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# Do We Need the Bar Examination--A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives ?

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DO WE NEED THE BAR EXAMINATION?  
A CRITICAL EVALUATION OF THE JUSTIFICATIONS  
FOR THE BAR EXAMINATION AND PROPOSED  
ALTERNATIVES

I. INTRODUCTION

These days nearly all attorneys in the United States have taken a bar examination to become licensed to practice law.<sup>1</sup> The bar exam is typically the final and absolute determination of whether a law student may join the law profession. As such, the bar exam looms large in a law student's career as perhaps the most significant preparatory experience. Robert E. Seiler may have best conveyed the bar exam's import when he said:

Whether or not a [person] will be permitted to use his [or her] three years of law school work by becoming a lawyer hangs on the result of an examination which lasts only two and a half to three days and is given by practicing attorneys who are not skilled teachers and who usually are not skilled in the art of preparing questions; and unless [this person] passes the bar examination, his [or her] law school work is for naught.<sup>2</sup>

Due to the bar exam's significance, legal professionals have studied it closely. Throughout the history of American legal education, support for a bar examination of one kind or another has gone in and out of fashion.<sup>3</sup> However, since the 1920s, support for

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1. See THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 18 (Stuart Duhl ed., 2d ed. 1980) [hereinafter HANDBOOK 2d ed.].

2. Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 393, 406 n.57 (1970) (quoting Robert E. Seiler).

3. Support for the bar exam steadily gained ground in the early 20th century after decades of bar admissions exams that varied greatly in depth and seriousness. See *infra* notes 52-56, 62-63 and accompanying text. Throughout this century acceptance of a mod-

the bar exam has been more or less entrenched with only a few raucous voices vainly calling for its elimination.<sup>4</sup> In the 1920s, the American Bar Association (ABA) unequivocally approved the written bar examination and rejected the diploma privilege as the preferred means to gain admission to law practice.<sup>5</sup> The diploma privilege entitles law students from certain specified law schools to automatic admission to the bar upon graduation from those law schools. Without the ABA's sanction, the support for the diploma privilege has steadily declined,<sup>6</sup> with Mississippi, Montana, South Dakota, and West Virginia eliminating it within the past fifteen years.<sup>7</sup>

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ern bar exam became entrenched, with only a few critical appraisals, until the 1970s. During the 1970s, legal education generally came under closer scrutiny. See generally Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978) (study finding that an attorney's own practical experience is the primary factor in learning and acquiring the essential skills of an attorney). The bar exam itself also came under scrutiny. See generally Alfred B. Carlson & Charles E. Werts, *Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results*, in 3 REPORTS OF LSAC SPONSORED RESEARCH 211 (1976) (concluding that bar exams are primarily achievement tests that measure the same legal skills and knowledge measured by law school grades, undergraduate grades, and LSAT scores); Bard & Bamford, *supra* note 2 (providing historical analysis of and lending support to bar exams); Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215 (1971) (criticizing bar exams); Charles B. Blackmar, *Is the Bar Examination an Anachronism?*, 60 A.B.A. J. 1240 (1974) (criticizing bar exams); Leon Green, *Why Bar Examinations?*, 33 NW. U. L. REV. 908 (1939) (questioning usefulness of bar exams); Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81 (1974) (supporting bar exams); Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., Aug.-Sept. 1978, at 48 (criticizing bar exams); George N. Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15 (1977) (providing history of bar exam and analyzing responses to surveys of bar examiners, judges, law school deans and law professors asking their opinions about the value of bar exams, and ultimately supporting bar exams); E. Marshall Thomas, *The Bar Examination: Its Function*, 32 B. EXAMINER 69 (1963) (supporting bar exams).

4. See generally Bell, *supra* note 3; Blackmar, *supra* note 3; Green, *supra* note 3; W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L.J. 563 (1989); Seligman, *supra* note 3.

5. HANDBOOK 2d ed., *supra* note 1, at 189-90. Today, only Wisconsin has the diploma privilege. THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 10:4 (Stuart Duhl ed., 3d ed. 1991 & Supp. 1993) [hereinafter HANDBOOK 3d ed.]. Law students who graduate from approved Wisconsin law schools are admitted automatically to the Wisconsin bar. See BAR/BRI BAR REV., BAR/BRI DIG. 47 (Donna M. Skibbe ed., 1995). Applicants for admission to the Wisconsin bar who graduated from other law schools must take a Wisconsin bar examination. *Id.*

6. See Stevens, *supra* note 3, at 19 (charting the rise and decline of the diploma privilege from its inception in the 19th century through the early 1970's).

7. See HANDBOOK 2d ed., *supra* note 1, at 18 (naming the five states that as of

This Note questions the need for a bar examination as a requirement for admission to legal practice. Although supporters of bar examinations should be praised for their concern for legal education and protection of the public, this Note evaluates both their common and esoteric justifications for bar examinations and finds none of them convincing. Finally, this Note comparatively analyzes admissions processes in other common law jurisdictions (England, Wales, Canada, and Australia) and proposes alternatives to the bar examination as a means of bar admission in America.

## II. HISTORY OF ADMISSION TO THE BAR IN THE UNITED STATES

### A. Bar Admission in Colonial Times through 1800

Unlike England, where practitioners conducted the sole training and admission of attorneys, admission to the bar in colonial America was determined by the local courts.<sup>8</sup> Courts in each colony essentially decided whether someone would be admitted, usually after the applicant had completed an apprenticeship of some indeterminate length.<sup>9</sup> The local court might admit the applicant to practice only before that court. Thus, an applicant would have to apply at each individual court for permission to practice there. However, in some colonies, admission to practice before one court would entitle an applicant to practice before all courts in that colony due to judicial comity.<sup>10</sup> Pursuant to this comity principle, some applicants would apply to the highest court in the colony for admission. If the highest court admitted the applicant, the applicant was usually then entitled to practice before all courts in that colony.<sup>11</sup>

Most colonies also had a "graded bar." Applicants applying to practice in colonies with graded bars still had to seek permission at the individual courts, but an applicant could not get permission to

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1980 had diploma privilege); Rogers, *supra* note 4, at 586 n.137 (indicating that only Wisconsin retains the diploma privilege).

8. HANDBOOK 2d ed., *supra* note 1, at 14.

9. *Id.*

10. *Id.* at 15.

11. Even in colonial times, courts, especially the highest courts, often would not actually consider an applicant themselves. Instead, the court would appoint an examining board to determine which applicants ought to be admitted to practice. *Id.* at 15-16. Thus, modern bar examiners may trace their positions to colonial America. Today, bar examiners in each state are appointed by the judicial branch. For a discussion of the qualifications and appointments of bar examiners, see HANDBOOK 3d ed., *supra* note 5, at 70:1-73:2001.

practice before higher courts without increased training. Therefore, if an applicant gained admission to a particular lower court, but wanted to also have permission to practice before a higher court, the higher court would require completion of an additional apprenticeship.<sup>12</sup>

As a contrary approach, many attorneys considered themselves part of the English bar, with the commensurate right to practice in any of the thirteen colonies because they had been called to practice by the Inns of Court in England.<sup>13</sup> Those invited to practice by the English bar, it was felt, did not have to apply at each individual court, and the graded bar had no effect on their ability to practice before all courts.<sup>14</sup>

When colonial legal apprenticeships were required, their lengths varied, but were generally long.<sup>15</sup> In Massachusetts, for example, an applicant had to endure an eleven-year apprenticeship, which included a college education, to have the full privileges of an attorney (i.e., practice before all courts in the colony).<sup>16</sup> But, if the applicant's apprenticeship did not include a college education, the period was only nine years.<sup>17</sup>

#### *B. Bar Admission from 1800 through the Jacksonian Era*

After the American Revolution, most states developed their own requirements for bar admission. The standards typically included a period of law study under a practitioner or judge, and varied greatly in length—generally ranging from one to five years.<sup>18</sup> In some states, the applicant also had to pass some kind of written or oral exam to gain admission.<sup>19</sup> However, sometimes an applicant was exempt from the examination if he had clerked in a law office for a period of years.<sup>20</sup> As one might surmise, stan-

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12. HANDBOOK 2d ed., *supra* note 1, at 15.

13. 2 ANTON-HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 171-72 (1965); *see also* discussion *infra* notes 151-80 and accompanying text (discussing the Inns of Court and admission to practice in England and Wales).

14. HANDBOOK 2d ed., *supra* note 1, at 14-15.

15. *Id.*

16. *Id.*

17. *Id.*

18. CHROUST, *supra* note 13, at 164-65 (listing requirements of various states during the first half of the 19th century).

19. *Id.*; *see also* Bard & Bamford, *supra* note 2, at 395 (discussing requirements of early examinations).

20. *See* CHROUST, *supra* note 13, at 165 (mentioning South Carolina's clerking exemption).

dards for legal education varied widely from state to state. In addition, as shall be discussed *infra*, where examinations did exist, they were typically mere formalities, or they could be bypassed simply by choosing a different path of legal study, such as clerking.<sup>21</sup>

However, during the Jacksonian era (roughly the 1820s and 1830s), and continuing through the Civil War, standards for bar admission generally decreased and became far more erratic and whimsical. During the Jacksonian era, Americans grew increasingly distrustful of lawyers and felt that admissions practices were elitist and contrary to the ideals of democracy.<sup>22</sup> The public saw the law as primarily an upper class profession that exclusively controlled entry and favored applicants who were well-connected and who could easily secure apprenticeships.<sup>23</sup>

As a result of the growing distrust of the bar, most admissions standards disappeared or were greatly reduced to permit virtually any man to practice law. In 1800, three-fourths of American jurisdictions (states and territories) required a specifically delineated period of preparation for law practice, but by 1840, only one-third of all American jurisdictions had a defined period of preparation for law practice.<sup>24</sup> Furthermore, by 1860, only about one-fourth of all jurisdictions had a specified period of law study.<sup>25</sup> For example, in 1851, Indiana's Constitution proclaimed that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."<sup>26</sup> Also, in Ohio, to be admitted to practice an applicant had only to show a certificate signed by a practicing attorney which stated that the applicant had "regularly and attentively studied law."<sup>27</sup> For a time, New

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21. See *infra* notes 29-31 and accompanying text (discussing the ineffectual nature of bar exams during the 19th century).

22. See CHROUST, *supra* note 13, at 165-66 (discussing antebellum efforts to enable lay persons to practice law); HANDBOOK 2d ed., *supra* note 1, at 15.

23. For a discussion of the Jacksonian era's dissatisfaction with the "elitist" legal profession, see CHROUST, *supra* note 13, at 165-66, 171 (describing how fear of creating a privileged class drove many to seek ways in which to deprofessionalize the bar); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S 10 (1983) (noting the temporary decline of formal educational requirements); Bard & Bamford, *supra* note 2, at 395 (citing attacks against the bar as a professional organization).

24. Bard & Bamford, *supra* note 2, at 395 n.7.

25. *Id.*

26. HANDBOOK 2d ed., *supra* note 1, at 15 (quoting 1851 version of the Indiana Constitution).

27. CHROUST, *supra* note 13, at 168 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 229 (1953)).

Hampshire was not as "strict" as either Indiana or Ohio. In New Hampshire from 1842-1859, the law simply "provided that any citizen over twenty-one was entitled to be admitted to practice."<sup>28</sup>

Despite the lowering or elimination of admission standards during the Jacksonian era, most states had some form of examination requirement for bar admission, either in addition to or in lieu of a period of apprenticeship.<sup>29</sup> However, the exams were inadequate because courts neither had the time nor the skills to administer a professional examination.<sup>30</sup> As a result, anecdotes such as the following were common:

In Abraham Lincoln's day, the state bar examination was a most casual affair. This may, in part, have been because Lincoln himself served on a board of bar examiners. One Illinois applicant recalled being examined by Lincoln while Abe took a bath: 'He asked me in a desultory way the definition of a contract, and two or three fundamental questions, all of which I answered readily, and I thought, correctly. Beyond these meager inquiries . . . he asked nothing more. As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice and the various incidents and adventures that attended his start in the profession. The whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all.'<sup>31</sup>

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28. STEVENS, *supra* note 23, at 9 (noting that despite New Hampshire's liberal requirement, the profession tried to maintain standards by ostracizing "untrained interlopers"). In those states that did not eliminate requirements of legal education, the requirements were often nominal standards that were easily met. See CHROUST, *supra* note 13, at 167 (pointing out the inadequacy of both enforcement and administration at the time). For example, in Massachusetts, in 1836, applicants with or without legal training could go before the courts to seek admission. *Id.* If the applicant was of good moral character and had in fact studied law in a law office for three years the courts were "obliged to admit" him. *Id.* Presumably, if the applicant came before the court with fewer than three years of law study (or none at all), the courts had discretion to admit him. See *id.* (highlighting the fact that persons without training could still apply). In addition, it was common at the time for courts to adopt loose interpretations of what constituted an "apprenticeship," "clerkship," or "legal study" in order to admit more applicants. See *id.* at 167-68.

29. CHROUST, *supra* note 13, at 168.

30. *Id.*; see also STEVENS, *supra* note 23, at 25 ("The bar examination, although required in all states [by 1860] but Indiana and New Hampshire, was everywhere oral and normally casual."); Stevens, *supra* note 3, at 17 (reporting that where oral exams existed they were often short and farcical, because if an applicant failed he need only look for a more lenient judge or court-appointed examiner and submit to an even easier test).

31. Seligman, *supra* note 3, at 48. The following equally vivid example of pre-Civil

### C. Late Nineteenth Century Admissions and the Rise of Law Schools

Prior to the Civil War there were virtually no law schools.<sup>32</sup> If a university or local bar initiated a law school or formal legal educational program, it always failed within a few years.<sup>33</sup> However, after the Civil War, there was growing demand for expert legal advice to assist clients during the increasingly legalistic and regulatory society of the Industrial Revolution.<sup>34</sup> Around 1870, professional articles lamented the state of legal training, asking why the legal profession

should be so utterly regardless of its own fair name, and careless of the honors which ought to be connected with the practice of so noble a profession as to admit so readily

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War bar examinations is also illustrative:

The Court appointed the usual committee to take charge of the victim [applicant for admission to the bar]. We assembled in the applicant's room, where 'Pony' Boyd was at once appointed Master of Ceremonies, Grand Inquisitor and Chairman of the Committee. After the usual preliminaries (to wit, some heavy imbibing), lasting some two hours, 'Pony' called us from refreshment to labor . . . and the 'inquiry' proceeded along about the following lines: Question: What books have you read? Answer: Law books. Q. Then, sir, what is law? A. (Confidentially) Now, 'Pony,' I did not expect to be made fun of. If I did not know what law is, would I be wanting a license? The committee ruled that 'Pony' . . . should answer the applicant's question, but he stood mute and repeated the question . . . . A. (Indignantly) 'Pony,' you ought to know that any one can answer such easy questions as that. If you are going to examine me, stop this trifling and ask me something hard. The committee reported favorably (and) he was admitted.

CHROUST, *supra* note 13, at 170 n.196 (quoting McAfee, *Riding the Circuits in Southwest Missouri*, *The Bench and Bar of Missouri* 73-74 (Stewart ed., 1898)).

32. STEVENS, *supra* note 23, at 8.

33. *Id.*

34. *Id.* at 9-10. Stevens stated:

Karl Llewellyn was right in postulating that every society has certain lawyer-jobs that must be performed by someone . . . . Over the past decades anthropologists have taught us that the formalized aspect of social control that we call law is likely to be effective (or to penetrate, as they would say) only if it reflects generally accepted norms. Apparently there was a demand in this country [after the Civil War]—either from above or below, or perhaps both directions—for a trained legal profession to operate an increasingly legalistic society . . . . [T]he pendulum began to swing back [toward standards of formal training], with the refounding of law schools and increased interest in the more organized side of bar life. Law was beginning once more to be seen as a learned profession.

*Id.*



horde upon horde . . . within its precincts, with scarcely a voucher for the ability or worth, morally or intellectually, of such applicants as choose to present themselves.<sup>35</sup>

In spite of a desire to raise standards of admission through some institution such as a law school, even by the turn of the century the "vast majority" of attorneys entered practice through only an apprenticeship or clerkship.<sup>36</sup> The law school, it was hoped, would raise standards of admission and cure large disparities in admission requirements that existed among the states.<sup>37</sup>

In 1870, Christopher Columbus Langdell was largely responsible for the modern study of law through some form of law school with a standardized curriculum.<sup>38</sup> Langdell's model of legal education included the case method and Socratic teaching, both still firmly in place in modern law schools.<sup>39</sup> Langdell intended to increase standards, make them more uniform, and limit competition in the legal profession.<sup>40</sup> At the time, Theodore Dwight proposed an alternative form of legal education which included part-time law school that taught practical legal skills (as opposed to Langdell's teaching of theory through the case and Socratic methods) and a period of mandatory law clerking.<sup>41</sup>

Langdell's theory of legal education prevailed over Dwight's. Langdell's theory may have succeeded not because it was intrinsi-

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35. *Id.* at 24 (quoting an article printed in both the *Albany Law Journal* and the *Western Jurist* in 1870).

36. STEVENS, *supra* note 23, at 24.

37. Typically, admissions requirements were higher in the eastern states, and lower in the South and the West. *Id.* at 8, 25.

38. John H. Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1520 (1984).

39. *Id.*

40. *Id.* at 1520-21; see also STEVENS, *supra* note 23, at 25 (explaining that a combination of law school, practical apprenticeship and an effective bar examination was intended to restrict entrance to the bar). It is interesting to note how often legal historians cite the limit of competition or barrier to entry as a reason for formal legal education. Given the liberal rules for bar admission prior to Langdell's call for a standard law school, one surmises that legal professionals desired barriers to entry to make it difficult for applicants to become attorneys, thereby permitting only those truly dedicated to the profession and willing to make a long-term commitment to law study to enter. Indeed, if nearly everyone could become a lawyer, simply because he was of "good moral character" or a voter over the age of twenty-one, lawyering might have lost its distinction as a "profession." For a discussion asserting that market barriers to entry are an essential part of the concept of a "profession," see generally MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

41. Schlegel, *supra* note 38, at 1524.

cally superior to Dwight's, but because Langdell was from Harvard, perhaps the most influential educational institution in America.<sup>42</sup> Furthermore, Langdell's theory was supported by two famous "missionaries," namely, William A. Keener (author of the nineteenth century legal treatise *The Methods of Legal Education*) and John Henry Wigmore (author of the famous evidence treatise known as *Wigmore on Evidence* and dean of Northwestern University Law School from 1901-1929).<sup>43</sup> Wigmore and Keener helped carry Langdell's message throughout the legal establishment.<sup>44</sup> Finally, Langdell's theory benefited from the aura of modern science, for he promoted his idea of legal education as the "science of law."<sup>45</sup>

Once Langdell's theory of education gained preeminence, law schools proliferated to put it into practice. It was not until 1921 that the profession began to "regulate" law schools by determining if they complied with its recommended standards of quality.<sup>46</sup> In these early days of accreditation, most students graduated from unapproved law schools.<sup>47</sup> Because the unapproved law schools did not have to abide by any standards for legal education, the rigors of their programs varied, and they generally had lower stan-

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; see also STEVENS, *supra* note 23, at 24 (noting that in the 1870s some were concerned that the law had drifted away from its roots as a liberal science and had become a mere trade). Other less important or more difficult to prove reasons may have contributed to the dominance of Langdell's theory. Langdell's system permitted the enhancement of law professors' egos. Under the Socratic method and the requirement of full-time legal study, law professors retain a great deal of control over a student's education, and consequently have much influence over who is eventually admitted to practice. See Schlegel, *supra* note 38, at 1524 (attributing the success of the Harvard method to several possible factors, including its positive effect on the egos of law professors). Also, Langdell's theory benefited from the common reasoning fallacy of novelty (the idea that novelty translates into better quality). By comparison, Langdell's model was more novel than Dwight's. *Id.*

46. "In 1921 the ABA directed the Council of the Section of Legal Education and Admissions to the Bar to publish from time to time the names of law schools that comply with its recommended standards. Thus the Council began the practice of 'approving' or 'accrediting' law schools." Bard & Bamford, *supra* note 2, at 397 n.23; see also THE NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 43 (1st ed. 1968) [hereinafter HANDBOOK 1st ed.] (discussing the history of law school accreditation).

47. In 1924, only 32% of law graduates came from approved or accredited law schools. By 1965, 92% of law graduates came from approved programs. Bard & Bamford, *supra* note 2, at 397. By comparison, in 1978, 95.8% of bar applicants graduated from approved law schools. HANDBOOK 3d ed., *supra* note 5, at 72:2003.

dards than those imposed on approved law schools.<sup>48</sup>

The resulting disparity between approved and unapproved law schools is sometimes cited as a principle reason for the rise of a relatively standard written bar examination.<sup>49</sup> Some theorize that as "inferior law schools" proliferated throughout the early twentieth century, the bar exam was increasingly seen as a means to combat the existence of these inferior law schools, either by increasing their standards or driving them out of business.<sup>50</sup> However, the written bar exam principally developed as a replacement for oral bar exams, and not as a check on law schools.<sup>51</sup>

Recall that prior to the Civil War, bar examinations, if given at all, were largely oral.<sup>52</sup> In addition, these oral exams varied greatly in seriousness depending on which judge or court-appointed examiner gave them, and the exams were often laughable.<sup>53</sup> The ancestor to the modern written bar examination developed between 1870 and 1890<sup>54</sup> and gained substantial ground and acceptance in the 1890s.<sup>55</sup> By the 1920s, there was a written bar examination in most states.<sup>56</sup>

As law schools developed after 1870, so did the concept of diploma privilege.<sup>57</sup> During the rise of law schools, legal clerkships or apprenticeships were still a primary means for aspiring attorneys to acquire their legal education.<sup>58</sup> Because law stu-

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48. See Bard & Bamford, *supra* note 2, at 399-400 (arguing that unapproved law schools have lower standards than and are inferior to approved law schools).

49. Today, a great many supporters of bar exams cite the exam as a means to maintain high standards among the ABA-approved law schools. See, e.g., HANDBOOK 3d ed., *supra* note 5, at 74:4-74:5; Griswold, *supra* note 3, at 81; Stevens, *supra* note 3, at 23-24; Thomas, *supra* note 3, at 70.

50. STEVENS, *supra* note 23, at 114.

51. Stevens, *supra* note 3, at 21; see also STEVENS, *supra* note 23, at 25-26 (explaining that the bar exam was intended to standardize admissions requirements and was considered egalitarian in the sense that its mission was to equalize the disparate admissions requirements in various regions around the country).

52. The first written bar exam predated the Civil War and was instituted in 1855 by Massachusetts. However, on a broad scale, written bar examinations remained unique until long after the Civil War. Stevens, *supra* note 3, at 21.

53. See *supra* notes 29-31 and accompanying text.

54. STEVENS, *supra* note 23, at 25.

55. Stevens, *supra* note 3, at 21.

56. *Id.*

57. See *supra* note 5 (describing a process whereby graduation from certain law schools results in automatic admission to the bar).

58. STEVENS, *supra* note 23, at 24 (noting that "[t]he vast majority of the legal profession until the turn of the century still experienced only on-the-job legal education"). Law office study may still account for an applicant's entire legal education in California,

dents could enter law practice through clerkship or apprenticeship without going to law school, the diploma privilege was necessary to entice students to attend law schools.<sup>59</sup>

However, the diploma privilege did not enjoy sustained approbation. Its peak popularity was during the interval between 1879 and 1929.<sup>60</sup> But, in 1921, the ABA formally expressed its disapproval of the diploma privilege, thus significantly affecting its continued popularity and leading to the privilege's decline ever since.<sup>61</sup> The ABA stated, "[t]he American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness."<sup>62</sup>

In 1971, the ABA and the National Conference of Bar Examiners reaffirmed the position taken in 1921 and added the following, offering some of the common justifications for the bar exam:

Bar examinations . . . encourage law graduates to study subjects not taken in law school. They require the applicant to review all he has learned in law school with a result that he is made to realize the interrelation of the various divisions of the law—to view the separate subject courses which he took in law school as a related whole. This the curriculum of most law schools does not achieve. Also it is the first time many of the applicants will have been examined by persons other than those who taught them, a valuable experience in preparation in appearing before a completely strange judge.<sup>63</sup>

The ABA and National Conference of Bar Examiners offer several reasons for the decline of the diploma privilege. They in-

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Vermont, Virginia, and Washington, and law office study may account for part of an applicant's legal education in Maine, New York, and Wyoming. HANDBOOK 3d ed., *supra* note 5, at 72:2001–72:2002.

59. See Stevens, *supra* note 3, at 18–19 (arguing that diploma privilege was a means for law schools' economic survival).

60. See *id.* (tabulating data concerning the number of states with the diploma privilege at the end of each decade from 1840 to 1970).

61. See *supra* note 6 and accompanying text (addressing the modern decline of the diploma privilege).

62. HANDBOOK 2d ed., *supra* note 1, at 189.

63. *Id.* at 190. The ABA and National Conference of Bar Examiners has retained the 1921 ABA statement and 1971 reaffirmation in its most recent justification for the bar exam. See HANDBOOK 3d ed., *supra* note 5, at 74:1.

clude: 1) lack of uniform standards among law schools, especially length of study program, 2) impracticality of having the privilege for some law schools within a state, but not for all law schools within that state,<sup>64</sup> 3) desire to have state authorities, rather than academicians, help determine which applicants are admitted to practice, 4) prevention of low standard law schools escaping the high standards imposed by the bar examiners, and 5) sincere public desire to raise admissions standards which would be better accomplished through means other than a diploma privilege, namely a bar exam.<sup>65</sup> As a result, the diploma privilege is no longer a means of admission in any state except Wisconsin.<sup>66</sup>

#### D. Modern Admissions Standards

Today, legal education requirements vary little from state to state. Prospective lawyers may not "read law" on their own and then submit themselves before a judge or bar examiner to gain admission as Abraham Lincoln did in 1837.<sup>67</sup> Only in a handful of states may an applicant receive a legal education, in whole or in part, from a clerkship or apprenticeship.<sup>68</sup> Modern applicants must complete at least three-fourths of the credit required to earn a baccalaureate degree at an accredited college or university.<sup>69</sup> Then the applicant must have completed all requirements for graduation from an ABA-approved law school before being eligible for law practice.<sup>70</sup> "Neither private study, correspondence study or law office training, nor age or experience should be substituted for law school education."<sup>71</sup>

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64. Due to greater mobility of today's society this argument could be extended to include the impracticality of having the privilege in only some states but not in others.

65. HANDBOOK 2d ed., *supra* note 1, at 20-21.

66. See *supra* note 5 (summarizing Wisconsin's version of the diploma privilege).

67. See THE LINCOLN READER 87-94 (Paul M. Angle ed., 1942) (discussing Lincoln's days studying law and his admission to practice).

68. See *supra* note 58 (listing states which continue to recognize on-the-job training as an acceptable form of legal education).

69. HANDBOOK 3d ed., *supra* note 5, at 72:1001. The requirement that an applicant have completed only "three-fourths" of the baccalaureate degree is somewhat misleading. Only about 10% of ABA-approved law schools will accept students who have completed only three-fourths of their undergraduate bachelor's degree. Therefore, the vast majority of applicants actually will have completed and earned their baccalaureate degrees before beginning law study. *Id.*

70. See *id.* (explaining that the applicant need not actually earn or receive the law degree before moving on to the next step in the admissions process, because some law schools do not award a diploma until after applicants sit for the bar exam).

71. HANDBOOK 3d ed., *supra* note 5, at 72:2001.

However, graduation from an ABA approved law school is not mandatory in all states.<sup>72</sup> A few states recognize graduation from a state-approved law school as fulfillment of the legal education requirement.<sup>73</sup> But, a law degree from only a state-approved law school will usually not qualify the applicant to sit for the bar in other states.<sup>74</sup> In contrast, graduation from an ABA-approved law school satisfies the legal education requirement in all states.<sup>75</sup>

Finally, following completion of law study, the applicant must pass a state-administered bar examination.<sup>76</sup> The Code of Recommended Standards for Bar Examiners provides the following description of modern bar examinations:

The bar examination may include multiple choice questions, such as those on the Multistate Bar Examination, and should include essay questions. Questions should not be based on unusual or unique local case or statutory law, except in subjects with respect to which local variations are highly significant and applicants are informed that answers should be based upon local law. An essay question should not be repeated except after a substantial lapse of time. Questions should not be labeled as to subject matter and should not be so worded as to be deceptive or misleading. Sufficient time should be allowed to permit the applicant to make a careful analysis of the questions and to prepare well-reasoned answers to essay questions.<sup>77</sup>

Despite the care taken in bar examination design and the guidelines set forth in the Code of Recommended Standards for Bar Examiners, bar exams are not the best available means to test and pre-

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72. *Id.* at 72:2001-72:2003.

73. *Id.*

74. *Id.*

75. *Id.* at 72:2003.

76. In addition, there is a requirement that the applicant be of good "moral character and fitness." However, this requirement usually attaches to the bar examination application process and does not warrant separate consideration. For discussion of the moral character and fitness requirement, see HANDBOOK 3d ed., *supra* note 5, at 73:1-73:3476.

77. *Id.* at 74:4001. In addition, some states require an extra component to the bar exam called the Multistate Professional Responsibility Examination. *See id.* at 74:301. Also, it is important to note that only applicants seeking admission for the first time must take a bar examination. Many states, through a process known as reciprocity, permit practicing attorneys from other states admission to practice in their state, provided the practicing attorney meets certain requirements (such as minimum years of practice). *See id.* at 74:101-74:105 (discussing reciprocity). *See also* BAR/BRI DIGEST, *supra* note 5, *passim* (providing rules for reciprocity in all states).

pare students for law practice.

### III. ANALYSIS: CRITIQUE OF THE JUSTIFICATIONS FOR BAR EXAMS

According to E. Marshall Thomas and the National Conference of Bar Examiners, the "obvious purpose" of the bar examination is

to determine what applicants should be admitted to the practice of law, by testing: (1) the applicant's ability to make an analysis of legal problems; (2) his knowledge of the law, and (3) his ability to apply his legal knowledge in working out a rational solution in a lawyer-like fashion . . . . [The bar examination] should require the applicant to demonstrate his ability to analyze the facts presented, to recognize the legal points involved, to apply the proper legal principles, and to give well reasoned answers.<sup>78</sup>

Whether the bar examination has such an "obvious purpose" is an issue this Note will not address. However, because this Note does not propose to attack examinations generally or the way legal educators evaluate law students, the above statement may be accepted for the purpose of further analysis.<sup>79</sup> To be fair, E. Marshall Thomas does not believe that his stated "obvious purpose" for the bar exam is sufficient justification for its existence.<sup>80</sup> He and many others go beyond the "obvious purpose" and offer a variety of justifications for the bar exam.<sup>81</sup> What follows is a critique of

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78. Thomas, *supra* note 3, at 69; see also HANDBOOK 3d ed., *supra* note 5, at 74:2001-74:2002 (relying on Thomas' analysis to explain the purpose of the bar exam); Bruce Hamilton, *Eliminate the Bar Exam!*, ARIZ. ATT'Y, Aug.-Sept. 1991, at 36, 37 (arguing that "[b]ar exams are designed to synthesize the law into a cohesive whole and to test the examinees' ability to address complex fact situations with time limitations, pressure, competition and the need for a sound solution—not unlike the daily practice of law").

79. *But see* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989) (arguing that typical blue book essay exams or any similar high-pressure classroom exam, like those given in law school, do not always test the examinee's ability to analyze legal problems, show his or her knowledge of the law, and work out solutions to the problems presented in a lawyer-like fashion). Kissam supports a more expanded testing process such as research papers or lengthy take-home or library exams to truly evaluate a test-takers's ability. *Id.* at 493-502. If Kissam is correct, his findings may cast doubt on the ability of bar exams, as they now are administered, to succeed in their "obvious purpose."

80. Thomas, *supra* note 3, at 69-70 (admitting that law schools have already taught the same skills tested by the bar exam).

81. In the area of support for the bar exam, E. Marshall Thomas, George Neff

both the common and esoteric justifications for the bar exam.

A. *Justification: The Bar Exam Weeds Out Incompetent Applicants*

Supporters of the bar exam cite consumer protection as perhaps the most important bar exam function. Since all attorneys owe a duty of providing competent legal advice to their clients, and legal educators owe at least some duty to instill that competence, there is no question that mechanisms should exist to protect the public from incompetent practitioners. Some supporters state the consumer protection justification in terms of testing a "minimum level of competency" or determining which applicants have the bare necessity of skills to be a lawyer.<sup>82</sup> Others state their position in terms of testing for *incompetency* as opposed to competency.<sup>83</sup> No mat-

Stevens, Stephen P. Klein, and former Harvard Law School dean Erwin N. Griswold lead the cause. Because these scholars have both written extensively on the subject and because the National Conference of Bar Examiners has relied for years on their reasoning in defense of bar exams, I have taken most of the justifications for the bar exam from their works. For the National Conference of Bar Examiners' reliance on the works of Thomas, George Stevens, Griswold, and Klein, see HANDBOOK 1st ed., *supra* note 46, at 127; HANDBOOK 2d ed., *supra* note 1, at 190-98; HANDBOOK 3d ed., *supra* note 5, at 10:4-10:5, 74:1-74:2005.

82. See HANDBOOK 2d ed., *supra* note 1, at 190-92 (stating that the bar exam is still important in protecting the public from incompetent practitioners); see also Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 VA. L. REV. 863, 880-81 & n.39 (1981) (arguing that despite the fact the bar exam may be an unsatisfactory competency measure, it still performs a valuable service to consumers of legal advice who have no mechanism of determining whether an attorney is competent); Myrna Oliver, *Testing the Bar Exam*, CAL. LAW., June 1985, at 53, 53 (quoting the California Committee of Bar Examiners' main concern as expressed by its chairperson: "[O]ur paramount interest is protecting the public from people who can't demonstrate a minimum level of skills."); Stevens, *supra* note 3, at 34 (stating that graduation from law school alone does not guarantee a minimum level of competency); Thomas, *supra* note 3, at 69, 73 (claiming that the bar exam serves the function of determining who is eligible to practice).

83. See Oliver, *supra* note 82, at 55 (reporting the opinion of Stephen P. Klein, a noted analyst at the Rand Corporation who has written extensively on what abilities written bar exams test and their usefulness as a screening device). Klein argues that the "bar exam is not designed to measure everything a person needs to know to be a lawyer . . . . The things that it does measure are relevant to the practice of law." *Id.* As support, Klein offers two studies which indicated that students who scored high on the traditional bar exam also scored high on new "performance tests," which evaluate examinees' abilities to interview and complete "other tasks common in law practice." *Id.* The implication is that the bar exam need not test for other lawyering skills, because the applicants who perform well on the traditional bar exam would also perform well on the performance tests. However, assuming these performance tests are adequate means of evaluating common lawyering skills, Klein fails to offer data for applicants who do not score high on the traditional bar exam. If the marginal or poor bar examinees scored well on the perfor-



ter how one presents the consumer protection justification, the position that the bar exam can sort out who has what it takes to be a lawyer and who has not is untenable.

Rather than testing for competency (or incompetency), the bar exam is essentially an achievement test and does not test for what lawyers actually do.<sup>84</sup> In fact, there is strong evidence to suggest that the bar exam merely verifies what has already taken place in the law schools.<sup>85</sup> Research sponsored by the American Bar Foundation and other groups has found that law school grades strongly correlate with bar exam passage rates.<sup>86</sup> The authors of the study concluded that "[t]his result suggests that bar examination scores and law school grades are measuring the same legal skills and knowledge."<sup>87</sup> In addition, research has indicated that both undergraduate grades and Law School Admission Test (LSAT) scores also correlate with bar exam passage rates, though not quite as strongly as law school grades.<sup>88</sup> Therefore, the bar exam, if it tests legal competency as its supporters suggest, may test for skills and "lawyering ability" that have already been tested for at least three times in a law student's career, namely, during undergraduate training, the LSAT, and law school training.

Whether the bar exam tests for legal skills or abilities related to lawyering is highly questionable. Indeed, the issue of whether bar exams test legal reasoning or lawyering skills arose in the context of a Fourth Circuit Court of Appeals case, *Richardson v.*

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mance tests, Klein's argument would be severely weakened.

84. See Bell, *supra* note 3, at 1216 (stating that the bar exam is totally unrelated to the successful practice of law); Carlson & Werts, *supra* note 3, at 214 (stating that bar exams are nothing more than achievement tests); Rogers, *supra* note 4, at 589-90 (stating that the bar exam does not assure competency in basic lawyering skills); Seligman, *supra* note 3, at 49 (stating that bar exams do not measure the legal reasoning ability that modern legal practice requires).

85. See generally Carlson & Werts, *supra* note 3 (reporting evidence from a study sponsored by the American Bar Foundation, Association of American Law Schools, Law School Admission Council, and the National Conference of Bar Examiners, in association with the Educational Testing Service, that the bar exam merely verifies law school results).

86. *Id.* at 220, 274. In assessing the quality of their sample, the authors offered that "[t]he sample studied and the results obtained in this study seem reasonably representative in the light of what is known about the population of applicants to the bar and the results of related studies." *Id.* at 291.

87. *Id.* at 220. "Cumulative undergraduate grade-point average and law school grade-point average are highly reliable measures [of bar exam results]." *Id.* "The LSAT and undergraduate grade-point average have a moderately strong relationship with performance on the bar examination." *Id.* at 259.

88. *Id.* at 259.

*McFadden*.<sup>89</sup> In *Richardson*, failing applicants to the South Carolina bar challenged South Carolina's admission practices under Title VII of the Civil Rights Act.<sup>90</sup> Under Title VII, a licensing or job admission test must be sufficiently "job related" to comply.<sup>91</sup> The Title VII test for licensing or job admission exams states that "the test used must be 'shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated.'"<sup>92</sup>

The *Richardson* court decided the case without employing the Title VII test for job relatedness.<sup>93</sup> However, if the Title VII standards for job relatedness had applied in *Richardson*, Title VII may well have rendered South Carolina's bar exam unconstitutional. Based upon testimony by South Carolina bar examiners as to how they graded bar exams, the court found that the evidence was unclear whether the South Carolina bar exam bore a "fair and substantial relationship" to the determination of minimal competency.<sup>94</sup> Note how close the court came to saying that the South Carolina bar exam would be unconstitutional if the Civil Rights Act standards for job relatedness were applied to it.<sup>95</sup> Thus, *Richardson v. McFadden* serves as some evidence that the bar exam does not test for legal competency.<sup>96</sup>

89. 540 F.2d 744 (4th Cir. 1976), *cert. denied*, 435 U.S. 968 (1978).

90. *Id.*

91. 42 U.S.C. § 2000e (1982); *see also Richardson*, 540 F.2d at 746 (stating that under a Title VII standard, job-relatedness must be predictive of success in the field).

92. *Richardson*, 540 F.2d at 746 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).

93. In declining to decide the Title VII issue of sufficient job relatedness, the court instead decided that the South Carolina bar exam complied with the Equal Protection Clause of the Fourteenth Amendment, in that proof of disparate racial impact does not invoke the equivalent of Title VII job relatedness standards upon the bar exam. *Id.* at 747. Thus, the bar exam, to remain constitutional, need only comply with the lesser standard of "rational relationship" to the job of lawyering. *Id.* at 748; *see also HANDBOOK* 2d ed., *supra* note 1, at 42 (discussing constitutionality of the bar exam under *Richardson*).

94. *Richardson*, 540 F.2d at 749-50. The bar examiners supported their contentions that their exam questions tested for minimum lawyer competency because 1) each examiner is a successful practicing attorney in South Carolina, who from "observation and experience, understands the skills necessary to practice law competently," 2) each examiner reviewed sample bar exam questions prepared by the National Council of Bar Examiners, and 3) each examiner designed questions to determine whether applicants possess minimum legal competence. *Id.* at 748.

95. For the argument that Title VII of the Civil Rights Act should govern state licensing agencies, including bar examiners, *see Rogers, supra* note 4. Rogers concludes that if Title VII did apply, bar exams would be unconstitutional. *Id.* at 624.

96. For additional support that the bar exam does not prepare applicants for law prac-

To be sure, *Richardson v. McFadden* may not represent a significant blow to the justification that the bar exam tests minimum legal competency, because *Richardson* provided only dictum against the bar exam. However, the position that the bar exam fails to test for the minimum skills required of attorneys was also taken in the *MacCrate Report*, the results of a three-year project conducted by a blue ribbon Task Force comprised of sections of the ABA, the Association of American Law Schools, American Bar Foundation, and a range of legal practitioners and scholars.<sup>97</sup> The ultimate goal of the Task Force was to improve the legal profession and the preparation of lawyers for practice.<sup>98</sup> To accomplish its goal, the Task Force formulated a lengthy and carefully considered analysis of the fundamental skills and values necessary for all lawyers.<sup>99</sup> Two of the fundamental lawyering skills analyzed by the Task Force are skills that bar exam supporters traditionally

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tice or test for lawyering skills, see generally Baird, *supra* note 3. The Baird study "attempted to determine the activities of the legally trained, the use to which they put their legal skills, and their views of the utility of various aspects of their legal training." *Id.* at 264. Baird surveyed a sample of 1600 legally-trained people from six different law schools at three different stages in their careers (beginners, mid-career professionals, and advanced "veteran" professionals). The portion of Baird's study relevant to this Note is his survey of the skills legally trained people employ in their work and their perception of the value of their legal training in developing those skills. *Id.* at 268-83. Except for knowledge of statutory law, Baird found that his subjects emphasized the usefulness of general skills over the usefulness of specific areas of legal knowledge. *Id.* at 292. Six skills emerged as important from the Baird survey: 1) counseling, 2) interviewing clients, 3) directing work of others, 4) organizing flow of work (Baird referred to skills 3 & 4 as "office practice"), 5) interviewing witnesses, and 6) negotiating. *Id.* at 293. Those surveyed felt that their legal educations had left them ill-prepared to use these skills. *Id.* The results of the Baird study imply that a mechanism intended to test minimum competency to practice law which emphasizes substantive knowledge, and to a lesser extent legal reasoning and communication, may miss the mark, because legally trained professionals have identified those areas of their legal training to be less useful in their roles as legal professionals than the areas the bar exam does not test. *Id.*

97. See AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 278 (1992) [hereinafter MACCRATE REPORT]. This report is named for the chairperson of the Task Force, Robert MacCrate. The Task Force endeavored to research and describe the "breadth and complexities of the legal profession," and performed an "in-depth study of the full range of skills and values necessary for a lawyer." *Id.* at xi.

98. *Id.* at 3-8, 123.

99. *Id.* at 123-222. The Task Force noted that it would be impossible for any group to write a comprehensive statement of the skills and values necessary for a lawyer with which all members of the profession would agree. *Id.* at 123-24. However, in endeavoring to compile such a statement, the Task Force hoped to challenge the profession to study what skills are central to the role and functioning of lawyers in our society. *Id.* at 124.

claim the bar exam evaluates: legal analysis and communication.<sup>100</sup> However, the Task Force identified and analyzed a host of additional lawyering skills necessary for lawyers to provide minimum competent legal advice. Those skills included problem solving, legal research, factual investigation, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.<sup>101</sup> Although the Task Force found that the preceding list of lawyering skills, together with substantive legal knowledge, legal analysis, and communication, are the fundamental lawyering skills necessary to provide competent legal advice,<sup>102</sup> a bar applicant need not master the Task Force's list of lawyering skills to be admitted to practice.<sup>103</sup> However, if an attorney lacks familiarity with an identified skill, the attorney should render legal advice only if other attorneys who are familiar with the skill lend assistance.<sup>104</sup>

Despite the presumption that competent legal advice depends on familiarity with all of the Task Force's identified skills, the Task Force recognized that bar exams cannot be employed to evaluate applicants' familiarity with those skills.<sup>105</sup> Because students and attorneys attain skills in a holistic way, usually through a combination of formal legal education and practical experience, a bar exam cannot possibly test for all the skills necessary to be a lawyer.<sup>106</sup> Indeed, most supporters of the bar exam recognize that the bar exam cannot test for all potentially useful lawyering skills. However, to the extent that the bar exam is supposed to test for minimum competency, the *MacCrate Report* suggests that minimum competency cannot be tested on a bar examination, because minimum competency is comprised of a host of skills learned in both

100. *Id.* at 151-57, 172-76. The Task Force noted also that substantive knowledge of legal rules and principles, is also necessary to be a competent lawyer. *Id.* at 125. However, the Task Force does not consider legal knowledge to be a skill, rather it is something all attorneys must possess before giving legal advice. *Id.* The lawyering skills analyzed by the Task Force are means to acquire legal knowledge.

101. *Id.* at 141-51, 157-72, 176-207.

102. See MACCRATE REPORT, *supra* note 97, at 124-25 (stating that a range of both knowledge and skill is necessary to adequately represent a client).

103. *Id.* at 125.

104. *Id.* Thus, minimum competency will often be provided by a "team" of lawyers, all of whom maintain different, yet complementary, fundamental lawyering skills.

105. *Id.* at 132-33.

106. See *id.*; see also *id.* at 278 (explaining the wide array of lawyering skills that are not tested by the bar exam).

educational and practical environments.

In addition, rather than testing legal skills or competence, the bar exam tests examinees' memories and asks them merely to disgorge what they recall.<sup>107</sup> The mere form of the exam asks examinees to replicate the knowledge they have retained from their bar review courses. No lawyer must rely solely on "the law" kept in his or her head, yet such reliance is exactly what the bar exam tests.<sup>108</sup> Indeed, if attorneys based all of their legal arguments on only the information in their heads, they would probably be liable for malpractice.<sup>109</sup> Attorneys usually have many days, weeks, or months to prepare their legal arguments. Even if they have an emergency motion or brief to file, it is unlikely that they are expected to give a legal dissertation based on an analysis of facts in thirty minutes as the bar exam requires. Therefore, an exam which tests memory seems absurd given the context of what attorneys actually do.<sup>110</sup>

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107. Bell, *supra* note 3, at 1216; *see also* Seligman, *supra* note 3, at 49 (claiming that the bar exam demands only that examinees pinpoint issues they've been taught to spot by "cram courses"). The worst offender in terms of testing memory is the Multistate Bar Examination (MBE) portion of the exam which consists entirely of multiple-choice questions. The MBE requires no legal reasoning, but rather requires only rote memorization of bar review outlines. *Id.* at 50. Thus, the MBE may not be a true test of lawyering ability because lawyering involves

the assimilation of facts, research of the law, development of legal issues and strategies, segregating relevant from irrelevant, and helpful from unhelpful materials, and the exercise of judgment in drawing a conclusion. Few of these processes [are] thought to be well-tested by . . . the MBE, which depends for the most part on recognition of accurate or inaccurate discrete statements of law.

Jeffrey M. Feldman & Margie M. Neille, *Certifying Professional Competence: The Alaska Experiment*, 52 B. EXAMINER 4, 6 (1983) (quoting Armando M. Menocal III, explaining why performance testing of actual lawyering skills should be part of the bar exam). In addition, the high value bar exams place on memorization of legal rules or principles may have serious consequences for legal education in general. *See infra* notes 146-49 and accompanying text.

108. Bell, *supra* note 3, at 1216. Judge Edward F. Bell stated that no attorney "will go into a trial depending on his memory to carry him through." *Id.*

109. In analyzing his experience with the Massachusetts bar exam, Joel Seligman argues that the bar exam emphasizes only simple, mechanized rules "that any competent attorney could—and would, if necessary—look up in a library in a matter of minutes." Seligman, *supra* note 3, at 50.

110. In addition, regardless of what "skills" the bar exam actually tests, "non-academic" skills are undervalued by the bar exam. Research by the ABA Task Force on Professional Competence found that many applicants who are strong in "non-academic" lawyering skills, such as courtroom advocacy or negotiation, fail bar exams. Graeme Browning, *Fail the Bar, Sue the Examiners*, 69 A.B.A. J. 1656, 1660 (1983). Also, the bar exam does nothing to foster "lawyering skills" such as those identified in the *MacCrate Report*.

B. *Justification: The Bar Motivates Students to Work Hard and Law Schools to Maintain High Standards*

Many supporters of the bar exam believe it is justified by its effect of stimulating students to pay attention and work hard during law school.<sup>111</sup> This justification makes the questionable assumption that other stimulants are inadequate, such as law school examinations, pressure to maintain high grades for prestige, pride, and employability, pressure to be prepared when called on in class, and pressure to maintain a minimum grade point average to either stay in school or in some cases to maintain a scholarship. In other words, there are other means to motivate lazy students short of a bar exam. In a similar vein, supporters argue that the bar exam forces law schools to maintain high standards.<sup>112</sup> Presumably, if a high percentage of a law school's students fail to pass the rigorous standards of the bar examiners, the law school will improve its program to boost its bar passage rate and thereby keep its program attractive to prospective students.

A unique version of the "bar exam as law school stimulant" argument is that if the bar exam is eliminated, law schools will rapidly deteriorate under Gresham's Law.<sup>113</sup> Gresham's Law is an economic law that says *other things being equal* cheap currency will drive out strong currency.<sup>114</sup> In ordinary discourse, Gresham's

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MACCRATE REPORT, *supra* note 97, at 277-78 (finding that bar examiners intend to test applicants' legal analysis and communication skills, but in reality test primarily for knowledge of legal rules); *see also id.* at 135-222 (explaining and analyzing fundamental lawyering skills and values). To be sure, the answer to correcting the undervaluation of non-academic lawyering skills is not necessarily the elimination of the bar exam. After all, the bar exam might simply be changed to test non-academic skills. However, due to the bar exam's poor job in evaluating students' "academic" skills and the existence of better means to test both academic and non-academic lawyering skills, the bar exam is an inferior means of determining competency. For a proposed alternative to the bar exam, see discussion *infra* part V.

111. *See, e.g.,* Stevens, *supra* note 3, at 27-28 (stating that many supporters of the bar exam believe it keeps students "on their toes"); Thomas, *supra* note 3, at 70 (claiming that the bar exam is a "healthy educational stimulant" for law students).

112. *See, e.g.,* Bard & Bamford, *supra* note 2, at 408 (stating that the most important effect of the bar exam has been the improvement or extermination of low-quality law schools); Griswold, *supra* note 3, at 81 (stating that bar exams encourage schools to do the best job they can); Stevens, *supra* note 3, at 23-24 (stating that the bar exam is the only fair way to check the adequacy of legal education); Thomas, *supra* note 3, at 70 (arguing that the bar exam stimulates law school faculty to maintain high standards).

113. Griswold, *supra* note 3, at 83.

114. *See* JAMES P. QUIRK, INTERMEDIATE MICROECONOMICS 4 (3d ed. 1987) (explaining the history and application of Gresham's Law).

Law means that *other things being equal*, a cheaper or inferior good will replace a superior good. Thus, one who relies on Gresham's Law fears that inferior law schools will replace superior law schools if the bar exam is no longer available to push all law schools toward high standards. Thus, the "bar exam as stimulant" argument implies that without a bar exam a disparity in price and academic rigor will develop among law schools. The argument's hidden assumption is that students will then patronize the cheaper and easier law schools, and avoid the more expensive and difficult law schools. This argument might be persuasive if in real life other things truly were equal; but they are not. That is to say, the bar exam is not the only mechanism to maintain high law school standards. The legal market for high quality lawyers and the practical necessity of ABA accreditation are major influences that will continue to keep law school standards high if there is no bar exam.

Finally, the argument that the bar exam must remain to encourage law schools is anachronistic. Historically, fostering law schools was a primary purpose for the modern bar exam as the two institutions developed simultaneously.<sup>115</sup> When the modern written bar exam developed, law schools were just beginning.<sup>116</sup> Most law schools were unaccredited, thus posing a real danger of graduating unqualified students.<sup>117</sup> Today, virtually all law schools are accredited according to the high standards of the ABA, and in the vast majority of states, only graduates from ABA-accredited law schools may enter the bar.<sup>118</sup> Therefore, a primary justification for bar exams rings less true today.<sup>119</sup>

*C. Justification: Studying for the Bar Exam Provides Applicants With a Beneficial Comprehensive Review of the Law*

Not only does the bar exam test for minimum legal competency, but according to its supporters, the exam also provides students with a beneficial comprehensive review of the law. In other words, the bar exam is the first opportunity for law students to combine

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115. See *supra* notes 49-50 and accompanying text.

116. See *supra* text accompanying notes 38-51.

117. See *supra* notes 47-50 and accompanying text (discussing development of law schools and written bar exams).

118. See MACCRATE REPORT, *supra* note 97, at 113 (stating that for most states admission to an accredited law school is a prerequisite for admission to the bar).

119. At this point it is important to remind the reader that bar exams may undermine rather than improve the quality of law schools. See *infra* notes 146-49 and accompanying text (discussing the bar exam's negative impact on legal education).

their knowledge of various areas of law (such as torts, contracts, and tax) all at once.<sup>120</sup> However, it is not clear that the bar exam can provide any kind of meaningful review or opportunity for students to synthesize their knowledge of the law. The reason is that the bar exam primarily tests an applicant's ability to recall and recite appropriate legal rules.<sup>121</sup> As a result, applicants prepare for bar exams by attending cram courses which teach students how to pass tests and do not provide a review of the law for them to retain after they take the exam. Moreover, at best the bar exam calls for examinees to recount what they learned in their bar review courses, and does not require the implied higher order cognitive skill of synthesis.<sup>122</sup>

Furthermore, supporters of the bar exam have not shown that a comprehensive review is particularly valuable, at least so much as to justify the expense, aggravation, and delay a bar exam causes applicants. As mentioned earlier, if lawyers were required only to

120. Presumably, this comprehensive review takes place both while the applicant studies for the bar exam and while taking it. For authors who support the bar exam on grounds of providing a comprehensive review, see, for example, Bard & Bamford, *supra* note 2, at 408; Griswold, *supra* note 3, at 81 (stating that the diploma privilege allows students to graduate and practice law without ever showing, in a comprehensive way, that he or she is qualified); Hamilton, *supra* note 78, at 37; Stevens, *supra* note 3, at 24, 27 (arguing that this comprehensive review is also an opportunity for students to demonstrate a "synthesis" of law, and that testing for the ability to synthesize the law alone justifies the bar exam); Thomas, *supra* note 3, at 70 (stating that the bar provides a comprehensive exam combining various areas of law, whereas law school exams deal with specific areas of law).

121. See MACCRATE REPORT, *supra* note 97, at 279 (discussing the false premise that one can, and should, know the law in all the many subject areas tested by the bar exam); see also *supra* notes 107-10 and accompanying text.

122. See generally TAXONOMY OF EDUCATIONAL OBJECTIVE HANDBOOK I: COGNITIVE DOMAIN (Benjamin S. Bloom ed., 1956). By "synthesis", supporters of the bar exam are probably referring to what Benjamin Bloom considered one of the highest cognitive skills. *Id.* at 185 (explaining what has become known as "Bloom's Taxonomy of Cognitive Skills"). Only "evaluation" is a higher cognitive skill. *Id.* Evaluation means being able to assess the worth or value of an argument. *Id.* Synthesis means being able to see how concepts relate. *Id.* at 162. If the principle cognitive skill required to conquer the bar exam is memorization, applicants will primarily demonstrate their recollection of legal rules and principles. For example, bar review courses teach applicants that whenever the facts are *X*, rule *Y* applies. All the applicant must do is plug rule *Y* into the facts *X* and the answer presents itself. Thus, there is no opportunity for the applicant to show, for example, how procedural issues will affect the substantive outcome, or how the procedural issues present constitutional questions, or how policies and politics might influence "the answer" just as much as the legal rule. Because the bar exam is usually a series of thirty-minute questions which the applicant is to identify as a "torts question," a "contracts question," or "administrative law problem," the bar exam cannot permit applicants to demonstrate a "synthesis" of the law.



rely on information they retained in their heads to counsel clients, then some sort of comprehensive review might be worthwhile. But since sole reliance on what attorneys know off the top of their heads is usually not normal or wise, supporters of the bar exam have failed to adequately explain the need for such a review.<sup>123</sup>

*D. Justification: The Bar Exam Should Remain Because There is Nothing Wrong with the Competition for Licensure Inherent in the Examination*

Dean Griswold advances the argument that the bar exam should remain because the competition it spawns is beneficial.<sup>124</sup> Dean Griswold appears to lash out at those educators who feel that competition in class is "bad, inhumane, debilitating, or un-American".<sup>125</sup> In defending competition, the dean argues that the bar exam instills a healthy competition between the examinee and himself, driving the examinee to high achievement.<sup>126</sup>

Although few authorities cite competition as a reason to support the bar exam,<sup>127</sup> Dean Griswold is probably correct that some kind of public good can come from competition. However, this justification does not carry much weight because there is already plenty of competition in a law student's career motivating him or her toward high achievement. For example, achieving a high score on the LSAT, getting into law school, performing well while there, and getting a job are all highly competitive endeavors

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123. Bar supporters often respond to criticisms such as this with the interesting retort that lawyers sometimes must rely solely on the information in their heads, as in responding to an opponent's evidence objection or answering a judge's courtroom challenge. However, such challenges are typically anticipated far in advance of a court proceeding when the attorney has a chance to carefully research and prepare the case. In addition, maneuvering through courtroom procedure and responding to judges and opponents are skills that the bar exam is probably not best suited to test. Indeed, the bar exam presents the examinee with time pressures, but it remains a written exercise, whereas responding to judges or opponents is an oral exercise. Skills in oral argument, trial advocacy, and general people skills are better taught through on-the-job legal experience and not a memory test. See MACCRATE REPORT, *supra* note 97, at 299-301 (reporting that more and more law firms have on-the-job in-house training programs for their new lawyers to teach them practical lawyering skills, like trial advocacy, because firms have concluded that these skills are best taught when new attorneys begin practice).

124. Griswold, *supra* note 3, at 82.

125. *See id.* (asking what is wrong with competition).

126. *Id.*

127. The fact that most people will probably agree with the general benefits of competition makes Griswold's argument seem like a red herring. The issue is not whether competition is good, but rather whether the bar exam is a good mechanism to invite competition.

which will push law students to achieve their best.

*E. Justification: The Bar Exam Should Remain Because It Is a Test, and Lawyers are Tested Throughout Their Careers*

Some supporters of the bar exam maintain that the exam has value merely because it is a test and lawyers must get used to tests.<sup>128</sup> If these supporters are correct, then the profession and society in general would be better served by two or three bar exams. To prepare neophytes in any endeavor, it is beneficial to test them in order to prepare them for the stress of testing which occurs in real life. However, imposing difficult situations on students merely because they will encounter difficult situations in their careers may have a negative effect on students and demoralize them before they begin their careers. Moreover, if we adopt Griswold's logic, a bar exam seems to be no special test, but simply a test. If we want to test students because their careers will be full of tests, then why not impose some other kind of test after graduation?

Therefore, if a purpose of the bar exam is simply to impose a stringent test, the bar exam seems little more than an unpleasant rite of passage for all bar applicants. That is to say, the bar exam is an unpleasant task that applicants must endure because all prior applicants have had to endure it. However, justifying something as a rite of passage is really an appeal to tradition and says nothing about the merits of the rite.<sup>129</sup> Therefore, if a justification for the bar exam is that the exam is a "test" or "rite of passage," the justification is circular and is no support indeed. Consequently, bar exam supporters must still explain why their chosen rite of passage deserves retention.

In addition, Dean Griswold advances another similar argument supporting the bar exam because it is a "test." Dean Griswold argues that the bar exam may be a student's only serious hurdle to

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128. Griswold, *supra* note 3, at 82 (paraphrasing Justice Benjamin Cardozo). Dean Griswold boldly states that "the life of the lawyer is inevitably one of constant testing." *Id.* Therefore, the dean continues, the bar exam (a test) must remain. *Id.*; see also HANDBOOK 2d ed., *supra* note 1, at 192 (pointing out adoption by the National Conference of Bar Examiners of Griswold's reasoning that the bar exam is valuable because a lawyer's life is full of "constant testing").

129. An appeal to tradition is when someone says a thing is good because it is part of our history, culture, or tradition, or because people feel reverence or respect for it. For an explanation of the appeal to tradition reasoning fallacy, see T. EDWARD DAMER, ATTACKING FAULTY REASONING 92-93 (1980).

beginning a law career.<sup>130</sup> The implication of Griswold's argument is that law schools have low standards and are unable to sufficiently challenge students. This would appear to be a serious indictment of law schools which Dean Griswold offers without support. Regardless of whether Griswold's assessment that law school does not sufficiently challenge law students is correct, his argument may simply be outdated. When Dean Griswold wrote his famous defense of bar exams twenty years ago, there were not as many law students competing with one another.<sup>131</sup> Very likely the increased competition for places in law school has raised standards across the board.<sup>132</sup>

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130. Griswold, *supra* note 3, at 82-83. Essentially, Dean Griswold argues that law school has become easy: "There is reason to fear that standards in law schools have declined in recent years, and they might have declined further but for the sanction of the bar examinations. Bar examinations may be the only serious hurdle that the student has to overcome." *Id.* at 82.

131. In 1965, there were 136 ABA-approved law schools, but by 1990 there were 175. MACCRATE REPORT, *supra* note 97, at 18. However, in 1965-66 there were 56,510 J.D. enrollments, while in 1990-91 there were 129,580. *Id.* Thus, J.D. enrollments more than doubled while the number of law schools to handle the massive influx of students increased by only about 29%. *See id.* at 13-18 (discussing expansion in the legal profession). In addition, law school applications have reached record highs in the past several years. Ken Myers, *Applicants Declined Slightly From Past Record High Levels*, NAT'L L.J., Oct. 12, 1992, at 4, 4 [hereinafter Myers, *Applicants Declined*] (reporting that although the number of applicants declined "a tiny fraction" for the first time in the previous several years, the number of applications to law schools increased). Despite the slight drop in applicants, there were still 92,500 applicants, more than two for every opening at America's ABA-approved law schools. *Id.*; *see also* Ken Myers, *Job Squeeze Seems to Take Toll on Number of 1992 Applicants*, NAT'L L.J., Apr. 6, 1992, at 4, 4 [hereinafter Myers, *Job Squeeze*] (indicating the number of law school openings in ABA-approved law schools as 44,000). The deputy corporate counsel for the Law School Admission Service reports that "[c]ompetition is fiercer than it has been and that may discourage some people from applying." Myers, *Applicants Declined*, *supra*, at 4. The stiff competition to get into law school and recent recession are the most likely reasons why the 1992 application figures did not match the record 94,000 applications in 1991-92. *Id.*

132. As mentioned earlier, there are many hurdles students must pass over before being admitted to practice. They include the LSAT, acceptance to law school during a time of unprecedented competition, law school assignments and examinations, and in many law schools a substantial writing requirement. These are all serious hurdles facing law students. *See also supra* note 131 (discussing fierce competition to get into law school).

In a related argument, Dean Griswold asserts that because law practice is tough the admissions process should be tough. *See* Griswold, *supra* note 3, at 83. Presumably, the admissions process would be easy if there were no bar exam. For argument's sake, assume Dean Griswold is correct. Why not have two bar exams, then? Perhaps there should also be a bar exam after one and a half years of law school to keep the admissions process tough throughout the applicant's training years. The dean's argument is similar to the "rite of passage" argument. Evaluation of the "rite of passage" argument, discussed *supra* note 129 and accompanying text, is equally applicable to Dean Griswold's tough

F. *Justification: If There is No Bar Exam, Academics Will Be the Only Ones Determining Admission to Practice*

Bar exam supporters offer many versions of the argument that without a bar exam only academics will determine who becomes a lawyer. Supporters contend that the bar exam ensures that state authorities outside of law schools will test the applicants.<sup>133</sup> Also, George Neff Stevens, in reporting responses from bar exam supporters, writes that the state bar "must retain a voice in the qualification process, *either* through a bar examination *or* by insisting upon a direct voice in compulsory curriculum planning and . . . since the latter alternative [is] impractical, the bar examination remain[s] as the better solution."<sup>134</sup>

Hidden in the bar exam supporters' argument is a fear of "ivory tower" types and the assumption that academics are incapable of appropriately determining who may practice law.<sup>135</sup> A large por-

admissions process justification.

133. See, e.g., Griswold, *supra* note 3, at 81.

134. Stevens, *supra* note 3, at 25 (emphasis added). See also *id.* at 29 (opining that the state bar authorities must retain a voice in admitting applicants via the bar exam). Notice how Stevens uses the word "or" in the cited quote. Stevens makes use of a clever rhetorical device called DeMorgan's Law, whereby the writer states his case by presenting two or more choices as the "only" choices. Usually one choice is "clearly" objectionable, making the writer's preferred option seem correct. For a discussion of DeMorgan's Law in legal reasoning, see M. Neil Browne & Daniel R. Hansen, *The Hasty Embrace of Critical Thinking by Business Law Educators*, 9 J. LEGAL STUD. EDUC. 515, 524-25 (1991). A bar exam or a direct voice in law school curriculum are not the only two ways practitioners may have a voice in the admissions process. For example, the practicing bar already has a substantial voice in the accreditation process. In addition, Members can have a voice if some form of mandatory clerkship or apprenticeship is adopted to replace the bar exam, as in Canada. Also, it is not clear that having a voice over law school curriculum is impractical, for that is exactly what has happened in Wisconsin, where the diploma privilege operates for graduates of its two approved law schools. See HANDBOOK 2d ed., *supra* note 1, at 195 (discussing the practicing bar's influence over curriculum in Wisconsin). In fact, the Wisconsin Supreme Court's curriculum requirements are not intrusive. Walter B. Rushenbush, *Do We Need the Bar Exam? Maybe Not—Diploma Privilege Works (in Wisconsin)*, SYLLABUS, Mar. 1986, at 1, 8 (noting that the only requirements are the receipt of a law degree and that two-thirds of a law student's degree credits must come from a "very broad list of 'core' courses").

135. In reporting responses from the practicing profession as to why it must remain in control of the admissions process, George Neff Stevens received and reported one response which stated that, "since legal educators are extremely subject to faddism, there is need for some means of bringing law schools up short, and that the check by way of the bar examination on ivory tower people is an uneasy but reasonably workable arrangement." Stevens, *supra* note 3, at 29. Another stated that "bar examiners are much closer to the realities of practice [than legal educators], and that the bar examination represents a basic fear on the part of the organized Bar of entrusting the entire determination of readi-

tion of the practicing bar's fear is a belief that legal educators are too isolated from law practice to know what it takes to practice law.<sup>136</sup> To be sure, the admissions process should involve the practicing bar, because they are in a better position than academics to observe and evaluate an applicant's day-to-day practice skills. The reason to involve practicing attorneys is not because academics are too isolated or incapable of judging quality, but because law school training is too short and does little to bridge the gap between law theory and law practice. In essence, spending a semester lecturing law students and interacting minimally with them is insufficient contact to evaluate prospective lawyers. However, the three-day memory test that is the bar exam is also insufficient and does little or nothing to add to the admissions process.<sup>137</sup>

*G. Justification: The Bar Exam is Necessary to Ensure that Applicants Are Familiar with Local Law*

Bar exam supporters fear that applicants do not learn local law in law school, because local law is not taught, or students attend school out of state. Therefore, they must be tested on it during the bar exam.<sup>138</sup> Once again, if lawyers were not allowed to use the library and had to rely on knowledge solely in their heads, this justification might have merit. Any practicing attorney, even an old hand who has been practicing in a particular state for a generation

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ness for the practice of law to law teachers, many of whom have had little or no experience in law practice . . . ." *Id.* These comments help indicate why legal educators should not have complete control over the admissions process, but they also offer little insight as to why legal practitioners should retain complete control over the ultimate admissions obstacle, namely the bar exam. If the practitioners' fears are essentially that legal academia is too isolated from everyday practice to assess applicants' lawyering skills, then one might expect the bar exam to assess skills with which legal academics have little experience. However, since the bar exam primarily tests knowledge of legal rules, and to a lesser extent "legal reasoning" and communication skills, there seems no compelling reason to fear academics, for they are well-equipped to test exactly what the bar exam tests. If, however, the bar exam tested more practical lawyering skills, such as those identified in the *MacCrate Report*, there would be greater justification for the practitioners' comments quoted above.

136. See *supra* note 134 and accompanying text. This is a curious argument because it is at best questionable whether the bar exam tests what it takes to be a lawyer. Therefore, it may not matter whether the admitting authority is or is not isolated from law practice.

137. Indeed, if the bar exam is the best that non-academics can offer the admissions process, then they have a responsibility to better explain why they must have the ultimate voice in deciding who becomes an attorney.

138. See, e.g., Stevens, *supra* note 3, at 28 (presenting views of many bar supporters who feel that the bar exam is a necessary vehicle to test applicants on local law).

will reacquaint him or herself with the local law before arguing a case or rendering an opinion.<sup>139</sup> In addition, other incentives besides a bar exam exist to encourage knowledge of local law. For example, an applicant's own interest to succeed in his or her practice would motivate the applicant to learn local law.<sup>140</sup>

In deciding the merits of justifying bar exams because they encourage knowledge of local law, it is important to ask why many states admit practicing attorneys to their bars from other states, without requiring them to pass exams on local law.<sup>141</sup> Typically, the only states which do not offer such reciprocity for attorneys seeking admission from out-of-state are retirement states, such as Florida.<sup>142</sup> This may suggest that the retirement states are more interested in restricting competition than ensuring knowledge of local law.

#### H. General Objections to the Bar Exam

The bar exam may be objectionable on grounds that are not related to the justifications for it. For years, both legal educators and practitioners have opined that the bar exam discriminates against minorities. Evidence of such discrimination usually comes from the fact that a disproportionately high number of African and Latin American applicants fail the bar exam.<sup>143</sup> However, if indeed the bar exam does discriminate against minorities, the natural

139. See *supra* notes 108-09 and accompanying text (indicating that attorneys do not rely solely on their accumulated knowledge).

140. Blackmar, *supra* note 3, at 1244.

141. See HANDBOOK 3d ed., *supra* note 5, at 74:101. "In the great majority of states, a migrant attorney [a practicing attorney from another state] may be admitted on his foreign license without taking an examination provided that he has fulfilled certain requirements of the admitting state which pertain to the length of time the foreign attorney has 'practiced law' in the state of his prior licensure." *Id.*

142. See BAR/BRI DIG., *supra* note 5, at 9-47 (listing requirements for admission into each state's bar).

143. See Bell, *supra* note 3, at 1216-18 (opposing bar exams because of discrimination, noting that a disproportionate number of blacks fail each exam); Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, N.Y. ST. B.J., Apr. 1989, at 42 (objecting to the bar exam because it imposes yet another barrier to the legal profession to minorities); Danyne Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 333 (1987) (noting that "the bar exam is a substantial barrier to minority entry into the legal profession"); Rogers, *supra* note 4, at 570 (noting that tests which "disproportionately exclude Blacks in a significantly discriminatory pattern" are forbidden under Title VII). *Contra* Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, N.Y. ST. B.J., Oct 1989, at 28, 30 (arguing that a disparity in passage along racial lines does not mean that the bar exam is discriminatory).

conclusion is not necessarily to eliminate the bar exam, but rather, the examiners should reform the bar exam so that it no longer discriminates.<sup>144</sup>

In addition to the discrimination problem, the bar exam may be harmful to legal education. The bar exam places a premium on cramming and rote memorization at the expense of true learning and other higher intellectual activity. Presumably, a legal education should teach students to engage in higher order cognitive skills, such as integration (or synthesis), analysis, and evaluation.<sup>145</sup> However, the bar exam requires little of these higher thinking skills and rewards applicants who can memorize legal formulae and apply them on the exam.<sup>146</sup>

Furthermore, the bar exam may fail to "check" law schools and instead damage law school quality.<sup>147</sup> Recall that the bar exam was initially developed to ensure that law schools produced quality education programs.<sup>148</sup> Presumably, if a high percentage of students failed the bar exam, that law school was performing poorly and needed to upgrade its program. Unfortunately, such reasoning pervades legal education. Therefore, law schools that appear weak due to poor bar exam passage rates have little incentive to intro-

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144. Despite years of efforts to reform the bar exam, some argue that discrimination persists. See Bell, *supra* note 3, at 1216-18 (arguing, in 1971, that the bar exam discriminated against black applicants, because the only explanation for disproportionate eventual bar passage rates is race); see also Emsellem, *supra* note 144, at 43 (positing that after years of discriminating against minority applicants, the bar exam continues to discriminate); Holley & Kleven, *supra* note 144, at 335-36 (pointing out continuing discrimination despite efforts to reform the test). The alleged discriminatory effects of the bar exam are beyond the scope of this Note. Since the bar exam continues its reign as the ultimate obstacle to bar admission, the reader may have interest in exploring whether the bar exam unfairly prevents minorities from entering legal practice. For that exploration the reader may wish to consult the titles referenced *supra* notes 143-45.

145. See *supra* note 122 and accompanying text.

146. In addition, success on the bar exam depends on understanding the particular format, grading standards, and difficulty of the bar exam in the applicant's jurisdiction. SMH BAR REVIEW, BAR EXAM JOURNAL 1994 BAR EXAM AND COURSE INFORMATION 1 (1993) [hereinafter SMH BAR REVIEW]. Consequently, bar review courses teach bar applicants how to answer exam questions. Joanne C. Naiman, *Spending Money to Relieve Bar Exam Jitters*, N.J. L.J., Thursday, June 26, 1986, at 7, 7. The operator of a New Jersey bar review course, Joseph L. Marino, explains that the bar reviewers can "second-guess" the bar examiners. *Id.* Because each question is made up by bar examiners with particular personalities and grading biases, the review course administrators study the bar examiners to learn how bar applicants should write essay answers to please the bar examiners. *Id.* at 7, 31.

147. See *supra* notes 112-19 and accompanying text (arguing that the bar exam serves no practical use as a check on law schools).

148. See *supra* notes 49-50 and accompanying text.

duce additional intensive theory courses that demand students to work harder analyzing and evaluating legal arguments. Instead, the schools have incentive to "teach the bar exam." Law professors may emphasize knowledge of local legal rules instead of legal reasoning and higher order cognitive thinking. Consequently, course offerings may be restricted to subjects taught on the bar exam. Even if a school has broad offerings, the students may select their courses with an eye toward the bar exam, taking only courses which they perceive will help them on the bar exam instead of courses they perceive will help them in their careers. Therefore, law schools that were once supposed to be "pulled up" by the bar exam, may instead be "pulled down" intellectually as a consequence of the bar exam.

Finally, the bar exam causes students unnecessary anxiety, expense, and delay.<sup>149</sup>

Taken alone, the possible discrimination against minorities, the

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149. See Blackmar, *supra* note 3, at 1241; Seligman, *supra* note 3, at 55 (noting the high costs of the bar exam, bar review courses, and the cost of foregoing two months' salary). Paul Reidinger, in reporting that about half of practicing attorneys think that the bar exam does not measure legal competence, sympathizes with law students preparing for the bar exam by musing that, "[i]t's summertime, and the living is easy—except for recent law school graduates who will be taking their bar exams before the end of July. They face weeks of grueling preparatory courses before undergoing a test whose relevance to the practice of law is arguable." Paul Reidinger, *Bar Exam Blues*, A.B.A. J., July 1, 1987, at 34, 34. Bar applicants endure a variety of costs and anxieties while taking the bar exam. Most recent law graduates maintain a sense that the bar examination is harder to pass these days, and many graduates understand that the path to becoming a lawyer is a costly investment. Naiman, *supra* note 146, at 7. As a result, bar applicants feel that they *must* pass the bar exam, and they are willing to spend great sums to do it. *Id.* A typical bar review course costs over \$1000. See, e.g., SMH BAR REVIEW, *supra* note 146, at 9-31 (providing cost information for bar review courses for several states). In addition, more and more students purchase specialized "supplemental review courses" which intensively train students in such areas as the Multistate Bar Examination (MBE) or essay writing techniques. *Id.* In 1986, the supplemental review courses cost as much as \$295. *Id.* Of course, the bar exam itself presents applicants with an additional expense. For example, in California, law students applying before deadlines for the 1994 bar exam will pay a total of \$645 (\$55 student registration fee, \$325 examination fee for general applicants, and \$265 fee for an Application for Determination of Moral Character). BAR/BRI DIG., *supra* note 5, at 12. In Ohio, timely applicants will pay a total of \$155 (\$30 student registration fee, if exam applied for by "December 1st following completion of one third of the credit hours required for law school graduation," and \$125 general exam fee). *Id.* at 37. In most states there is a late fee if applications arrive after a certain date which usually falls in the applicant's second year of law school. See *id.* at 9-47 (providing cost information for bar exams in all 50 states and Washington, D.C.). In Ohio, for instance, the late fee is \$100. *Id.* at 37. Therefore, if law students have not decided where they will practice by their third semester of law school, they will probably be assessed a late fee.



negative effect on legal education, and harm to applicants may not be compelling reasons to eliminate the bar exam. However, once the efficacy and need for the bar exam has been seriously called into question, these arguments take on strength. Each of these harms must be outweighed for the bar exam to be justified.

#### IV. COMPARATIVE ANALYSIS

An evaluation of the American bar examination and proposals for alternatives would not be complete without a comparative analysis of bar admissions processes in other common law countries. Comparing and contrasting bar admissions processes in England, Wales, Canada, and Australia provides Americans with an additional perspective upon which to base admissions reform.

##### A. *England and Wales*<sup>150</sup>

To understand legal education in England, it helps to understand the barrister/solicitor distinction. In general, barristers argue cases before a court while solicitors do all other legal work except appearing in court.<sup>151</sup> Although the barrister/solicitor distinction may be breaking down a bit (i.e., solicitors may in some cases appear in court), the paths to becoming either a solicitor or a barrister remain different.

The path toward admission as a solicitor has four stages: 1) academic stage, 2) vocational stage, 3) professional stage, and 4) continuing education.<sup>152</sup> These days, most bar applicants in England fulfill the academic stage by obtaining a law degree from a university.<sup>153</sup> The degree is really an undergraduate degree, typically begun when the student is eighteen or nineteen years old.<sup>154</sup> A student need not study law, but if a student obtains a university degree in something other than law, the student must take an intensive one year course called the Common Professional Examination

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150. England and Wales share a common admissions process. G.S.A. Wheatcroft, *The Education and Training of the Practising Lawyer in England*, 30 B. EXAMINER 3, 3 (1961).

151. *Id.* at 5-7; see also Gary Scanlan, *A Brief History of the Legal Profession*, in THE IVANHOE/BLACKSTONE GUIDE TO THE LEGAL PROFESSION 1990 3-6 (Jonathan Grosvenor ed., 1990) (explaining basic concepts of the British legal profession).

152. Richard Ramsay, *Routes into the Profession*, in THE IVANHOE/BLACKSTONE GUIDE TO THE LEGAL PROFESSION, *supra* note 151, at 45.

153. *Id.* at 45-46.

154. Wheatcroft, *supra* note 150, at 10-11.

or CPE.<sup>155</sup> Mature students, those who come to law some time after obtaining a non-law degree, must spend two years in the CPE.<sup>156</sup>

Following their university degree, either in law or in some other field combined with successful completion of the CPE, the bar applicant enters the vocational stage.<sup>157</sup> This stage consists of an intensive course called the Solicitor's Finals. The course is a series of intensive lectures and exams that primarily require students to commit an array of legal information to memory.<sup>158</sup>

After passing the final exams in the Solicitor's Finals course, the applicant moves on to the professional stage.<sup>159</sup> In this stage, the applicants complete a period of "articles" or a clerkship with a practicing solicitor or law firm.<sup>160</sup> Applicants arrange these articles themselves, perhaps through notices posted at the Finals school, but they also often receive help from the Law Society (a group which functions like an American bar association).<sup>161</sup> There is no requirement that these positions be paid; however, most of these articles or clerkships are in fact paid positions. The law firms want to entice students to clerk with them in hopes of hiring them full-time later.<sup>162</sup>

After completing the articles, a bar applicant is called to the bar as a solicitor, but then enters the fourth stage, known as continuing legal education. For the first three years of a solicitor's practice, he or she must attend continuing legal education courses to ensure ongoing development as a practitioner.<sup>163</sup>

Similarly, the route toward admission as a barrister exists in several stages: 1) academic stage, 2) vocational stage, 3) bar examination, and 4) pupillage and practical training.<sup>164</sup> Two common paths comprise the academic stage. Some students graduate from a university with a law degree, while others obtain some other degree and then complete the Common Professional Examination

155. Ramsay, *supra* note 152, at 46.

156. *Id.*

157. *Id.* at 47.

158. *Id.*

159. *Id.*

160. Ramsay, *supra* note 152, at 47.

161. *Id.*

162. *Id.* at 47-48.

163. Many larger law firms arrange these continuing legal education courses for their new associates. *Id.* at 48.

164. Ann Halpern, *Routes into the Profession*, in THE IVANHOE/BLACKSTONE GUIDE TO THE LEGAL PROFESSION, *supra* note 151, at 159.

course.<sup>165</sup> To move on to the vocational stage, the university degree must be "qualifying," meaning it must be ranked sufficiently high by the Council of Legal Education. In other words, someone who barely passes and gets his law degree will not have a "qualifying" degree.<sup>166</sup> Therefore, not everyone who obtains a law degree or some other degree in combination with the CPE may qualify to become a barrister.

Students with qualifying degrees enter the vocational stage.<sup>167</sup> The vocational stage consists of training at the Inns of Court School of Law.<sup>168</sup> The training lasts three academic terms and consists of intensive teaching of the skills necessary to be a barrister.<sup>169</sup> The focus of the training is to prepare the student for practice, not to expand the student's knowledge for its own sake.<sup>170</sup>

Students who pass the vocational courses go on to sit for the bar examination. Students taking the bar exam must write six "papers," each on a specific subject chosen by the bar examiners, and then the students must write two optional papers on their choice of topics from among a list of several alternatives.<sup>171</sup> The goal of both the bar exam and the vocational training is to teach and assess minimum skills.<sup>172</sup> Students who pass vocational training and the bar exam are supposed to have the skills to survive the next period, because during the second six months of pupillage would-be barristers practice independently.<sup>173</sup>

Students passing the bar exam move on to pupillage to work under a certified pupil master, who is a practicing barrister.<sup>174</sup> The bar applicant, now called a pupil, will argue real cases in court, just as if the pupil were a barrister. After six months of pupillage, the master must sign a certificate indicating the pupil has performed satisfactorily.<sup>175</sup> In return, the pupil gets a practicing

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165. See *supra* notes 155-57 and accompanying text (discussing the CPE).

166. See Halpern, *supra* note 164, at 159-61.

167. *Id.* at 159.

168. *Id.* at 159-60.

169. *Id.*

170. *Id.* at 165-67.

171. Halpern, *supra* note 164, at 169-70.

172. *Id.* at 169.

173. *Id.* at 166-67.

174. See generally David Latham, *Pupillage and the Practical Training*, in THE IVANHOE/BLACKSTONE GUIDE TO THE LEGAL PROFESSION, *supra* note 151, at 171 (explaining the pupillage stage of barrister training).

175. *Id.* at 172.

certificate. Now the student may advocate on his or her own behalf without the need for the Master's close supervision. After this second six months, if the pupil has performed adequately, he or she gets a full practicing certificate and is now officially a barrister.<sup>176</sup>

### B. Canada

In Canada there is no barrister/solicitor distinction. A Canadian lawyer is both a barrister and solicitor.<sup>177</sup> Despite Canada's historic ties to Britain and France, Canada's pattern of legal education closely follows America's, with a significant departure following law school.<sup>178</sup> Canadian legal education philosophy has been described as follows:

The [law school] curriculum was designed to give students three years of thorough academic grounding in the law. The guiding spirit was a wish to impart a critical understanding of legal institutions, and the scope and purpose of legal rules, rather than simply a training for day-to-day practice. The university did not claim to teach everything the law student would need to know. Many pieces of practical knowledge, it was considered, could best be imparted outside the university, and this duty was left to the profession.<sup>179</sup>

When Canadian lawyers are eligible to practice law they are "called to the bar" or said to be part of the Law Society of a particular province.<sup>180</sup> Thus, for example, a Toronto applicant called to the bar would become a member of the Ontario Legal Society. To be called to the bar, a student must earn a Bachelor's Degree at a Canadian college.<sup>181</sup> Usually this is a four-year degree, but some law schools will admit a student with two years or less of undergraduate training.<sup>182</sup> Then an applicant must graduate

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176. *Id.*

177. See FREDERICK B. SUSSMAN, *THE LAW IN CANADA* 45 (1976) (explaining the bar admissions process in Canada).

178. See S.M. WADDAMS, *INTRODUCTION TO THE STUDY OF LAW* 26 (1983) (noting that while Canada has modeled its law school after America's schools, it has added a practical training component to legal education).

179. *Id.* at 26.

180. GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 186-87 (1977).

181. *Id.*

182. *Id.* at 186.

from a Canadian law school. Like their American counterparts, Canadian law programs last three years.<sup>183</sup> Finally, an applicant to the Canadian bar must complete a bar admission course provided by the practicing legal profession.<sup>184</sup>

The bar admission course is unique to Canada and diverges sharply from the post-graduate path toward admission in America. The Canadian bar admission course usually consists of an "articles in clerkship," followed by completion of about six months of classroom course work. The course work is intended to equip the student with practical legal skills and knowledge of the day-to-day operation of a law practice.<sup>185</sup> Therefore, the course work in the bar admissions course includes such mundane affairs as how many copies of various documents must be filed in particular courts.<sup>186</sup> The articles in clerkship is similarly practical in its purpose and consists of a one-year clerkship spent under the tutelage of a practicing attorney. The articles in clerkship "provides the graduating law student with an opportunity to learn from an experienced practitioner many of the techniques and procedures not included in the academic courses given at law school."<sup>187</sup>

### C. Australia

In Australia practicing lawyers are generally divided into barristers and solicitors, similar to those in England and Wales.<sup>188</sup> Barristers are lawyers who concentrate their practice in presenting cases in court, while solicitors concentrate on doing virtually all other legal work, including some court representation.<sup>189</sup> Austra-

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183. *Id.*

184. *Id.* at 187; see also SUSSMAN, *supra* note 177, at 46 (discussing Canada's bar admission course).

185. See SUSSMAN, *supra* note 177, at 46.

186. WADDAMS, *supra* note 178, at 26-27.

187. GALL, *supra* note 180, at 187. Recently, The Ontario Law Society has changed its bar admissions course to include "one month of Law Society instruction prior to the commencement of articles, one year of articles of clerkship, and a further three months of Law Society instruction thereafter." *Id.* at 411.

188. See MARK NICHOLLS ET AL., LEGAL STUDIES FOR SOUTH AUSTRALIA 140-41 (1989) (explaining Australia's barrister/solicitor distinction).

189. *Id.* In South Australia and a few of the smaller states, there is a "fused profession," meaning there is no distinction between barristers and solicitors. *Id.* at 141. In general, customers seeking legal representation in Australia may not directly contact barristers. *Id.* Instead, customers must first hire a solicitor, and then if a case requires either the legal opinion or court case presentation of a barrister, the solicitor, not the customer, would hire the barrister. *Id.* In most Australian states, solicitors may present court cases in the lower courts. Thus, solicitors need not hire barristers each time the former tries a

lian lawyers, whether they choose to practice as barristers or solicitors, must be admitted to practice by the Supreme Court of the state where they practice.<sup>190</sup> The only requirements for admission to practice are that an applicant have "an appropriate legal education [and be] of good moral character."<sup>191</sup> Therefore, Australian lawyers gain admission to the bar via the diploma privilege.<sup>192</sup> In order for an applicant to have an "appropriate legal education," the applicant must obtain a law degree from an accredited law college.<sup>193</sup>

In Australia, legal educators are concerned about admitting applicants to practice solely on the basis of obtaining a law degree.<sup>194</sup> Concern primarily arises from the fact that a law degree is a "generalist's" degree, educating private practitioners, when in fact most practitioners are specialists and do not remain in private practice throughout their careers.<sup>195</sup> Thus, an Australian law degree may be insufficient preparation for today's Australian law graduates.<sup>196</sup>

Consequently, some Australian states have instituted "bridge-the-gap" programs to help ease law graduates into their chosen profession.<sup>197</sup> For example, in Melbourne, Victoria, law graduates may enroll in a non-mandatory Practical Training Course, which combines theoretical and practical skills training within a variety of substantive law formats.<sup>198</sup> Similarly, in New South Wales, the

case. See NICHOLLS, *supra* note 188, at 141.

190. See *id.* at 138 (explaining admission to practice in Australia).

191. *Id.*

192. See Margaret Thornton, *Portia Lost in the Groves of Academe Wondering What to do about Legal Education*, in LEGAL EDUCATION AND LEGAL KNOWLEDGE 9, 10 (Jan Duncanson ed., 1991) (discussing tensions in Australian legal education between providing a scholarly liberal education and practical training).

193. *Id.* The Supreme Court of a state or a statutorily constructed group of senior practitioners specifies subjects or particular areas of knowledge that must be included in the law school's curriculum in order to be accredited. *Id.* Technically, Australia does not require applicants to obtain law degrees from accredited law colleges. However, no law college in Australia has failed to comply with the terms of accreditation. *Id.*

194. See, e.g., *id.* at 18; see generally DAVID PEARCE ET AL., AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION (1987).

195. Thornton, *supra* note 192, at 18.

196. See *id.* (questioning appropriateness of the current Australian law degree to satisfy heterogeneous demands for legal services).

197. See MACCRATE REPORT, *supra* note 97, at 408, 410 (describing the Australian NSW program which teaches practical lawyering skills).

198. *Id.* at 406 (listing the skills taught: legal research, drafting, negotiation, counseling, communication, and office management).

bridge-the-gap program teaches practical lawyering skills in the context of substantive and procedural sections.<sup>199</sup> Thus, for example, while graduates learn about practical topics in property and commercial law, they also learn and practice "account[ing], professional responsibility, office management, computer skills, interviewing, advising, research, drafting, and negotiation."<sup>200</sup>

## V. PROPOSED ALTERNATIVES

Many opponents of the bar exam do not advocate eliminating it. Instead they argue that it should be significantly altered.<sup>201</sup> After attacking the bar exam as useless, harmful, or superfluous, it seems strange for these opponents to then decide to keep the exam, even though they advocate changing it. The reason such a position seems strange is that many of the problems associated with the bar exam are problems that would plague any "competency" test.<sup>202</sup>

For example, the skills required of a competent attorney may not be testable in a bar exam format. Lawyer skills take time to develop, and more importantly, they take time to display. Complicated legal issues which lawyers are hired to resolve take time, certainly much longer than the two or three days a bar exam would permit. Therefore, it seems impossible to assess legal competency in the short time allotted for any bar exam, current or reformed.<sup>203</sup>

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199. *Id.* at 408.

200. *Id.* (citing Audrey Blunden & Les Handler, *A New Course at the New South Wales College of Law: The Introduction of the Full Time Course Strategy Plan*, J. PROF. L. EDUC., June 1987, at 42, 45-49).

201. *See infra* note 207 and accompanying text.

202. Indeed a review of the attacks on the justifications for the bar exam are mostly attacks on the idea of a final, all-or-nothing, time-pressure test, rather than attacks on the modern bar exam *per se*. *See supra* text accompanying notes 79, 107-10, 120-23, 128-32, 146-49 (discussing drawbacks of time-pressure tests such as the bar exam).

203. I do not mean to say that no mechanism should exist to protect the public from incompetent lawyers. However, the bar exam should not be that mechanism. Unlike some authors who agree that the bar exam should be eliminated, I do not place confidence in the marketplace to protect the public as does W. Sherman Rogers. *See Rogers, supra* note 4, at 590-91 (quoting Bell, *supra* note 3, at 1216). A brief look at common market failures, especially the problem of asymmetrical consumer information, will reveal the danger of solely letting the market screen incompetent attorneys. Asymmetrical information occurs when the buyer and seller do not have the same knowledge about the good or service for which they are contracting. In the case of the provision of legal advice, a service, consumers have little information, while practitioners have a great deal of information. Thus, there is great potential for consumers of legal advice to hire incompetent attorneys because they have little way of knowing ahead of time who is and who is not competent.

In addition, many critiques of justifications for the bar exam indicate that the goals of the bar exam have either already been achieved by the time applicants graduate from law school,<sup>204</sup> or simply do not require a bar exam to achieve.<sup>205</sup> Therefore, to take a position that the bar exam is useless, harmful, or superfluous, and then to merely advocate its reform, is untenable.

One alternative to the bar exam is the diploma privilege.<sup>206</sup> Models of the diploma privilege exist in Wisconsin, Australia, and in a modified form in Canada.<sup>207</sup> So long as law schools maintain high admissions standards and quality study programs, there is little reason to require a bar exam after graduation. Recall that bar exams developed to ensure that law schools maintained high quality programs.<sup>208</sup> Now that competition to enter law school is fierce and the law schools have other means to check their quality the bar exam has lost its *raison d'être*.<sup>209</sup>

Another alternative to the bar exam is a mandatory clerkship or apprenticeship. Americans may have much to learn from the Canadians and British, who both provide extensive clerkships to "bridge the gap" from course work to practical legal work. Mandatory clerkships have the added benefit of involving practitioners in the licensing process. Given the many shortcomings of the bar exam, practitioner involvement in the form of organizing and supervising clerkships would be far more valuable than writing and grading bar exams.

Unfortunately, in America, the concept of mandatory clerkships is controversial. In George Neff Stevens' study of bar examiners including judges, deans of law schools, and law school professors, he found little support for mandatory clerkships.<sup>210</sup> Generally,

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204. See, e.g., *supra* notes 84-88, 111 and accompanying text.

205. See, e.g., *supra* notes 84-110, 112-23, 128-43 and accompanying text.

206. See *supra* notes 5, 57-62, 134-37 (discussing the history and modern incarnations of the diploma privilege).

207. Recall that Canadian law students need not take a bar exam. However, upon graduation from a Canadian law school, they are not automatically admitted to the bar. They must then take a bar admissions course consisting of a period of clerkship and class work covering practical lawyering skills. See *supra* notes 185-88 and accompanying text.

208. See *supra* notes 49-50 and accompanying text.

209. See *supra* notes 111-19 and accompanying text (arguing that other means exist to promote high standards in law schools besides the bar exam). See *supra* notes 131-32 and accompanying text (arguing that competition to get into law school is fierce). In addition, the bar exam may actually lower standards in law schools. See *supra* notes 146-49 and accompanying text.

210. See Stevens, *supra* note 3, at 16, 31-32 (listing a variety of reasons why mandatory clerkships have little support). Stevens notes the following problems with mandatory



there is concern that practitioners will not agree to supervise clerkships, or if they do, they will not provide students with a meaningful experience. In addition, there is a real possibility that the clerkship would amount to slave labor where "the clerk [is] expected to put in a substantial number of hours per day on law office business for which service he receive[s] no compensation on the theory that the service was payment for the training received."<sup>211</sup>

Although many of the criticisms of clerkships are worth investigating, most of them were offered against clerkships as a replacement for traditional law school education.<sup>212</sup> No one realistically suggests a return to Lincoln's day when applicants could "read law" with a lawyer and gain admission to the bar. Instead, a mandatory clerkship would simply augment traditional legal education and provide a student with an important bridge between law school and "real" legal practice.

As experience in Canada and Great Britain has shown, there is little reason to fear that applicants will become slaves to their preceptors. In Britain, for example, a barrister's clerkship consists of a one-year pupillage. During the pupillage, the aspiring barrister must argue real cases in court, and that is the means for evaluating the applicant. If a pupil performs only "slave labor," such as filing and proof-reading, then there is no means to evaluate the pupil. Thus, a clerkship that requires applicants to perform real lawyerly tasks in order to determine whether the applicant should advance in the admissions process should prevent the kind of useless clerkships that critics fear.<sup>213</sup>

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clerkships: no uniformity in clerk training, the preceptor or supervising practitioner will not have time to devote to his pupil, the clerks will perform menial and repetitious tasks (slave labor) that will add little to the clerk's skill enhancement, and the preceptor will more than likely be a specialist, thus limiting the skills he [or she] can impart. *Id.* at 16.

211. *Id.*

212. *See id.* at 15-16; HANDBOOK 2d ed., *supra* note 1, at 111.

213. In addition, fears that applicants could not afford to "work for free" during their clerkships may be unrealistic. Competition among law firms will force them to continue their practice of paying law clerks. *See supra* note 163 and accompanying text (explaining that although there is no requirement to pay British law clerks completing their mandatory clerkships, most are paid). Most likely, law firms will hire clerks either because the firms need help with their workload or because the firms recruit future lawyers through a clerkship program. Either way, the firms will still pay their clerks to induce them to work at a particular firm. If for some reason, applicants could not find paid clerkships, grants and student loans should be allowed to cover costs of completing a clerkship, just as they would cover classroom education costs.

### A. A New Alternative

It seems that American legal education has come nearly full circle. In colonial America and through the Civil War, legal education consisted almost entirely of practical skills acquired while studying with a practitioner.<sup>214</sup> These days, legal education is highly theoretical and conducted almost entirely in a classroom. Although the practicing bar has the ultimate say over who enters the profession, it has almost no role in legal education. The bar exam as it exists today does nothing to further a student's education or thinking ability.<sup>215</sup> Instead, the exam has assumed the role of rite of passage that gives the profession and the public a false sense that it performs a valuable function.

Therefore, a proposed alternative that combines the best of the diploma privilege and a mandatory clerkship may be the best alternative to the bar exam. By the best of the diploma privilege, I mean resurrecting faith in the law schools and providing them with ample opportunity to evaluate law students, so that graduating from law school becomes even more of an achievement and preparation for practice than it is now. With the program I propose, the law student will be much better prepared when the law school "hands over" the law student to the practitioners. The practitioners will then supervise the applicant's continuing education in a practical setting via a mandatory clerkship.

The proposed alternative would borrow heavily from the idea of performance tests. Currently, Alaska, California, and Colorado include performance tests as part of the traditional bar exam.<sup>216</sup> The performance tests are supposed to transcend "memorization of legal rules"<sup>217</sup> and instead test examinees' abilities to perform and utilize lawyering skills, such as those delineated in the *MacCrate Report*.<sup>218</sup> In Alaska, students must write a legal memorandum in the time allowed, answering particular legal questions from a set of facts.<sup>219</sup> To aid the student, the bar examiners provide both rele-

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214. See *supra* Part II (discussing the history of admission to the American bar).

215. See *supra* notes 107, 121-22, 146-49 and accompanying text.

216. MACCRATE REPORT, *supra* note 97, at 280.

217. *Id.*

218. See *id.* (explaining that bar exam performance tests determine the students' ability to use analytic skills and practical knowledge, not whether they have memorized legal rules); see also *supra* notes 97-106 and accompanying text (discussing the bar exam and its relation to lawyering skills).

219. MACCRATE REPORT, *supra* note 97, at 280.

vant and irrelevant cases and statutes.<sup>220</sup> In California, bar applicants receive a "case file," containing memos, police reports, cases, statutes, and letters.<sup>221</sup> The applicants then have three hours to answer two questions seeking the applicant's analysis of the legal issues.<sup>222</sup> Similarly, in Colorado, in two thirty-minute essays, students are asked to explain major differences between certain evidentiary rules, and then review a two-page client statement and write a memo indicating the important legal issues that would require research and which of the client's documents might hold additional useful information.<sup>223</sup>

Proponents of performance testing should be praised for their attempts to transcend superfluous traditional bar exams. Performance test advocates correctly recognize that there is more to competent lawyering than memorization of legal rules. However, current performance tests represent unrealistic means to evaluate applicants' abilities to perform fundamental lawyering skills besides legal reasoning. To be sure, lawyers must complete the kinds of tasks provided on performance tests. However, few lawyers would ever draft legislation in thirty minutes, much less review an entire client file in a similarly short time. Therefore, bar applicants must be given the opportunity to demonstrate their ability to evaluate an entire client's case, make all the relevant legal arguments, and draft all of the necessary documents, but in a more realistic manner.

In order to accomplish the goals of performance tests, the admissions procedure should involve drastically changing a law student's third year curriculum. The law student's third year is underutilized and characterized by the student methodically plowing through the year, simply marking time until graduation. This year could be the vehicle to vastly improving the admissions process in combination with eliminating the bar exam.

During the third year, a law student would embark on an intensive supervised research project. The project would constitute a "grand performance test," and would account for most of the student's credit hours that year. Consequently, law classes would not take away from project time. A faculty advisor or team of

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220. *Id.*

221. *Id.* at 280-81.

222. *Id.* at 281. California applicants also have a drafting exercise on the bar exam which asks applicants to either outline a deposition, draft legislation, write a brief, write a closing argument, or some similar task. *Id.*

223. MACCRATE REPORT, *supra* note 97, at 281.

advisors would assist the student in the same way a master's committee would advise a graduate student on a thesis. The project would consist of a complicated fact pattern or dispute that involves a variety of legal issues. Thus, in researching how the dispute might be resolved, the student would be required to integrate the core elements of a legal education, such as contracts, torts, civil procedure, property, constitutional law, criminal law, and professional responsibility. The fact pattern would also raise legal issues which are important but may not have been covered in classes taken by the student, such as tax, environmental law, or corporate law. This will prevent students from choosing all of their elective courses simply to prepare for the third year research project. Also, lawyers constantly encounter legal issues about which they know little or nothing, and they must educate themselves and consult with experts.

As should become obvious, such an intense project offers the student an opportunity to work like a lawyer and be evaluated like a lawyer. As discussed *supra*, the bar exam cannot test what lawyers do, nor can it assess legal competency. In addition, a performance test cannot adequately test in thirty minutes what in real life takes most lawyers much longer. Therefore, the research project would not be encumbered with unrealistic time restraints such as those imposed during the bar exam. Students would take the entire year or one semester to work on their projects. As a result, the project would enable students to engage in thought (instead of memorization and recital). It would force students to integrate ideas, analyze facts and legal doctrine, and evaluate proposed resolutions to the disputes while working in a lawyer-like fashion. Thus, the research project has the appealing quality of closer correspondence with what lawyers actually do than either the traditional bar exam or performance testing.

In addition, the practicing bar could have meaningful input into legal education through the third year project instead of providing a competency test which serves little use. Practitioners could help draft the fact patterns, thereby ensuring that legal issues currently facing the practicing bar will be incorporated into the student's research.

Once the project is completed, the student will have intimate knowledge of the legal issues involved and the real-life problems clients face, instead of only the fleeting acquaintance students obtain in preparing for the bar exam. Also, they will have demonstrated an ability to think with the highest order of cognitive skills,

to research efficiently, and to communicate effectively their findings and proposals. Perhaps more importantly, students will show that they can take charge of a long and arduous task and prove that they can manage a project of proportions facing real practicing attorneys. Therefore, law students would be of better use to their preceptors and would more quickly assimilate themselves into the legal environment when they begin their clerkship.

A rigorous project such as the one I have outlined would greatly assist students in preparing for their transition from the classroom to the law office. To further facilitate such a changeover, every law student should benefit from a mandatory clerkship following graduation.<sup>224</sup> As noted earlier, there are many criticisms of clerkships, not the least of which is the varied or uncertain experiences each applicant might encounter. In evaluating Vermont's clerkship,<sup>225</sup> the *MacCrate Report* implies that the single most disturbing aspect of clerkships is that there is no guarantee that an applicant will learn, or even be exposed to the fundamental lawyering skills necessary for minimum competency.<sup>226</sup> I agree. However, the purpose of a clerkship is not to teach all fundamental lawyering skills. A formal legal education, and the research project go a long way toward teaching most of the *MacCrate Report's* fundamental lawyering skills. However, the practicing bar must assume responsibility for educating prospective lawyers and take their roles as preceptors or supervisors seriously. In so doing, clerkships will accomplish all that they realistically can accomplish. That is, applicants will learn the subculture of professional attorneys—how a law firm operates, how a judge

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224. Clerkships following formal legal education in other common law jurisdictions typically range from three months to one year. Students completing an enormous research project in their third year will have already acquired many of the practical lawyering skills that they will need to offer minimum competency to clients. Thus, a one year clerkship is unnecessarily long. In six months, applicants should receive exposure to the skills and legal environment that will help them develop into practitioners. Consequently, students would be admitted to practice, assuming all goes well, in October or November after May graduation. This time frame is identical for a student who takes and passes the bar exam in the summer after graduation.

225. Recall that in Vermont a portion of an applicant's legal education may be acquired via a clerkship. The sort of clerkship I intend is not one that could substitute for any portion of a formal legal education. In contrast, the clerkship I envision is supplementary to a legal education.

226. See MACCRATE REPORT, *supra* note 97, at 289 (criticizing clerkship programs in New Jersey, Vermont, and Delaware because the program is not guaranteed to teach all necessary tasks and skills).

administers a court, where filings are made. Applicants will interact with attorneys and clients, with no guarantee of mastering skills such as interviewing, counseling, and negotiating, but they will at least have an opportunity for exposure to such lawyering skills. In addition, a clerkship could be tailored toward an applicant's particular career path. Thus, if an applicant hopes to practice criminal law, the applicant could clerk in the prosecutor's office, with a trial court judge, or in a criminal law firm.

## VI. CONCLUSION

Historically, the modern written bar exam was developed to ensure that law schools provided high quality legal education. Since that time, other justifications, such as the motivation of students to high achievement, has perpetuated the bar exam's domination as the ultimate determinant of bar admission. However, the historical and contemporary justifications for the bar exam are no longer convincing. As a result, the bar exam should be eliminated. Admissions processes from other common law countries indicate that a modern bar exam as administered in the United States is not necessary to ensure competent attorneys. Instead, a special practical education in the third year, combined with a mandatory postgraduate clerkship, may both produce better attorneys and help "bridge the gap" between law school and legal practice.

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