

Bar Score Is Best Hiring Metric Post-Affirmative Action

By **Alice Griffin** (July 11, 2023)

Now that the U.S. Supreme Court has struck down affirmative action admissions policies in *Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, law firms may find fewer Black candidates among their recruitment pools at Top 14 or Top 20 law schools.

As standardized test statistics were the foundation of the petitioners' claims about academic merit, it is logical to use them to assess and stratify newly minted lawyers.



Alice Griffin

This article takes the position that the best evidence of law graduates' merit is bar results as they are the final evaluation of ability — ranking graduates within their alma mater, their state and nationally. And, thus, law firms should look to a candidate's bar score — over that person's undergraduate or law school GPAs or LSAT score — when making hiring decisions to foster diversity after the Supreme Court's ruling.

What the MBE Does and Why It Is Reliable

In 1972, the National Conference of Bar Examiners instituted the multiple-choice Multistate Bar Examination to assess a law graduate's minimum qualifications to practice law.[1] No one has achieved a perfect score on the MBE and scores above the 98th percentile are rare.

This is logical: A moderately rigorous test would not challenge the average examinee much less the most able.

As a practical matter, the MBE is the bar exam as one's MBE score dictates whether one will pass or fail.[2]

This unsparing six-hour test uses complexity, nuance and brutal time constraints to gauge grasp of legal concepts, and an examinee wages a dogfight for each point. The MBE is entirely objective, and is therefore a much more accurate measure of legal knowledge and analytics than essays, which, after three years of law school, any examinee can craft,[3] and which is why the MBE defeats many bar examinees who managed to graduate from law school where subjective essay grading is the standard.[4]

Moreover, the MBE has integrity: Where a 1600 SAT score was once newsworthy, MBE scores have been stable for decades,[5] indicating the test preparation industrial complex has not gamed the MBE — yet. Remaining ahead of test preparers is obviously an NCBE priority.[6]

Law School Quality, MBE Scores and Examinee Rank

A law school's average MBE score is the true measure of its quality, and an examinee's MBE score reveals his or her rank.

LSAT scores and undergraduate GPAs are retrospective, and experts acknowledge both imperfectly correlate with MBE scores.[7] Law school GPAs are also retrospective and, of course, grading is subjective and varies by school.[8] By contrast, the MBE is not only a

final judgment on an examinee's ability, but it provides the benefit of stratification.

Connecticut appears to be the only state that publishes the average MBE of each law school represented by its examinees,[9] and assuming its data is a fair representation of a school's performance nationally, Harvard and Yale graduates' outstanding MBE performance in Connecticut is why they and the other premier law schools usually boast the highest pass rates on the California bar exam — considered the nation's toughest.[10]

According to the Connecticut data, from 2007 to 2022 Yale's average MBE was 160, revealing why its average California pass rate for 2007-2022 was 93%, commensurate with Harvard. Yale's nadir was 151, it is the only school in the Connecticut data with an MBE score in the 170s, and neither it nor Harvard had a score below the 150s.[11] These law schools, along with Stanford, are generally referred to as the Top 3.

While the number of graduates taking the Connecticut bar is small relative to those taking the New York or California bars — the roughly 350 Connecticut July 2022 examinees are about 3.5% of New York[12] and 4.5% of California[13] — the Connecticut data is a good national sample because the schools represented are from all tiers of the roughly 185 ABA-approved law schools.

Moreover, the fact that Connecticut is the situs of Yale is very fortunate for MBE data regarding elite law schools — e.g., the class of 2025 boasts eight Rhodes scholars, or 4% of the class. [14]

Yale's data, coupled with Harvard's and that of the three premier New York law schools, Columbia, NYU and Cornell, means the Connecticut data provides a complete representation of T14 law schools nationwide.

Analysis of the Connecticut and other state and national data indicates:

- A Top 14 law school has an average MBE score of 155 to 162, i.e., between the 84th and the 90th percentiles of all Connecticut July examinees; and
- Schools ranked below the Top 50 consistently have average MBE scores near or below 140, i.e., near the nation's 50th percentile/statistical mean.

While elite law schools have the highest bar pass rates, every year a certain number of their graduates fail.[15] Conversely, many students from lower ranking schools pass the same exams. Successful examinees with the same, or higher, level of MBE performance should be considered competitive for jobs at the elite law firms, in corporations and for judicial appointments.

MBE as Equalizer

The MBE rectifies inflated LSAT scores, undergraduate GPA and law school GPA data.

Admissions data for elite law schools indicates most entrants are among the top 0.5% to 2% of undergraduates as to both grades and LSAT score,[16] but data shows the MBE deposes most of them to the historical top 25% of law graduates — i.e., a 150 or higher score.

Specifically, the fact that every graduate of a Top 3 school does not achieve an MBE score of

170 or more,[17] which would correspond to the top 1% of MBE examinees, validates the rectification.

If the reverse were true it would mean LSAT scores and undergraduate grades perfectly correlate with MBE scores.

The MBE performance of the middle ranks of the Top 14 law school graduates — scores between 155 and 158 — is no mean feat: The Connecticut data suggests only the top 0.3% of graduates of the three most heavily represented schools on the Connecticut bar, Quinnipiac, University of Connecticut and Western New England, have an average MBE score of 151 or higher. Conversely, a 151 MBE is probably within the bottom 20% for Yale.

Conclusion

MBE scores can be used to increase diversity.

The bar exam is the "put up or shut up" moment when an examinee can no longer hide behind his college and law school brands. The MBE is fair because it is objective, and examinee preparation for it is democratic — i.e., all examinees study the same curriculum, take a bar review course and have the same roughly nine-week window to prepare for the July exam.

Therefore, using an MBE score as a proxy for ability is not a compromise to mediocrity.[18] It is a realistic assessment of an examinee's ability and rank.[19]

Although elite law schools produce a great proportion of examinees with high MBE scores, gifted lawyers emerge from all law schools.[20]

Accordingly, if a Howard University Law School graduate passed the bar on her first attempt with a high MBE score, she is arguably more able than an alumna of an elite law school with a lower MBE score, or who failed the bar but is otherwise camouflaged by her illustrious brands.[21]

As first-year associates are glorified clerks until they pass the bar, why not solicit resumes for a firm's entering class in November from people with attractive MBE scores — i.e., a kind of secondary market?

Firms complain that they can't find qualified candidates belonging to minority groups — and these complaints may increase as firms used to recruiting solely from Top 14 schools face student bodies affected by the Supreme Court's ruling in Students for Fair Admissions — but they're mischaracterizing merit.[22]

The real gauge of ability has been around since 1972.

Alice Griffin is the principal of Griffin Counsel PC.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] In 2006 the New York Board of Law Examiners said: "The purpose of licensure examinations, such as the bar exam, is to protect the public by providing reasonable assurance that those licensed to practice the profession have met minimal competency requirements." Summary of the October 2006 Report Prepared by the National Conference of Bar Examiners for the New York Board of Law Examiners Entitled: Impact of the Increase in the Passing Score on the New York Bar Examination", <https://www.nybarexam.org/press/summary.pdf>, p. 1 (last accessed June 15, 2023). One might well ask why 'minimal' qualifications are considered in the public interest.

[2] After the MBE score is calculated the essay and other portions of the bar exam are 'scaled' (i.e., calibrated) to the MBE. It is the dominant portion of test, and in some states (e.g., New York) the MBE score is 50% of an examinee's final grade. As discussed herein, just as the MBE scales an examinee's bar exam essays it likewise rectifies his law school record: depending on the rank of his school, a student in the middle of his class at a T14 school should score 155 to 162; well above the 133 to 136 minimums required by about 80% of U.S. jurisdictions. See Note 17.

[3] Giving an examinee a multiple-choice exam after three years of testing exclusively through essays would seem the ultimate bait and switch, but unlike essays the MBE is objective so an examinee's individual limitations (e.g., indecipherable handwriting) that might have hindered him in law school are irrelevant.

[4] Law professors make subjective assessments of essay answers and – at least as far as core coursework (e.g., first year curriculum, Constitutional Law, Evidence) is concerned – grade according to a fixed percentage of letter or numerical grades to indicate student quality (e.g., 20% As, 40% Bs, and 40% C and below). The student who writes slowly, has poor penmanship, or both, and/or discusses only 14 of the 20 issues in the Contracts final is getting a 'C' on that exam and as his grade for the course. Such limitations are irrelevant to the MBE.

[5] See <https://thebarexaminer.ncbex.org/wp-content/uploads/PDFs/2007-Statistics.pdf>. The MBE will be suspect if the number of high scores grows noticeably above historical MBE norms (high 150s to low 160s) for T14 alumni or the proportion of MBEs in the 170s or 180s does likewise. The likely reasons for the stability of the exam's statistics are: (a) at about 60,000 examinees per year (including repeaters) there is probably less money in MBE preparation compared to SAT preparation (about 1.2 million people take the SAT each year) so the Test Preparation Industrial Complex is probably less interested in the MBE; (b) law graduates do not choose a preparation window (i.e., they must be ready to take the bar roughly 10 weeks post-graduation); and (c) law (like medicine) as a licensed profession is consequential, i.e., practitioners' competence is ultimately regulated by malpractice insurance underwriters and public opinion.

[6] That said, the NCBE is revising its bar exam suite and intends to roll out a new bar exam in July 2026. Hopefully it will retain the benefits stakeholders laud in the MBE (i.e., "objective scoring, reliability of scores, and scaled scores that have consistent meaning over time and across jurisdictions because the exam is equated"), and it would be particularly valuable if the NCBE began publishing the MBE average for each law school so that prospective law students can assess bar success prospects realistically. See <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/#ftoc-heading-36>.

Finally, testing should be in-person to prevent chicanery (see Judy Mann, 'Disbarment's Mitigating Circumstances', The Washington Post, August 11, 1982

(<https://www.washingtonpost.com/archive/local/1989/08/11/disbarments-mitigating-circumstances/e629007e-1ab9-4cc7-9040-f5203fa8fb72/> (discussing the case of a woman who took the California bar for her husband)) and paper examinations should be used (e.g., in case of examinee computer failure or third-party hacking).) Paper examinations with an unbroken chain of custody are probably the best way to administer exams; protecting students and the end users.

[7] See Susan M. Case, *Identifying and Helping At-Risk Students*, *The Bar Examiner*, December 2011, pp. 30 – 32 (https://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800411Testing.pdf).

[8] See Note 3. As an aside, it is difficult to overstate the power of law school grades: They determine who receives plum summer associate jobs, federal judicial clerkships and, in some cases, law review positions. They also impact a student's self-assessment:

"[A] survey of the Harvard Law School reunion class of 1969 indicated that due to the law school's 'scarifying emphasis on grades . . . men of outstanding undergraduate attainment, Rhodes scholars and junior Phi Betes, let mediocre grades in law school convince them that they were mediocre men.'" Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 *Fla. St. U. L. Rev.* 721, 784 (1996) (citing Michael H. Levin, *Fear and Loathing at Harvard Law School*, *Harvard Magazine*, Mar.-Apr. 1995, at 44, 47 (quoting Dr. David Reisman, Harvard Law School class of 1934)).

These 'mediocre' Harvard alums probably would have had the same level of performance on the MBE as their successors at Harvard Law School, which has an average MBE of about 160, a score near the apex of MBE averages.

[9] Connecticut publishes such data if at least three examinees from a law school take a bar exam, and the data is for all examinees — i.e., repeaters and first timers). See <https://www.jud.ct.gov/cbec/stats.htm>. Georgia provides MBE statistics for Georgia law schools. See <https://www.gabaradmissions.org/georgia-bar-examination-statistics#00jul>.

[10] In 2020 California lowered its minimum MBE from 144 to 139. See https://newsroom.courts.ca.gov/sites/default/files/newsroom/document/SB_BOT_7162020_FINAL.pdf.

[11] Average or 'mean' is the 50th percentile. A school's MBE score should correspond to a B-/C+ student at that institution.

[12] See https://www.nybarexam.org/Press/July2022_PressRelease.pdf.

[13] See <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-results-of-july-2022-bar-exam>.

[14] See <https://law.yale.edu/admissions/profiles-statistics>. Harvard's class of 2025 has one Rhodes Scholar.

[15] For example, Kathleen Sullivan, a Harvard Law graduate and former dean of Stanford Law School failed the California bar exam. See James Bandler and Nathan Koppel, "Raising the Bar: Even Top Lawyers Fail the California Bar Exam", *The Wall Street Journal*, December 5, 2005.

[16] See <https://www.ilrg.com/rankings/law/>.

[17] The 162 average of Stanford law alumni and the 160 estimated MBE average of Yale law alumni correspond to the middle of the class (i.e., a B+/C- GPA at most schools) at those schools. Accordingly, the top 10% of Yale law graduates (e.g., Order of the Coif) should achieve a minimum MBE score \geq of 164. (A Coif graduate (top 10% of law class) from a non-T14 school would probably get a lower MBE score.)

[18] Mediocre (i.e., 'normal' or 'average') is relative. Harvard's mediocrity is about a 160 MBE and New York's Touro's is about 136. There are probably many senior partners in very respected firms who had mediocre grades at top law schools. While some of them may have achieved high MBE scores, undoubtedly some (a) failed the bar at least once, (b) passed it with a minimum MBE score (it is not commonly known) that the average passing MBE score in most U.S. jurisdictions, 133 – 136, is actually the 16th percentile – 20th percentile, respectively, of first-time examinees), or (c) passed it with an MBE score that was low relative their school's average MBE. Arguably, graduates in categories (a) through (c) are relatively 'mediocre' despite enjoying the presumption of superior legal ability, while a graduate of a low ranked school will endure the presumption of mediocrity even with a stratospheric MBE score.

[19] The tech industry, hedge funds, private equity funds, and Wall Street's front office departments are run by and recruit people whose analytics are well above normal. See Jennifer Ouellette, 'Physicists Graduate From Wall Street', The Industrial Physicist (December 1999) (https://guava.physics.uiuc.edu/news/articles/Industrial_Physicist_wallst_Dec_1999.pdf) and Jared Dillian, 'Wall Street is Now Ruled By Physics PhDs, Not Traders', Seeking Alpha (July 3, 2017), <https://seekingalpha.com/article/4085524-wall-street-is-now-ruled-physics-phds-not-traders>. Why would people with advanced degrees in STEM subjects want lawyers with low MBE scores handling their legal matters? They would trust the MBE because, among other things, its rigor causes an average of 7% of Top 3 graduates to fail the California bar exam each year.

[20] See http://www.swift.law.pro/about_stephen.htm (resume of attorney Stephen C. Swift, a Wayne State University Law School (non-T14 law school) alumnus who achieved a 163 MBE and whose bar exam essays were not graded by Michigan bar examiners because the MBE score was \geq 150 per standing policy) (last accessed May 24, 2023). Given the subjectivity of law school quality and grading one can debate whether a Coif graduate of Brooklyn Law School is equal to one from Yale or Stanford, but can one persuasively argue that a Brooklyn Law graduate with a 160 MBE is less able than a Yale or Stanford graduate with the same or lower MBE score?

[21] In other words, one's MBE score is one's personal brand; the most accurate reflection of a person's ability, though it may or may not be an accurate reflection of his alma mater's institutional brand. The Supreme Court decision means Black lawyers will have to rely on their personal brands more heavily – but so should everyone else. What law firm would not hire someone like Matthew Graham, who passed the bar with a 155 MBE score? See Meron Moges-Gerbi, 'He Crushed the Bar Exam, But the Legal Profession Remains Disproportionately White', CNN.com, <https://www.cnn.com/2023/07/02/us/black-lawyers-representation/index.html> (July 2, 2023). (A 309 score in Maryland equates to approximately 155 on the MBE (<https://jdadvising.com/understanding-your-ube-results-2/>).)

[22] 'Merit' was the substance of the Harvard affirmative action case, so why shouldn't states award distinctions or rank based on MBE performance? For example, why not

designate a score of 155 'with distinction'? Better performance (e.g., 165+) could be designated 'high distinction' and the highest scores (e.g., 170+) designated 'highest distinction'. This would likely be lauded by the public and prospective employers. A general counsel paying upwards of \$800 per hour for a newly minted lawyer in her outside counsel's law firm might well demand that lawyers working on her matters have passed the bar with an MBE score well above the state's minimum. She would probably also want to know the MBE scores of her law department's potential hires. (Surprisingly, many corporate law departments are not as selective about people within their own ranks; not infrequently people with very modest law credentials end up in senior counsel positions at well-known companies. Indeed, this is not an anomaly in law departments at major financial firms in New York. Based on personal observations made while working at major banks in New York, a license to practice law in any U.S. jurisdiction is sufficient to land a counsel position and the fact that one barely passed the bar exam or attempted it many times is not a consideration. As most general counsels graduated from T14 schools and probably achieved high MBE scores, it is remarkable that bar performance is not a – indeed, the – factor in hiring (including internal hires and promotions) for in-house counsel roles.)