

RAISING THE BAR

EVIDENCE-BASED THINKING ABOUT THE BAR EXAM

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FROM THE DIRECTOR

This issue of *Raising the Bar* opens with O.J. Salinas' essay *On the Sidelines*. Professor Salinas reflects on his current position at the center of a law school enterprise by recalling his law student experience at the margins. For many of us, our work is animated by our own law school experiences, often an experience defined by existence at the margins. Additional contributors to this issue explore the experience of those at the margins of law school and bar admissions. AccessLex Institute's Paige Wilson examines how law schools may preserve student diversity after the U.S. Supreme Court's decision in *Students for Fair Admissions*, while Akron Law's Allesan Armstrong and Zachary Lindesmith share their strategies and success in supporting those law graduates preparing for their second attempt at the bar exam.

Contributing researchers to this issue also demonstrate the value of collaboration in our field to effect change at the center and the margin. The work of researchers from three law schools, the Nevada Board of Bar Examiners, and AccessLex Institute is detailed in a summary of the Nevada Bar Exam Study investigating the relationship between lawyering skills and an existing bar exam. Finally, Professor C.J. Ryan shares the origins and mission of the AALS Section on the Empirical Study of Legal Education and the Legal Profession.

At a time when central changes to law school and bar admissions dominate our thoughts and time, our collaborations must continue to consider supporting the success of those at the margins. As always, AccessLex Institute stands firm in supporting our member schools in preparing the next generation of lawyers.



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Director, Programs for Academic and Bar Success
AccessLex Center for Legal Education Excellence®

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DISTINGUISHED COMMENTARY

On the Sidelines

O.J. Salinas is a Clinical Professor of Law and Director of Academic Excellence at the University of North Carolina School of Law. His essay, [Secondary Courses Taught by Secondary Faculty: A \(Personal\) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam](#), was recently published by the *Minnesota Law Review*. This article highlights some of the points he makes in his essay.

"I felt like I was on the sidelines when I was in law school. And, like many faculty who teach skills courses in the legal academy, I have experienced what seems like teaching and working from the sidelines."¹

I wanted to quit law school during (and after) my 1L year — not because of grades, but because I felt like I was out of place. I didn't feel like I belonged. I couldn't see myself contributing to the law school classroom or to the legal profession. I was one of a few Hispanic students in the entire law school. My parents didn't get the opportunity to go to college, and we didn't grow up with a lot of money. Most of the full-time faculty at the law school didn't look or sound like me, and their life experiences seemed to be quite different than mine. I didn't feel like they could relate to me, nor did I feel like they ever could have struggled in law school.

I also didn't enjoy the traditional law school classroom. I did my reading, but I was afraid to speak up in class. I felt like the traditional law school classroom only valued certain skills and experiences. I didn't like how the professors often "hid the ball" in hopes that someone in the class would eventually discover it, but there never really seemed to be an attempt to ensure that everyone in the class was on the same page. I was getting good grades in my classes, but I felt like my classmates were chapters and chapters ahead of me — perhaps, even on a different, advanced book. I was confused and frustrated. But I figured everything would work out if I just worked hard.



¹ O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 Minn. L. Rev. 2663, 2670 (2023).



I guess some would say that things worked out. I am sitting in my office at the University of North Carolina School of Law. I am a Full Clinical Professor. I serve as the Director of Academic Excellence. I teach skills and doctrine. And I have won teaching and service awards at the law school. So, perhaps, it may have worked out for me. And, perhaps, it works out for others throughout the country. But that doesn't mean it works out for everyone and it doesn't mean that legal education can't (or shouldn't) do better.

Every year that I work with students, I am reminded of the challenges that I experienced as a law student. I am reminded of the challenges that our profession and the legal academy continue to face. Even after curricular and staffing changes prompted by the American Bar Association (ABA) and the Carnegie Report, most traditional law school classrooms continue to operate the same way that they have been operating for over 150 years.² Students continue to find the law school experience to be challenging and unwelcoming, while many faculty and administrators fail to recognize how or why this may be so. Faculty and staff tasked with teaching students the practical lawyering skills that they will be expected to perform during their summer or post-graduation work continue to be treated unequally. The disconnect between what law schools say they value and who they value remains.

As I write in my recent Minnesota Law Review essay, the National Conference of Bar Examiners' (NCBE) shift to the NextGen bar exam is an ideal time for law schools to similarly shift their priorities to address this disconnect. The NCBE's move to a licensing exam that reduces the amount of substantive law tested on the exam, while incorporating the assessment of practical lawyering skills, like client counseling, negotiations, and legal research and writing, creates an opportunity for law schools throughout the country to reimagine legal education.

But this reimagining will not come easy. It will require the breaking of this anchored belief that skills faculty (including those of us in the academic support space) are secondary to their doctrinal counterparts. It will require doctrinal faculty and law school administrators "to question their own superiority and distance themselves from the traditional hierarchical structures that gave them their superior status."³ It will require law school faculty and administrators to remove their survivorship bias glasses so that they can better recognize when they may be working with a student who feels like they are on the sidelines.

Thus, my essay encourages law schools to incorporate more skills training throughout the law school curriculum and to treat doctrinal faculty and faculty who teach skills courses equally. My essay also encourages others in the legal academy or legal profession to tell their stories. As more stories are told, the more expansive the idea of who a lawyer is grows. The more stories that are told, the less likely that law students will feel like "their talents, stories, and perspectives are not needed and will not be valued in the legal profession."⁴ Fewer students will feel like they are on the sidelines while in law school because the playing field will have grown. I hope the same for skills faculty throughout the country. As the ABA and NCBE continue to emphasize the importance of teaching practical lawyering skills, I hope the playing field for who is a valued, compensated, and protected member of the legal academy will continue to expand.

² *Id.* at 2666–68.

³ *Id.* at 2691 n.60.

⁴ *Id.* at 2699.

RESEARCH SPOTLIGHT

The Nevada Bar Exam Study: Does the Bar Exam Predict Lawyering Skills?

Jenny S. Kwon is Assistant Chancellor and Dean at University of California Law San Francisco. Rick Trachok is the former Chair of the Nevada Board of Bar Examiners and Senior Counsel at McDonald Carano. David Faigman is Chancellor and Dean at University of California Law San Francisco.

For generations, states have used a bar exam as the metric for entry into the practice of law. But does the bar exam accurately assess lawyering skills? Do higher exam scores correlate to better lawyering? In short, does the bar exam serve its intended purpose? These are longstanding questions that the **Nevada Bar Exam Study** sought to answer.

In 2019, a team from the Nevada State Bar, the Nevada Supreme Court, AccessLex Institute, University of Nevada Las Vegas Boyd School of Law, and University of California Law San Francisco (formerly UC Hastings) came together to assess whether an association exists between the bar exam and lawyering skills.

The team relied on the well-regarded research of University of California Berkeley Professors Marjorie Shultz and Sheldon Zedeck that evaluated which skills and characteristics are required of successful lawyers. Their 2011 study identified 26 factors of lawyering effectiveness, along with corresponding behavioral examples for levels of performance in each factor. The Nevada Study used the Shultz/Zedeck factors to create a survey for self-evaluation and for supervising attorneys, peers, and judges. The team accessed data on 1,414 new lawyers who, at the time, had been practicing law in Nevada between one and five years. Fortunately, 37% (524 lawyers) agreed to participate in the study. After a short delay due to the pandemic, in fall 2021 participants completed a self-evaluation survey and identified supervising attorneys, peers, and judges who then received surveys to assess each new lawyer. The surveys evaluated each lawyer's abilities in the following five areas based on the Shultz/Zedeck factors:

- Ability to use analytical skills, logic, and reasoning to approach problems and to formulate conclusions and advice.
- Understanding of legal concepts and utilizing sources and strategies to identify issues and derive solutions.
- Ability to identify relevant facts and issues in a case.
- Ability to generate well-organized methods and work products.
- Ability to write clearly, efficiently, and persuasively.

The bar exam did not test well. The Nevada Study indicated that bar exam performance correlated little with lawyering skills. Performance on both the Multistate Bar Exam (MBE) and essay components of the Nevada Bar Exam revealed little relationship with the skills and characteristics of a competent lawyer. MBE scores in the survey group had a “negligible, although positive,” relationship with ratings of lawyering effectiveness. The same held true for both the Nevada essay and Multistate Performance Test questions for new lawyers. The only factors showing a modest correlation came from supervising judges, in which their ratings of lawyering effectiveness were associated with higher scores on bar essays.

What knowledge and skills are required for minimal competency to practice law? The profession needs a valid examination to determine whether someone is fit to be a practicing attorney. The results of the study raise the question of how best to test for minimum competency for entry into the practice of law. It also calls into question the value and meaning of states adopting differing “cut scores” on the MBE defining minimum competence. To be sure, there is likely some number below which no candidate should be licensed to practice law. What that number should be awaits future research, but whatever number is used should be based on its true value in predicting actual lawyer performance.

Based partly on the results of the Nevada Bar Study, the Nevada Supreme Court formed a commission to investigate alternative, and more valid, methods of measuring lawyering competence. Any licensing scheme must be validated to the factors associated with the actual practice of law. The Nevada Bar Study indicates that the current scheme fails this test. As jurisdictions contemplate the future of their bar exams, they too should consider how to ensure that those exams accomplish what they were designed to do.

Protecting Diversity After Students for Fair Admissions

Paige Wilson is a Senior Research Analyst at AccessLex Institute.

This June, the Supreme Court ended affirmative action in the United States with its rulings in the *Students for Fair Admissions* cases brought against Harvard and the University of North Carolina. In doing so, the Court reversed over forty years of precedent allowing the soft consideration of race as a plus-factor in admissions for the sake of campus diversity.

A torrent of scholars and advocates have warned of the potentially negative effects of these decisions, including AccessLex. Specifically, recent AccessLex research suggests that (1) educational benefits indeed flow from law school diversity and (2) diversity in law schools may diminish without affirmative action.

In a study currently undergoing peer review titled **Protecting Diversity: Can We Afford to Throw Out Grutter Before Its Expiration Date?**, Scott et al. (2023) use data from the American Bar Association (ABA), the Law School Survey of Student Engagement (LSSSE), and the U.S. Census to investigate the relationships between a law school’s campus diversity and several outcomes: attrition among underrepresented students of color (at the law school level), first-time bar passage, and final law school GPA (at the student level). We operationalize campus diversity

as an index accounting for both the extent to which a law school’s racial and ethnic composition matches that of its surrounding geographical area and the probability of two randomly chosen students of that institution differing by race or ethnicity.

We find that greater law school campus diversity portends slightly higher retention of underrepresented students of color, a group including students who identify as American Indian and Alaska Native, Black or African American, Hispanic or Latino, or Native Hawaiian or Pacific Islander in the ABA data. This finding speaks directly to the notion of “critical mass” raised in *Grutter* (2003), suggesting that greater on-campus representation fosters greater belonging among underrepresented students of color.

We also observe a modest positive relationship between campus diversity and final law school GPA across racial groups at the student level. The overall effect is slight and lacks statistical significance, but when we explore the relationship between campus diversity and final law school GPA by race and ethnicity, we find that the effect grows stronger for Black students at more selective law schools.

Finally, the analysis shows a modest positive association between campus diversity and probability of first-time bar passage among students of color — respondents to the LSSSE survey who identified as Asian, Black, or Hispanic. For White law students, the association between campus diversity on first-time bar passage flips negative. Moreover, the relationship is only statistically significant among White students. This finding is unexpected and may require more research and context to disentangle in the future.

Overall, however, the models point to positive outcomes associated with campus diversity. These findings confirm that educational benefits flow from diversity in the form of greater retention at the law school level and, possibly, in the form of better academic performance and bar passage at the law student level.

Diversity must therefore remain a critical objective for any law school hoping to improve the experience and education it imparts to its students — especially as Black and Latino students remain woefully underrepresented in the nation’s law schools. A swath of research, including a recent AccessLex paper titled **‘Freedom is Not Enough...’: Affirmative Action and J.D. Completion Among Underrepresented People of Color** (also undergoing peer review), suggests that achieving campus diversity may be harder than ever without affirmative action. Even so, institutions of higher education have no choice now but to hold on to hope — and to innovate in the face of these headwinds.





PROGRAM PROFILE

Akron Law Rebound Program

Allesan M. Armstrong is the Director of Academic Success and Zachary Lindesmith is the Assistant Director of Academic Success at the University of Akron School of Law.

ABA Accreditation Standard 316 requires 75% percent of students pass the bar exam within two years of graduation. Historically speaking, students are most likely to pass the bar exam on the first try. In fact, once a student fails the bar exam, their chances of passing on a second try diminish to around 30%.⁵ As a result, schools have been consistently developing programming to focus on students taking the bar exam for the first time.

At the University of Akron, we have identified common reasons students have failed the bar exam: life circumstances, poor studying and critical thinking skills in law school, low first-year GPA, low average essay scores, and low average scores on MBE question sets both during law school and in their bar prep course. These data points are common to all students, as all our students have a 1L GPA, take our MBE course, write graded essays, and have access to a school-provided commercial bar prep course.

ONE-ON-ONE MENTORSHIP

Akron Law strives to meet the needs of every student, regardless of their circumstances. We recognize that often, a student's academic needs come secondary to life's needs. Not every student has the luxury to solely focus on their bar exam success, and historically we tend to see these students again as repeat takers. Holding one-on-one meetings allows us to target students' life needs, to connect them with services in the community and services through our Student Affairs Dean.

⁵ Nat'l Conf. Bar Exam'rs, *First-Time Exam Takers and Repeaters in 2022*. The Bar Exam'r (2023).

GOAL SETTING

In addition, these meetings allow us to consider what academic focus the student needs moving forward and develop individualized plans to attain a successful bar exam result. During these meetings, we have also created a weekly goal-setting survey. This encourages the student to take ownership of their preparation by setting goals, measuring their ability to meet their goals, and prioritizing their studying.

SKILLS WORKSHOPS

Once the students' weaknesses are targeted in these meetings, we can improve their skills. We have developed a series of videos that focus on bar taking *skills*, rather than *material*. These short videos show students how to approach MBE questions, how to remediate regularly missed subject areas, and how to critically review rubrics and sample answers for Multistate Essay Exams. The goal is to offer videos in a format that is a quick review. No video lasts longer than 15 minutes.

ADDITIONAL GRADED ESSAYS

Many times, students that come back to our office have completed their commercial prep course, and the feedback they received on their essays was not specific. By offering additional graded essay support, we can workshop writing skills to get their essay score averages to a passing score. We offer one graded essay per week; however, we will allow the student to submit that essay repeatedly. This requires the student to internalize the feedback and make the revisions necessary to improve their writing. We have also created a reporting form that requires students to critically review and assess their work before submitting the essay.

If law schools want to continue to increase their bar pass rates, they need to increase programming targeted towards historically neglected takers. Repeat bar takers are a group that is ripe for increasing ABA Accreditation Standard 316 reporting numbers.



ORGANIZATION UPDATE

American Association of Law Schools (AALS) Section on the Empirical Study of Legal Education and the Legal Profession

C.J. Ryan is an Associate Professor of Law at the University of Louisville Louis D. Brandeis School of Law and the current chair of the AALS Section on the Empirical Study of Legal Education and the Legal Profession.

I write with greetings from the **American Association of Law Schools (AALS) Section on the Empirical Study of Legal Education and the Legal Profession**. Our section is comprised of educators, administrators, and staff at AALS member schools who have a passion for learning more about what we do in law schools to prepare our students for their chosen profession. Moreover, we share a common interest in improving the enterprise of legal education with data-based results and applying these same methods to optimize our students' training in the practice of law — for the betterment of the entire legal profession. Naturally, AccessLex has been and continues to be a partner in our mission, and it brings me great joy to share more about our section with AccessLex Institute's readership in *Raising the Bar*.

We accomplish our section's mission through the strength of members' research pursuits and engagement with our programming. To that end, we organize sessions at every AALS Annual Meeting, in addition to our summer webinar series and quarterly newsletters, to apprise our members of the cutting-edge research taking place in the field. This past year, we saw — in action — what emerging and established scholars are doing to push the frontiers of empirical research on legal education and the legal profession. And our main program featured leading interdisciplinary researchers and policy analysts who addressed a pressing question that gets at an old divide in methodological research approaches: "What does it mean for research on legal education and the legal profession to be empirical?" The answers converged around a theme that we have explored in our summer webinar series this year: quantitative and qualitative research are not merely methodological camps but complementary of one another. In resolving research matters like these through discourse, we hope to promote rigorous research in our field that uses mixed methodologies to better understand the *what*, *how*, and *why* of trends within the legal academy and the legal profession. At the 2024 AALS Annual Meeting, we will be hosting three sessions, with our main program centering on the development of professional identity in law schools.



Our section is a latter-day creation, and its development somewhat trailed analogous organizations in other professional education communities. As one of our Section's co-founders, the late Judith Welch Wegner (who served as the principal investigator for the study of legal education undertaken by the Carnegie Foundation for the Advancement of Teaching from 1999–2001, work that led to the publication of the Carnegie Report *Educating Lawyers* in 2007, and for whom our annual award for significant contributions to the field is in honor) observed, "The development of this section realizes all my hopes for the development of a disciplined 'scholarship of teaching and learning' in legal education, as has come to pass in medical education and in other fields." In the five years of its existence, our section has led meaningful conversations about myriad issues impacting legal education and the profession. Yet, the need for the insights produced by our Section's members and through our Section's programming has never been greater.

It is in our very recent memory that law schools across the country were forced to make countless, challenging decisions in the face of an unpredictable pandemic. A past chair of our section, Victor Quintanilla, wrote contemporaneously during the pandemic, "We have experienced a massive challenge and transformation in legal education, an overnight revolution in legal education. Nothing like this has ever happened to legal education in as compressed a time, under similar conditions. The challenges we face involve change and disruption." As we have emerged from the pandemic, we are more resilient but are faced with new questions. How will legal education become more inclusive, incorporate technological advancement, and develop in our students a life-long professional identity? How will the legal profession become more just and equitable, adapt to a 21st century landscape, and lead in concerns of local and national import? Newly emerging empirical research, which our Section showcases through its programming and newsletters, will hold clues to how the legal academy and the legal profession will address present and future questions for our ever-evolving times. It is my hope you will consider joining our section and engaging in this essential dialogue.

CONFERENCE CORNER

- **AASE 4th Biennial Diversity Conference** (October 11-13)
- **AccessLex Legal Education Research Symposium** (November 7-8)
- **LexCon '23 Financial Capability and Student Success Conference for Graduate and Professional Administrators** (November 8-10)
- **Association for the Study of Higher Education Annual Conference** (November 15-18)
- **Association of American Law Schools Annual Meeting** (January 3-6)

Please email RTB@accesslex.org about upcoming bar-related conferences.

PUBLICATIONS AND POSTS

- Rory D. Bahadur & Kevin Ruth, ***Chat GPT-4 Understands Academic Attrition's Impact on Bar Passage But Does Anyone Else?***, Washburn L. J. (forthcoming).
- Amy A. Emerson, ***A Threshold Assessment: Is Technology Among the Competencies Tested by the MPRE?***, Univ. St. Thomas L. J. (forthcoming).
- ***NCBE Publishes First Sample Questions for NextGen Bar Exam***, Nat'l Conf. Bar Exam'rs (July 11, 2023).
- Kyle Rozema, ***How Do Occupational Licensing Requirements Affect the Size of the U.S. Legal Profession?*** (July 3, 2023).
- Marsha Griggs, ***Outsourcing Self-Regulation***, Wash. & Lee L. Rev.(forthcoming).
- Deborah Jones Merritt et al., ***Enhancing the Validity and Fairness of Lawyer Licensing: Empirical Evidence Supporting Innovative Pathways***, Wash. Univ. J. L. & Pol'y (forthcoming).

Please email RTB@accesslex.org with recent and forthcoming bar-related publications, posts, and podcasts to be included in future issues of *Raising the Bar*.

RESOURCES FOR LEGAL EDUCATORS AND LAW STUDENTS

Information About the Bar Exam

- [AccessLex Resource Collections: Bar Success](#)
- [ABA Bar Information for Applicants with Disabilities](#)
- [ABA Bar Passage Outcomes](#)
- [ABA Statistics](#)
- [Bar Exam Results by Jurisdiction](#)
- [Bar Admission Guide](#)
- [NCBE Bar Exam Fundamentals for Legal Educators](#)
- [NCBE NextGen: Bar Exam of the Future](#)

Student Resources

- [AccessLex® Law School Scholarship Databank](#)
- [AccessLex® Student Loan Calculator](#)
- [MAX by AccessLex®](#)

Research Grants

- [AccessLex Bar Success Intervention Grant Program](#)
- [AccessLex Bar Success Research Grant Program](#)
- [American Association of Law Libraries \(AALL\)](#)

ASP and Bar Success Resources

- [JDEdge by AccessLexSM](#)
- [The Bar Examiner](#)
- [CALI Lessons](#)

Please email RTB@accesslex.org with information about resources for faculty and students in your jurisdiction.

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EMPOWERING THE NEXT GENERATION OF LAWYERS®

AccessLex Institute®, in partnership with its nearly 200 nonprofit and state-affiliated ABA-approved member law schools, has been committed to improving access to legal education and to maximizing the affordability and value of a law degree since 1983. The AccessLex Center for Legal Education Excellence® advocates for policies that make legal education work better for students and society alike, and conducts research on the most critical issues facing legal education today. The AccessLex Center for Education and Financial Capability® offers on-campus and online financial education programming and resources to help students confidently manage their finances on their way to achieving personal and professional success. AccessLex Institute is headquartered in West Chester, PA.
