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## Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates

Haley Moss

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# RAISING THE BAR ON ACCESSIBILITY: HOW THE BAR ADMISSIONS PROCESS LIMITS DISABLED LAW SCHOOL GRADUATES

HALEY MOSS\*

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\* J.D. University of Miami School of Law 2018, B.S., University of Florida, 2015, B.A., University of Florida, 2015. A thank you to the wonderful students at American University Washington College of Law and the American Bar Association's Commission on Disability Rights for hosting a groundbreaking symposium on disability inclusion in law school and the profession. Thank you to the many disabled law students and lawyers currently leading the fight towards justice each and every day. And of course, eternal gratitude to my family.

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## I. INTRODUCTION

Think about the steps it takes to get from law school admission through passing the Bar exam. Not only do you have to graduate with your college degree, but you have to take the Law School Admissions Test (LSAT); enroll in law school; potentially take out student loans; do plenty of reading; pass all of your classes; survive a few internships; participate in clinics, practicums and activities; obtain the juris doctor degree; study for weeks and months on end to take the bar exam; and hope for good news to begin your journey as an attorney.

While it sounds like a lot of steps and hurdles to go through for any law student, imagine the additional hurdles and difficulties for law students with disabilities. Until a 2014 consent decree, the Law School Admission Council would flag LSAT scores obtained with disability accommodations,<sup>1</sup> signaling to admissions officers the applicant likely had a disability.<sup>2</sup> Standardized tests have a history of discrimination against test-takers with disabilities.<sup>3</sup>

Graduates with acquired disabilities may be able to get student loans discharged,<sup>4</sup> but people with disabilities are more likely to be poor, in poverty, or end up unemployed than nondisabled people.<sup>5</sup> Receiving

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1. Consent Decree at 19, *Dep't of Fair Emp't and Hous. v. Law Sch. Admissions Council*, No. CV 12-1830-EMC (N.D. Cal. May 29, 2014) (ending the Law School Admission Council's practice of flagging test scores administered with extra time or other accommodations); Haley Moss, *Extra Time is a Virtue: How Standardized Testing Accommodations After College Throw Students with Disabilities Under the Bus*, 13 ALB. GOVT. L. REV. 201 (2020).

2. See Nancy Leong, Comment, *Beyond Breimhorst: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 STAN. L. REV. 2135, 2145 (2005).

3. See *Breimhorst v. Educ. Testing Serv.*, No. C-99-CV-3387, 2000 WL 34510621, at \*1, \*1 (N.D. Cal. Mar. 27, 2000); Leong, *supra* note 2, at 2137.

4. Claire Lombardo & Cory Turner, *Student Loan Borrowers with Disabilities Aren't Getting the Help They Were Promised*, NPR (Dec. 4, 2019, 5:00 AM), <https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve>.

5. Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After*

accommodations in law school can be hard-fought battles. The bar application and examination process are riddled with additional hurdles for law students and graduates with disabilities, such as navigating an environment designed without them in mind and hope to make it through the same rites of passage with statistically lower odds of employment.

There are two largely competing lenses of how disability is viewed: the medical model of disability, and the social model of disability. The medical model of disability focuses on the physical or mental impact of a condition that places a person with a disability at a disadvantage.<sup>6</sup> The medical model also focuses on curing disability. In comparison, the social model of disability sees a social process that turns an impairment into a disadvantage because of barriers to access.<sup>7</sup>

When considering legal protections for students with disabilities, the social model is more apt to describe their challenges of navigating an inaccessible educational environment. These challenges continue in adulthood where the focus on diagnosed or medical deficits should be secondary to receiving the proper support to succeed.

Barriers to access for students with disabilities permeate through education, beginning in childhood. Under the Individuals with Disabilities Education Act (“IDEA”), students with disabilities are entitled to free and appropriate public education up until receipt of their high school diploma, or until age 22, whichever comes first.<sup>8</sup> After being identified as having a disability, families request and receive an evaluation to determine if a student is eligible for special education services. Following this process, qualified students in primary and secondary education benefit from the creation of an individualized education plan (IEP), where a student’s goals, strengths, weaknesses, and accommodations are documented and reviewed regularly to create a comprehensive record of the student’s education.<sup>9</sup>

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*Landmark Law*, NPR (July 23, 2015, 3:38 PM), <https://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law>.

6. See MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 34 (1st. ed. 1995); see also CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 12 (1988).

7. Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do with It Or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 427 (2011).

8. See 20 U.S.C. § 1412 (2018).

9. Haley Moss, *As an Autistic Woman, the Disability Question at the Democratic Debate Finally Made Me Feel Seen*, MIC (Dec. 20, 2019), <https://www.mic.com/p/as-autistic-woman-the-disability-question-at-the-democratic-debate-finally-made-me-feel->

However, IDEA has its barriers depending on where a student lives and attends public school. When IDEA was passed in 1975, Congress pledged to fund 40% of the additional cost of special education, but has failed to fulfill its promise, currently funding 14.6% of those costs.<sup>10</sup> The rest of the costs are shouldered onto state and local education budgets.<sup>11</sup>

Private school students did not interact with IDEA, though they were still entitled to receive reasonable accommodations in education. Private schools, colleges, and universities all interact more with Section 504 of the Rehabilitation Act of 1973, which entitles students at postsecondary schools to accommodations that reflect their abilities in the classroom rather than reflect the extent and nature of their disabilities.<sup>12</sup>

But who qualifies as having a disability and thus can enforce their civil rights under the law? The legal definition of disability is fairly broad. The Americans With Disabilities Act (“ADA”) defines a disability as “a physical or mental impairment that substantially limits one or more major life activit[y].”<sup>13</sup> This definition includes physical disabilities, invisible disabilities, learning disabilities, chronic illnesses, as well as intellectual and developmental disabilities. The ADA’s definition of disability further includes mental health conditions and substance abuse, both of which disproportionately affect law students and lawyers in comparison to the general population.<sup>14</sup>

There is no specific count measuring the population of law students with disabilities. However, if measured, people with disabilities would be the largest minority group in the United States today, with 61 million American

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seen-19624939.

10. *IDEA Full Funding: Why Should Congress Invest in Special Education?*, NAT’L CTR. FOR LEARNING DISABILITIES, <https://nclld.org/news/policy-and-advocacy/idea-full-funding-why-should-congress-invest-in-special-education/>.

11. Amanda Litvinov, *Congress’ Broken Promise On IDEA Hurts State Budgets, Special Education Students*, NAT’L EDUC. ASS’N (June 7, 2015), <https://educationvotes.nea.org/2015/06/07/congress-broken-promise-on-idea-hurts-state-budgets-special-education-students/>.

12. See 34 C.F.R. § 104.44 (2019).

13. 42 U.S.C. § 12102 (2017).

14. Dan Lukasik, *Why We Need To Talk About Lawyers’ Mental Health Now*, THRIVE GLOBAL (Sept. 20, 2018), <https://thriveglobal.com/stories/aba-misses-the-mark/> (“The ABA study showed that 28% of lawyers had struggled with some kind of depression in the past 12 months of the survey. That is *four times* the rate found in the general population and, truly, an epidemic. Even more troubling was the fact that 61% of attorneys surveyed had struggled with depression at some point in their legal careers. That is almost *ten times* the rate found in the general population”).

(or about 1 in 4) adults having disabilities.<sup>15</sup> In Fall 2019, 112,882 law students were enrolled in J.D. programs nationwide.<sup>16</sup> With this in mind, if the law school population proportionately matches the disabled American adult population, there are around 28,000 juris doctor candidates with disabilities enrolled in law school today who will one day sit for the bar exam in their jurisdiction of choice.

The American Bar Association estimates that there are about 1.3 million licensed attorneys nationwide<sup>17</sup>, and according to diversity reports from the National Association for Law Placement, 0.55% of attorneys surveyed in 2019 self-reported having disabilities.<sup>18</sup> Other data from the National Association for Placement suggests slightly higher figures of between 2.5 and 3.5% of law school graduates identifying as having disabilities.<sup>19</sup>

This Article aims to address the hurdles and accessibility issues associated with the bar examination and application processes, as well as the laws and precedents governing access to the legal profession. Part I of this Article first expands upon the congressional intent and purpose behind the Americans with Disabilities Act, along with a history of reasonable accommodations in high-stakes testing scenarios under Title III of the Americans with Disabilities Act. Part II will then dovetail into the unique situations surrounding the Americans with Disabilities Act in the bar admissions process under both Title II and Title III, such as analyzing how mental health questions on the character and fitness portion of the bar application are discriminatory and infringe on the rights of emerging lawyers and recent graduates with disabilities. After providing an understanding of the preliminary inquiries, Part III gives an overview of various hurdles in the process of taking the bar exam and culminates by analyzing reasonable accommodations on the bar exam itself. To conclude, Part V offers final reflections about the future of the exam for disabled law graduates and

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15. *CDC: 1 in 4 US Adults Lives with a Disability*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 16, 2018, 1:00 PM), <https://www.cdc.gov/media/releases/2018/p0816-disability.html>; *see also* Ashley Welch, *1 in 4 U.S. Adults has a Disability, CDC Says*, CBS NEWS (Aug. 16 2018, 1:31 PM), <https://www.cbsnews.com/news/1-in-4-u-s-adults-has-a-disability-cdc-says/>.

16. *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS'N (May 11, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new\\_aba\\_data\\_reveals/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/).

17. *Id.*

18. *2019 Report on Diversity in U.S. Law Firms*, NAT'L ASS'N OF L. PLACEMENT 30 (2019), [https://www.nalp.org/uploads/2019\\_DiversityReport.pdf](https://www.nalp.org/uploads/2019_DiversityReport.pdf).

19. *Id.* at 8.

balancing the needs of accommodation and fairness for lawyer licensing.

## II. BACKGROUND

Disability policy and antidiscrimination did not necessarily come to the forefront until after the civil rights movement of the 1960s. The first of the key disability rights laws to be passed was the Rehabilitation Act of 1973, which continued the philosophy of Title IX and Title VI of the Civil Rights Act (which prohibited federal support of programs that discriminated on the basis of gender and race, respectively).<sup>20</sup> Under Section 504 of the Rehabilitation Act of 1973, no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.<sup>21</sup>

Section 504 of the Rehabilitation Act was one of many instances where disabled people advocated for their own rights. Following successful implementation of regulations and definitions under Section 504, the Supreme Court interpreted disability discrimination throughout the 1980s.<sup>22</sup> Section 504 laid the groundwork for a more comprehensive civil rights law to protect the rights of people with disabilities. Section 504 first established the three-pronged legal definition of disability, as opposed to a medical one. It defined people with disabilities as: (1) people with physical or mental impairments that substantially limit one or more major life activity, (2) those who have a record of such an impairment, and (3) those who are regarded as having such an impairment.<sup>23</sup> Another principle of Section 504 that is particular to disability civil rights is the balancing of the individual's right to be free from discrimination with the cost to society to effect a remedy. Section 504 established the right of a disabled individual who has experienced discrimination to pursue an administrative remedy with the appropriate federal agency as well as to go to court.<sup>24</sup>

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20. Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What are the New Issues?*, 22 AM. U.J. GENDER, SOC. POL'Y & L. 519, 526-27 (2014).

21. 34 C.F.R. § 104.4 (2000).

22. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>.

23. 29 C.F.R. § 1630.2(g)(1) (2020).

24. Kitty Cone, *Short History of the 504 Sit In*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/>.

*A. Disability Rights are Civil Rights: The Americans with Disabilities Act*

Although modeled after the Civil Rights Act, Section 504 and the Rehabilitation Act of 1973 did not go far enough to protect the civil rights of people with disabilities. The proposed Americans with Disabilities Act was first introduced in Congress in 1988, and faced revisions and introductions in subsequent legislative sessions.<sup>25</sup> When the proposed ADA was stalled in the House Committee on Public Works and Transportation in early 1990 after two failed introductions, disabled activists took control hoping to see movement on the legislation.<sup>26</sup> On March 12, 1990, disabled activists descended upon Washington, D.C. to ascend the steps of Capitol Hill during the “Capitol Crawl.” Here, dozens of disability activists abandoned wheelchairs and mobility aids to climb and crawl up the stairs in a demonstration about accessibility for people with disabilities, and to help mobilize Congress into passing the ADA.<sup>27</sup>

The culmination of disability civil rights advocacy and activism was when former President George H.W. Bush signed the ADA on July 26, 1990.<sup>28</sup> The final result was a landmark civil rights law providing equal opportunities and access for people with disabilities.<sup>29</sup> With the ADA, Congress intended to have comprehensive civil rights legislation to protect people with disabilities by modeling the ADA after the Civil Rights Act of 1964. The overall purpose of the Americans with Disabilities Act is “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>30</sup>

The ADA borrows from the three-pronged legal definition of disability set out in Section 504 to define who is a qualified individual with a disability. Under the ADA, a qualified individual with a disability has “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as

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25. Mayerson, *supra* note 22.

26. Jess Zimmerman, “Capitol Crawl” – Americans with Disabilities Act of 1990, HIST. BY ZIM (Sept. 9, 2013), <http://www.historybyzim.com/2013/09/capitol-crawl-americans-with-disabilities-act-of-1990/>.

27. *Id.*; William J. Eaton, *Disabled Persons Rally, Crawl Up Capital Steps*, L.A. TIMES (Mar. 13, 1990), <https://www.latimes.com/archives/la-xpm-1990-03-13-mn-211-story.html>.

28. *Introduction to the ADA*, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm)

29. *ADA - Findings, Purpose, and History*, ADA NAT’L NETWORK, [https://www.adaanniversary.org/findings\\_purpose](https://www.adaanniversary.org/findings_purpose).

30. 42 U.S.C. § 12101(a)(7) (2020).



having such an impairment.”<sup>31</sup> In other words, the ADA applies to people who have at least one major life activity substantially limited because of a disability.<sup>32</sup>

The ADA is divided into five titles.<sup>33</sup> Title I regulates access to employment opportunities for people with disabilities, and prohibits employers with more than fifteen employees from discriminating against qualified disabled individuals in terms, conditions and privileges of employment beginning with job application procedures.<sup>34</sup> Title II handles nondiscrimination on the basis of disability in state and local government services.<sup>35</sup> Title III, which is about public accommodations and commercial facilities, prohibits private places from discriminating against people with disabilities and sets standards for accessibility at facilities and businesses.<sup>36</sup> Title IV requires that telecommunications services be accessible to individuals with speech and hearing disabilities to communicate via telephone.<sup>37</sup> Title V provides miscellaneous information as to how the ADA interacts with other laws, and which conditions are not considered disabilities.<sup>38</sup> Further amendments to the ADA in 2008 provide a non-exhaustive list of major life activities in its definition of the term, stating that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>39</sup>

The need to provide access to the legal profession is discussed amongst disabled lawyers, and accommodations – whether granted under the ADA or as a form of self-accommodation – are one of the many ways law students and graduates are forced to adapt in a rigorous environment not designed with them in mind. Kim Forde-Mazrui, a blind law professor at the

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31. 42 U.S.C. § 12102(1) (2020).

32. *See* Rothberg v. Law Sch. Admission Council, Inc., 300 F. Supp. 2d 1093, 1104 (D. Colo. 2004), *rev’d on other grounds*, 102 Fed. App’x 122 (10th Cir. 2004); *see also* Love v. Law Sch. Admission Council, Inc., 513 F. Supp. 2d 206, 223 (E.D. Pa. 2007).

33. *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada> (last visited Sep. 20, 2019).

34. 42 U.S.C. § 12112(a) (2017).

35. 42 U.S.C. § 12132 (2017).

36. 42 U.S.C. § 12182(a) (2017).

37. 47 U.S.C. § 225(b)(1) (2017).

38. *See* 42 U.S.C. §§ 12201, 12211 (2017).

39. 42 U.S.C. § 12102(2)(A) (2018).

University of Virginia, would listen to casebooks on audio cassette while in law school.<sup>40</sup> While at Harvard Law, Haben Girma, a deafblind lawyer, had assistive listening devices and American Sign Language interpreters to provide access to audio and visual information in her classes – accommodations she was entitled to under the ADA.<sup>41</sup>

Students with disabilities who attend law school or sit for high-stakes examinations, including graduate school admissions tests or professional licensing exams (such as the bar exam), may have substantial limitations in one or more major life activities including learning, concentrating, thinking and communicating; therefore, disabled law school graduates are qualified individuals with disabilities for the purposes of limited major life activities and are entitled to receive reasonable accommodations.

### *B. Reasonable Accommodations for High-Stakes Testing*

Accommodations on exams can run the gamut from extra time, questions being read to someone who is blind, using a screen reader, or taking the exam in a wheelchair-accessible room – anything that makes the test or environment accessible to disabled students without substantially modifying its contents and format or compromising the integrity of the test.<sup>42</sup>

While the ADA is comprehensive and a bipartisan success, there is both room for improvement and a need for further amendments because the law remains open to interpretation. Since its inception in 1990, courts have been grappling with interpreting the ADA in situations involving high-stakes standardized testing and examinations. While this Article primarily focuses on the bar exam, courts are tasked with leveling the playing field for disabled test-takers across their lifespans while avoiding granting an unfair advantage to either disabled or nondisabled test-takers. To determine whether an ADA violation has occurred under the circumstances of standardized testing, courts analyze three factors established in *D'Amico v. New York Board of Law Examiners*. A plaintiff must show (1) that [he] is disabled, (2) that [his] requests for accommodations are reasonable, and (3) that those requests have

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40. Christina Luk, *Law Weekly Faculty Lunch Series: Kim Forde-Mazrui*, VA. L. WEEKLY (Oct. 31, 2019), <https://www.lawweekly.org/col/2019/10/30/law-weekly-faculty-lunch-series-kim-forde-mazrui>.

41. Haben Girma, *I am Harvard's First Deafblind Graduate. Here's what College is Like for Students with Disabilities*, CNBC, (Jan. 16, 2020), <https://www.cnbc.com/2020/01/03/what-college-is-like-for-students-with-disabilities-according-to-a-harvard-grad.html>.

42. See 28 C.F.R. §§ 36.303(b), 36.309(b)(3) (2017) (providing non-exhaustive lists of auxiliary aids and services).

been denied.<sup>43</sup> “These factors are applied in a case by case, fact specific fashion, with the focal point usually being whether the denied request for accommodation was reasonable in light of the ADA’s purpose to place disabled individuals on an equal footing without giving them an unfair advantage.”<sup>44</sup>

Issues surrounding private and public entities offering examinations relating to education and occupational certification should be considered under Title III of the ADA. All standardized tests a student has taken throughout his or her education are at a minimum required to be compliant with Title III, though exams administered by state or local government entities must not violate Title II of the ADA. Bar exams are a requirement in the majority of jurisdictions to practice law; therefore, the application process and examination should be covered under both Title II and Title III. However, all standardized tests are prohibited from discriminating against people with disabilities under Title III of the ADA. In accordance with Title III, an examination is to be administered so as best to ensure that it reflects an individual’s aptitude or achievement level rather than the individual’s impaired skills.<sup>45</sup> Title III also provides that required modifications may include changes in the length of time permitted for completion of the exam, auxiliary aids and services, and alternative accessible arrangements such as providing an examination at a person’s home.<sup>46</sup> Title III is specifically enforced by the United States Department of Justice<sup>47</sup> and utilizes a standard of “reasonable modification.”<sup>48</sup>

Under the reasonable modification standard, public and private entities should make accommodations and modifications reasonable for their services and locations to be accessible to people with disabilities without substantially altering the content or goals.<sup>49</sup> An alternate or less challenging exam may not be a reasonable modification, but providing an exam in a large print format or allowing extra time may be a reasonable modification that does not alter the goals of testing minimum competence of hopeful new

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43. *D’Amico v. N.Y. State Bd. of Law Exam’rs*, 813 F. 217, 221 (W.D.N.Y. 1993).

44. *Agranoff v. Law Sch. Admission Council, Inc.*, 97 F. Supp. 2d 86, 87 (D. Mass. 1999) (quoting *D’Amico v. New York State Bd. of Law Exam’rs*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993)).

45. 28 C.F.R. § 36.309(b)(1)(i) (2020).

46. *Id.*

47. *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 223 (E.D. Pa. 2007).

48. 42 U.S.C. § 12182(2)(A) (2017).

49. *Id.*

lawyers.

Courts consistently hold that the ADA applies to individuals who have at least one major life activity which is substantially limited because of a disability.<sup>50</sup> In addition, courts primarily rely on diagnostic criteria to determine whether a person has a disability. Courts steadily hold that to access accommodations for mental impairments, such as learning disabilities, psychiatric disabilities, and neurological disabilities, a person needs a current diagnosis made in accordance with the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>51</sup>

For prospective law students and future lawyers, the LSAT is the first of three standardized tests that law students must conquer on their journey to becoming lawyers. Following the LSAT, law students and graduates sit for the Multistate Professional Responsibility Exam and the bar exam. The bar exam is often one of the last times law students and graduates apply for accommodations in high-stakes environments, since college admissions and postsecondary schooling are behind them. For examinees with disabilities, proving disability is part of the process of receiving accommodations on that case by case basis. To receive accommodations, applicants must submit supporting documentation.

In *Agranoff v. Law School Admission Council*, the plaintiff, Michael Agranoff, had a neurological disability that prevented him from being able to write for long periods of time<sup>52</sup>. He requested extra time on the LSAT and provided evidence that he had received extra time throughout his educational career.<sup>53</sup> The court granted an injunction permitting extra time because he would suffer irreparable harm from the time and effort he spent with tutors and in a preparatory course to take the LSAT, and face prejudice in the law school admissions process that utilized rolling admissions.<sup>54</sup> The court also found that there is a public interest in providing people with disabilities equal

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50. See *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1104 (D. Colo. 2004), *rev'd on other grounds*, 102 Fed. App'x 122 (10th Cir. 2004); see also *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 223 (E.D. Pa. 2007).

51. See Ashley Yull, *The Impact of Race and Socioeconomic Status on Access to Accommodations in Post-Secondary Education*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 353, 364–65 (2015).

52. *Agranoff v. Law Sch. Admission Council, Inc.*, 97 F. Supp. 2d 86, 86 (D. Mass. 1999).

53. *Id.* at 87.

54. *Id.* at 88.

footing.<sup>55</sup>

Several years after *Agranoff*, Abby Rothberg, a college senior with significant reading and learning disabilities since elementary school, was applying to law school and intended to take the LSAT in October 2003.<sup>56</sup> She requested additional time to take the LSAT, and despite evidence of her identified disabilities, she was denied the accommodation.<sup>57</sup> The court held that Rothberg had disabilities that impacted major life activities under the ADA,<sup>58</sup> and the Law School Admission Council violated Title III of the ADA through its denial of extra time.<sup>59</sup> However, the Tenth Circuit reversed Rothberg's claim for injunctive relief.<sup>60</sup>

Contrary to the decision in *Rothberg*, the Eastern District of Pennsylvania later held in *Love v. Law School Admission Council, Inc.*, that Jonathan Love's diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") did not substantially limit major life activities.<sup>61</sup> ADHD is a neurological condition marked by severe inattention, unfocused motor activity, and hyperactivity that occurs more often than in the general population, and interferes with performance in educational settings.<sup>62</sup> Students with ADHD benefit from receiving accommodations for quiet spaces or extra time when taking tests in schools. Love requested extra time as an accommodation for the LSAT.<sup>63</sup>

The Law School Admission Council initially denied Love an additional 17.5 minutes per section on the LSAT because his supporting documentation, which included two psychological reports, did not "demonstrate a substantial limitation related to taking the LSAT."<sup>64</sup> The court affirmed the Law School Admission Council's decision. The court did

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55. *Id.*

56. *See Rothberg*, 300 F. Supp. 2d at 1095–96.

57. *See id.* at 1098.

58. *See id.* at 1104.

59. *See id.* at 1106.

60. *Rothberg v. Law Sch. Admission Council, Inc.*, 102 F. App'x 122, 127 (10th Cir. 2004).

61. *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 229 (E.D. Pa. 2007).

62. *See Attention-Deficit/Hyperactivity Disorder*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd/index.shtml> (last visited Oct. 2019).

63. *Love v. Law Sch. Admission Council, Inc.*, 513 F. Supp. 2d 206, 228 (E.D. Pa. 2007).

64. *Love*, 513 F. Supp. 2d. at 208.

not dispute that ADHD was a disability or impairment, nor did it question that Love had ADHD, but rather, it did not find how it met the requirement of “substantial[ly] limiting” a major life activity. The Supreme Court requires the substantial limitation of a life activity to be “considerable”<sup>65</sup> and the determination of a substantial limit on a major life activity is “not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”<sup>66</sup> In *Love*, the court’s rationale highlighted that the plaintiff did not establish a deep-rooted history of ADHD based on his educational background, and that his inattention was not significant enough to warrant accommodation.<sup>67</sup>

Under the *Love* court’s approach, a disability must have been present and significantly impaired an individual for a large portion of a person’s life, and a plaintiff would need to demonstrate the disability and the major life activities it affects. *Love* does not address recent onsets or impairments changing throughout a student’s lifespan. Yet, a student whose learning disability was not identified until law school should not be denied accommodations simply because the student had not received accommodations in the past.<sup>68</sup>

Outside of the LSAT, the next hurdle in high-stakes testing is the Multistate Professional Responsibility Exam (“MPRE”), which is also part of the bar admissions process. To receive accommodations on the MPRE, applicants submit to the National Conference of Bar Examiners (1) an applicant request form, (2) a personal narrative (which is optional), (3) medical documentation, (4) proof of past accommodations, and (5) standardized test score reports.<sup>69</sup>

To determine whether a violation of the ADA occurred in granting accommodations, courts continue to apply the standards set in *D’Amico* for the MPRE as well. In a challenge for reasonable accommodations on the MPRE, Deanna Jones, a legally blind law student, sought to use a screen reader for the exam.<sup>70</sup> In the *Jones* decision, the court determined that the

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65. See *id.* at 225 (quoting *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999)).

66. *Id.* (quoting *Sutton*, 527 U.S. at 483).

67. *Id.* at 225–226.

68. Rothstein, *supra* note 20 at 568.

69. John Passmore, *Everything You Need to Know About ADA Accommodations for the MPRE and Bar Exams*, BAR EXAM TOOLBOX (Oct. 25, 2017), <https://barexamtoolbox.com/everything-you-need-to-know-about-ada-accommodations-for-the-mpre-and-bar-exams/>.

70. *Jones v. Nat’l. Conference of Bar Exam’rs*, 801 F. Supp. 2d 270, 272 (D.C. Vt. 2011).

National Conference of Bar Examiners must grant accommodations that “best ensure” that her knowledge of the law governing a lawyer’s ethical and professional obligations is tested by the MPRE, rather than the extent to which Jones is able to overcome her uncontested disabilities.<sup>71</sup>

Accommodations do not measure whether a law student or lawyer is competent. Rather, accommodations give applicants and test-takers the ability to demonstrate their competence to understand a lawyer’s obligation and requisite knowledge to practice law and be admitted to a particular jurisdiction.

### III. ANALYSIS

#### A. *Applying for Admission: Character & Fitness*

To be admitted to the bar in any jurisdiction, applicants must complete a character and fitness screening, demonstrating by clear and convincing evidence that they possess good moral character.<sup>72</sup> The successful completion of character and fitness requirements prior to bar admission dates back to at least the 18th century, when Massachusetts required that applicants provide references from their ministers.<sup>73</sup> Character and fitness requirements sometimes had the precise purpose of prohibiting women, racial minorities, immigrants, and members of unpopular political groups from joining the bar.<sup>74</sup> In an 1873 case, the U.S. Supreme Court invoked an early character and fitness prohibition to prevent Myra Bradwell (who sat for and passed the Illinois Bar Exam in 1869) from joining the bar because women could not enter into contracts without their husband’s consent and, therefore, were “incompetent to fully perform the duties and trusts that belong to the office of an attorney and counselor.”<sup>75</sup> Bradwell eventually became the first woman admitted to the Illinois Bar in 1890, and the Supreme Court admitted her in 1892.<sup>76</sup>

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71. *Id.* at 285.

72. David L. Hudson, *Honesty is the Best Policy for Character and Fitness Screenings*, ABA J. (June 1, 2016), [http://www.abajournal.com/magazine/article/honesty\\_is\\_the\\_best\\_policy\\_for\\_character\\_and\\_fitness\\_screenings](http://www.abajournal.com/magazine/article/honesty_is_the_best_policy_for_character_and_fitness_screenings).

73. The Young Lawyer Editorial Board, *The Archaic Bar Character and Fitness Exam Needs to Be Reformed*, THE AM. LAWYER (Sept. 10, 2019), <https://www.law.com/americanlawyer/2019/09/10/the-archaic-bar-character-and-fitness-exam-needs-to-be-reformed/>.

74. *Id.*

75. *Bradwell v. State*, 83 U.S. 130, 141 (1873).

76. Leonard Willis, *Myra Bradwell: The First Woman Admitted to the Illinois Bar*,

Today's character and fitness screenings do not evoke the same level of egregious gatekeeping as in *Bradwell*, but still utilize personal information to serve a gatekeeping function and to protect the public. The character and fitness application questionnaires request information about an applicant's background, employment history, criminal record, financial history, and other aspects of their lives to determine good moral character. However, like the effort to exclude women and other marginalized groups, the most controversial of questions on today's character and fitness applications surround disability by asking whether someone is capable of practicing law because of mental illness or psychiatric disability. Bar examiners may attribute a student's mental struggles, illness, disorders, or disability to the law student's "flawed" character or something within the law student's control.<sup>77</sup> This reinforces the medical model of disability, where a disability is a condition to be cured or treated, rather than reinforcing the idea that the attitudes of bar examiners and biases permeating throughout the character and fitness review are seen as barriers for law students and graduates living with a mental health disability.

*i. Disclosure of Mental Health Disabilities*

Concerns surrounding attorney mental health and wellbeing begin with law students, and research from the Dave Nee Foundation demonstrates depression occurs among 8-9% of law students prior to matriculation, 27% of law students after one semester of law school, 34% after two semesters, and 40% after three years.<sup>78</sup> The idea that mental health improves post-graduation is also incorrect. According to a study from the American Bar Association in conjunction with the Hazelden Betty Ford Foundation, 28% of lawyers suffer from depression, and additionally, 19% of lawyers suffer from anxiety.<sup>79</sup>

With the permeation of mental health issues and substance abuse amongst

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A.B.A. (Oct. 31, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/myra-bradwell-first-woman-admitted-to-illinois-bar/>.

77. Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 30 (1999).

78. *Lawyers & Depression*, DAVE NEE FOUND., <http://www.daveneefoundation.org/scholarship/lawyers-and-depression/> (last visited June 11, 2020).

79. Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 1, 46-52 (2016) [https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The\\_Prevalence\\_of\\_Substance\\_Use\\_and\\_Other\\_Mental.8.aspx](https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx).



lawyers and law students, it is no surprise bar examiners question whether law students and graduates have histories of mental health diagnoses or substance abuse, and if so, whether the applicant received treatment. From an ethical perspective, lawyers must possess the requisite competence to practice law,<sup>80</sup> yet competence can also be met with accommodation under the ADA and de-stigmatize mental health counseling and treatment.

Mental health questions were not addressed without criticism or challenges from law students, law faculty, and lawyers. Beginning with a 2011 complaint to the U.S. Department of Justice (“DOJ”), the DOJ launched an investigation into whether there was an ADA violation within the bar questioning. In 2014, the DOJ concluded that the Louisiana bar violated the ADA by making “discriminatory inquiries” about mental health, subjecting applicants to additional investigations because of their mental health conditions and making discriminatory admissions recommendations.<sup>81</sup>

The DOJ found in its ADA investigation of bar licensure that questions about medical conditions as part of a fitness inquiry inappropriately focus on an applicant’s status as a person with a disability, rather than on the applicant’s conduct.<sup>82</sup> Yet, the ADA has not yet been applied as a rationale for any other removal of mental health questions from bar admissions following the Louisiana settlement.<sup>83</sup> The DOJ found Louisiana to be in violation of Title II of the ADA, summarizing their finds as such:

“In particular, we find that Louisiana’s attorney licensure system discriminates against bar applicants with disabilities by: (1) making discriminatory inquiries regarding bar applicants’ mental health diagnoses and treatment; (2) subjecting bar applicants to burdensome

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80. Model Rules of Professional Conduct, *Rule 1.1: Competence*, A.B.A. [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/) (last visited June 11, 2020).

81. Dept. of Justice to The Honorable Bernette J. Johnson, C.J. La. Sup. Ct. & Elizabeth Schell, Executive Director, La. Sup. Ct. Comm. on B. Admissions & Charles Plattsmier, Chief Disciplinary Couns., La. Att’y Disciplinary Bd. (Feb. Civil Rights Division, Opinion 5) (2014).

82. Conference of Chief Justices, *Resolution 5: In Regard to the Determination of Fitness to Practice Law*, CONN. B. ASS’N, [https://www.ctbar.org/docs/default-source/lawyer-wellbeing/resolution-5\\_admission-to-bar-resol-item-iv-1](https://www.ctbar.org/docs/default-source/lawyer-wellbeing/resolution-5_admission-to-bar-resol-item-iv-1) (last visited June 11, 2020).

83. Madeline Holcombe, *Law Students Say They Don’t Get Mental Health Treatment for Fear It Will Keep Them From Becoming Lawyers. Some States are Trying to Change That*, CNN (Feb. 29, 2020), <https://www.cnn.com/2020/02/23/health/law-school-bar-exam-mental-health-questions/index.html>.

supplemental investigations triggered by their mental health status or treatment as revealed during the character and fitness screening process; (3) making discriminatory admissions recommendations based on stereotypes of persons with disabilities; (4) imposing additional financial burdens on people with disabilities; (5) failing to provide adequate confidentiality protections during the admissions process; and (6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment".<sup>84</sup>

The DOJ found that the specific questions Louisiana asked applicants violated Title II of the ADA, and explained how the questions screen out people with disabilities and subject them to additional burdens. The DOJ found the inquiries and subsequent actions from disability-status based questions to be centered on "mere speculation, stereotypes, or generalizations about individuals with disabilities."<sup>85</sup> Further, the DOJ concluded that mental health questions are not necessary to determine an applicant's fitness to practice law, quoting language that Title II prohibits eligibility criteria that screens out or tends to screen out people with disabilities "unless such criteria can be shown to be necessary for the provision of the program of the service, program, or activity being offered."<sup>86</sup> Rather, an applicant's conduct is a better determination of an applicant's fitness to practice compared to his or her disability; a disability does not identify unfit applicants.<sup>87</sup>

However, not all jurisdictions are taking steps to remove invasive disability or medical questions from their character inquiries, despite challenges to the validity of these questions. Following the DOJ settlement in Louisiana, the National Conference of Bar Examiners released its model mental health questions in 2015.<sup>88</sup>

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84. The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89) at 2, <https://www.ada.gov/louisiana-bar-lof.pdf>.

85. *Id.* at 19.

86. *Id.*; 28 C.F.R. § 35.130(b)(8) (2020).

87. *Id.* at 22; The United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89) at 22, <https://www.ada.gov/louisiana-bar-lof.pdf>.

88. Aaron J. Loudenslager, *Applying to the Bar: Fit to Practice?*, WIS. LAW. (Feb. 1, 2016), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=2&ArticleID=24607#a>; Alyssa Dragnich, *Have You Ever . . . ? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 682 (2015).

*ii. Fit to Practice? Mental Health and Disability Discrimination in Court*

Around the same time as the DOJ investigation relating to the Louisiana Bar in 2011, Amanda Perdue and the American Civil Liberties Union student chapter at the Indiana University School of Law brought their challenges to the courts. Indiana asked four distinct questions about an applicant's mental health.<sup>89</sup> The court struck down one of the four questions, claiming it violated the ADA while upholding the other three.<sup>90</sup> Indiana currently still asks questions about mental health on its bar application, upholding a question asking about "serious" mental illness diagnoses, such as bipolar and schizophrenia, by rationalizing that inquiry into past diagnosis and treatment of the severe mental illnesses is necessary to provide the Board with the best information available with which to assess the functional capacity of the individual; therefore, not running afoul of Title II of the ADA.<sup>91</sup> The court upheld the broad scope of the question because mental illnesses recur throughout a person's lifetime.<sup>92</sup> The Indiana court found the question, "From the age of 16 years to the present, have you been diagnosed with or treated for any mental, emotional or nervous disorders?" to be an ADA violation because it was overly broad due to its emphasis on treatment of anything, and that the age range prescribed was arbitrary and not a good indicator of an applicant's current fitness to practice law.<sup>93</sup>

The mixed outcome in Indiana was the latest in a series of nationwide court challenges to mental health inquiries for bar applicants under Title II of the ADA. Had the DOJ findings been released sooner, perhaps Indiana might have seen a different outcome showing discrimination in all mental health inquiries on the bar application.

The Florida Bar requires mental health disclosures, asking for information such as diagnoses, physicians, and medications taken. Interestingly enough, Florida initially faced challenges to its character and fitness questioning as an ADA violation back in 1994.<sup>94</sup> In 1994, three bar applicants challenged the Florida Bar application's mental health inquiries, and specifically an

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89. *ACLU v. Individual Members of the Ind. State Bd. of Law Exam'rs.*, 2011 U.S. Dist. LEXIS 106337 \*1, \*6-7 (S.D. Ind. Sept. 20, 2011).

90. *Id.*

91. *Id.* at \*24 (quoting *Applicants v. Texas State Bd. of Law Examiners*, 1994 U.S. Dist. LEXIS 21290, 1994 WL 923404 at \*3 (W.D. Tex. Oct. 11, 1994)).

92. *Id.*

93. *Id.* at \*25.

94. *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489 1489, 1490-91 (S.D. Fla. Aug. 1, 1994).

application question asking if applicants ever sought treatment for a nervous, mental or emotional condition, had have ever been diagnosed with any of those conditions, or had ever used psychotropic drugs. An affirmative response to either question would require applicants to provide the names of any consulted medical practitioners and waive patient confidentiality.<sup>95</sup> The release of medical information and line of questioning was challenged<sup>96</sup> under Title II of the ADA.<sup>97</sup> The court found that Title II of the ADA applied to the Florida Board of Bar Examiners because a public entity is prohibited from administering “a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”<sup>98</sup> Further, Title II “restricts a public entity from imposing or applying ‘eligibility criteria that screen out an individual with a disability.’”<sup>99</sup> The court further clarified that the Board did not require knowledge of a plaintiff’s actual disability, explaining “the Board can discriminate against qualified disabled applicants by placing additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses to practice law.”<sup>100</sup> The *Ellen S.* case led to changes within the mental health questioning, but was not the end of the road for Florida Bar applicants.

Today, while asking questions about an applicant’s mental health, the Florida Board of Bar Examiners encourages applicants to receive and seek mental health treatment.<sup>101</sup> Florida’s encouragement followed more litigation; the change in attitude came as a result of a settlement following the case of Julius Hobbs, a war veteran who would have been required to pay to undergo mental and physical evaluations after affirming he had received treatment for his mental health and alcohol use within the past five years.<sup>102</sup>

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95. *Id.* at 1490-91.

96. *Id.* at 1491.

97. 42 U.S.C. §§ 12101-12213.

98. *Ellen S.*, 859 F. Supp. at 1493; 28 C.F.R. § 35.130(b)(6).

99. *Id.*; 28 C.F.R. § 35.130 (b)(8).

100. *Id.* at 1494.

101. *Frequently Asked Questions*, FLA. BD. OF BAR EXAM’RS, <https://www.floridabarexam.org/web/website.nsf/faq.xsp#177C2> (last visited June 11, 2020) (“The Board supports applicants seeking mental health treatment, and views effective treatment from a licensed professional as enhancing the applicant’s ability to meet the essential eligibility requirements to practice law.”).

102. Raychel Lean, *Florida Board of Bar Examiners Settles Suit Alleging Discrimination Over Mental Health*, DAILY BUS. REVIEW (Mar. 27, 2019), <https://www.law.com/dailybusinessreview/2019/03/27/florida-board-of-bar-examiners-settle-suit-alleging-discrimination-over-mental-health/>; see also Raychel Lean, *Law*

Florida's current approach is a step forward from the *Ellen S.* decision, and does not explicitly require law students to report utilizing counseling services for stress or anxiety.

Coming off the heels of the *Ellen S.* decision, a 1995 case in Virginia saw a bar applicant challenge a bar application question that asked if she had received treatment or counseling for a mental disorder within the past five years. The court found the question to be a violation of the applicant's rights under Title II the ADA, and that the "broadly worded mental health question discriminates against disabled applicants by imposing additional eligibility criteria."<sup>103</sup> Further, the finding stated that questions requiring individuals with mental disabilities to subject themselves to further inquiry and scrutiny discriminate against those with mental disabilities.<sup>104</sup> Rhode Island also had a successful challenge leading to the rewriting of the mental health questions in 1996.<sup>105</sup> Each state bar application has different questions for applicants, leading to inconsistent inquiries and individual challenges that lead to differences of opinions in the state courts.

*iii. A Stigma-Free Legal Industry: The Growing Call to Remove Mental Health Questions*

Nearly half of all law students nationwide were dissuaded from seeking mental health treatment because of the potential consequences and ramifications involved in the bar admissions process.<sup>106</sup> The consequences and risks of disclosure, or nondisclosure, for mental health disabilities can impact careers before they even begin. At times, the bar only offers conditional admission to law students with current or past mental health issues.<sup>107</sup> Nineteen states use conditional admission as an option for lawyers

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*Student Who Disclosed Alcoholism Says Florida Bar Examiners Taking New Punitive Action*, DAILY BUS. REV. (Oct. 9, 2019), <https://www.law.com/dailybusinessreview/2019/10/09/law-student-who-disclosed-alcoholism-says-florida-bar-examiners-taking-new-punitive-action/>.

103. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 431-46 (E.D. Va. 1995).

104. *Id.* at 442-43.

105. *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1333-34 (R.I. 1996).

106. Margaret Hannon & Scott Hiers, *Law Students, Law Schools Lead Efforts to Remove Mental Health Questions from Character & Fitness Equation*, ABA FOR LAW STUDENTS (Oct. 9, 2019), <https://abaforlawstudents.com/2019/10/09/law-students-law-schools-mental-health-character-and-fitness/>.

107. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, ABA (Feb. 2008), available at [www.abanet.org/legalservices/downloads/colap/ABAModelRule\\_ConditionalAdmission\\_Feb2008.pdf](http://www.abanet.org/legalservices/downloads/colap/ABAModelRule_ConditionalAdmission_Feb2008.pdf).

with mental illnesses and substance abuse issues.<sup>108</sup> Conditional admission requires additional mental health treatment, submission of reports to the bar, notification to the bar if the lawyer moves outside of the jurisdiction, and the possibility of admission being revoked should a lawyer not comply with the terms of a conditional admission. Or, perhaps more severely, an applicant can be denied bar admission after passing the bar exam due to mental health in a character and fitness inquiry.

As a result of the lines of questioning and potential for conditional admission or denial, law students who mentally suffer during law school play a game of caution. They decline needed treatment and counseling, fearful of repercussions from fellow law students, faculty, and administrators if they disclose their problems.<sup>109</sup> As of February 2020, thirty-eight states inquire about mental health on the character and fitness evaluation.<sup>110</sup> Following a 2016 survey of 3,300 law students, 45% believed seeking mental health treatment and help would threaten their bar admission, and 63% felt those threats would deter them from seeking help for substance abuse.<sup>111</sup> Such deterrence and shame contributes to internalized ableism.<sup>112</sup> Yet, the Director of Counseling Services at Valparaiso University opined in the case challenging the Indiana Bar's mental health questioning that less than 0.1%

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108. See *Comprehensive Guide to Bar Admission Requirements 2020*, NAT'L CONFERENCE OF BAR EXAM'RS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, [ncbex.org/assets/BarAdmissionGuide/CompGuide2020\\_021820\\_Online\\_Final.pdf](https://ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf).

109. Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 123 (2010).

110. *Mental Health Provisions in State Bar Exams*, ABA: COMM'N ON DISABILITY RIGHTS, <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/mh-provisions-state-bar-exams.pdf>; Holcombe, *supra* note 83.

111. Jerome M. Organ, David B. Ja□e & Katherine M. Bender, Ph.D., *Su□ering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 141 (August 2016); see also Holcombe, *supra* note 83.

112. Fiona A. Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23 *Disability & SOC'Y* 151, 156 (2008); Dana Barnett, *8 Things I Learned from WSBA's Disability and Ableism Program*, NW SIDEBAR (Nov. 14, 2017), <https://nwsidebar.wsba.org/2017/11/14/8-things-i-learned-from-wsbas-disability-and-ableism-program/> ("People with disabilities often blame themselves for not being able to function and perform in the same ways that able-bodied people do. People sometimes hide disabilities due to shame or push their bodies to the point of pain and suffer health consequences rather than admit that an accommodation would be helpful.").

(two to three students over the course of twenty-three years) of the law students counseled presented psychiatric problems of such severity that he doubted their fitness to practice law.<sup>113</sup>

The Louisiana DOJ findings emboldened stakeholders in the legal community to take the next steps to dismantle the discrimination under Title II of the ADA on each state's bar application. To tackle the fear of repercussions and have a more stigma-free, disability-friendly profession, law schools are part of a growing movement to remove mental health disabilities to gatekeep and discriminate against future lawyers and lawyers with mental health issues. As of January 1, 2020, California prohibits state bar examiners from "reviewing an applicant's mental health records unless offered by the applicant."<sup>114</sup>

In 2019, law students, judges, lawyers, and law professors made headway in the efforts for state bar associations to remove mental health questioning in determining whether a bar applicant has good moral character. Connecticut removed its mental health queries in 2019, citing the 2014 DOJ findings in Louisiana and Vermont, as well as an American Bar Association 2015 report on individual rights and responsibilities.<sup>115</sup> In 2019, Virginia also removed queries into prior mental health treatment following activism from law students and law school deans that targeted legal communities, the media, and the state bar association.<sup>116</sup> In November 2019, New York courts were weighing whether to drop the questions following a report from a working group within the New York State Bar Association, and following the support from fourteen of the fifteen New York law schools.<sup>117</sup> The working group found the question of mental health was unnecessary to determine an applicant's fitness to practice law.<sup>118</sup> In February 2020, New

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113. *ACLU v. Individual Members of the Ind. State Bd. of Law Exam'rs*, 2011 U.S. Dist. LEXIS 106337, at \*10 (S.D. Ind. Sept. 20, 2011).

114. Hannon & Hiers, *supra* note 106; Senate Bill No. 544 (Cal. 2019), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB544](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB544).

115. *Bar Admissions Process Bends Toward Justice – With a Little Help*, CONN. L. TRIB. (June 14, 2019), <https://www.law.com/ctlawtribune/2019/06/14/bar-admissions-process-bends-toward-justice-with-a-little-help/>.

116. Hannon & Hiers, *supra* note 106; AJ Quinlen, *Mental Health Question Removed from Virginia Bar After Law School Graduate's Efforts*, COLLEGIAN (Mar. 8, 2019), <https://www.thecollegianur.com/article/2019/03/mental-health-question-removed-from-virginia-bar-after-law-school-graduates-efforts>.

117. Holcombe, *supra* note 83.

118. Keshia Clukey, *N.Y. to Ban Mental Health Question on State Bar Application*, BLOOMBERG LAW (Feb. 26, 2020), <https://news.bloomberglaw.com/us-law-week/n-y-to-ban-mental-health-question-on-state-bar-application>.

York Chief Judge Janet DeFiore announced the New York State Bar Association application will “no longer ask intrusive questions about a candidate’s mental health conditions or treatment history” and “[i]nstead, the application will focus on disclosure of behavior and conduct that is relevant to a candidate’s fitness to practice law.”<sup>119</sup>

Prior to these efforts, Arizona, Illinois, Mississippi, and Washington removed mental health questions in the fitness process.<sup>120</sup> Other states are launching task forces and continue to investigate the effects of mental health questioning, while some jurisdictions have challenges to these questions working their way through the courts. While the National Conference of Bar Examiners has model questions about applicant mental health that have been revised as recently as 2019, states are under no specific pressure to conform to the specific language of the model questions.<sup>121</sup> Court challenges gave rise to model questions, and ultimately, individual state-by-state activism is leading to the erasure of queries into the disability status and treatment history surrounding an applicant’s psychiatric disability or mental health.

People with other disabilities also have fears surrounding mental health questioning. Some disabilities, like mine, are sometimes mislabeled as mental illness or have comorbid conditions occurring alongside them. I am autistic; autism is a developmental disability, but a myth is that it is a mental illness.<sup>122</sup> However, there are co-occurring mental health conditions, such as anxiety, depression, or ADHD that autistic or neurodivergent people may have,<sup>123</sup> and I have not been clinically diagnosed with any of these conditions. Would I be perceived as dishonest if I did not disclose my autism diagnosis? I was not receiving psychiatric help for autism (again, it is a neurodevelopmental disability, not a mental illness), and was never diagnosed with co-occurring mental health conditions because most of my struggles are developmental and in daily independent living skills. Many things that are hard for me are outside of the office and law practice, such as

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119. *Id.*

120. Hannon & Hiers, *supra* note 106.

121. *Mental Health Provisions*, *supra* note 110.

122. *Resources - About Autism*, AUTISM SOC’Y OF MAINE, <https://www.asmonline.org/resources/about-autism.aspx> (last visited June 11, 2020) (“Autism is not a mental illness or caused by bad parenting. Furthermore, no known psychological factors in the development of the individual have been shown to cause autism”).

123. Emily Simonoff, Andrew Pickles, Tony Charman, Susie Chandler, Tom Loucas & Gillian Baird, *Psychiatric Disorders in Children with Autism Spectrum Disorders: Prevalence, Comorbidity, and Associated Factors in a Population-Derived Sample*, 47 J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 8, 921 (Aug. 2008), <https://www.sciencedirect.com/science/article/abs/pii/S0890856708600593>.



keeping my apartment clean – skills that should have no bearing on whether I am fit or competent to practice law.

*B. The Bar Exam: Designed for the Nondisabled*

Outside of the hurdles related to character and fitness, one aspect to measuring competence for lawyers-to-be is the bar exam itself. The exam is a cumbersome, two-day test that measures minimum competence and the sheer amount of information students are expected to have learned while in law school, primarily information learned during a student's first year.

To refresh memories of the information learned during the first year of law school, and to prepare law graduates for the types of essay questions to expect on the exam, commercial bar review courses and supplements are increasingly popular study tools. Bar review courses have become an essential part of preparing to take the bar exam.<sup>124</sup> Yet, plenty of obstacles to bar review courses are in the way for disabled test takers, including financial cost. While financing the bar exam is a struggle for most recent graduates because they are advised not to work part-time or full-time while studying, and have living expenses and bills to pay prior to student loans or before beginning their repayment plans on money borrowed for law school, people with disabilities experience higher rates of poverty.

A previous lawsuit brought by blind bar examinees forced bar prep behemoth, BarBri, Inc., to enter into a consent decree to make the materials accessible to blind users online.<sup>125</sup> To be utilized, blind test-takers use screen readers to read and absorb digital and online content.<sup>126</sup> Following a lawsuit against Scribd, one of the largest providers of eBooks, online learning content is expected to be accessible under the ADA.<sup>127</sup> In the case against Scribd, its library was inaccessible to screen readers. The court held that website and mobile applications should be accessible under Title III of the

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124. Don Macaulay, *BarBri Settles Lawsuit Over Blind Access to Online Bar Review Components*, NAT'L JURIST (Feb. 2, 2018), <http://www.nationaljurist.com/national-jurist-magazine/barbri-settles-lawsuit-over-blind-access-online-bar-review-components>.

125. Consent Decree at 1-7, *Stanley v. Barbri*, No. 3:16-cv-01113-BK (N.D. Tex. Jan. 22, 2018), available at [http://www.washlaw.org/pdf/2018\\_01\\_24\\_consent\\_decree\\_barbri.PDF](http://www.washlaw.org/pdf/2018_01_24_consent_decree_barbri.PDF).

126. *Id.* at 2.

127. *See generally* Nat'l Fed'n. of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567 (D. Vt. 2015).

ADA<sup>128</sup>; the BarBri lawsuit and ensuing consent decree follow in the spirit of *Scribd*. Website and mobile inaccessibility to preparation materials is one of the many ways blind users have been discriminated against while preparing for the bar exam. Web accessibility is not explicitly covered in the ADA, and the DOJ rescinded its proposed guidelines to cover websites; though in the BarBri suit, plaintiffs alleged that Title III of the ADA applied to online-only materials.<sup>129</sup> These specific scenarios illustrate the issues leading up to the bar exam that disproportionately impact applicants with disabilities.

Whilst access to sit for the exam and the potential to pass and become an attorney is important, the accommodations process for the exam itself is crucial to ensure disabled students have the best chance of success.

*i. The Bar Exam Accommodation Process*

Similar to the LSAT and other high-stakes testing scenarios, bar accommodations under the ADA began within the courts by interpreting who has a disability and what is a reasonable accommodation. Unlike other examinations, such as the LSAT, that are administered by private entities, the bar exam in each jurisdiction is also required to comply with Title II of the ADA because it is administered by a public entity, such as a state government service or an administrative agency of a state's highest court.<sup>130</sup> Each testing agency has an independent duty under the ADA to determine the reasonableness of requested accommodations on a case-by-case basis.<sup>131</sup> Disabled individuals are entitled to reasonable accommodations "that permit them to have access to and take a meaningful part in public services and public accommodations."<sup>132</sup>

Lawyers are licensed by state agencies.<sup>133</sup> Courts began interpreting both

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128. *See id.* at 576.

129. The Accessibility Group, *Consent Decree in BarBri Case Includes Compliance With WCAG Standards for Digital Content*, Ballard Spahr LLP, (Jan. 31, 2018), <https://www.ballardspahr.com/alertspublications/legalalerts/2018-01-31-consent-decree-in-barbri-case-includes-compliance-with-wcag-standards-for-digital-content>.

130. *See, e.g.*, Fla. Bd. of Bar Exam'rs, <https://www.floridabarexam.org/> (last visited June 11, 2020) ("This board is an administrative agency of the Supreme Court of Florida created by the Court to handle matters of bar admission"); *Ware v. Wyo. St. Bd. of Law Exam'rs*, 973 F. Supp 1339, 1351 (D. Wyo. 1997) ("the Board is an entity or an arm of the state of Wyoming").

131. *Ware v. Wyo. St. Bd. of Law Exam'rs*, 973 F. Supp 1339, 1357 (D. Wyo. 1997).

132. *Powell v. Nat'l Bd. Of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004).

133. *Lawyer Licensing*, A.B.A., <https://www.americanbar.org/groups/>

Title II and Title III of the ADA in relation to the bar exam with *D'Amico v. N.Y. State Board of Law Examiners* in 1993. D'Amico has not only set the standard for the bar, but standardized tests entirely as discussed in Part I. Following the *D'Amico* decision, courts have agreed that "the purpose of the [Americans with Disabilities Act] is to place those with disabilities on an equal footing and not to give them an unfair advantage."<sup>134</sup> Yet, bar examiners show skepticism that an attorney can be disabled enough to qualify for legal protection and accommodation while still being qualified to practice law.<sup>135</sup> Title II of the ADA encompasses nondiscrimination on the basis of disability in state and local government services.<sup>136</sup> Title III, which is about public accommodations and commercial facilities, prohibits private places from discriminating against people with disabilities and sets standards for accessibility on facilities and businesses.<sup>137</sup>

ii. *Defining a Reasonable Accommodation on the Bar Exam*

*D'Amico* was a seminal case in which a court had overturned what bar examiners denied being reasonable. Marie D'Amico, who had a severe visual disability that affected her ability to read normal size print and made it difficult to read for extended periods of time, was supposed to take the February 1993 New York Bar Exam.<sup>138</sup> She had previously taken and failed the July 1992 exam with the accommodations of nine and a half hours during each of the two days to take the exam in a large print format along with her own lamp in a separate test location.<sup>139</sup> She requested those same accommodations on the February exam, except with a letter and affidavit from her doctor, to take the exam over a four-day period because the two

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legal\_services/flh-home/flh-lawyer-licensing/ (last visited June 11, 2020).

134. *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993).

135. See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at \*37 (S.D.N.Y. Aug. 15, 2001); cf. John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting from the ADA's Disability Definition*, 11 PSYCHOL. PUB. POL'Y & L. 83, 91 (2005) ("the testing organization might express concern that if the student claims disability at a severity that prevents a major life activity such as concentration or reading, can the student truly perform the essential features of the profession?").

136. See 42 U.S.C. § 12132 (2017).

137. 42 U.S.C. § 12182 (2017).

138. *D'Amico*, 813 F. Supp. 217 at 218-219.

139. *Id.*

long days each would further impact her eyes.<sup>140</sup> The court sided with D'Amico and decided the accommodation to take the February 1993 exam over four days, consisting of six hours of testing per day, was reasonably in line with her disability and her doctor's request for that time period.<sup>141</sup>

Following *D'Amico*, courts have held that bar examiners are required to grant disability accommodations in all professional licensing and exams, beginning with the case of Marilyn Bartlett: a woman with a learning disability who was denied accommodations such as extra time on the New York bar exam.<sup>142</sup> The Second Circuit included in its holding that "extra time provided to learning disabled applicants merely levels the playing field and allows these individuals to be tested on their knowledge; it does not provide them with an unfair advantage."<sup>143</sup> *Bartlett* reached the Supreme Court, where it was vacated and remanded; the lower court determined Bartlett was disabled under the ADA.<sup>144</sup> Indeed, accommodations are not given as unfair advantages, but rather to allow disabled test-takers and applicants the same opportunities as nondisabled test-takers.

In determining whether to grant those disability accommodations following the decision in *Bartlett*, courts utilized the three-pronged test in the *D'Amico* holding to determine whether there is an ADA violation in connection with testing: (1) that the plaintiff test-taker is disabled; (2) the requests for accommodations are reasonable; and (3) that those requests were denied.<sup>145</sup> Determining the reasonableness of accommodations is a tricky situation for courts to grapple with because it is decided on a case-by-case basis.<sup>146</sup> While past accommodations may be helpful to prove a test-taker is disabled, they do not prove that the same request would be reasonable in a different high-stakes testing environment; past accommodations are not per se reasonable in present or new circumstances.<sup>147</sup> This was first illustrated

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140. *Id.* at 222.

141. *Id.* at 223-224.

142. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1099 (S.D.N.Y. 1997); *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 332 (2d Cir. 1998); *See generally* *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 119 S. Ct. 2388 (1999).

143. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 2001 U.S. Dist. LEXIS 11926, at \*137-138 (S.D.N.Y. Aug. 15, 2001).

144. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 70 (2d Cir. 2000).

145. *D'Amico v. N.Y. Bd. of Law Exam'rs*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993).

146. *Id.*

147. *Ware v. Wyo. Bd. of Law Exam'rs*, 973 F. Supp. 1339, 1357 (D.C. Wyo. 1997).

in *Ware v. Wyoming Board of Bar Examiners*, where the plaintiff, Corine Ware, took the Utah Bar Exam in 1995; she passed a portion of it, but failed the Multistate Bar Exam. To accommodate her motor difficulties with multiple sclerosis, Ware received time and one half to complete the Utah exam, as well as a scribe and large print test booklets.<sup>148</sup> While in law school, Ware was able to use a computer on essay exams, received extra time, and was permitted to circle answers on multiple choice exams.<sup>149</sup> When she applied to take the Wyoming Bar Exam, some of the accommodations Ware was granted were a separate room to take the exam to accommodate a court reporter and technical equipment, a large print exam, and a choice of how to mark multiple choice answers.<sup>150</sup> In her challenge, Ware argued for time and one half, which she did not receive as she had in law school and on the Utah Bar Exam. She received some, but not all of her past accommodations from the Utah Bar Exam when she went to take the Wyoming Bar Exam.<sup>151</sup> The court began its analysis under the ADA, following *Ellen S.* in character and fitness, finding that the Wyoming Board of Bar Examiners was a public entity under Title II of the ADA.<sup>152</sup> The court did not dispute that Ware was disabled with multiple sclerosis, but contended how the ADA does not completely displace state bar rules and regulations relating to reasonable accommodation and attorney licensing, saying “the ADA does not completely preempt or displace a state’s procedure for licensing attorneys, rather “the ADA merely prohibits states from discriminating on the basis of disability.”<sup>153</sup> In its reasoning for denying Ware time and one half on the Wyoming bar exam, the court rationalized information regarding past accommodations may be helpful, but the fact a person has been granted a particular accommodation in the past does not mean that the accommodation is presumed to be reasonable.<sup>154</sup>

Following the *Ware* court’s rationale surrounding new testing circumstances, Alabama courts further expanded upon differing situations and past accommodations in *Cox v. Alabama State Bar*.<sup>155</sup> Ware specifically

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148. *Id.* at 1346.

149. *Id.* at 1344.

150. *Id.* at 1346.

151. *Id.* at 1357.

152. *Ware v. Wyo. Bd. of Law Exam’rs*, 973 F. Supp. 1339, 1353 (D.C. Wyo. 1997).

153. *Id.* (quoting *Ellen S.*, 859 F. Supp. at 1493).

154. *Id.*

155. *See Cox v. Ala. State Bar*, 330 F. Supp. 2d 1265, 1266 (M.D. Ala. 2004).

dealt with differing jurisdictions and their approaches to accommodations, but the *Cox* court took interpreting new accommodation situations a step further. Eric Cox, who was diagnosed with dyslexia and ADHD, sought three accommodations on the Alabama Bar Exam for the July 2004 administration: a quiet testing area, a word-processor with spellcheck, and double time on the exam.<sup>156</sup> The Alabama State Bar agreed to grant him a quiet testing area and a word processor, but Cox was denied double time.<sup>157</sup> Cox argued he previously received double time on the LSAT as well as on his exams at Cumberland Law School, but the court found the accommodation was unreasonable<sup>158</sup> for the bar exam in lieu of expert testimony determining double time would be an unfair advantage.<sup>159</sup> The court also followed the decision in *Ware* that past accommodations should not presume the reasonableness of the same accommodations in new situations. Double time has also been found to be unreasonable in other jurisdictions because following *Cox*, time and a half is seen to be reasonable.<sup>160</sup>

While courts continue to grapple with what is a reasonable accommodation in the realm of standardized testing – especially on the bar exam – the accommodation process for the bar exam arguably begins in law school, when accommodations might be needed for preexisting disabilities to succeed at law school courses or exams. As case law continues to show, receiving accommodations in law school helps demonstrate that an examinee is in fact disabled. Sometimes, applicants begin applying for accommodations months or years in advance to secure the necessary supporting documentation from their law schools, physicians, therapists, or to leave time to appeal an unfavorable decision denying the request.

However, disabilities can be acquired, or a law school might be perfectly accessible, which fails to account for the unique challenges taking the bar exam may posit for disabled examinees. For me, taking an exam in a classroom or large lecture hall has notably different sensory input and anxieties involved than taking the Florida Bar Exam in a convention center with thousands of hopeful attorneys-to-be in one massive room; it was not until I arrived at the testing site in Tampa, Florida, that I was aware of private

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156. *Id.* at 1266.

157. *Id.*

158. *Id.*

159. *Id.* (“allowing Cox any more than time and one half to complete the examination would undermine the nature of the examination and give him an unfair advantage over other candidates”).

160. *Kelly v. W. Va. Bd. of Law Examiners*, 2010 U.S. Dist. LEXIS 145855, at 1\*, 33\*–34\* (S.D. W.Va. Apr. 16, 2010).

testing rooms as an accommodation. It certainly would have relieved my anxieties and feelings of being overwhelmed in a space with thousands of people nervously shuffling to use the restroom, the microphone and sound setup in the front of the room, and the bright fluorescent lights overhead. I self-accommodated as best I could, wearing a soft shirt that I can rub my hands against to feel less nervous, and thankfully passed – though if I had applied for accommodations and received them, I would have had a better experience. Yet, I wonder if I would have been denied because I did not receive academic accommodations in law school, although situations surrounding the bar exam are substantially different than law school exams.

Each state has different requirements and deadlines for submitting requests for accommodation and what supporting documentation is required. Accommodations are decided on a case-by-case basis. The American Bar Association has a comprehensive directory of which jurisdictions and federal courts have accommodation process information online, as well as which jurisdictions inquire about mental health disabilities in the character and fitness application.<sup>161</sup>

### *iii. Is the Bar Exam Ableist?*

One of the biggest barriers for law graduates with disabilities is financial access to the bar exam. Before including the cost of a bar review course, registering for the exam as a first-time taker in a specific jurisdiction can cost between \$150 and \$1,500.<sup>162</sup> It can cost more if an applicant elects to use a laptop for the essay portion, which for some examinees with disabilities can be an accessibility tool to write faster, or to make sure their work is legible. That is all before the costs of a bar review course, which can add hundreds if not thousands of dollars to the cost of an exam where it is advisable to be unemployed while preparing. People with disabilities disproportionately experience poverty.<sup>163</sup> Coupled with disability's high unemployment rate,

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161. *Bar Information for Applicants with Disabilities*, ABA, <https://www.americanbar.org/groups/diversity/disabilityrights/resources/biad/> (last visited June 11, 2020).

162. Shirlene Armstrong, *Breaking Down the Cost of the Bar – The Fees No One Tells You About*, BAR EXAM TOOLBOX (May 1, 2019), <https://barexamtoolbox.com/breaking-down-the-cost-of-the-bar-the-fees-no-one-tells-you-about/> (last visited June 11, 2020).

163. Rebecca Vallas & Shawn Fremstad, *Disability Is A Cause and Consequence of Poverty*, TALKPOVERTY (Sept. 19, 2014), <https://talkpoverty.org/2014/09/19/disability-cause-consequence-poverty/>.

not every law firm or organization's human resources department will pay for or reimburse a bar review course,<sup>164</sup> which can greatly increase the chance of passing the exam. Additional considerations for disabled bar exam takers include the travel involved – the exam might not be close to a student's home and require travel as well as a two-night hotel stay.<sup>165</sup> These travel considerations include financial costs, as well as determining how an itinerary may be accessible.

“Ableism is a set of beliefs or practices that devalue and discriminate against people with physical, intellectual, psychiatric disabilities and rests on the assumption that disabled people need to be ‘fixed’”<sup>166</sup> - in other words, it is a prejudicial system of stereotypes that reinforces the medical model of disability.<sup>167</sup> Ableism can be benevolent and well-intentioned<sup>168</sup>, or a form of overt biases. Ableism exists everywhere, including within academia and in law schools.<sup>169</sup>

Critics have argued that standardized tests do not reflect disabled students' competence, and reinforces outdated thinking of what intelligence, achievement, and competence mean. High-stakes standardized testing is rife with ableist assumptions that prevents students from achieving and essentially forces students to become nondisabled to pass or graduate; in

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164. How To Ask Your Law Firm To Pay For Bar Exam Preparation, JD ADVISING, <https://www.jdadvising.com/how-to-ask-your-firm-to-pay-for-bar-exam-preparation/> (last visited Aug. 23, 2020) (stating that some big law firms and few small firms may agree to pay for bar exam preparation); Brooke Moore, 2019 *Solo & Small Firm*, AM. BAR ASS'N (Dec. 04, 2019), <https://www.americanbar.org/groups/lawpractice/publications/techreport/abatechreport2019/solosmallfirm19/> (“Solo and small firms (2-9 attorneys) comprise the majority of the legal profession.”).

165. *Id.*

166. Leah Smith, #Ableism, CTR. FOR DISABILITY RIGHTS, <http://cdrnys.org/blog/uncategorized/ableism/>

167. Eric Shyman, *The Reinforcement of Ableism: Normality, the Medical Model of Disability, and Humanism in Applied Behavior Analysis and ASD*, 54 INTELLECTUAL & DEVELOPMENTAL DISABILITIES 366, 367 (2016).

168. Haley Moss, *For Autistic People, “Benevolent Ableism” Can Be a Form of Bullying*, TEEN VOGUE (Aug. 9, 2019), <https://www.teenvogue.com/story/for-autistic-people-benevolent-ableism-can-be-a-form-of-bullying> (recognizing benevolent ableism as “the discrimination and negative treatment and stereotypes facing people with disabilities, but disguised as kind and caring. Benevolent ableism seemingly happens with the best of intentions.”).

169. See e.g., JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUC. (2017), <https://quod.lib.umich.edu/u/ump/mpub/9708722/1:4/--academic-ableism-disability-and-higher-education?rgn=div1;view=toc>.



other words, ableism at its extreme.<sup>170</sup> High-stakes testing negatively impacts marginalized test-takers beyond just those with disabilities, including students of color and students from low-income backgrounds.<sup>171</sup>

In addition to the many barriers to taking the exam, and how those practices discriminate and place additional burdens on disabled law graduates, standardized testing has issues that place students with disabilities at a disadvantage, thus enforcing ableist beliefs about who is intelligent and who is competent to practice law, when competence is measured by the ability to recall and regurgitate information, without considering the economic and mental health factors involved in the bar admissions process.

Challenges to the reasonable accommodations process that courts have grappled with stem from a form of ableism. For instance, Corine Ware argued she was discriminated against on the basis of her disability because of the Wyoming State Bar's time and a half denial to effectively screen out disabled applicants and asking her doctor to detail the exact accommodations she needed.<sup>172</sup> Further, in later cases such as *Kelley*, courts determined time and a half was a reasonable accommodation, but double time would be unreasonable and give some test-takers an unfair advantage.<sup>173</sup>

Determining the exact accommodations an individual might need is not between a disabled person and her physician, but is a multifaceted approach that might include the testimonies of the disabled person, her documented history of accommodation, and educational specialists. Creating additional hurdles to an accommodation is a form of pervasive ableism, which may force disabled applicants to self-accommodate. In determining reasonableness, it is important to balance whether the playing field is being leveled, or if others are being placed at an unfair advantage if the test cannot be properly taken without the accommodation.

#### *iv. Public Health Barriers to Access: COVID-19 as a Case Study in Bar Exam Ableism*

The COVID-19 pandemic reached the United States around March 2020, and to date has infected millions globally and claimed hundreds of thousands of lives.<sup>174</sup> To stop the spread of COVID-19, public health guidance advised

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170. Thomas Hehir, *Eliminating Ableism in Education*, 72 HARV. EDUCATIONAL REV. 1, 27-28 (2002).

171. *Id.* at 28.

172. *Ware*, 973 F. Supp. at 1355-56.

173. *Kelly v. W. Va. Bd. of Law Examiners*, 2010 U.S. Dist. LEXIS 145855, at \*43-\*44.

174. *WHO Coronavirus Disease (COVID-19) Dashboard*, WHO,

against large in-person gatherings and congregate settings, such as the very convention centers that bar exams are often administered in. However, twenty-three states administered an in-person July 2020 exam.<sup>175</sup>

For disabled examinees, who may be at increased risk of contracting COVID-19 due to preexisting disabilities or are immunocompromised, in-person bar exams required either taking a calculated risk to their personal health or being forced to delay taking the bar exam, often at their own personal, financial, and emotional expense. In effect, law graduates are being punished for looking out for their health with no other alternatives. Disabled examinees took to organizing on the internet to call for emergency diploma privilege to practice law without the exam, less restrictive bar exam environments, and to highlight the ways the exam was exacerbating ableism within the testing process.<sup>176</sup> Disabled examinees had to weigh their own health situations or restart the accommodation process to account for medical needs in ways that may not have required accommodations under regular circumstances.

Jurisdictions that did not administer in-person exams or outright cancelled their bar exams pivoted to remote, online bar exams with several weeks' notice. However, the rules for online exams appeared to target disabled test-takers. By limiting movement or bathroom breaks, those with specific conditions such as ulcerative colitis or physical disabilities may be at a disadvantage. Examinees who are neurodivergent, with conditions such as autism, Tourette syndrome, or ADHD, are under heightened scrutiny because behaviors and traits associated with those conditions, such as fidgeting, body movements, or certain types of stimming and movements associated with self-regulation, are interpreted as signs of cheating.<sup>177</sup>

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<https://covid19.who.int/> (“Globally, as of 10:35am CEST, 3 August 2020, there have been 17,889,134 confirmed cases of COVID-19, including 686,145 deaths, reported to WHO.”).

175. Karen Sloan, *ABA Resolution Calls on States to Pull the Plug on In-Person Bar Exams Amid Pandemic*, LAW.COM (Jul. 30, 2020, 3:16 PM), <https://www.law.com/2020/07/30/aba-resolution-calls-on-states-to-pull-the-plug-on-in-person-bar-exams-amid-pandemic/> (“23 jurisdictions . . . held in-person bar exams July 28 and 29 . . . 11 more jurisdictions still have plans to administer an in-person exam in September.”).

176. See, e.g., Johnny Carver, *The Life of a Disabled Bar Examinee*, JURIST (Jul. 17, 2020, 4:30 PM), <https://www.jurist.org/commentary/2020/07/johnny-carver-diploma-privilege/>.

177. See Yoonji Han, *Some Young Lawyers Taking the Bar Exam Could See Their Scores Canceled if They Touch Their Face, Fidget, or Twirl Their Hair*, BUS. INSIDER (Jul. 25, 2020, 9:38 PM), <https://www.businessinsider.com/tennessee-online-bar-exam-strict-rules-2020-7> (“[T]he bar’s strict rules are nearly impossible to adhere to when

## IV. POLICY

What happens within the bar examination process reflects a larger trend in the legal profession: when an individual lawyer or law student claims protection under the ADA, she is often met with skepticism that her impairment could truly be sufficiently limiting to warrant legal protection, particularly in the context of invisible or non-apparent disabilities. “On the other hand, if the impact of an impairment is more obvious to the observer, it is common in the profession to challenge whether the individual could ever be sufficiently qualified to practice in the esteemed profession of law.”<sup>178</sup>

*A. Eradicating Mental Health Questions Through Activism, Not Courts*

In the bar application stages, it is important to recognize that activism, more so than past challenges with varying degrees of success under Title II of the ADA, has more success in the removal of mental health questions from the bar application to determine if lawyers are fit to practice. Much like how disabled activists played a crucial role in the passage of the ADA during the Capitol Crawl and beforehand with advocacy and protests, disabled law students and allies are leading the charge towards a more inclusive profession and placing pressure on state bar examiners to comply with the ADA.

Each state’s unique wording of questions and reluctance to adapt NCBE model guidance has led to inconsistent degrees of mental health questioning, and the invasive nature of the questions had led to more effective grassroots advocacy to cease mental health questioning used to determine fitness to practice altogether. Due to increased pressure from law schools, students, and lawyers, the public entities responsible for lawyer licensing could eventually phase out these invasive questions once and for all, which would be more effective than conflicting precedents in each jurisdiction. A proactive approach and changing culture over the past thirty years following the passage of the ADA have led to much change; those spearheading the charge today are members of a generation that would not have had current opportunities without the ADA and the disabled activists who tirelessly fought for its passage. The spirit of this activism and open conversation allows for greater acceptance and less burden on law students and graduates who are afraid that even passing the bar exam may not be enough.

The bar exam might not be leaving anytime soon, but how we take and

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you have a disability”).

178. Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench and Bar*, 69 U. PITT. L. REV. 637, 642 (2008).

standardize high-stakes tests is continuing to evolve. Should mental health questioning remain, the process should be restructured in a way that minimizes stigma and the risk of discriminatory treatment.<sup>179</sup>

### *B. Consistency in Determining Reasonableness*

Courts continue to grapple on a case by case basis as to what is reasonable, but there is some uniformity in how the exam is administered across jurisdictions. Thirty-three states, as well as the District of Columbia and U.S. Virgin Islands, adapted the Uniform Bar Exam in order to have consistent competency measures nationwide,<sup>180</sup> and the Law School Admissions Council acknowledged its biases against blind test-takers in a settlement where it was working to develop an accessible test section to replace the logic games section, which required test-takers to draw diagrams and use various spatial reasoning skills to solve complex analytical puzzles.<sup>181</sup>

Dismantling ableism within the legal profession is a common theme occurring with the lack of disabled lawyers. Lawyers with disabilities comprise a small subset of lawyers, and the removal of stigma surrounding mental health is part of the broader conversation surrounding the subconscious preference for able-bodied and neurotypical lawyers. As an attendee of a continuing legal education panel on disability pointed out, dismantling ableism for disabled lawyers means access to mentorship, leadership, sponsorship, and great opportunities.<sup>182</sup> Yet, this should not fall on disabled law students and lawyers, who are a minority of these groups; it should be the burden of all participants in the legal industry and profession to make entry into the practice of law more equitable for marginalized law students and graduates. After all, opportunities simply would not exist if the bar admissions process stands in the way of disabled law students and graduates attempting to become lawyers.

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179. Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans With Disabilities Act*, 49 UCLA L. REV. 93 (2001).

180. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/exams/ube/> (last visited June 11, 2020).

181. Debra Cassens Weiss, *LSAT will change for all would-be lawyers as a result of blind man's lawsuit settlement*, ABA J., (Oct. 9, 2019) <http://www.abajournal.com/news/article/lsat-will-change-for-all-would-be-lawyers-as-a-result-of-blind-mans-lawsuit-settlement>.

182. Barnett, *supra* note 112.

*C. Universal Design and The Balance Between Accessibility and Test Integrity*

A key portion of accommodation and granting accessibility is balancing test integrity as to not grant unfair advantage or to have a separate process for disabled test-takers. The ADA does not grant reasonable accommodation if the accommodation would substantially modify an examination's contents and format or compromise the integrity of the test.<sup>183</sup> In a 1994 decision, the Supreme Court of Delaware opined that "the integrity of the examination process has been an important consideration for the federal courts in reviewing the reasonableness of accommodations made by testing authorities pursuant to other disabilities legislation."<sup>184</sup>

Others argue that standardized tests do not measure abilities and achievement, but rather reward those who are good test-takers. Research has shown that eliminating the need for speed in standardized tests benefits all test-takers, though it greatly benefits test-takers with disabilities.<sup>185</sup> Accommodation requests often surround asking for extra time on exams, all of which are challenged and interpreted differently in courts – on the bar exam, time and a half is reasonable, whilst double time is not, and in some instances, time and a half is unreasonable even if it was granted in other contexts. To avoid further confusion, "testing entities should devise exams that can validly measure the skills and abilities of the entire applicant pool, rather than continue to place the burden on people with disabilities to meet onerous and expensive standards to request extended time."<sup>186</sup> Timed exams often value rushing, while extending the limits so the vast majority can complete in a prescribed time period would be reasonable and universally accessible. Often, tight time limits adversely affect the performance of students with disabilities more so than any other marginalized group.<sup>187</sup> An alternative would borrow from universal design principles, making the test more accessible rather than going through timing accommodations on a case-by-case basis; not all applicants and test-takers are treated the same with

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183. See 28 C.F.R. § 36.303(a); 28 C.F.R. § 36.309(b)(3).

184. *In re Rubenstein*, 637 A.2d 1131, 1137 (De. 1994).

185. Mary A. Nester, *Psychometric testing and reasonable accommodation for persons with disabilities*, 38 REHABILITATION PSYCHOL. 75, 80 (1993).

186. Ruth Colker, *Test Validity: Faster is Not Necessarily Better*, 49 SETON HALL L. REV. 679, 679 (2019).

187. See *id.* at 686 (citing Nonie K. Lesaux et al., *The Effects of Timed and Untimed Testing Conditions on the Reading Comprehension Performance of Adults with Reading Disabilities*, 19 READING & WRITING 21 (2006)).

extra time being weighed as an accommodation.<sup>188</sup> Rather than seeing some students at an advantage, all would be given ample time to demonstrate the minimum competence needed to be admitted to the practice of law.<sup>189</sup>

## V. CONCLUSION

Ultimately, balancing accessibility comes down to fairness and leveling the playing field for all test-takers. Fairness can be thought of in two ways – procedures that treat everyone the same, or it can mean treating individuals according to their needs, to ensure a fair outcome for everyone.<sup>190</sup> For disabled students and test-takers, fairness means removing barriers that prevent them from achieving their best results.<sup>191</sup> Those barriers occur as early as in the first year of law school when a student may begin filling out a bar application for clearance to obtain a certified legal internship, when one is applying to take the bar or requesting accommodations, or on the test day itself.

It is up to lawyers – and those who govern bar admissions – to consider the whole law student and lawyer, and to prioritize inclusion of all above gatekeeping based on perceived impairment, rather than ability to successfully bring access to justice for all – including law students and lawyers with disabilities.

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188. *Id.* at 724-25.

189. *Id.* at 725 (“A universal design solution . . . [provides] ample time to everyone. All students are offered an opportunity to take as much time as they need to demonstrate their knowledge and abilities.”).

190. Jacqueline Joy Cumming, *Standardised Test Limits Students with Disability*, THE CONVERSATION (Nov. 22, 2017, 2:06 PM), <http://theconversation.com/standardised-tests-limit-students-with-disability-86763>.

191. *Id.*