not offer cost-effective assistance. . . . Critics also worry that some lawyers' inexperience and insensitivity in dealing with low-income clients will compromise the objectives that pro bono requirements seek to advance. . . . Differences in racial, ethnic, socio-economic, and educational backgrounds exacerbate the problem, particularly if students lack 'cross-cultural competence' and are not in classroom or workplace settings that foster it.").

[46] *See New York State Bar Admission: Pro Bono Requirement FAQs*, NYCOURTS.GOV, 1, 9–11, https://perma.cc/E6TY-PD4Y (last visited Oct. 31, 2023) (indicating in the FAQ's that a wide array of work can satisfy the requirement, including work in in-house clinics, or field placement/externships; receiving credit, or a stipend or grant does not disqualify the work if otherwise eligible).

[47] SHAPING THE BAR, *supra* note 1, at 3, 51–58.

documented failures in the traditional Bar Examination in terms of validity and fairness,[48] raise doubts about the benefits of the traditional classroom teaching for either the Bar Examination or the practice of law.

Justice Gants was a brilliant and empathic jurist and leader.[49] He was always willing to listen and learn and had an outstanding sense of humor. He was intrigued and even amused by my proposal, and while chortling a bit, asked me to explain. As I made the case for what happens at a school like New England Law, where the subjects on the Bar Examination impact curricular choices, he was taken aback. While he recognized the idea of "teaching to the test,"[50] he and, as it turned out, most of the members of the Commission and many practicing lawyers with whom we discussed the proposal, were stunned that anyone would choose courses based on the subject areas tested on the bar.

It did not take long for a divide to emerge between lawyers and judges who had attended elite law schools and those who had not. Justice Gants was an alumnus of Harvard Law School and he, like many members of the Commission, did not focus on the Bar Examination until the end of law school and the start of bar preparation. Our informal discussions revealed that the same mindset seemed to hold among graduates of Harvard, Boston College, and Boston University, among Massachusetts law schools. Graduates of, or teachers at, Suffolk Law School, Western New England College of Law, and UMass Law School recognized the dynamic I lived with at New England Law.[51]

With Justice Gants' firm leadership, the proposal moved from concept to final form in a year. Justice Gants appointed a committee, which I chaired, that included representatives of the Commission, the Boston Bar Association (BBA), and the Massachusetts Bar Association (MBA). The Committee explored various options to modify licensing before supporting the proposal that I had initially suggested. A six-page memorandum supported the proposal. It explained the Justice Gap in terms of the shortage of lawyers serving the poor and middle class and the connection between the topics tested on the Bar Examination and the training that law students receive at many law schools that makes them ill-equipped to provide the legal representation in areas needed to fill the Justice Gap. The memorandum

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[48] SHAPING THE BAR, *supra* note 1, at 5–7.

[49] I have described elsewhere my Access to Justice work with the late and, in my view, truly great Chief Justice Gants. *See* Russell Engler, *Chief Justice Gants and Access to Justice: A Case Study in Leadership, Compassion, Brilliance and Strategy*, 62 B.C. L. REV. 2814 (2021).

[50] My view is that law schools do not actually succeed in teaching to the test because they have done a poor job of figuring out how to do so.

[51] Reports from Northeastern Law School seemed to put that school somewhere in between.

explained what it would mean to add the topic of Access to Justice to the Bar Examination and how it would be tested. In the final part, citing research showing how the Bar Examination has a negative impact on curricular development at law schools, the proposal also made the case for the elimination of some topics currently tested, leaving it to the BBE to determine which ones.[52]

Justice Gants, by then the Chief Justice of the Supreme Judicial Court (SJC), shepherded the proposal through the Commission, the BBA, the MBA, and ultimately the BBE, before the proposal was submitted to the Supreme Judicial Court for consideration. A number of telling reactions and questions arose throughout the course of this proposal. First, as noted above, lawyers and judges who graduated from elite law schools were consistently stunned that the topics on the bar exam had any impact on legal education; it did not square with their experience.[53]

Second, once the conversation moved past acceptance that there was merit to the idea, two questions immediately arose: "What do we mean by Access to Justice," and "How can we test it on the Bar Examination?" In our view, the first question alone seemed to justify the proposal: if many practicing lawyers were fuzzy on the concept of Access to Justice, that seemed all the more reason to pressure the law schools to figure out how to educate future lawyers on the topic. In terms of how to test the topic, the stated concerns again seemed to justify the proposal. Since Access to Justice cuts across many doctrinal areas, would adding the topic lead students to feel they needed to take doctrinal courses not tested on the bar, such as Employment Law, in case an Access to Justice question arose in the context of that subject matter? The proposal solved this dilemma by noting that "the testing can easily occur within the ambit of the traditional essay portion of the bar examination."[54]

> Many of the subjects identified above as components of Access to Justice are components already tested on the bar. Landlord-tenant is part of Property, among other tested areas, custody cases are part of Domestic Relations, debt collection cases are part of Consumer Protection, the ethical issues are part of Professional Responsibility and the

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[52] The proposal is on file with the Commission.

[53] Perhaps not surprisingly, while both the BBA, whose membership includes many lawyers from large Boston law firms, and the MBA, whose membership includes lawyers from around the state and many solo practitioners or lawyers from small law firms, supported the proposal, the support from the BBA seemed polite and tepid, while the support from the MBA was enthusiastic.

[54] Proposal from Mass. Access to Just. Comm'n to Bd. of Bar Exam'rs, Addition of "Access to Justice" Topic to the Massachusetts Bar Examination 3 (n.d.), https://perma.cc/6VDD-WPVE.

> constitutional components of due process and the right to counsel are part of Constitutional Law.[55]

The proposal then provided illustrations of how the topic could arise in landlord-tenant, domestic relations, and consumer debt settings.

While the proposal was approved by the SJC, [56] it is hard to assess its impact. A number of law schools created Access to Justice courses and initiatives, in part because of the inclusion of the topic on the Bar Examination.[57] Yet, between the time the proposal was adopted and the date it became effective, Massachusetts switched to the Uniform Bar Examination (UBE). Since the UBE does not include the topic, Access to Justice was relegated to the Massachusetts Law Component of the Bar Examination.[58] Fitting squarely within the general failure of our profession to collect reliable data,[59] we can only speculate as to what impact the proposal might have had, or even did have, on legal education in Massachusetts.

In the same way that the prior section confirmed Dean Howarth's observations that the combination of law school curricula and the bar examination fail to produce law graduates who are minimally competent to practice law, this section illustrates the manner in which those same forces harm the profession's ability to promote access to justice. The combination of the Bar Examination and law school curricula steer law students away from the experiences that would give them the tools to help close the justice gap. Moreover, the licensing process has a devastating and disproportionate impact on law students with backgrounds that might enable them to better

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[55] *Id*.

[56] Mass. Access to Just. Comm'n, *Final Report of the Second Massachusetts Access to Justice Commission*, MASSA2J 6 (Apr. 2015), https://perma.cc/RH4T-QC3V ("The Second Commission successfully petitioned the Supreme Judicial Court to add 'access to justice' as a topic on the bar examination in order to equip law school graduates with an understanding of the legal issues facing low and moderate income people. A committee with Commissioners and bar association representatives developed the idea, which the Board of Bar Examiners and the SJC accepted. The 'access to justice' essay question will first appear on the bar examination in July 2016."). The second part of the proposal, asking the BBE to consider reducing topics tested, led the BBE to agree to examine the question, without promising to reduce topics. The Second Commission was designed to have a five year existence, so the Second Commission finished its business in 2015 and gave way to a reconstituted Third Commission, which remains in existence.

[57] *See generally 2022–2023 Law Curriculum and Courses*, UMASS DARTMOUTH, https://perma.cc/L7FK-CRM9 (last visited Oct. 31, 2023) (showing UMass Law School, for example, created an Access to Justice course which serves in part to satisfy the school's upper class writing requirement).

[58] *The Massachusetts Law Component (MLC)*, MASS.GOV, https://perma.cc/F7YU-DRTJ (last visited Oct. 31, 2023).

[59] *See* SHAPING THE BAR, *supra* note 1, ch. 6.

serve the communities most impacted by the shortage of affordable legal help.

CONCLUSION: OPTIMISM OR PESSIMISM?

Despite her searing critique of the history of attorney licensing in the United States and the vast challenges ahead, Dean Howarth brings a remarkably optimistic lens to the challenges ahead. "After decades of relative stability, attorney licensing is changing."[60] "Today, many of us are accepting the challenge to break the grip of tradition and return to the fundamentals of public protection."[61] "I understand the challenges better than I used to. But, now more than ever, I also appreciate the drive, values, and vision of those standing at the entrance of the profession."[62] The forces Dean Howarth identifies may well finally be the catalyst for fundamental change: "Ambition for more fundamental reform burned out and disappeared for decades. Until now."[63] Her final words? "My optimism is high, and I'm eager to see what, working together, we accomplish next to shape the profession for the public we serve."[64]

I wish I could share Dean Howarth's admirable optimism. The bulk of her book confirms the vested interests of powerful actors: the private bar, the law schools, the bar examiners, and even the ABA. Which of these actors do we trust to "work together" with those recognizing the need for widespread change and be true partners rather than resisters? If we are serious about fighting climate change, for example, do we trust the oil and gas (and nuclear power) industries to help develop meaningful solutions that risk not only significantly impacting their bottom line, but possibly putting them out of business?[65] It is hard to ignore the fact that the powerful

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[60] SHAPING THE BAR, *supra* note 1, at 147.

[61] SHAPING THE BAR, *supra* note 1, at 147.

[62] SHAPING THE BAR, *supra* note 1, at 147.

[63] SHAPING THE BAR, *supra* note 1, at xii.

[64] SHAPING THE BAR, *supra* note 1, at 147.

[65] *See, e.g.*, NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE 218 (2014) (refuting the idea that the enlightened self-interest of oil and airline executives will lead them to use their technological prowess to invent low-carbon and renewable energy sources in the future; "[t]he industry will use its technology and resources to develop ever more ingenious and profitable new ways to extract fossil fuels from the deepest recesses of the earth . . . "). For a searing critique of the "myth[]" that elites will pursue meaningful reform that cuts against their self-interest, *see* ANAND GIRIDHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 11–12 (2019) ("What these various figures have in common is that they are grappling with certain powerful myths—the myths that have fostered an age of

stakeholders in the legal licensing system have a stake in maintaining the status quo or, at most, presiding over grudging change at the margins.

I ultimately conclude that, as with the Access to Justice and Civil Right to Counsel work in which I have been involved for decades, the imperative to fight for change that runs through *Shaping the Bar* is an essential undertaking even if the odds of fundamental reform are slim. The data from civil courts confirms what practitioners, litigants, and observers know all too well. The legal system is designed by lawyers and judges, and benefits those with power and knowledge over those without. It is poor and moderate-income litigants without power who are left without the help that they need, and steamrolled by the system. Despite the abject failure of the court system to collect, track, and publish reliable data, "terrible racial disparities" are "persistent" and are "well-known," as with the system of attorney licensing.[66]

Yet, the existence of powerful, vested interests with a stake in preserving the status quo in the legal system cannot lead us to throw up our hands and withdraw. We must redouble our efforts to improve the system. The increased attention to Access to Justice over the past decades is undeniable. It is reflected in the creation of Access to Justice Commissions in most states,[67] the steady stream of Access to Justice Resolutions from the Conference of Chief Justices and Conferences of State Court Administrators, and the almost dizzying array of reforms and assistance programs designed to increase access for those who cannot afford lawyers.[68] Before 2017, not a single jurisdiction provided a right to counsel for indigent tenants facing eviction; following New York City's lead, three states and fifteen cities have now created some version of the right, and other jurisdictions are in the

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extraordinary power concentration; that have allowed the elite's private, partial, and self–preservational deeds to pass for real change; that have let many decent winners convince themselves, and much of the world, that their plan to 'do well by doing good' is an adequate answer to an age of exclusion; that put a gloss of selflessness on the protection of one's privileges; and that cast more meaningful change as wide-eyed, radical, and vague.").

[66] *See* SHAPING THE BAR, *supra* note 1, at 7.

[67] The American Bar Association's Access to Justice Resource Center provides a wealth of information about state Access to Justice Commissions, as well as research and data on the topic. *See Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, https://perma.cc/A8GZ-HPAU (last visited Oct. 31, 2023).

[68] The National Conference of State Courts' website lists the more than fifty resolutions relating to Access to Justice, issued by the Conference of Chief Justices (CCJ), often in collaboration with the Conference of State Court Administrators (COSCA). *See CCJ-COSCA Resolutions by Category*, CONF. OF CHIEF JUSTS., https://perma.cc/H8E2-ZAAN (last visited Oct. 31, 2023).

process of following suit.[69]

While we may rightly question the extent to which changes such as these are cosmetic or transformative, we should not question the need to be thoughtful, creative, energetic, persistent, and collaborative in pushing to make the legal system fairer and more just. The same holds true with needed efforts in the area of attorney licensing. Attorney licensing is in desperate need of change and *Shaping the Bar* is an essential tool for guiding the battles ahead.

[69] The National Coalition for a Civil Right to Counsel's Status Map is the best resource for understanding the status of a right to counsel in the different states, issue by issue. *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., https://perma.cc/GES7-UHJE (last visited Oct. 31, 2023). Given the rapid changes in the area of eviction defense, the Coalition has developed a separate page dedicated to a right to counsel for tenants. *Intro to Tenant Right to Counsel*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., https://perma.cc/9YHJ-NXHY (last visited Oct. 31, 2023). The Massachusetts Right to Counsel Coalition's website also tracks changes at the national level. *Right to Counsel Across the Country*, MASS RIGHT TO COUNS., https://perma.cc/T5WD-FH8W (last visited Oct. 31, 2023).