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# A REBUTTAL TO KINSLER'S AND TO ANDERSON AND MULLER'S STUDIES ON THE PURPORTED RELATIONSHIP BETWEEN BAR PASSAGE RATES AND ATTORNEY DISCIPLINE

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## INTRODUCTION

Because of the escalating cost of legal education and the recent decline in bar passage rates among ABA approved law schools, some analysts have reasonably attempted to determine the social costs of legal education.<sup>1</sup> Many have attempted to place the blame on segments of the legal education marketplace.<sup>2</sup>

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<sup>1</sup> Alexei Koseff, *A Bar Too High? Pass Rate Plummets to Record Low for California Lawyer Exam*, SACRAMENTO BEE (May 19, 2018), <https://www.sacbee.com/news/state/california/article211500444.html>; Mark Hansen, *What Do Falling Bar-Passage Rates Mean for Legal Education--and the Future of the Profession?*, ABA J. (Sept. 1, 2016), [http://www.abajournal.com/magazine/article/legal\\_education\\_bar\\_exam\\_passage](http://www.abajournal.com/magazine/article/legal_education_bar_exam_passage); Andrew Brockman, *Cost of Legal Education*, MICH. ST. INT'L. L. REV.: OFFICIAL LEGAL F. PAGE (May 11, 2017), <https://www.msuilr.org/msuilr-legalforum-blogs/2017/5/11/cost-of-legal-education>; Debra Cassens Weiss, *Legal Education Cost Is Even Higher than First Estimated, Transparency Group Says*, ABA J. (May 7, 2012), [http://www.abajournal.com/news/article/legal\\_education\\_cost\\_is\\_even\\_higher\\_than\\_first\\_estimated\\_transparenc](http://www.abajournal.com/news/article/legal_education_cost_is_even_higher_than_first_estimated_transparenc)y\_group.

<sup>2</sup> See, e.g., Staci Zaretsky, *Failed Law School Somehow Musters up "Respectable" Bar Exam Pass Rate Before Closure*, ABOVE THE LAW (Nov. 30, 2018), <https://abovethelaw.com/2018/11/failed-law-school-somehow-musters-up-respectable-bar-exam-pass-rate-before-closure/>; Jill Switzer, *Bar Exam Pass Rates Suck, so Does Legal Education Need a Reboot?*, ABOVE THE LAW (Nov. 28, 2018), <https://abovethelaw.com/2018/11/bar-exam-pass-rates-suck-so-does-legal-education-need-a-reboot/>; Staci Zaretsky, *Law School Once Again Destroys State's Bar Exam Passage Rate*, ABOVE THE LAW (May 16, 2017), <https://abovethelaw.com/2017/05/law-school-once-again-destroys-states-bar-exam-passage-rate/>; Paul L. Caron, *Eighteen Law Schools Would Fail ABA's Proposed 75% Bar Passage Within 2 Years Accreditation Standard*, TAXPROF BLOG (Jan. 26, 2019), [https://taxprof.typepad.com/taxprof\\_blog/2019/01/eighteen-law-schools-would-fail](https://taxprof.typepad.com/taxprof_blog/2019/01/eighteen-law-schools-would-fail)

The complicated relationships among the policies of providing more access to justice, increasing minority representation in the bar, and protecting the public from shoddy law practice have recently inflamed academic debate. In the rush for assessing blame, some analysts have published empirically flawed reports that have received a great deal of media and academic attention, but have not received serious methodological analysis. The problem is that merely believing that one variable, such as LSAT scores, causes results, such as lower bar examination scores and/or increased ethical violations, is very different than empirically proving that professed cause and effect relationship. This article responds to two of these studies: one conducted by Professor Kinsler in *Is Bar Exam Failure a Harbinger of Professional Discipline?*<sup>3</sup> and another conducted by Professors Anderson and Muller in *The High Cost of Lowering the Bar.*<sup>4</sup> These studies concluded that there is either a causal link and/or a correlation between bar passage scores and the probability of state bar disciplinary rates. Both studies argue for more

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abas-proposed-75-bar-passage-within-2-years-accreditation-standard.html; David Frakt, *ABA Standard 316 Gets Shot Down Again – Here's How To Fix It*, FAC. LOUNGE (Jan. 28, 2019), <https://www.thefacultyounge.org/2019/01/aba-standard-316-gets-shot-down-again-heres-how-to-fix-it.html>; David Frakt, *Recent Bar Pass Rates – A Cautionary Tale*, FAC. LOUNGE (Nov. 5, 2018), <https://www.thefacultyounge.org/2018/11/recent-bar-pass-rates-a-cautionary-tale.html>; Bernie Burk, *How the Legal Academy Has Changed Since the Great Recession (Hint – It's Probably a Lot More than You Think)*, FAC. LOUNGE (Sept. 26, 2018), <https://www.thefacultyounge.org/2018/09/how-the-legal-academy-has-changed-since-the-great-recession-hint-its-probably-a-lot-more-than-you-th.html>; David Frakt, *Lessons from the 2018 ABA Bar Passage Data Spreadsheet: Part 1*, FAC. LOUNGE (Mar. 26, 2018), <https://www.thefacultyounge.org/2018/03/lessons-from-the-2018-aba-bar-passage-data-spreadsheet-part-1-.html>; David Frakt, *Lessons from the 2018 ABA Bar Passage Data Spreadsheet: Part 2*, FAC. LOUNGE (Mar. 26, 2018), <https://www.thefacultyounge.org/2018/03/lessons-from-the-2018-aba-bar-passage-data-spreadsheet-part-2.html>; David Frakt, *Lessons from the 2018 ABA Bar Passage Data Spreadsheet: Part 3 – A Proposal to Change Bar Pass Standard 316*, FAC. LOUNGE (Mar. 26, 2018), <https://www.thefacultyounge.org/2018/03/lessons-from-the-2018-aba-bar-passage-data-spreadsheet-part-3.html>; David Frakt, *Lessons from the 2018 ABA Bar Passage Data Spreadsheet: Part 4 – Anomalies and Deceptions*, FAC. LOUNGE (Mar. 26, 2018), <https://www.thefacultyounge.org/2018/03/lessons-from-the-2018-aba-bar-passage-data-spreadsheet-part-4-anomalies-and-deceptions.html>.

<sup>3</sup> Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883, 922 (2017).

<sup>4</sup> Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, GEO. J. LEGAL ETHICS (forthcoming) (manuscript at 21–22), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2977359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977359).

restrictive access to law schools or, alternatively, for more regulation of the legal stream leading to membership in the bar. Their data does not support their drastic remedies.

### I. THE KINSLER STUDY

Professor Kinsler's claim is simple: he states that a higher percentage of attorneys who failed the bar exam multiple times commit more ethical violations in their early careers than other attorneys.<sup>5</sup> Because he concludes that multiple bar examination attorneys are a danger to the public, he proposes that states limit the number of bar examination attempts applicants can take.<sup>6</sup>

Although Kinsler details the careers of attorneys that he says prove his bar exam and ethical violation thesis, there is a glaring omission—Kinsler did not discuss a single case in which an attorney who took the bar exam multiple times was found to have violated a disciplinary rule early in his or her career involving any of the five skills he claims are tested on bar examinations. He failed to demonstrate any nexus between multiple bar exam failures and attorney disciplinary violations.

In addition, Kinsler fails to provide sufficient empirical data to support his proposition that multiple bar examination attorneys have a different pattern of disciplinary violations early in their careers. In fact, a Connecticut ethics study cited by Kinsler found that all attorneys who committed ethical violations, not just those who failed the bar exam, committed most ethical violations during what Kinsler terms “early” in their careers.<sup>7</sup> In Connecticut, “the average length of time between admission and the filing of a grievance leading to a sanction was 10.74 years.”<sup>8</sup> Kinsler's logical leap in connecting the timing of multiple bar exam test taker discipline “early in their careers” to their lack of bar exam performance fails since almost all disciplinary cases for all attorneys occur during that same time frame.<sup>9</sup>

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<sup>5</sup> Kinsler, *supra* note 3, at 885.

<sup>6</sup> *Id.* at 917–18.

<sup>7</sup> Kinsler, *supra* note 3, at 900; Leslie C. Levin et al., *A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline* 9 (Mar. 15, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2258164](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258164).

<sup>8</sup> Levin et al., *supra* note 7, at 16.

<sup>9</sup> Kinsler, *supra* note 3, at 899. Kinsler's time period includes discipline “in the first few years—ranging from two years to twelve years—of their legal careers.” *Id.* at 893.

The most fatal flaw in Kinsler's argument and data is that he did not produce evidence to demonstrate the level of correlation between multiple bar attempts and ethical violations. To illustrate his empirical failure, consider the following facts: from February 2012 to February 2018, men tended to have a lower "first-time" and a lower "repeater" (multiple bar exam) passage rate than women did on the California Bar Examination.<sup>10</sup> The problem is that even though there is a correlation between gender and the frequency of ethical violations, the correlation is so low that it does not warrant dramatic changes to the bar examination.<sup>11</sup> For instance, a study of the disciplinary patterns of Connecticut attorneys found that men are 2.5% more likely to be disciplined by the state bar than women are.<sup>12</sup> However, the authors of that study cautioned that the slight predictive variable of gender on discipline does not warrant reliance on that variable to alter public policy, much less to frame a drastic remedy like Kinsler's to limit the number of times men can take a bar exam.<sup>13</sup>

Kinsler not only failed to demonstrate a significant relationship between multiple bar examination attempts and ethical violations, but also failed to consider other possible correlations with bar exam failure and attorney discipline. One could speculate that there are so many marginally correlated variables with ethical violations that they lose any predictive value. For instance, "in 2004, Klein and Bolus reported in a study of the Texas Bar Examination that applicants who worked while preparing for the bar examination earned about 15 total scale score points less than their classmates with comparable

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<sup>10</sup> See *California State Bar Examination Statistics*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics>.

During that period, women scored better than men on eight of thirteen exams as first time test takers and better on eight out of twelve exams as repeat test takers. *Id.*

<sup>11</sup> Anderson & Muller, *supra* note 4 (manuscript at 18) (agreeing that such gender differences on bar passage rates do not support changes to bar admission standards). The professors state, "[E]ven though men are subject to higher discipline rates, one would not suggest restricting the practice of law based on gender." *Id.* (footnote omitted).

<sup>12</sup> Leslie C. Levin et. al., *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51, 66 (2015).

<sup>13</sup> *Id.* at 52, 62–63, 75–76.

LSAT scores and LSGPA who were not working.”<sup>14</sup> This fact certainly does not imply that poorer students, who have to work during bar preparation study, should be denied a chance to repeat the bar examination.

Nonetheless, Kinsler claims that his data demonstrates that:

(1) [t]he more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for ethical violations, particularly early in the lawyer’s career; and (2) [t]he more times it takes a lawyer to pass the bar exam the more likely that lawyer will be disciplined for lack of diligence—including noncommunication—and/or incompetence.<sup>15</sup>

The problem, as the following analysis will demonstrate, is that Kinsler’s empirical data does not support either of his claims. In addition, in some instances Kinsler’s reliance on his empirical data is extremely misleading, especially since he omitted highly relevant data from some of the sources he relies on.

Kinsler offers specific examples of attorneys he identified that took the bar exam multiple times and had disciplinary records within the first twelve years of their careers.<sup>16</sup> The following section demonstrates that Kinsler’s attorney examples fail to prove any causal relationship between poor bar exam performance and excessive disciplinary violations by those re-takers. A second fatal flaw of Kinsler’s study is that he fails to establish a correlation between the factual basis for the attorney disciplinary cases he discusses and the topics actually tested on the bar examination.

#### A. *Kinsler Mischaracterized the Specific Cases of Attorney Discipline That He Used To Support His Hypothesis*

##### 1. The Filer Case Study

One would think that if attorneys who passed the bar exam after multiple attempts frequently commit ethical violations, Kinsler would easily find examples to demonstrate his thesis that poor performance on bar exam topics predicts higher attorney

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<sup>14</sup> Roger Bolus, *Performance Changes on the California Bar Examination: Part 2*, STATE BAR OF CAL. 1, 63 (Dec. 20, 2018), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf>.

<sup>15</sup> Kinsler, *supra* note 3, at 922.

<sup>16</sup> *Id.* at 893.

ethical violations. However, the few examples of disciplinary cases he discusses have little, if any, correspondence to the topics frequently covered on standard bar examinations.

Kinsler apparently chose to discuss the case of Max D. Filer<sup>17</sup> first for dramatic and hyperbolic effect since Filer took the California Bar Examination forty-eight times,<sup>18</sup> even though Filer's first ethical violation did not occur until he had practiced law for ten years.<sup>19</sup> Kinsler never discusses the other variables beyond failing the bar examination that may have contributed to Filer's disciplinary action, such as medical or family problems. Kinsler states that in 2001, ten years after admission, Filer was disciplined "for not performing competently" and again in 2005 was disciplined for failing "to perform legal services competently."<sup>20</sup>

First, the obvious problem is that the 2005 disciplinary case occurred outside of Kinsler's definition of "early career" since it was in Filer's fourteenth year of legal practice.<sup>21</sup> Second, Kinsler also failed to demonstrate that Filer's two disciplinary actions

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<sup>17</sup> Diane Curtis, *Advice from One Who Failed Bar Exam 47 Times: Try Again, Again and Again*, CAL. ST. B. J. (Feb. 2004), <http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=54802&categoryId=54503&month=2&year=2004>.

<sup>18</sup> *Id.*

<sup>19</sup> Kinsler provides no empirical support for classifying ethical violations more than a decade after admission to the bar as ones as occurring "early in their legal careers." Additionally, Kinsler could have demonstrated that government or state bar organizations define the term "early in careers" as a term of art or as a customary term within the industry. For example, "early career" is defined as the first five years of a career in determining which scholars qualify for research grants in the United Kingdom. See *Assessment Framework and Guidance on Submissions*, RESEARCH EXCELLENCE FRAMEWORK 1, 19 (July 2011), [http://www.fapesp.br/avaliacao/manuais/ref\\_guidelines.pdf](http://www.fapesp.br/avaliacao/manuais/ref_guidelines.pdf) (stating that for the 2014 Research Excellence Framework an early career researcher must have started their careers on or after August 1, 2009). The "early research grants" for the National Institute of Health are formulated such that "[t]he 7 year eligibility period will be calculated based on the MM/DD/YYYY the degree was awarded." *Department of Health and Human Services Part 1. Overview Information*, NAT'L INST. HEALTH (Feb. 9, 2017) [https://grants.nih.gov/grants/guide/pa-files/PAR-17-161.html#\\_3.\\_Additional\\_Information](https://grants.nih.gov/grants/guide/pa-files/PAR-17-161.html#_3._Additional_Information). The author has not been able to find a single official definition of "early career" that is consistent with Kinsler's expanded definition that includes incidents occurring during the first twelve years of one's career. The problem, of course, is that if Kinsler were to use a more recognized definition of "early career," the examples of attorney discipline that he used would not fit as cases of early career disciplinary violations.

<sup>20</sup> Kinsler, *supra* note 3, at 884 & n.12.

<sup>21</sup> See *supra* note 19 and accompanying text; see also Kinsler, *supra* note 3, at 883, 884 n.12 (stating Maxcy D. Filer passed the bar in 1991, while he was disciplined fourteen years later in 2005).

are correlated to the subjects and skills tested by the California Bar Examination. All that Kinsler reports about Filer's disciplinary cases was that he was found to have failed "to perform legal services competently."<sup>22</sup> Kinsler conveniently left out of his article the actual nature of Filer's 2001 and 2005 "incompetency" disciplinary cases.

According to the California State Bar, Filer was disciplined in 2001 for failing to file a proof of service for a client.<sup>23</sup> Filer was found to have violated California Rules of Professional Conduct, Rule 3-110(A), which in 1991 stated that "[a] member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently."<sup>24</sup> However, failing to file a proof of service has little to do with failing the California Bar Exam. The California Bar Examination does not test the legal timing for filing a proof of service in a divorce action.<sup>25</sup>

Filer's 2005 disciplinary action, which occurred beyond Kinsler's own definition of "early career," was also for failing to file proof of service.<sup>26</sup> Again, although the State Bar found that Filer failed to perform his legal services "competently," that incompetence involved a lack of diligence, not a failure to understand and implement a topic covered by the California Bar Examination.<sup>27</sup> Kinsler also failed to discuss the facts surrounding Filer's 2005 failure to file the proof of service. In 2005, Filer was seventy-four years old and had been ill for several years, which prevented him from fulfilling his

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<sup>22</sup> Kinsler, *supra* note 3, at 884 n.12.

<sup>23</sup> *Suspension/Probation*, CAL. ST. B. J. (Aug. 2005), <http://archive.calbar.ca.gov/archive/Archive.aspx?articleId=70768&categoryId=70682&month=8&year=2005>; see also *The State Bar of Cal. Office of the Chief Trial Counsel Enforcement v. Maxcy D. Filer*, State Bar Court of the State Bar of California, Hearing Department Stipulation Re Facts, Conclusions of Law and Deposition and Order Approving Stayed Suspension; No Actual Suspension, filed October 21, 2004 in case number 04-0-12425, at p. 2. (copy obtained from the State Bar Court in author's possession).

<sup>24</sup> CAL. RULES OF PROF'L CONDUCT r. 3-110 (STATE BAR OF CAL. 1989).

<sup>25</sup> *Scope of the California Bar Examination*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope> (last visited May 22, 2019).

<sup>26</sup> See *Suspension/Probation*, *supra* note 23 (discussing Filer's 2005 violation and subsequent stipulation).

<sup>27</sup> *The State Bar of Cal. Office of the Chief Trial Counsel Enforcement v. Maxcy D. Filer*, State Bar Court of the State Bar of California, Hearing Department Stipulation Re Facts, Conclusions of Law and Deposition and Order Approving Stayed Suspension; No Actual Suspension, filed October 21, 2004 in case number 04-0-12425, at p. 2. (copy obtained from the State Bar Court in author's possession).

professional lawyer duties.<sup>28</sup> Although illness is not an excuse for negligent advocacy, such a failure to file a document while ill has no correspondence to the bar exam. As it turns out, Kinsler's posterchild for the correlation between multiple bar exam failures and early career disciplinary proceedings was an old man who wrongfully abandoned a client due in large part to his illness.

Kinsler, apparently content with using Filer as his bar-failing, incompetent attorney flag-bearer, decided to keep the most interesting facts about this lawyer's life undisclosed. Filer grew up as a black man who lived "a segregated childhood in Marianna, Ark[ansas]."<sup>29</sup> Filer moved to Compton, California, a demographically black neighborhood where "[h]e helped organize and was president of the Compton chapter of the NAACP. He proudly carried the California flag in the 1963 March on Washington with Martin Luther King Jr. He later carried the same flag in King's funeral procession."<sup>30</sup> Filer served in the U.S. Navy from 1946 to 1949, and he was a Compton city councilman from 1976 to 1991.<sup>31</sup> Filer tirelessly fought for civil rights in Compton's Neighborhood Legal Services office and at the Community Redevelopment Agency, and he testified at the McCone Commission regarding the causes and solutions regarding the Watts Riots.<sup>32</sup>

Kinsler's many omissions regarding Filer's pre- and post-law degree life, and regarding the factual predicates of his bar discipline, demonstrate his questionable and methodologically biased research. He did not discuss the true nature of Filer's

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<sup>28</sup> Curtis, *supra* note 17. See also *Maxcy Filer, Persistent Tackler of Bar Exam, Dies at 80*, METROPOLITAN NEWS-ENTERPRISE (Jan 11, 2011), <http://www.metnews.com/articles/2011/obit011111.htm>. Before the 2005 disciplinary case, Filer "began having health problems that prevented him from fulfilling his responsibilities." *Id.*

<sup>29</sup> David Margolick, *At the Bar; A Man's Pride and Persistence Conquer the California Bar Exam's Most Famous Losing Streak*, N.Y. TIMES (Sept. 13, 1991), <https://www.nytimes.com/1991/09/13/news/bar-man-s-pride-persistence-conquer-california-bar-exam-s-most-famous-losing.html>.

<sup>30</sup> Curtis, *supra* note 17.

<sup>31</sup> Yussuf J. Simmonds, *Maxcy Filer, a Legend . . . STRAIGHT OUTTA COMPTON*, L.A. SENTINEL (Jan. 13, 2011), <https://lasentinel.net/maxcy-filer-a-legend-straight-outta-compton.html>.

<sup>32</sup> *Id.*; Ann M. Simmons, *Maxcy Dean Filer dies at 80; 'Mr. Compton' served on City Council and Sought to Empower Blacks*, L.A. TIMES (Jan. 15, 2011), <https://www.latimes.com/archives/la-xpm-2011-jan-15-la-me-maxcy-filer-20110115-story.html>.

disciplinary incompetency—failing to file two proofs of service. He not discuss Filer’s age and health as a possible cause of his abandoning his client in 2005. He even failed to discuss whether the California Bar Examination frequently tests the substantive nature of his ethical violation—failure to file a proof of service. Kinsler simply did not demonstrate that the Filer case fits his speculation that failing a bar exam multiple times is correlated with more disciplinary violations during the first twelve years of a lawyer’s career.

Kinsler is also silent regarding the impact of his drastic remedy, which would have prevented attorneys like Filer from getting a license to practice law. He does not discuss a cost-benefit analysis between the benefits that Filer provided to the hundreds of poor clients he represented versus the two ethical violations that led to his state bar discipline.

## 2. The DeZell Case

Kinsler’s second posterchild for multiple bar exam failures and early disciplinary violations is John DeZell, who passed the Oregon bar examination on his “tenth attempt.”<sup>33</sup> The only information that Kinsler provides regarding DeZell’s disciplinary violation is that he “was suspended in 1995 for three years for neglecting multiple legal matters and incompetence.”<sup>34</sup> Kinsler failed to discuss the factual bases for DeZell’s state bar discipline and did not even attempt to show a correlation between those violations and DeZell’s failure of subjects tested on the Oregon Bar Examination.

DeZell was charged with four disciplinary counts.<sup>35</sup> In Count I, he was alleged to have failed to timely file a complaint and provide the client with a trust fund accounting.<sup>36</sup> In Count II, DeZell was alleged to have improperly filed a “Notice of Appeal, one day beyond the statutory deadline” and failed to properly serve that notice.<sup>37</sup> In Count III, he was charged with failure “to maintain client property in a place of safekeeping, and failed to promptly pay or deliver to his client funds . . . that she was

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<sup>33</sup> Kinsler, *supra* note 3, at 883.

<sup>34</sup> *Id.* at 884 n.12.

<sup>35</sup> *In re Dezell*, 9 DB Rptr 143, 146–47 (Or. 1995).

<sup>36</sup> *Id.* at 146.

<sup>37</sup> *Id.* at 147.

entitled to receive.”<sup>38</sup> Finally, in Count IV, DeZell was charged with representing two clients where there was a clear conflict of interest and failing to obtain his clients’ consent to that conflict of interest.<sup>39</sup> Most of DeZell’s ethical violations relate to topics covered on the Multistate Professional Responsibility Exam (“MPRE”), not the bar examination.<sup>40</sup>

Kinsler’s reference to other attorneys who took the bar examination multiple times provides no support for his theory. He includes Paulina Bandy as another example of why states should have a maximum limit on the number of times applicants can sit for the bar since she “passed the California bar exam on her fourteenth attempt.”<sup>41</sup> However, Kinsler did not tell the rest of the story about Ms. Bandy perhaps because it would present a case of a multi-test taker who did not fit his model of the negligent or incompetent advocate. What Kinsler left out is that even though Ms. Bandy took the bar exam fourteen times, during her “early career,” from 2008 to 2018, she had no state bar disciplinary actions.<sup>42</sup>

Kinsler also used the case of Kevin D. Callahan to demonstrate the absurdity of permitting repeated attempts to pass a bar exam. He states that “Callahan failed the Massachusetts Bar Exam ten times.”<sup>43</sup> Again, Kinsler only presents “straw-man” arguments and does not discuss any facts in the examples that he uses that could weaken his crusade to rid the United States of multi-bar examination test takers. What he did not disclose is that Mr. Callahan was admitted to practice law in Massachusetts in 1990, but during the twenty-eight years of Callahan’s legal practice, there are no reports of any disciplinary proceedings against him.<sup>44</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 147–48.

<sup>40</sup> See *MPRE Subject Matter Outline*, NAT’L CONFERENCE OF BAR EXAM’RS (2013), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F2>.

<sup>41</sup> Kinsler, *supra* note 3, at 901.

<sup>42</sup> See Attorney Licensee Profile for Paulina Louise Bandy, License Number 255002, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Licensee/Detail/255002> (last visited June 1, 2019).

<sup>43</sup> Kinsler, *supra* note 3, at 901.

<sup>44</sup> At the time of this of writing, neither the Massachusetts Board of Bar Overseers records database nor the Board’s Disciplinary Decision index has indicated any history of disciplinary proceedings against Kevin D. Callahan. See Attorney Licensee Profile For Kevin D. Callahan, Board of Bar Overseers (BBO) Number 557146, MASS. BD. B. OVERSEERS, <https://www.massbbo.org/Attorney>

Kinsler presents another attorney, “Marcus Wiggins [who] passed the California bar exam on his twenty-fourth attempt.”<sup>45</sup> The problem, again, is that Wiggins has never had any disciplinary proceedings during his legal career.<sup>46</sup>

If Kinsler is correct that there are hundreds of multiple bar-test taking attorneys who pose a serious danger to the public because of their poor performance on the bar exam, then why did he not present examples of those attorneys in his analysis?

### 3. Kinsler Failed To Fully Discuss the Connecticut Bar Study Results on Attorney Discipline

Kinsler cited to two Connecticut State Bar studies of attorney discipline that attempted to isolate variables that might have a statistical correlation with attorney misconduct.<sup>47</sup> Kinsler states that “[t]here is also anecdotal and statistical evidence showing that lawyers who failed the Connecticut Bar Exam were more likely to face discipline than lawyers who never failed that exam.”<sup>48</sup> However, Kinsler did not present any of the caveats of the Connecticut studies which undermine his drastic remedy of limiting bar examination attempts. First, the Connecticut study found that those who failed the bar exam were more likely to receive “less severe” discipline rather than “severe discipline.”<sup>49</sup> In fact, the Connecticut study found that attorneys who received severe discipline were academically “somewhat stronger than those who were less severely disciplined” as more “of the less severely disciplined lawyers attended a law school ranked in the bottom half” compared to the severely disciplined lawyers.<sup>50</sup> Under Kinsler’s public policy rationale, since academically better performing students who attended better law schools are a

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Lookup?bbonumber=557146 (last visited June 1, 2019); *Disciplinary Decisions*, MASS. BD. OF BAR OVERSEERS, <https://www.massbbo.org/Decisions> (last visited June 1, 2019).

<sup>45</sup> Kinsler, *supra* note 3, at 900.

<sup>46</sup> See Attorney Licensee Profile for Marcus B. Wiggins, License Number 272501, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Licensee/Detail/272501> (last visited June 1, 2019).

<sup>47</sup> See Kinsler, *supra* note 3, at 900 n.99.

<sup>48</sup> *Id.* at 900.

<sup>49</sup> Levin et al., *supra* note 12, at 70.

<sup>50</sup> *Id.*

serious danger to the public, they should not be admitted to the bar even though they passed the bar examination on their first attempt.

Kinsler also failed to discuss several other findings in the Connecticut study that rebut his suppositions:

*B. No Predictive Correlation Between Multi Bar Test Taking and Disciplinary Action Early in an Attorney's Career*

One of Kinsler's primary claims is that "early career" multiple bar test takers commit ethical violations at rates significantly greater than attorneys who passed the bar exam on the first or second attempt.<sup>51</sup> He structures his argument as follows:

1. Law students with lesser intellectual abilities perform worse in law school;
2. Those who do poorly in law school are more likely to fail the bar exam multiple times;
3. Those who fail the bar exam multiple times are predicted to commit more ethical violations; and finally,
4. That subset of attorneys are much more likely to commit their ethical violations early in their careers.<sup>52</sup>

The problem is that Kinsler failed to discuss the empirical data contained in the Connecticut study that rebuts his attorney discipline predictive model. First, that study found that LSAT scores have no correlation with attorney discipline.<sup>53</sup> The Connecticut study rebuts Kinsler's intuition that academically weaker students are predicted to commit statistically significantly more ethical violations.<sup>54</sup> In addition, the study found that attending a low-ranked law school had almost no correlation with predictive ethical violations and only increased the likelihood of discipline by "1.7 percentage points."<sup>55</sup>

The Connecticut study also rebuts Kinsler's temporal predictive model in which he claims that "lawyers who repeatedly fail the bar exam are more likely to be disciplined for incompetence early in their legal careers."<sup>56</sup> What Kinsler did

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<sup>51</sup> Kinsler, *supra* note 3, at 885.

<sup>52</sup> *Id.*

<sup>53</sup> Levin et al., *supra* note 12, at 67.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Kinsler, *supra* note 3, at 892.

not include in his analysis is that the Connecticut study found that for all disciplined attorneys the average time between admission to the bar and a disciplinary sanction was 10.7 years.<sup>57</sup> In other words, the Connecticut study did not find that length of time practicing law was a variable that correlated with distinctions among attorney disciplinary records.

*C. Kinsler Stacks the Empirical Deck by Overgeneralizing the Categories of Ethical Misconduct He Relies on in His Attempt To Prove a Cause and Effect Relationship Between the Number of Bar Exams Taken and Attorney Incompetence*

Kinsler defines two types of attorney misconduct that he is investigating. First, he defines “client neglect” as both “non-diligence and failure to communicate.”<sup>58</sup> His second category is “competence” or “incompetence.”<sup>59</sup> The problem is that Kinsler never defines the term competence and often just lumps and cumulates statistics on what he terms “neglect and/or incompetence.”<sup>60</sup> Consequently, it is impossible to track the different types of misconduct or the cause and effect and/or correlations among his data and the skills and substantive knowledge actually tested on bar examinations. This is a fatal methodological flaw because it substantially exaggerates the number of disciplinary cases correlated with subjects tested on bar examinations.

However, Kinsler does outline the skills inherent in the definition of “competency” under Rule 1.1:

1. specific knowledge about the fields of law in which the lawyer practices;
2. performance of the techniques of practice with skill;
3. identification of areas beyond the lawyer’s competence and bringing those areas to the client’s attention;
4. proper preparation; and
5. attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client’s interest.<sup>61</sup>

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<sup>57</sup> Levin et al., *supra* note 12, at 61.

<sup>58</sup> Kinsler, *supra* note 3, at 886.

<sup>59</sup> *Id.* at 884–85, 891–92, 895, 898, 922.

<sup>60</sup> *Id.* at 898.

<sup>61</sup> *Id.* at 891 (quoting N.H. R. RPC Rule 1.1(b)).

He next claims that the skills required under Rule 1.1 competency are the same as those tested on the bar exam:

1. Recognition, characterization and articulation of the issues;
2. Analysis and evaluation of the facts presented in the light of those issues;
3. Recognition and statement of the rules, standards or principles of law pertinent to those issues, including qualifications and limitations;
4. Application of the law to the facts and reasoning to a sound conclusion; and
5. Coherent communication of such analysis and reasoning.<sup>62</sup>

What Kinsler apparently fails to understand is that state bar disciplinary boards and courts do not use the terms “competent,” “competency,” or “incompetency” when referring to only acts or omissions solely related to the five areas that Kinsler admits are tested on the bar examination. As was demonstrated in Part I, almost all of the cases that Kinsler presented as examples of attorneys’ lack of competence were in reality cases in which an attorney failed to perform an act, such as filing a court document. However, such issues like client neglect are not subjects included in the five categories Kinsler states are tested on the bar examination. In fact, the fifth category that Kinsler lists as an example of incompetent lawyering under Rule 1.1, “attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client’s interest,”<sup>63</sup> is not even listed by Kinsler as a topic covered on bar examinations.

The most common areas of attorney discipline—failure to properly communicate with clients, trust fund violations, drug and alcohol violations, and misrepresentation<sup>64</sup>—are rarely

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<sup>62</sup> *Id.* at 892.

<sup>63</sup> *Id.* at 891. (quoting N.H. R. RPC Rule 1.1(b)).

<sup>64</sup> For instance, in Tennessee from July 1, 2016 through June 30, 2018, neglect and failure to communicate with clients constituted between fifty-two percent and fifty-eight percent of disciplinary cases, relationships with clients and courts were nine to ten percent, trust violations were eight percent, and misrepresentation and fraud were eight percent. *36th Annual Discipline Report*, TENN. BD. OF PROF'L RESPONSIBILITY (2016–2017), at 5, <http://www.tbpr.org/news-publications/annual-reports> [hereinafter *36th Annual Discipline Report*]; *37th Annual Discipline Report*, TENN. BD. PROF'L RESPONSIBILITY (2017-2018), at 3, <http://www.tbpr.org/news-publications/annual-reports> [hereinafter *37th Annual Discipline Report*].

tested on the bar examination, as opposed to on the MPRE ethics exam. And when tested on the bar exam, professional responsibility issues comprise a very small percentage of the points on bar examination questions. It is odd that Kinsler, Anderson, and Muller did not use the MPRE to determine whether there is a correlation between low scores on that test and patterns of attorney discipline rather than relying on data from the general bar examination.<sup>65</sup>

The California State Bar has published previous test questions and sample answers from the July 2012 through the July 2018 bar examinations.<sup>66</sup> After analyzing each of the dozens of California Bar Examination essay questions and suggested answers from that period, it is clear that the exam almost never tests the substance of the types of ethical violations relied on by Kinsler as proof of a connection between bar exam failure and higher disciplinary rates.<sup>67</sup> In addition, if a bar exam question tests disciplinary issues discussed by Kinsler such as the failure to perform a required act, the points value of such an issue is very slight in relation to the total points for each question and is very minimal in relation to all of the subjects and questions on that bar examination.<sup>68</sup> For instance, the topic of trust account

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<sup>65</sup> See Anderson & Muller, *supra* note 4 (manuscript at 15) (admitting that the “relationship between scores on the multistate professional responsibility exam (MPRE) and career discipline rates is also worth investigating”).

<sup>66</sup> The California Bar maintains a database of previous examination questions and sample answers. *Past Exams*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Past-Exams#examquestions> (last visited June 1, 2019).

<sup>67</sup> *Id.*

<sup>68</sup> For instance, one question on California’s February 2012 exam concerned professional responsibility. *Id.* However, that question only concerned illegal attorney advertising, witness fees, client solicitation, and fee sharing, which are not topics included in Kinsler’s examples of attorney discipline. *Id.* The July 2012 exam had a short question on professional responsibility regarding attorneys entering business deals with clients and unconscionable attorney fees. *Id.* The February 2013 exam had a question addressing the duty of fairness, confidentiality, and duty to communicate. *Id.* The July 2013 exam had issues involving the duty to have expertise in the substantive area of a client’s case, the formation of the attorney-client relationship, fees, confidentiality and communication, improper influence and perjury. *Id.* The February 2014 exam had issues involving press releases, the duty of a prosecutor, lack of candor, discovery, and ex parte communications. *Id.* The July 2014 exam contained issues of the scope of representation, fairness to opposing counsel, loyalty, candor, and confidentiality. *Id.* The February 2015 had no professional responsibility issues. *Id.* The July 2015 exam tested loyalty, care, and fiduciary duties to clients. *Id.* The February 2016 exam concerned sexual relations with clients, loyalty, expertise in subject area of representation, forcing clients to

violations, the leading ground for ethical discipline in California, was tested on only one question during the fourteen different bar exams administered from 2012 through 2018.<sup>69</sup> Furthermore, I was unable to find a single question that focused on an attorney's failure to file an action within the statute of limitations, one of the types of disciplinary actions significantly relied on by Kinsler.

Moreover, that is the heart of the matter in Kinsler's research. Most of the cases he cites relate to a type of competency—lack of diligence—used by disciplinary tribunals and infrequently tested on bar examinations.<sup>70</sup> Therefore, Kinsler's data provides no empirical connection between most types of disciplinary cases and attorneys' lack of skills as tested on a bar examination.

The problem is that when Kinsler refers to or analyzes attorney disciplinary cases in which he illustrates attorney "incompetency," he never specifies the acts that led a state bar to discipline the attorney. He does not discuss whether that finding of incompetency correlates with one or more of the five areas of competency tested on the bar exam. Kinsler recognizes that some instances of attorney neglect are classified as incompetency cases by state bar disciplinary codes even though that finding of incompetency has no relationship to the five types of

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waive their rights, court appearances, trust funds, and fee agreements. *Id.* The July 2016 exam tested formation of an attorney client relationship, corporations as clients, loyalty, conflicts, knowledge of substantive law, confidentiality and candor. *Id.* The February 2017 exam involved issues of loyalty, withdrawal, frivolousness, fees, communication, investigation, returning client's property. *Id.* The July 2017 exam tested privilege, work product, fees, confidentiality, fairness, loyalty, and withdrawal. *Id.* The February 2018 exam included issues of candor, false testimony, and attorney as a witness. *Id.* The July 2018 exam tested loyalty, conflicts, substantive expertise, confidentiality, and fees. *Id.*

<sup>69</sup> See *California Bar Exam February 2016*, STATE BAR OF CAL., [http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February2016CBX\\_Questions\\_R.pdf](http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/February2016CBX_Questions_R.pdf).

<sup>70</sup> For instance, in 2017 in New Jersey the disciplinary cases involved the following factual violations: (1) dishonesty, fraud, and misrepresentation: 16.7%; (2) criminal convictions: 16%; (3) misappropriation of client funds: 15.4%; (4) trust fund violations: 10.3%; (5) gross neglect and incompetence: 9%; (6) conflict of interest: 6.4%; (7) non-cooperation with bar proceedings: 5.1%; (8) fee violations: 4.5%; (9) lack of communication: 3.8%; (10) ineligible practice of law: 3.8%; and (11) unauthorized practice of law: 2.6%. *2017 State of the Attorney Disciplinary System Report*, SUPREME COURT OF N.J. OFFICE OF ATTORNEY ETHICS, at 13–17, <https://www.njcourts.gov/attorneys/assets/oea/2017oeaannualrpt.pdf?cacheID=aNU1La>.

incompetency tested on the bar exam.<sup>71</sup> Therefore, he admits that some incompetency disciplinary cases bear no relationship with the bar examination and do not provide support for his claims that multiple bar examination test takers' ethics violations are predicted by bar exam performance.

The author has not been able to find any evidence that attorney incompetence based on Kinsler's five areas of bar examination testing comprise even a small percentage of attorney discipline cases nationally.<sup>72</sup> For instance, I searched for all disciplinary cases published on the Alabama State Bar database that contain the words "competent," "competency," "incompetent," or "incompetency," and found that only nine disciplinary cases were reported.<sup>73</sup> In the first case, on September 4, 2018, an attorney was reprimanded for failing to timely file an appellate brief.<sup>74</sup> Although the attorney was found to have acted incompetently, that incompetence does not fit under Kinsler's five state bar exam tested areas. In the second case, on May 20, 2013, an attorney was found incompetent for making false statements to the court, misappropriating client funds, failing to attend hearings, and practicing outside his substantive expertise.<sup>75</sup> Based on my own study of the California

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<sup>71</sup> Kinsler, *supra* note 3, at 891.

<sup>72</sup> In some State Bar Organization reports on attorney discipline the category of "incompetent" or "incompetence" is not even used. For instance, each year the Tennessee Board of Professional Responsibility issues an annual Disciplinary Report that charts the types of disciplinary infractions litigated by the Board that year. In the July 1, 2017 through June 30, 2018 and July 1, 2016 through June 30, 2017 reports, the Board does not even include a category for incompetency. *See 37th Annual Discipline Report, supra* note 64; *36th Annual Discipline Report, supra* note 64. Instead, the Board reported that of the complaints received in 2017 and 2018, fifty-two percent involved "neglect or failure to communicate;" eight percent were "trust violations;" eight percent were "misrepresentation or fraud;" six percent were for "fees;" two percent were "criminal convictions;" four percent were for "conflict of interest;" nine percent were disputes over "relationship with client or court;" and two percent were for "personal behavior." *37th Annual Discipline Report, supra* note 64, at 5. The July 1, 2016 through June 30, 2017 statistics were very similar and did not include any specific data on incompetency. *36th Annual Discipline Report, supra* note 64.

<sup>73</sup> On October 23, 2018, I searched for variations of the word "incompetence" in Alabama State Bar's disciplinary case database. Only nine results were found. *Discipline History*, ALA. STATE BAR, <http://alabar.org/resources/office-of-general-counsel/disciplinary-history> (last searched Oct. 23, 2018).

<sup>74</sup> *Id.* (searching keywords "appellate brief" and "timely file" together) (last accessed Mar. 1, 2019).

<sup>75</sup> *Id.* (searching keywords "false statements" and "misappropriated" together) (last accessed Mar. 1, 2019).

Bar Examination, these topics, such as substantive expertise, were not frequently tested; other state bar examinations may be similarly situated. In the third case, on October 9, 2013, the Alabama State Bar reprimanded an attorney for “failing to provide competent representation to [a] client” because the attorney “failed to timely file an application for rehearing.”<sup>76</sup> Again, this incompetency does not involve a bar exam tested area of law. In the fourth case, the lawyer, on April 1, 2014, was found to have “fail[ed] to provide competent representation as he did not possess a license to practice law in the other state and failed to appear at the client’s arraignment.”<sup>77</sup> Again, this is not a bar exam topic. In the fifth case, on January 9, 2015, a lawyer was found to be incompetent because he was under the influence of narcotics during the representation.<sup>78</sup> In the sixth case, on March 13, 2015, an attorney was reprimanded because he failed to file a witness list, failed to take a deposition, and failed to file any motions for his client.<sup>79</sup> Again, these are not bar tested areas. In the seventh case, on January 8, 2016, an attorney was reprimanded for incompetence because he filed the wrong immigration form for his client.<sup>80</sup> In the eighth case, on January 19, 2016, an attorney was found incompetent for appointing an incorrect person as an estate’s personal representative and for withdrawing from the case without refunding the clients’ fee or correcting his error.<sup>81</sup> Again, these are not bar exam topics. Finally, in the ninth case, on June 25, 2018, an attorney was found incompetent for filing documents “containing erroneous information” and he “filed a deed contrary to an order issued by the Court.”<sup>82</sup> Again, the ninth case, like the other eight examples of disciplinary actions in Alabama, did not involve any of

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<sup>76</sup> *Id.* (searching keywords “competent representation”) (last accessed Mar. 25, 2019).

<sup>77</sup> *Id.* (searching minimum date field for “Apr. 1, 2014,” then searching maximum date field for “Apr. 1, 2014,” and searching keyword/exact phrase field for “competent”) (last accessed Mar. 25, 2019).

<sup>78</sup> *Id.* (searching minimum date field for “Jan. 9, 2015,” then searching maximum date field for “Jan. 9, 2015,” and searching keyword/exact phrase field for “competent”) (last accessed Mar. 25, 2019).

<sup>79</sup> *Id.* (search minimum date field for “Mar. 13, 2015,” then searching maximum date field for “Mar. 13, 2015,” and searching keyword/exact phrase field for “competence”) (last accessed Mar. 25, 2019).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Kinsler's five areas of bar examination testing. Even so, these cases would likely have been included in his research since at first blush they fit into his category of "non-diligence and/or incompetence."

Kinsler's failure to define and distinguish cases of neglect from cases of incompetence regarding bar exam tested skills and substance makes it impossible for him to demonstrate that his empirical evidence proves a cause and effect or correlative relationship between multiple bar exam failures and attorney discipline. The following hypothetical illustrates this critical methodological error: assume that a researcher studied attorney misconduct cases in California for a decade. She reports that she found one hundred cases in which young career attorneys who took the bar exam multiple times were disciplined for neglect and/or incompetence. She does not disclose the actual acts that led to discipline or how many specific cases involved neglect and the number of cases that involved incompetence related to subjects frequently tested on the bar.

Does her data prove causation and/or correlation between bar exam failure and attorney discipline? It clearly does not. To demonstrate that relationship, the researcher must also demonstrate that the acts that led to disciplinary action are related to subjects and skills tested on the bar exam.

Kinsler undermines his own research in two ways. First, he admits that client neglect forms more than fifty percent of attorney disciplinary cases and no other category of attorney misconduct, including incompetence, comprises more than ten percent.<sup>83</sup> Since issues of attorneys' neglect in communicating with clients and failures to perform tasks are not frequently tested on the bar exam, those cases must be excluded from the data set used to show causation and/or correlation. In our hypothetical, by applying Kinsler statistics, on average, only 10 of the 100 cases she studied involve incompetence as opposed to neglect. Second, to demonstrate causation and/or correlation, the hypothetical researcher must identify the nature of the ten incompetency disciplinary cases she studied. Unless she can tie those specific types of incompetency cases to the subjects and skills tested by the bar exam, she cannot demonstrate that

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<sup>83</sup> Kinsler, *supra* note 3, at 885–86.

failing the bar exam predicts or is correlated with disciplinary actions.

Kinsler's specific study of Tennessee bar disciplinary cases also has dual empirical flaws: (1) failure to properly categorize and itemize his two chosen types of attorney discipline, "client neglect" and "incompetency;" and (2) failure to demonstrate that those few cases involving "incompetency" are related to subjects and skills tested on the Tennessee bar exam.

First, his study only analyzes sixty-nine attorneys who failed the Tennessee bar examination multiple times between 2005 and 2014 and who were disciplined within two to twelve years after admission.<sup>84</sup> Ironically, the most obvious empirical weakness, small sample size, is not the weakest part of Kinsler's methodological design. The more serious empirical flaw is that he did not provide a shred of evidence that any of the sixty-nine cases of attorney discipline involved acts related to subjects or skills tested on the Tennessee bar examination. In fact, he listed thirteen different types of ethical violations that resulted in those sixty-nine attorneys being disciplined.<sup>85</sup> Only one of those factual types of ethical violations, "incompetence," might have a correlation with the bar exam. I say "might" have a correlation with the bar exam because Kinsler did not provide any quantitative or qualitative information about the category of "incompetence" cases he relies on. He did not provide how many of the sixty-nine attorneys were found to be incompetent and did not describe the facts surrounding any of the cases in which the State Bar found an attorney incompetent. It is statistically impossible to determine whether there is any correlation between failing the bar, ethical violations, and early stages of attorneys' careers in Kinsler's data and analysis.

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<sup>84</sup> *Id.* at 893–94.

<sup>85</sup> *Id.* at 895. The categories of attorney discipline listed include neglect, failure to communicate with clients and/or opposing counsel, failure to file court papers, *incompetence*, failure to perform work as promised, misrepresentation of the status of a case to clients, failure to timely file or refile a case, failure to attend meetings, failure to attend court on behalf of clients, failure to notify clients of the attorney's suspension, failure to protect client interests, failure to respond to the BOPR, and abandonment of the attorney's practice.

*Id.* (emphasis added).

*D. Kinsler Failed To Consider the Social Justice Aspects of His National Rule for the Maximum Number of Bar Examination Attempts*

Equally troubling is Kinsler's silence on the social justice results of his proposed national rule that law students can take the bar exam a maximum of three attempts.<sup>86</sup> Kinsler did not even discuss the disparate impact on the following groups: (1) test takers in jurisdictions with extremely high MBE cut scores<sup>87</sup> and with historically low bar passage rates; and (2) diversity candidates.

1. Disparate Impact on Bar Test Takers in High MBE Cut Score States

Kinsler's analysis assumes that there is something termed "the bar exam." Kinsler neglects that passage rates on the many forms of the bar examinations are largely determined by each state's chosen MBE cut score. A simple comparison between the bar examination MBE cut scores and passage rates of Tennessee, the state he chose for his empirical study, and California, one of the most difficult bar examination passage cut scores, demonstrates how unwise and discriminatory his proposal is to limit bar examination test administrations based solely on pass/fail statistics.

Kinsler states that the bar passage rate in Tennessee for first time takers from 2005 to 2014 was 87.76%.<sup>88</sup> In comparison, the ABA first-time taker passage rate for California applicants during those years was only 73.75%.<sup>89</sup> A 14.01% mean lower bar passage rate in California can be primarily explained by the differential in MBE cut scores between the two states.<sup>90</sup> The

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<sup>86</sup> *Id.* at 920. Kinsler suggests that a fourth attempt might be warranted based on the applicant's earlier test results. *Id.* at 921.

<sup>87</sup> "The Multistate Bar Examination (MBE) is a six-hour, 200-question multiple-choice examination developed by NCBE [National Conference of Bar Examiners] and administered by user jurisdictions as part of the bar examination." *Multistate Bar Examination*, NAT'L CONF. OF B. EXAM'RS, <http://www.ncbex.org/exams/mbel>. Each state determines its own bar examination MBE cut (passing) score.

<sup>88</sup> *Id.* at 894.

<sup>89</sup> STATE BAR OF CAL., *supra* note 10. Since California permits non-ABA accredited students to sit for the bar exam, this data only includes students who graduated from ABA accredited schools who took the California Bar Examination as a first time taker.

<sup>90</sup> The California bar has recently modified its bar passage statistical model and rates will now result in an approximately 0.5% increase because they will no longer

MBE cut score in Tennessee is only 135 but California's cut score is 144.<sup>91</sup> Why is Kinsler's failure to include such disparate state bar passage standards and passage rates in his model so critical? The reason is that he uses bar passage as the sole criteria for predicting early career attorney disciplinary violations. But, the problem is that one cannot draw the same conclusions about a bar applicant failing an easy, or lower MBE cut score, bar exam versus the failure of a student to pass a much more difficult bar examination, or higher MBE cut score exam.

In a recent article, I demonstrated that even though students attending the bottom quartile of California ABA approved law schools have a very poor first time passage rate on the California Bar Examination because of the 144 MBE cut score, most of those students scored well enough on the MBE portion of the exam to have passed the bar examination in almost every other state.<sup>92</sup> For instance, consider one example, Southwestern Law School. The mean MBE cut score among the states is 134.<sup>93</sup> From February 2007 through July 2014, a similar period as studied by Kinsler in his Tennessee study, Southwestern students scored substantially higher than the national mean of 133.<sup>94</sup> In fact, Southwestern students scored between 138 and 147.7 on the MBE even though their passage rates on the

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count students who do not complete the test or who score lower than forty on a question as test takers who failed the exam. Derek T. Muller, *A Change in Calculating Pass Rates for the California Bar Exam*, EXCESS DEMOCRACY (Dec. 5, 2017), <http://excessofdemocracy.com/blog/2017/12/a-change-in-calculating-pass-rates-for-the-california-bar-exam>.

<sup>91</sup> See *Comprehensive Guide to Bar Admission Requirements*, NAT'L CONFERENCE OF BAR EXAM'RS & THE AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, (2018), at 33–34, <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html#p=1>.

<sup>92</sup> See generally William Wesley Patton, *A Blueprint for a Fairer ABA Standard for Judging Law Graduates' Competence: How a Standard Based on Students' Scores in Relation to the National Mean MBE Score Properly Balances Consumer Safety with Increased Diversity in the Bar*, 24 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3 (2017). Part of that article relied on Professor Anderson's earlier study that demonstrated that California's fourth-tier law schools' mean MBE scores on the California Bar Examination would have resulted in those students passing the New York State Bar Examination at rates between fifty-seven and eighty-three percent. Robert Anderson, *California Law School Bar Passage Rates Recalculated for the New York Bar*, WITNESSETH: LAW, DEALS, & DATA (Dec. 19, 2016), <http://witnesseth.typepad.com/blog/2016/12/california-law-school-bar-passage-rates-recalculated-for-the-new-york-bar.html>.

<sup>93</sup> Patton, *supra* note 92, at 12.

<sup>94</sup> *Id.* at 31–32.

California Bar Examination ranged during that examination period from a low of fifty-three percent to a high of seventy-four percent.<sup>95</sup> What is equally surprising is that from 2007 through 2014, the Southwestern students' MBE scores would have passed all states' bar exams in some years, and even during their worst bar year performance they would have passed all state bar exams except for Alaska, California, Delaware, Nevada, Oregon and Virginia, states with the highest MBE cut scores in the nation.<sup>96</sup>

Kinsler's multiple test taking, incompetency, and disciplinary violation model simply does not work. He cannot possibly argue that students who fail the California Bar Examination, but who would pass almost all other bar exams based on their MBE scores, are incompetent without declaring that most other states are admitting incompetent attorneys who passed those states' bar examinations on the first attempt, but with lower MBE scores than California's 144 cut score. Kinsler has not provided a shred of evidence to support his proposition that students who have to take the California bar exam multiple times and whose MBA scores would predict passage of almost every other state exam are more likely to commit disciplinary acts and endanger the public early in their careers. Yet, he advocates for limiting these test takers to a maximum of three or four bar exam administrations to become a California attorney.

## 2. The Kinsler Proposal's Effect on Diversity in the Bar

States with very high MBE cut scores and with large minority populations, like California, have a very low percentage of minority lawyers in relation to the minority state population. The United States Census states that the percentage of Hispanics in California increased from 32.4% in 2000 to 37.6% in 2010,<sup>97</sup> and comprised 38.9% of the California population in 2016.<sup>98</sup> According to the California State Bar Association,

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<sup>95</sup> *Id.* at 31.

<sup>96</sup> *Id.* at 32.

<sup>97</sup> SHARON R. ENNIS ET AL., *THE HISPANIC POPULATION: 2010*, 6 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (citing U.S. CENSUS BUREAU, *Census 2000 Summary File 1*; U.S. CENSUS BUREAU, *2010 Census Summary File 1*).

<sup>98</sup> *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (June 2017), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

Hispanics comprised 3% of California's attorneys in 1991, 3.7% in 2001, and 3.8% in 2006.<sup>99</sup> In 2011, the most recent survey, Hispanics comprised only 4.2% of California attorneys.<sup>100</sup> As of June 1, 2019, there are currently 189,846 attorneys licensed to practice law in California.<sup>101</sup> But, based on the 2011 survey results, only 7,837, or 4.2%, are Hispanic attorneys despite the fact that there are approximately 14,013,719 Hispanics living in California.<sup>102</sup>

Adopting Kinsler's recommendation of allowing a maximum of three bar examination attempts will exacerbate the already minimal diversity in the California bar because although some minority bar test takers have a low first-time passage rate, after several administrations, their passage rate substantially increases on the California exam.<sup>103</sup> Several bar exam test-taking persistence studies indicate that many minority bar candidates benefit from having multiple attempts at passing the bar exam, especially those students who take bar exams in states with very high MBE cut scores.<sup>104</sup> For instance, a study by Klein

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<sup>99</sup> See *Final Report of Results Member Services Survey February 2006*, STATE BAR OF CAL. 12, [http://www.calbar.ca.gov/Portals/0/documents/reports/2006\\_State-Bar-Survey.pdf?ver=2017-05-19-134112-167](http://www.calbar.ca.gov/Portals/0/documents/reports/2006_State-Bar-Survey.pdf?ver=2017-05-19-134112-167) (providing the demographic makeup of the California State Bar); see also *Final Report California Bar Journal Survey September 10, 2001*, STATE BAR OF CAL. 2, <https://www.calbarjournal.com/Portals/1/documents/2001-CBJ-Survey-Summary.pdf> (indicating that the growth in California State Bar membership among Hispanics from 1991 to 2001 was smaller than the growth rate among Asians).

<sup>100</sup> See *Summary Results Survey of Members of the State Bar of California December, 2011*, STATE BAR OF CAL. 8 [http://www.calbar.ca.gov/Portals/0/documents/reports/2011-12\\_SBCdemosurvey\\_sumandfacts.pdf](http://www.calbar.ca.gov/Portals/0/documents/reports/2011-12_SBCdemosurvey_sumandfacts.pdf) (indicating the percentage of California State Bar members amongst the 1,820 survey respondents that categorized their "ethnic or racial background" as "Latino/Hispanic"). *But see id.* at 10 (explaining that "the margin of sampling error would be approximately plus or minus three percent, with a confidence level of 95 percent," and that "[t]he margin of sampling error for subgroups of respondents is higher than it is for the overall results").

<sup>101</sup> See *Licensee Demographics*, STATE BAR OF CAL., <https://members.calbar.ca.gov/search/demographics.aspx> (providing the population of active attorneys that are licensed members of the California bar).

<sup>102</sup> See ENNIS ET AL., *supra* note 97, at 6 (listing the Hispanic or Latino population for California as found in the 2010 census).

<sup>103</sup> Patton, *supra* note 92, at 52-56.

<sup>104</sup> See generally Stephen P. Klein & Roger Bolus, *Initial and Eventual Passing Rates of July 2004 First Timers of Texas Bar Exam*, TEX. BD. OF LAW EXAM'RS (2006), <https://ble.texas.gov/klein-report-0606> [hereinafter Klein & Bolus, *Texas July 2004*]; Stephen P. Klein & Roger Bolus, *A Comparison of Initial and Eventual*

and Bolus compared minority test taker passage rates on the California bar examination according to the number of administrations of the exam they attempted.<sup>105</sup> The study of minority persistence and ultimate bar-passage rates on the California Bar Examination compared the ultimate bar examination passage rates among cohort test takers that took the exam up to three times, up to five times, and up to seven times.<sup>106</sup> The study found the following ultimate minority bar-passage rates based upon the number of times students repeated the examination:

SUCCESS RATES PER MULTIPLE BAR EXAM ATTEMPTS<sup>107</sup>

	<u>All Hispanic</u>		<u>All Black</u>	
	<u>1977 Exam</u> (Up to 7 Exams)	<u>1982 Exam</u> (Up to 3 Exams)	<u>1977 Exam</u> (Up to 7 Exams)	<u>1982 Exam</u> (Up to 3 Exams)
Eventual Pass Percentage	80%	54%	64%	38%

Table 1 demonstrates the significantly higher ultimate bar-passage rates for Hispanic and black law students in California based on the number of opportunities to take the test. The Hispanic and black ultimate passage rates for both groups increased by twenty-six percent when up to seven repeat examinations were calculated rather than only including three bar administrations.<sup>108</sup> The Klein and Bolus study demonstrates that under Kinsler's maximum of three or four bar administrations, fewer minority test takers will become members of the California bar.<sup>109</sup>

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*Passing Rates on the California Bar Examination*, PR-87-5 (Oct. 30, 1987) [hereinafter Klein & Bolus, *California 1987*].

<sup>105</sup> Klein & Bolus, *California 1987*, *supra* note 104, at ii.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> A second study by Klein and Bolus demonstrated that minority candidates in states with lower MBE cut scores and with higher annual bar passage rates than those in California need fewer examination attempts to pass the exam. See Klein & Bolus, *Texas July 2004*, *supra* note 104, at 6.

<sup>109</sup> The NCBE published a minority multiple test taker study that analyzed the July 2006 and 2007 California Bar Examinations. See Douglas Ripkey & Susan Case, *Exploration of MBE Attempt Patterns: July 2006 and July 2007 First-Taker Groups*, NAT'L CONFERENCE OF BAR EXAM'RS, at 2, <https://www.americanbar.org/>

The bottom line is that Kinsler's study is significantly methodologically flawed and proposes a drastic remedy that is empirically unsupported and inconsistent with reasonably providing increased access to justice.

## II. THE ANDERSON AND MULLER STUDY

Analyzing Anderson and Muller's study is important because there is a cross-pollination between their article and Kinsler's.<sup>110</sup> The following section demonstrates some of the methodological and policy flaws in their article.

Professors Anderson and Muller recently concluded that there is a connection between bar passage scores and the probability of state bar discipline, and that lowering the MBE cut score in California will result in an explosion of attorney

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content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/March2016CouncilOpenSessionMaterials/2016\_march\_ncbe\_persistence\_data\_recent.pdf. That study found that approximately 14.5% of black students took the July 2006 California Bar Examination four or more times and approximately 9% of Hispanic students took that exam four or more times. *Id.* For a detailed analysis of the many methodological flaws of the Ripkey and Case persistence study, see Memorandum from William Wesley Patton, Professor Emeritus, Whittier Law School, Assistant Clinical Vol Professor, UCLA David Geffen School of Medicine, Department of Psychiatry, to the American Bar Association Council (July 24, 2016) [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/201607\\_comment\\_s316\\_william\\_patton\\_8.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_william_patton_8.pdf). That analysis demonstrates that the NCBE study is methodologically flawed because its use of MBE administrations is an inaccurate statistical prediction of the number of times students actually sit for the bar exam. *Id.* The NCBE study substantially underestimated the number of students who actually took the July 2006 and 2007 bar exam. *Id.* For another study demonstrating the flaws of using the MBE as a proxy for the number of bar exam test takers, see Gary S. Rosin, *Comments on Look-Back Periods and Eventual Bar Passage Rates*, 3 (July 31, 2012), <http://ssrn.com/abstract=2121116>. The NCBE has recently admitted that it only has ethnicity data for about sixty percent of MBE test takers and that it has "limited information on whether a given examinee is retaking the MBE." Mark A. Albanese, *The Testing Column February 2018: The MBE Storm Surge Continues*, 87 B. EXAMINER, at 27–28. In addition, the NCBE admits that because the Uniform Bar Examination (UBE) permits candidates to transfer their MBE scores to other states, they do not actually know how many students repeat the MBE. *Id.* at 28. "In 2017 alone, approximately 3,700 individuals transferred their UBE scores to another UBE jurisdiction—individuals who might otherwise have retaken the MBE." *Id.* at 32.

<sup>110</sup> Kinsler relies on the Anderson and Muller study, and Anderson and Muller also rely on Kinsler's study. See Kinsler, *supra* note 3, at 900 n.100; Anderson & Muller, *supra* note 4 (manuscript at 13 n.37).

disciplinary and legal malpractice cases.<sup>111</sup> However, unlike Kinsler, Anderson and Muller discuss many of the problems and limitations inherent in their research. Most importantly, they admit that they are uncertain regarding the importance of that relationship between the bar exam and attorney discipline. They begin by proclaiming that there is a significant relationship,<sup>112</sup> but as the paper progresses, they admit that the relationship may not be significant and that the predictive power of bar examination performance which they term the “magnitude of the effect[,] may be larger or smaller than [they] estimate.”<sup>113</sup>

Anderson and Muller’s study contains the following limitations and methodological weaknesses:

1. Their “analysis is limited due to the imperfect data available . . .,”<sup>114</sup>
2. They “do not have access to the bar exam scores of these attorneys. Accordingly, [they] use proxies . . .,”<sup>115</sup>
3. Their results require “numerous assumptions that [they] *believe* are reasonable but may not ultimately reflect the true relationships” among LSAT, bar scores, and attorney discipline;<sup>116</sup> and
4. “[A]lthough [their] model relies on aggregate (and *noisy*) data, it gives roughly accurate predictions of the individual data we do have.”<sup>117</sup>

Unfortunately, Anderson and Muller fail to adequately address the most obvious questions: if lowering MBE cut scores substantially increases attorney discipline and endangers the public, why have the forty-eight states that have substantially lower MBE cut scores than California not experienced the explosion in disciplinary cases that they predict? Also, why have states like Idaho, Montana, Nevada, Oregon, and Washington recently lowered their MBE cut scores if such a change threatens

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<sup>111</sup> Since the publication of their piece, Anderson and Muller have each responded to criticism regarding the validity of their analysis, methodology, and conclusions. In this section, I discuss the significant criticism of their article and Professor Anderson’s confusing responses.

<sup>112</sup> See Anderson and Muller, *supra* note 4 (manuscript at 3).

<sup>113</sup> *Id.* (manuscript at 14).

<sup>114</sup> *Id.* (manuscript at 3).

<sup>115</sup> *Id.* (manuscript at 6).

<sup>116</sup> *Id.* (manuscript at 10) (emphasis added).

<sup>117</sup> *Id.* (manuscript at 12–13) (emphasis added).

their public safety?<sup>118</sup> Finally, why have the media and the public in states with much lower MBE cut scores not zealously fought to increase the MBE cut score to protect the public from the onslaught of predicted attorney malpractice?

A. *States with a 133 MBE Cut Score Have Not Experienced the Attorney Disciplinary Increase Predicted by Anderson and Muller*

Anderson and Muller predict that if California lowered its MBE cut score from 144 to 133 there would be at least a 10% increase in the chances of an attorney with that MBE bar exam score of being disciplined during a thirty-five year career—a 1,330 pass score would predict a 19% chance of discipline versus a 9% chance for a passing score of 1,440.<sup>119</sup> If their data and predictions are accurate, the disciplinary rates in jurisdictions with a 1,330 pass score should be at least 10% higher than those in California. Instead of testing their research and hypothesis in jurisdictions with a 133 MBE cut score—Connecticut, District of Columbia, Illinois, Iowa, Kansas, Montana, New Jersey, New York, and South Carolina<sup>120</sup>—they took the easy way out by citing two law review articles that they say support their conclusion that “[c]ross-state comparisons may have little value due to disparities in state bar disciplinary procedures, enforcement, and priorities.”<sup>121</sup> Their two referenced articles do not sufficiently support Anderson and Muller’s conclusion that conducting cross-state comparisons of attorney disciplinary

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<sup>118</sup> Stephanie Francis Ward, *California Sees Increase in Pass Rates for July 2017 Despite Denying Requests to Lower Cut Score*, ABA J. (Nov. 20, 2017), [http://www.abajournal.com/news/article/california\\_increase\\_bar\\_exam\\_pass\\_rate\\_july](http://www.abajournal.com/news/article/california_increase_bar_exam_pass_rate_july); Sawsan Morrar, *Should State Adopt Lower Passing Score for the Bar Exam? Current One May Harm Students of Color*, SACRAMENTO BEE (Jan. 7, 2019), <https://www.sacbee.com/latest-news/article223879635.html>.

<sup>119</sup> Anderson and Muller, *supra* note 4 (manuscript at 9). Under state bar grading, the MBE cut score 133, for instance, is scaled to a final score of 1330.

<sup>120</sup> *Comprehensive Guide to Bar Admission Requirements 2017*, NAT’L CONFERENCE OF BAR EXAM’RS & THE AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, (2017), at 30–31, [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/ComprehensiveGuidetoBarAdmissions/2017\\_comp\\_guide\\_web.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf).

<sup>121</sup> Anderson & Muller, *supra* note 4 (manuscript at 17 n.45) (citing Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997)).

statistics has “little value.”<sup>122</sup> For instance, their reliance on Professor Curtis’s article is misplaced. In her article, she merely noted that “finding this [bar exam disciplinary] information in one place to make comparisons among states and of lawyers licensed in multiple jurisdictions is difficult.”<sup>123</sup> Curtis then spent more than one hundred pages providing comparative state attorney disciplinary statistics.<sup>124</sup> Curtis would probably be surprised that Anderson and Muller, who rely on her data, find her study of “little value.”

In addition, the other article cited by Anderson and Muller on the futility of comparing state disciplinary systems actually undercuts some of their rationale for failing to look at other states’ disciplinary patterns. In that article, Professor Moulton states that “[t]he point is that we should be careful not to exaggerate the extent to which the substance of lawyer conduct standards varies among the states. Most states’ rules are close to identical in substance if not in precise language.”<sup>125</sup> Therefore, disciplinary statistics among states are not significantly skewed by the substance of ethical precepts. Further, the thrust of the Moulton article is that lawyers who engage in multi-jurisdiction practices face uncertainty about how rules will be interpreted and enforced differently in multiple jurisdictions, not whether enforcement machinery has substantial disparities.<sup>126</sup> Moulton even limits those potential multi-jurisdictional ethics conflicts and states that “where compliance with one state’s rule would mean violation of another state’s rule, and vice versa—is largely limited to the area of attorney-client confidentiality and exists only as a result of the rules in four states.”<sup>127</sup> The Moulton article does not provide Anderson and Muller a safe harbor against the need to test their predictions of dramatically increased attorney disciplinary cases in other states with lower MBE cut scores.

The reality is that the cross-state disciplinary articles that Anderson and Muller cite provide comparative attorney

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<sup>122</sup> See Anderson & Muller, *supra* note 4 (manuscript at 17).

<sup>123</sup> See Curtis, *supra* note 121, at 209.

<sup>124</sup> See generally *id.*

<sup>125</sup> Moulton, *supra* note 121, at 95–96.

<sup>126</sup> *Id.* at 76–77.

<sup>127</sup> *Id.* at 100. “In terms of the states that have adopted the Model Rules, therefore, the level of disparity in adopted standards is not as great as advertised.” *Id.* at 91.

disciplinary statistics that are very germane to their prediction of escalating disciplinary cases if California were to change its MBE cut score to 133 or some other number lower than 144. The following chart demonstrates that the percentage of attorneys with disciplinary charges and the mean ratio of disciplinary charges to actual disciplined attorneys in states with 133 MBE cut scores are not only similar to one another, but they are also not dramatically different than current California statistics.<sup>128</sup> Anderson and Muller's prediction of a 10% increase in attorney disciplinary cases in California if the MBE cut score is changed to 133 is simply not supported by the comparative state attorney disciplinary evidence.<sup>129</sup>

The following chart compares the percentage of attorneys charged with disciplinary violations and the rate of convictions to charges lodged in each state that uses a 133 MBE cut score with those rates in California that has a 144 cut score:

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<sup>128</sup> I agree that comparing different jurisdictions' disciplinary rates may not always be statistically accurate if those states have extremely different rates of enforcement and/or conviction rates. However, the states in this comparison of 133 cut scores, other than Iowa, each have almost identical rates of prosecution and similar conviction rates.

<sup>129</sup> It is obvious that lowering the MBE cut score from 144 to 133 would result in more attorneys being admitted to the bar and that more disciplinary cases would be expected as the number of practicing attorneys increases. However, as discussed, *infra* Part II.B, it is a very different question of whether that increase in disciplinary cases is a function of bar examination performance or whether it is merely a result of bias and structural functions of the state bar disciplinary system itself.

STATE ATTORNEY DISCIPLINARY STATISTICS FOR CALIFORNIA  
(MBE 144) & FOR STATES WITH 133 MBE CUT SCORES<sup>130</sup>

<u>State</u>	<u>% of Attorneys Charged to Number of Active Attorneys</u>	<u>Mean % of Attorneys Charged to Those Actually Disciplined</u>
California <sup>131</sup>	Approx. 1%	10%
Connecticut <sup>132</sup>	Approx. 1%	15%
Illinois <sup>133</sup>	<1%	5%
Iowa <sup>134</sup>	Approx. 1%	25%
Kansas <sup>135</sup>	Approx. 1%	13%
Montana <sup>136</sup>	Approx. 1%	17%
New Jersey <sup>137</sup>	<1%	8%
New York <sup>138</sup>	<1%	8%
South Carolina <sup>139</sup>	1–3%	12%

This data demonstrates that the percentage of active attorneys with formal disciplinary complaints is similar across jurisdictions, even where MBE cut scores range from as low as 133 to as high as 144, as in California. In addition, unlike Anderson's and Muller's prediction that changing the cut score from 144 to 133 will result in at least a 10%, or possibly greater, increase in the California attorney disciplinary rate, the chart demonstrates that Iowa is the only state that has ever recorded a rate over 19%. Further, in three states with a 133 MBE cut score, the percentage of disciplined attorneys is lower than in California—Illinois, New Jersey, and New York. In three other states, the percentage is only slightly higher than in California—Connecticut, Kansas, and South Carolina. Not only does the data

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<sup>130</sup> This data is derived from Curtis, *supra* note 121, at 209.

<sup>131</sup> *Id.* at 227–28.

<sup>132</sup> *Id.* at 232–33.

<sup>133</sup> *Id.* at 241, 245.

<sup>134</sup> *Id.* at 248–50.

<sup>135</sup> *Id.* at 250–52.

<sup>136</sup> *Id.* at 267, 270–71.

<sup>137</sup> *Id.* at 279, 282–83.

<sup>138</sup> *Id.* at 285, 288–89.

<sup>139</sup> *Id.* at 301–03.

not support their assertion, but the California Bar Association's own study found no correlation between bar exam cut scores and attorney discipline.<sup>140</sup>

*B. Anderson and Muller Have Failed To Prove a Causal Link or Even a Critical Connection Between Bar Examination Scores and the Rate of Attorney Discipline*

Anderson and Muller state that they are “confident that the relationship between lower bar examination score and higher discipline is accurate.”<sup>141</sup> They do not clarify whether that statement asserts that the relationship is merely a correlation or whether they assert a statistically significant causal link between low bar scores and attorney discipline. After their paper was published and received significant criticism for their methodology and conclusions, they attempted to walk back what many readers thought was the authors' claim of a causal link between bar scores and attorney discipline.<sup>142</sup> For example, Professor Merritt concluded: “Despite some suggestive language in the paper, Anderson and Muller do not identify a direct correlation between bar exam scores and disciplinary actions.”<sup>143</sup> She stated that no causation was proven because there is a ten-year gap between the bar exam and attorney discipline manifesting and because they presented no proof of a connection between what the bar exam tests and the types of issues for which California attorneys are predominately disciplined.<sup>144</sup>

The same day that Merritt's critical review of their article was published, Anderson began backtracking. Anderson attempted to make it clear that their paper does not allege causation between bar exam scores and attorney state bar discipline. In his response, he provided two antithetical explanations for their paper's findings: (1) “low bar exam scores are not actually causing discipline, but rather [are] merely

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<sup>140</sup> *Report to the Supreme Court of the State of California Final Report on the 2017 California Bar Exam Standard Setting Study*, STATE BAR OF CALI. 44–45 (2017), <http://www.calbar.ca.gov/Portals/0/documents/communications/CA-state-Bar-Bar-Exam09122017.pdf>.

<sup>141</sup> Anderson & Muller, *supra* note 4 (manuscript at 14).

<sup>142</sup> For an excellent analysis and criticism of the Anderson and Muller article, see Deborah J. Merritt, *Bar Exam Score and Lawyer Discipline*, L. SCH. CAFE (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

correlated with it;” and (2) their paper “argues that the current proposal to lower the required passing score for the California Bar Exam would *result* in an increased rate of discipline.”<sup>145</sup> The problem, of course, is that when one argues that X action on Y will result in Z effect, you are stating causation: “Causation indicates that one event is the result of the occurrence of the other event; i.e. there is a causal relationship between the two events. This is also referred to as cause and effect.”<sup>146</sup>

At most, all that Anderson and Muller have demonstrated is that there is a greater chance that California attorneys who scored lower on the bar examination have a higher chance of being disciplined than those who scored higher. That does not prove that attorneys with lower bar scores commit more ethical violations, but rather, only that California’s attorney disciplinary system happened to identify and sanction a greater percentage of lower scoring bar exam attorneys. Anderson and Muller have not proven causation because the disparity in disciplinary filings may be caused by so many other variables that they did not build into a multi-variate analysis to determine relative causal weight, or as Professor Anderson recently phrased the issue, “the exact magnitude” of the relationship.<sup>147</sup>

Their discussion of the differences between graduates of “elite” law schools and graduates of lower ranked schools in terms of the types of jobs they accept and the levels of predictive ethical violations within each of those types of legal employment is problematic. The gist of their argument is as follows:

1. Elite law school students score much higher on the bar exam;<sup>148</sup>
2. Elite law school students hire into elite legal jobs;<sup>149</sup> and
3. California disciplinary records indicate a much lower percentage of disciplinary cases against those from elite law schools who work in elite law jobs.<sup>150</sup>

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<sup>145</sup> Robert Anderson, *Responsibility and Irresponsibility in the California Bar Exam Debate*, WITNESSETH: LAW, DEALS, & DATA (June 2, 2017), <https://witnesseth.typepad.com/blog/2017/06/responsibility-and-irresponsibility-in-the-california-bar-exam-debate.html> (emphasis added).

<sup>146</sup> *Statistical Language – Correlation and Causation*, AUSTRALIAN BUREAU OF STATISTICS (last updated July 3, 2013), <http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language+-+correlation+and+causation>.

<sup>147</sup> Anderson, *supra* note 145.

<sup>148</sup> *See id.*

<sup>149</sup> Anderson & Muller, *supra* note 4 (manuscript at 16–17).

<sup>150</sup> *See id.*

And their argument continues:

4. Students from non-elite or much lower ranked law schools score lower on the bar exam;<sup>151</sup>
5. Students from lower ranked law schools and who perform lower on the bar exam get jobs that are different, like jobs in solo practice or small firms;<sup>152</sup> and
6. California disciplinary records indicate a much higher percentage of disciplinary cases involving attorneys from lower ranked schools who work in solo practice or small firms.<sup>153</sup>

Anderson and Muller have justified their study as necessary to protect “the most vulnerable, least sophisticated clients;”<sup>154</sup> however, they fail to discuss one of the most vulnerable client populations: criminal defendants, who are often at the mercy of prosecutors who graduated from elite law schools. Anderson and Muller do not discuss the ethical crisis among the highest scoring bar examination test takers from the most elite law schools who work in the United States Attorney Office or in elite state and county prosecution units. According to one U.S. Attorney’s Office, not only is hiring into that office “highly competitive,” but those with “a judicial clerk[ship]” will be considered even if they do not have the expected years of lawyering experience.<sup>155</sup> Harvard Law School even informs its students that those who have a judicial clerkship have a serious leg up on the competition for becoming a U.S. Attorney.<sup>156</sup> In addition, attorney jobs in county and city district attorney offices in large cities have become exceedingly competitive, with graduates from elite law schools now representing a large percentage of lawyers hired and graduates from fourth-tier law schools being rarely hired.<sup>157</sup>

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<sup>151</sup> Anderson, *supra* note 145.

<sup>152</sup> Anderson & Muller, *supra* note 4 (manuscript at 16–17).

<sup>153</sup> *Id.* at 16–18.

<sup>154</sup> Anderson, *supra* note 145.

<sup>155</sup> *Attorneys/Lawyers Employment*, U.S. ATTY’S OFF. CENT. DISTRICT OF CALI., <https://www.justice.gov/usao-cdca/employment/attorneyslawyers> (last visited June 1, 2019).

<sup>156</sup> Joan Ruttenberg et al., *The Fast Track to a U.S. Attorney’s Office*, BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING, HARVARD LAW SCH., 8 (2014), <https://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf>.

<sup>157</sup> It is extremely difficult to engage in a comprehensive study of district attorneys’ law schools because district attorney offices rarely publish a list of their attorneys. However, the Santa Clara, California District Attorney Office recently announced the hiring of fifteen new lawyers, which may be used as an example. *See*

Professor Muller has recently catalogued the relationship among elite law school students and judicial clerkships; they are essentially one and the same. His study indicates that, from 2014 to 2016, a super-majority of federal clerks attended only a handful of elite law schools including: Yale University, 200; Stanford University, 153; Harvard University, 312; University of Chicago, 98; University of Virginia, 159; Duke University, 82; University of California-Irvine, 40; University of California-Berkeley, 110; and the University of Michigan, 119.<sup>158</sup> In contrast, students from fourth-tier California Law Schools simply did not receive federal clerkships: Golden Gate University, zero; Whittier Law School, zero; Western State College of Law, zero; and Southwestern Law School, one.<sup>159</sup>

Therefore, a review of ethical violations within the U.S. Attorney's Office and other large city elite District Attorney Offices puts the Anderson and Muller findings to its strictest test. Under their theory, we should find an ethically pristine legal environment in offices staffed by high bar exam scoring elite law students. The data, however, tells a very different

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*District Attorney Hires 15 New Lawyers*, OFF. OF DIST. ATT'Y CTY. OF SANTA CLARA, <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2012/District-Attorney-Hires-15-New-Lawyers.aspx> (last visited June 1, 2019). I took that list of attorneys' names and searched for the law school from which each graduated in a public attorney search offered by the California State Bar. See *Licensee Search*, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch> (last visited June 1, 2019) (enter the desired attorney's name or licensee number in the search bar; then click search). One of the fifteen attorneys hired is deceased and those records are no longer maintained. Of the other fourteen attorneys hired, none attended any of the bottom quartile schools referenced by Anderson and Muller as likely to produce attorneys whose bar exam scores predict higher likelihood of bar discipline. And of those fourteen who were hired, one attended Harvard, one attended Stanford, two attended Berkeley, one attended UCLA, and one attended University of Virginia. It is generally recognized in the legal hiring arena that graduates of elite law schools have a distinct advantage in district attorney hiring decisions: "You must also excel while you are attending law school and it always looks better if you attend one of the more prestigious schools in the country." Silas Reed, *How to Become a District Attorney*, LAW CROSSING, <http://www.lawcrossing.com/article/5426/How-to-Become-a-District-Attorney/> (last visited June 1, 2019).

<sup>158</sup> Derek T. Muller, *Visualizing Law School Federal Clerkship Placements, 2014-2016*, EXCESS DEMOCRACY (May 15, 2017), <http://excessofdemocracy.com/blog/2017/5/visualizing-law-school-federal-judicial-clerkship-placement-2014-2016>.

<sup>159</sup> *Id.*

story: some of these prosecutors commit serious ethical violations that place citizens in jeopardy of losing their liberty.<sup>160</sup>

The Northern California Innocence Project published a study of hundreds of cases of demonstrated prosecutorial misconduct in California, including those that occurred in California federal courts where prosecutors were almost never sanctioned.<sup>161</sup> The Innocence Project data demonstrates that Anderson and Muller are asking not only an incorrect question, but also an unfair one. The issue is not how many attorneys are actually disciplined, but how many and which attorneys are committing ethical violations even if the disciplinary system does not prosecute them. The Innocence study found that judges rarely refer prosecutorial malpractice cases to the California Bar Association, and even if those cases are referred, the Bar Association rarely proceeds with disciplinary action: “Courts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it.”<sup>162</sup> Even though the State Bar Disciplinary overall conviction rate is 10%, only 1% of the prosecutorial misconduct claims the State Bar investigates result in convictions.<sup>163</sup> “[T]he State Bar publicly disciplined only one percent of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct and NCIP researchers identified the prosecutor.”<sup>164</sup> Unlike the solo practitioners who Anderson and Muller accuse of committing the lion’s share of California’s

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<sup>160</sup> See, e.g., Maura Dolan, *U. S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html> (chronicling recent examples of serious prosecutorial misconduct in California courts that have been characterized as “epidemic”).

<sup>161</sup> KATHLEEN RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, SANTA CLARA UNIV. SCH. OF L., PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 2–4 (2010), <http://digitalcommons.law.scu.edu/ncippubs/2>.

<sup>162</sup> *Id.* at 3.

In California, as in many states, prosecutors rarely face sanctions for their courtroom tactics. For that reason, the Field case—which could result in the prosecutor being suspended or even barred from the practice of law—is seen by some as a test of the system’s ability to police itself.

Leslie Griffy, *Prosecutor Faces Rare Disciplinary Hearing Today*, MERCURY NEWS (May 20, 2008, updated Aug. 14, 2016), <http://www.mercurynews.com/2008/05/20/prosecutor-faces-rare-disciplinary-hearing-today/>.

<sup>163</sup> See Table, *supra* Part II.A.

<sup>164</sup> RIDOLFI & POSSLEY, *supra* note 161, at 3.

ethical violations, U.S. Attorneys and District Attorneys can use the political power of their offices to shield themselves from obloquy.<sup>165</sup>

Perhaps the most famous denouncement of prosecutorial misconduct was by Judge Alex Kozinski, who said that violations “have reached epidemic proportions in recent years,” and that “[p]rofessional discipline is rare.”<sup>166</sup> However, because, as Judge Kozinski states, “it’s highly unlikely [prosecutorial] wrongdoing will ever come to light,” we may never have the ability to compare the extent of ethical violations among attorneys from elite law schools in elite prosecution offices with graduates of lower ranked law schools in solo and small firm practice.<sup>167</sup>

These attorneys who attended elite law schools, scored very well on the bar examination, and were hired into elite prosecution offices demonstrate the methodological flaws within Anderson’s and Muller’s conclusions. Their study did not sufficiently account for system effects, such as political factors that affect the filing of state bar disciplinary actions or elite law firm “in-house” mechanisms for keeping ethical violations secret. In addition, elite law firm clients may prefer to address their problems privately rather than report misconduct to the state bar. As the data on the lack of state bar sanctions against prosecutorial misconduct demonstrates, state bar disciplinary statistics do not predict the number of relative ethical violations among different groups of attorneys, but rather only predict the chances that those who violate ethics rules will be reported and prosecuted.

All that Anderson and Muller have demonstrated is what the State Bar has known for more than a decade: (1) graduates of less elite law schools are more likely to work in solo or small firms where their ethical violations are more likely to be discovered, to be referred to the State Bar, and to require

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<sup>165</sup> See, e.g., *United States v. Lopez-Avila*, 678 F.3d 955, 956 (9th Cir. 2012) (denying the U.S. Attorney’s Office motion to have the federal court delete the U.S. Attorney’s name from a case where prosecutorial misconduct played a significant role).

<sup>166</sup> *United States v. Olsen*, 737 F.3d 625, 630–31 (9th Cir. 2013) (Kozinski, J., dissenting). Although *Olsen* dealt with the failure of a U.S. Attorney to proffer alleged exculpatory information, Judge Kozinski also discussed other forms of prosecutorial misconduct, such as using unreliable experts and stated “some prosecutors turn a blind eye to such misconduct because they’re more interested in gaining a conviction than achieving a just result.” *Id.* at 632.

<sup>167</sup> *Id.* at 630.

discipline; and (2) graduates of elite law schools are more likely to work either in elite law firms or elite government positions where their ethical violations are less likely to be either discovered or reported, and those violations are less likely to result in disciplinary sanctions.<sup>168</sup>

For instance, in 2001, the California State Bar issued a report studying complaints about disparate treatment of big law firm attorneys and solo practice and small firm attorneys in the disciplinary system.<sup>169</sup> The study found that the State Bar Disciplinary system “is predominantly complaint driven,” and that practitioners of personal injury law, family law, criminal law, workers’ compensation, and building contract disputes are most often referred to the State Bar’s disciplinary system.<sup>170</sup> But, perhaps most importantly, the State Bar study found that the culture in elite or large firms makes it much less likely that elite law firm lawyers who commit ethical violations will be referred to the State Bar disciplinary system:

[S]olo and small firm attorneys can find themselves so overworked that they miss a statute of limitations, neglect to communicate a settlement offer or fail to return a client’s phone call. In a large law firm, while these mistakes could result in a reprimand from the firm or even the loss of a job, *it would not usually result in a complaint to the Bar.*<sup>171</sup>

Thus, a review of the differences between disciplinary actions against solo and small firm lawyers and elite law firm lawyers does not support Anderson and Muller’s conclusion that solo and small firm lawyers pose a greater risk to consumers because we lack data on the comparative number and seriousness of ethical violations by elite firm lawyers that are kept in-house and never reported. Perhaps Anderson and Muller’s cynical observation

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<sup>168</sup> See generally Anderson & Muller, *supra* note 4.

<sup>169</sup> STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS 14 (2001), [http://www.calbar.ca.gov/Portals/0/documents/reports/2001\\_SB143-Report.pdf?ver=2017-05-19-134106-347](http://www.calbar.ca.gov/Portals/0/documents/reports/2001_SB143-Report.pdf?ver=2017-05-19-134106-347). The State Bar did not find a bias against solo practice and small firm practitioners, but rather that more complaints were filed against those attorneys than against large firm attorneys. *Id.*

<sup>170</sup> *Id.* at 14, 17. The State Bar report included several other variables that justified the greater percentage of solo practice and small firm attorney cases litigated in the State Bar disciplinary system that have nothing to do with the actual ethical violation being investigated: (1) solo practice and small firm attorneys often cannot afford to hire an attorney to defend them in the State Bar Proceeding; (2) solo practice and small firm attorneys’ records are often less cooperative. *Id.* at 1–2, 13.

<sup>171</sup> *Id.* at 18 (emphasis added).

about students from elite law schools is correct: “It may be the case that graduates of more elite law schools are more sophisticated in covering up their unethical behavior. . . .”<sup>172</sup> Anderson and Muller have not proven that attorneys that graduate from lower ranked schools, score lower on the bar, and work in solo practice and small firms are (1) more unethical; (2) a greater danger to consumers; or (3) incompetent to practice law.

In addition, as discussed in Part 1, the Connecticut attorney disciplinary study determined that there is no correlation between law school grades and disciplinary patterns, and that the correlation between attending a low ranked law school and disciplinary cases is only 0.3%.<sup>173</sup>

### C. *The Methodological Flaws and Weakness of the Study*

Anderson and Muller admit that a well-designed and highly predictive study of the relationship between bar passage and attorney discipline would consist of the following data on each disciplined attorney, including:

1. Law school attended;
2. Date of Admission;
3. LSAT score;
4. Law school GPA;
5. Public disciplinary record;
6. Bar exam score, including MBE score.<sup>174</sup>

However, the authors did not use individualized LSAT scores, law school GPAs, or bar exam scores. Instead, they use what they term “proxies” for this data. The chain of proxies, difficult to follow, is linked in the following manner:

1. A disciplined attorney’s LSAT score was estimated based on the 25th and 75th percentile LSAT scores at the attorney’s law school.<sup>175</sup> However, this calculation amounts to no more than a guess of where that student fits on the full range of LSAT scores within the law school. The probability of the accuracy of that prediction is very low and such an erroneous estimate could significantly affect any conclusions regarding that particular disciplined attorney’s bar passage score.

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<sup>172</sup> Anderson & Muller, *supra* note 4 (manuscript at 17).

<sup>173</sup> Levin et al., *supra* note 7, at 32.

<sup>174</sup> Anderson & Muller, *supra* note 4 (manuscript at 3–7).

<sup>175</sup> *Id.* (manuscript at 6–7).

2. They then predicted the law school's average bar passage score by using the LSAT average by "interpolating" that score from data published by the National Conference of Bar Examiners ["NCBE"].<sup>176</sup> One problem is that Anderson and Muller do not describe their interpolation protocol. The NCBE does not publish individual law school students' or law schools' LSAT scores or MBE scores, and therefore, it is difficult to understand how this interpolation has any statistical validity regarding the analysis of any single disciplined attorney referred to the State Bar.
3. They then tested their model against a single set of data for the July 2016 California that examined the mean MBE scores of individual law schools—but not the scores of individual test takers.<sup>177</sup> The obvious problem is that the Anderson and Muller study analyzed bar exam data for graduates from 1975 to 2006, but their test instrument was based on a single administration of the California bar examination. They did not address the possibility that the school specific bar passage scores and mean MBE scores were aberrant for that July 2016 administration of the California bar examination. Based upon my inspection of California State Bar Examination records for tests from February 2007 to July 2015 for Whittier Law School, the first-time test taker MBE mean scores varied from a low of 133.6 to a high of 146.4.<sup>178</sup> This significant variation among different bar examination administrations demonstrates the methodological flaw in the Anderson and Muller study. A single law school's mean MBE score cannot accurately predict an individual attorney's disciplinary history.

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<sup>176</sup> *Id.* (manuscript at 7).

<sup>177</sup> *Id.* I commiserate with their inability to gather sufficient data from the State Bar to conduct a more statistically reliable study, and I join their request that more State Bar data should be released to the public.

<sup>178</sup> Patton, *supra* note 92, at 33.

*D. A Study of Wisconsin Attorney Disciplinary Cases Demonstrates That No Correlation Exists Between Passing a Bar Exam or Admission by Diploma Privilege, and Disciplinary Violation Rates*

A study, submitted to the ABA Council by the author, demonstrates that there is no correlation between attorney discipline and bar admission method, whether through passing a bar exam or through being admitted pursuant to “diploma privilege.”<sup>179</sup> In that study, the author examined Wisconsin disciplined attorneys from January 2013 to March 2016 in relation to whether they had to pass a bar exam or whether they were admitted by diploma privilege.<sup>180</sup> By employing a chi-square analysis, the data demonstrated that there was no valid statistical relationship between rates and/or the seriousness of attorney disciplinary violations and attorneys’ method of bar admission.<sup>181</sup> The results actually disproved my hypothesis that diploma privilege admitted attorneys would have a greater number and more serious ethical violations than those who passed a bar exam. In a companion study of bar passers versus diploma admitted attorneys, the author conducted an additional analysis of the patterns and seriousness of those two groups’ disciplinary violations.<sup>182</sup> The results demonstrated that the bar passage group had more sustained disciplinary cases and that those disciplinary violations were usually based upon more serious ethical violations than the diploma admitted attorneys.<sup>183</sup> For instance, the diploma admitted group’s recidivist rate was 0.99, but the bar exam group’s rate was 1.52.<sup>184</sup> The diploma

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<sup>179</sup> Memorandum from William Wesley Patton, Professor Emeritus, Whittier Law School, Assistant Clinical Vol Professor, UCLA David Geffen School of Medicine, Department of Psychiatry, to ABA Council (Apr. 22, 2016). [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/201607\\_comment\\_s316\\_william\\_patton\\_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201607_comment_s316_william_patton_2.pdf). The author submitted additional bar exam studies to the ABA, which can be found at [https://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment/notice\\_comment\\_archive/](https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive/).

<sup>180</sup> *Id.* at 4–5.

<sup>181</sup> *Id.* at 6–7.

<sup>182</sup> Memorandum from William Wesley Patton to ABA Council on Legal Education & Admission to the Bar 1 (May 7, 2016).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 3. The “recidivist rate” refers to those attorneys who committed one or more additional disciplinary violation after having been formally disciplined for a previous ethical violation.

group's violations involving dishonesty was 33%, but it was 43% for the bar exam group.<sup>185</sup> The percentage of cases involving monetary violations was similar for both groups: 40% for diploma admitted and 46% for bar exam admitted.<sup>186</sup>

These two studies of the differences between Wisconsin attorneys admitted by bar exam versus those admitted by the diploma privilege raise serious questions about the Anderson and Muller conclusions. The Wisconsin studies suggest the possibility that the bar exam could be either irrelevant or only marginally relevant in predicting attorney misconduct. Much more research is needed before we determine whether there is any correlation between bar examination performance and predicted disciplinary violations.

*E. Anderson and Muller's Claim That Lowering the California MBE Cut Score Will Increase Malpractice Cases Is Inconsistent with State Bar Disciplinary Statistics*

Anderson and Muller predicted that those with low California bar passage scores would have a greater chance of being disciplined than attorneys with high passage scores.<sup>187</sup> They assumed, without analysis, that those disciplined attorneys would "increase the amount of *malpractice*, misconduct, and discipline among [California attorneys]" and that would reduce consumer protection.<sup>188</sup>

First, Anderson and Muller presented no data to demonstrate that changing the California MBE cut score would increase malpractice rates. They did not present any quantitative or qualitative data and analysis to prove that the types of misconduct that result in attorney discipline in California also would support the very different legal standard in malpractice cases. Many acts sanctioned by the State Bar do not amount to malpractice. A study that the author sent to the ABA Section on Legal Education and Admission to the Bar analyzed 163 California State Bar disciplinary opinions issued from January 1 to April 30, 2016.<sup>189</sup> That analysis demonstrated that

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Anderson & Muller, *supra* note 4 (manuscript at 2–3).

<sup>188</sup> *Id.* (manuscript at 2) (emphasis added).

<sup>189</sup> Memorandum from Patton, *supra* note 182, at 1.

51% of the 163 charges involved client trust fund violations.<sup>190</sup> Many of those violations only involved inappropriate comingling of funds.<sup>191</sup> Almost none of those cases would support legal malpractice filings because most of the violations either did not result in harm to the client versus potential harm to the client, or they did not result in any prejudice to the client's legal cause of action. Another 18% of the cases involved drug and/or alcohol problems or failures to meet disciplinary probation conditions, issues unrelated to any specific lawyer acts that would give rise to a malpractice action.<sup>192</sup> Cases associated with the common claims for malpractice such as not meeting a statute of limitations, failure to call a critical witness, failure to reasonably engage in discovery, failure to inform a client of a proffered settlement offer, etc., were almost non-existent. Therefore, Anderson and Muller's prediction that lowering the California MBE score would result in a substantial increase in malpractice claims is simply unproven and empirically unsupported.

Anderson and Muller admitted that lowering the MBE cut score may "increase access to justice and likely lower costs for consumers."<sup>193</sup> However, they did not decide whether such benefits are outweighed by their prediction of increased bar discipline. They provided no evidence that indigent clients would be better off proceeding pro se rather than being represented by an attorney who graduated from an accredited law school and who passed a bar exam but who is predicted to commit an unspecified ethical violation sometime during that attorney's career.<sup>194</sup> They have presented insufficient evidence that California attorneys who score lower than 144 on the bar exam and who would be admitted to practice law in almost every other state pose a serious risk to the California public.

### CONCLUSION

I applaud Professors Kinsler, Anderson, and Muller for investigating whether the bar examination is relevant to patterns of attorney discipline. However, their research failed to

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<sup>190</sup> *Id.* at 6.

<sup>191</sup> *See id.*

<sup>192</sup> *Id.*

<sup>193</sup> Anderson & Muller, *supra* note 4 (manuscript at 19).

<sup>194</sup> In one study, "[Sixty-two percent] of the judges said that outcomes were worse for the unrepresented parties." Judge Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 147, 148-49 (2013).

prove that: (1) students from low rated law schools engage in significantly more unethical behavior; (2) there is a causal relationship or correlation between students who attend low ranked schools, their bar exam scores, and their disciplinary patterns; or (3) students from low ranked schools who scored lower on the bar exam are either not minimally competent to practice law or are a significantly greater danger to the public than students who attended elite law schools. They also failed to prove that lowering an extremely high MBE cut score to one near the national MBE mean will have any significant effect on attorney misconduct. Finally, they failed to demonstrate any connection between the number of times attorneys retake the bar exam, attorney disciplinary rates, and danger to the public.

Serious social harm can result from reliance on statistically and methodologically flawed bar examination studies. For instance, from my perspective, Anderson and Muller's zealous arguments against lowering the California MBE cut scores could needlessly lead to: (1) a loss of many attorney candidates, including diversity candidates, who could provide legal services to California residents; (2) an unreasonable monopoly on the practice of law that has long-term impact on the availability and cost of legal services; and (3) great economic and psychological harm to the hundreds of attorney applicants whose MBE scores demonstrate that they would have been admitted to most other state bar associations in the United States,<sup>195</sup> but who, because of the 144 MBE cut score, failed the California bar examination. In addition, Kinsler's proposed national maximum number of bar examination attempts will substantially limit access to the bar by qualified candidates whose circumstances, such as single parenthood, poverty, or health, create significant challenges to studying for the bar. Ultimately, the studies by Professor

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<sup>195</sup> *Id.* at 148–49. Anderson's earlier study demonstrated that California's fourth-tier law schools' mean MBE scores on the California Bar Examination would have resulted in those students passing the New York bar examination at rates between fifty-seven percent and eighty-three percent. Anderson, *supra* note 145. In addition, Professor Muller has demonstrated that even though many California bar exam test takers fail the California bar exam, students from California law schools perform better on the MBE than students in other states. Derek T. Muller, *California Bar Exam Takers Are Far More Able than Others Nationwide but Fail at Much Higher Rates*, EXCESS DEMOCRACY (Nov. 21, 2015), <http://excessofdemocracy.com/blog/2015/11/california-bar-exam-takers-are-far-more-able-than-others-nationwide-but-fail-at-much-higher-rates>.

Kinsler, and Professors Anderson and Muller, while commendable in their aims, represent little more than methodologically flawed attempts to rationalize harmful and elitist intuitions about the legal profession.