BOOK REVIEW

Three Little Words

Reliable, Valid, and Fair

Shaping the Bar: The Future of Attorney Licensing
Joan Howarth (Stanford University Press 2022), 240 pages

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Most lawyers have a bar exam story. Some have more than one. Mine goes like this: the summer before I sat for the NY bar exam, I packed up my apartment and moved back into my parents' house along with my husband and 18-month-old son. I had a job waiting for me in Asmara, Eritrea—one that did not require a license to practice law—but I knew that I should take the bar anyway. I had graduated from law school and the bar was the final gate I needed to clear before I could call myself a lawyer. I paid for BarBri and, because I was located 100 miles from a live BarBri site, I was able to complete the bar review course by listening to CDs. Yes, CDs. Each day, after breakfast with my family, I climbed the stairs, passed through a closet, and entered the room above my parents' garage to study. I created a rigid schedule and kept to it. Part determination, part fear. I came down for lunch, dinner, bedtime, and a daily run. Occasionally, summertime laughter or my son's cries shook my focus. But my entire team had one goal: pass the New York bar.

As the date approached, I became less confident that I would pass. I had given up so much for this exam and the thought of having to give up more hung around me. After the first day in a room filled with unfamiliar bodies, I walked out of the Albany convention center deflated. When I pushed open the doors I saw my dad, my husband, and my son waiting for me. I don't know who wrapped their arms around me first. My dad took my son back home and my husband stayed with me. Tension swirled in my hotel that night as nervous applicants tried to review outlines and prepare for day two. Then the electricity went out. Darkness. Unable to

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study, my husband and I found a local Friendly's where we ate dinner and hatched a plan to listen to the Democratic National Convention, which would be televised later that night. Armed with a battery-operated radio we bought at CVS, we listed to then-senator Barack Obama talk about his own improbable journey to that moment, to "faith in the simple dreams" and "insistence on small miracles."[1] I fell asleep hopeful, not about the bar, but about the world outside that exam.

When I left the convention center after the second day, certain that I had just written the worst essays any bar examiner had ever encountered, dread rather than relief flooded over me. I had already either failed or passed. There was nothing more I could do. Then, all the minutiae I had crammed into my brain began to evaporate. To this day, all I can remember about the bar, and the months of study leading up to it, are the two-mile stretch of road I ran each day, seeing my son waiting for me, the dinner at Friendly's with my husband, finding a single battery-operated radio at CVS, and Obama's speech. I don't remember a lick of law—and I passed.

For those who pass, bar stories form part of a mythic, cathartic rite of passage. Joan Howarth tells hers in the preface to her timely book *Shaping the Bar: The Future of Attorney Licensing*.[2] Our stories share some similarities: we both had jobs lined up, "[s]ympathy and kindness"[3] surrounded us, and we had one thing to do—pass the bar. And we did. But what about those who don't? What about those law school graduates who, but for the antiquated and deeply discriminatory licensing machine, would have been excellent attorneys and who are now lost to the profession?

In four parts, Howarth's book takes up these questions and in so doing, it chronicles the legal profession's protectionist roots and ties them to ongoing gatekeeping that is based on mistaken ideas about attorney competence and how to measure it. Perhaps her most important contribution—which says a lot because the book contains so many—is her analysis of the interdependent relationship among law schools, the ABA, the NCBE, and the billion-dollar testing industry. This relationship perpetuates costly gaps between what law students learn in law school, what they need to do to pass the bar, and the work (and clients) they will actually face when they enter the profession. These gaps are costly for law students, for law schools, and for the legal profession. Most of all, she argues, they're costly to the public.

1 Barack Obama, Keynote Address at the 2004 Democratic National Convention, Boston, Mass. (July 27, 2004) (transcript at https://www.presidency.ucsb.edu/documents/keynote-address-the-2004-democratic-national-convention).

2 Joan Howarth, Shaping the Bar: The Future of Attorney Licensing (2022).

3 *Id.* at ix.

While the title of this book points to the future, and the future is particularly significant with the NextGen bar (discussed below) looming just around the corner, much of its brilliance lies in the careful way Howarth has mined the legal profession's history. She starts in Part One, entitled "The Attorney Licensing Crisis and How We Got There," by laying the groundwork for her present-day critiques and building the framework for possible paths forward. In five crisply written chapters, she takes us through the whole historical arc of attorney licensing. She starts at the nascent American legal profession's "shaky beginnings," when lawyers were reviled. She then stops briefly in the first half of the eighteenth century—a period of conquest, expansion, and Jacksonian democracy, where new states adopted admission standards that included allowing any "voter" of "good moral character" to be an attorney. Then, while sketching out the rise of the modern licensing regime, she brings us through the mid-to-late nineteenth century when states began to require proof of formal education and an apprenticeship.

Howarth acknowledges that the haphazard and extremely local approach to admission had its obvious drawbacks, but focusses much of her critique on the later efforts to professionalize or reprofessionalize law practice in the newly formed and rapidly expanding United States—efforts that made the profession "more exclusive and rarified."[4] In particular, she chronicles the steady move away from the apprenticeship model where prospective lawyers trained in law offices to a model chock full of requirements—requirements for an undergraduate degree; three years of curated law study at a law school with rigorous, high-stakes exams; and finally a written bar exam. Although many of these standards first emerged from law schools, most notably Harvard Law School under the leadership of Dean Christopher Columbus Langdell, rather than from the practicing bar or licensing bodies, both constituencies soon joined the push for higher barriers to entry.[5]

Howarth locates the initial race to add requirements in the growing distrust between licensers and law schools. But she argues it was their greater concern over a "common enemy," the less elite law schools providing "a pathway for ambitious immigrants and other outsiders to enter the profession," that ultimately propelled the push for more uniform and higher standards.[6] She supports this point by mapping licensing

4 *Id.* at 19. Depending on your perspective, lawyers filled or littered the nation's founding. Howarth notes that twenty-five of the fifty-six signers of the Declaration of Independence were lawyers and thirty-one of the first fifty-five members of the continental congress. *Id.* at 15–16.

5 Howarth notes that the American Bar Association joined the movement for more formal and stringent licensing requirements in 1878. *Id.* at 19.

6 *Id.* at 24.

reforms onto changes in the post-Civil Rights era legal and educational landscapes. For example, she recounts how the last jurisdictions to abandon diploma privilege—the ability to practice law after successfully graduating from law school—did so right at the moment when more Black law students started being admitted to law schools.[7] She also describes how disparate bar passage rates between Black and white applicants led to legal battles, but that court after court rejected them.[8] Instead, courts found that although other workplaces had been forced to stop using tests to cull applicants unless the tests could be proven to be both related to the job and valid, states could continue to use bar exams because bar exams were related to assessing minimum competence for law practice.[9] Here, Howarth demonstrates the legal folly unfolding in the courts by using quotes from circuit decisions, like one suggesting that any apparent relationship between a particular cut score and competence was "almost a matter of pure luck" rather than proof of actual of competence to practice law.[10] She concludes by stating, "[i]n these cases, the federal courts deferred to bar examiners' good faith instead of holding them accountable for shoddy practices and even blatant scoring discrepancies used to prevent African Americans from getting licenses to practice law."[11]

The final chapter in Part One sets out the "Pressure Points in Contemporary Licensing." They include: the high cost of legal education, the ABA's shift to permitting bar-related education in law school, the bar prep industry, bar exam consolidation under the NCBE, and the advocacy sparked in 2020 "when licensing as usual became impossible" due to the pandemic.[12] This chapter, on its own reads like a wake-up call and hits like a gut punch. Together the chapters in Part One demonstrate how the U.S. legal profession has "buil[t] barriers to entry as high as possible to enhance the prestige of the profession and stifle competition."[13] But these barriers, Howarth argues, have done little, if anything to protect the public. Despite the gloom, she ends on a glimmer by suggesting that this confluence of pressure points might just create the right equation for dramatic reform.

The three slim chapters of Part Two tackle the assessment debacle. Howarth begins with an obvious statement: "Professional licensing requirements should protect the public by attempting to ensure that

7 *Id.* at 37.

8 *Id.* at 35.

9 *Id.* at 36–37.

10 *Id.* at 37 (quoting Richardson v. McFadden, 540 F.2d 744, 749 (4th Cir. 1976)).

11 *Id.* at 38.

12 *Id.* at 39.

13 *Id.* at 3.

the newest members of the profession are at least minimally competent to practice their profession."[14] This simple statement, repackaged and sprinkled throughout the book serves as a mantra-like reminder: law schools and licensers must finally align their work and their rules to law practice. Howarth follows up this claim with a sharp rebuke: neither bar examiners nor law schools know very much about what minimum competence to practice law looks like. Even more striking, they don't know how to assess it. These chapters offer no quarter to the forces that created this mess. Here she addresses familiar, evergreen arguments about the gap between legal education and law practice, the false hierarchy of doctrine over skills, and the elitist law school hiring proclivities that endure. Chapter Eight then turns to the wealth of research bar examiners (and law schools) could look to when trying to answer the question: what is minimum competency for a new lawyer anyway? Readers who are familiar with research on the legal profession, like the IAALS *Build a Better Bar* project led by Deborah Merrit,[15] the NCBE testing task force reports,[16] Marjorie Schultz and Sheldon Zedeck's work identifying twenty-six attributes of successful lawyering,[17] or on the decades of legal education reform literature[18] could probably skip this section. But I wouldn't. There is something comforting in rereading how much information already exists that we could rely on if we just put our minds (and our dollars) to it.

Part Three, which addresses Character and Fitness, begins with a question: Who Fits? Here, Howarth answers by calling out bar examiners for focusing on the wrong questions and for asking the right questions but at the wrong time. She argues that bar examiners should spend less time trying to keep people out by predicting who will break the profession's ethical rules in the future and instead focus on monitoring and preventing actual attorney misconduct. As in the other sections, Howarth pays careful attention to how bar examiners have used licensing requirements to exclude applicants for specious, discriminatory, and at times even unlawful reasons. She also exposes how they have chilled speech and

14 *Id.* at 51.

15 Deborah Jones Merritt & Logan Cornett, Building a Better Bar: The Twelve Building Blocks of Minimum Competence 63–66 (2020).

16 Kellie R. Early, Joanne Kane, Mark Raymond & Danielle M. Moreau, *NCBE Testing Task Force Phase 2 Report: 2019 Practice Analysis*, Nat'l Conf. of Bar Exam'rs (Mar. 2020), https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf.

17 Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 Law & Soc. Inquiry 620 (2011) (describing twenty-six factors of lawyering effectiveness).

18 *See, e.g.*, Neil W. Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, The Bar Exam'r (Sept. 2014), https://thebarexaminer.ncbex.org/article/september-2014/empirical-research-on-the-core-competencies-needed-to-practice-law-what-do-clients-new-lawyers-and-legal-employers-tell-us/.

association, discouraged applicants from seeking mental health services, and punished applicants for their sexual orientation and gender identity. By educating the reader in this way, Howarth makes it nearly impossible to disagree with the challenge she levies at law schools in Chapter Nine: fix character and fitness by actually educating future lawyers for strong professional identities. While Part Three deftly illustrates how current pre-licensure requirements do little to protect the public, these two chapters almost feel like a separate beat—a scene from another story not fully fleshed out in this narrative. Selfishly, I hope this section of the book is just a trailer for a full-length feature still to come.

In Part Four, the book's concluding section, Howarth looks to the future. In five chapters she plots a hopeful course for legal education and professional licensing—a competence-based course that aligns learning, experience, and assessment with modern law practice. Building on the critiques from earlier chapters, this section first sets out twelve foundational principles to reform legal education and professional licensing. These principles range from aligning licensing requirements with actual lawyer competencies to making licenses portable from state to state. Some of the principles could be whole books themselves. And many of them require a radical departure from business as usual. For example, Howarth argues for a new licensing requirement: clinical residencies. She calls this "a single, relatively simple step that jurisdictions can take now to dramatically improve public protection."[19] At the same time, the framework she suggests seems far from simple to implement. In a clinical residency program, preferably one tied to law schools, students would represent clients under the direct supervision of a skilled attorney. While many law schools offer clinics that already provide this type of robust and carefully supervised educational experience, some do not. Additionally, few law schools have built their clinical teaching capacity to provide such an experience for every student. As a beneficiary and vocal advocate of clinical education, I support Howarth's inclusion of clinical residency as a licensing requirement for the future, but I wanted to know how we get there. As she notes, the cost of legal education is already keeping would-be lawyers from the profession. Adding high-touch clinical models will only add to the cost. On top of cost, law schools will have to grapple with the mismatch between faculty expertise and the experiential learning paradigm, a mismatch that is partly due to their deeply hierarchical staffing models. The clinical residency model requires an army of supervisors who are expert lawyers and expert teachers, and most current

19 Howarth, *supra* note 2, at 101.

law professors are simply unprepared to teach and supervise actual law practice.

Howarth makes clear from the beginning: "Practicing law is difficult, so obtaining a license to practice law should be hard."[20] She also acknowledges that licensing exams will continue to exist in at least some, if not most, jurisdictions. With this in mind, she suggests that states use performance tests, which are the most appropriate form of minimum competence assessment because they don't rely primarily on memorization and "can test manipulation of facts, legal strategy, case evaluation and development, and other more sophisticated and realistic lawyering tasks."[21] Here, she calls on states to take more active responsibility for attorney licensing and to function as incubators—adapting requirements to the changing profession. This recommendation also faces a pinch point. For tests to be reliable, valid, and fair they must be carefully calibrated. While such calibration is possible, it is also costly and time-consuming. Further, if testing is to align with the needs of the profession and law school curricula, greater coordination among constituencies will be necessary. You can see how easy it might be for the gears of reform to stutter, stall, and then grind to a halt.

Still, I left Part Four hopeful, although not for the reasons I imagined when I began the book. As Howarth notes, "preparing students for competent practice has not been the historic mission of most U.S. law schools."[22] Neither has licensing. Yet for years, attorney licensing and bar exam pressure have been a driving force behind both inertia and reform in law schools. While advances in test design, administration, and scoring have stabilized what exam scores mean across exam administrations, the test itself has become (and may have always been) meaningless. Howarth notes that bar exams have been criticized for testing both too little and too much, of being too summary in some places and too detailed in others. Most importantly, they have failed to test the critical lawyering competencies that are actually required of new lawyers. In this section, rather than continue her critique on the impact that licensing requirements have had on law schools, Howarth seems to hope that their influence will continue. That's because the NextGen bar is on the near horizon. The NextGen bar will test fewer doctrinal subjects and those it does test will be more contextualized. This drastic change will hopefully turn the focus from rote memorization to legal methods and analysis, which are the more complex cognitive skills required of new lawyers. Despite signaling

20 *Id.* at 3.

21 *Id.* at 138.

22 *Id.* at 59.

that the NCBE may finally be moving in the right direction, Howarth does point out that numerous flaws still endure—particularly the NCBE's commitment to an "all-or-nothing one-shot exam using the familiar twice-a-year timing."[23]

One thing is certain: change is coming. And Howarth's book sets out an ambitious vision for that change, one that would remake legal education, licensing, and the profession. The history she narrates though suggests that actual changes will be much more conservative. Even so, her book reminds us in each section that whatever changes we make, we must make them with "humility and constant self-scrutiny to ensure that our current motivation is to protect the public, not the profession."[24] I, for one, hope her book is read widely and that the legal education and legal profession gatekeepers heed her wise counsel.

23 *Id.* at 137.

24 *Id.* at 115.