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Why the Bar Examination Fails to Raise the Bar

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As 2014 came to a close, the National Conference of Bar Examiners ("NCBE") was facing an outpouring of questions and concern about the most recent bar exam, and the NCBE was dealing with a great deal of pressure to defend the exam and provide greater transparency about the examination process.[1] The NCBE President, Erica Moeser, devoted her entire comment in the December 2014 issue of the *Bar Examiner* to the topics of the reliability, validity, and fairness of the bar exam in general and the 2014 exam in particular.[2] The impetus for the various challenges and inquiries, as well as this published response, was that "average scores on the Multistate Bar Examination ("MBE") fell to the lowest level since the July 2004 administration."[3]

In her December 2014 column, President Moeser explained that the drop in pass rates was "inevitable . . . because most jurisdictions follow the best practice of setting their written scores on the MBE scale."[4] She provided a list of possible factors, including a drop in mean LSAT scores in law school matriculants over the past few years, the rise in experiential learning offerings in law schools, a trend toward fewer required courses, and the proliferation of bar preparation courses in law schools as potential explanations for the dramatic decline in bar pass rates.[5] Her conclusion was that the bar results communicated news that law schools simply would rather ignore and, to address the issue, law schools should change pedagogy or fail more students.[6]

This was not the first salvo in the battle of words following the announcement of dramatically lower bar passage rates across the country.[7] In October 2014, President Moeser delivered a memo to law school deans

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1. Tamara Tabo, *When Bar Scores Plummet, Who Will Examine the Examiners?*, ABOVE THE L. (Nov. 7, 2014, 6:01 PM), http://abovethelaw.com/2014/11/when-bar-scores-plummet-who-will-examine-the-examiners/.

2. *See generally* Erica Moeser, *President's Page*, 83 B. EXAMINER 4, (2014), *available at* http://ncbex.org/assets/media_files/Bar-Examiner/articles/2014/830414-abridged.pdf [hereinafter Moeser, *President's Page*].

3. *Id.*

4. *Id.*

5. *Id.* at 6.

6. *Id.* at 7.

7. *See* Letter from Erica Moeser, President, Nat'l Conf. of B. Exam'rs, to Kathryn Rand, Dean, U. of N. D. (Dec. 18, 2014), *available at* http://taxprof.typepad.com/files/ncbe.pdf [hereinafter *December Response*].

defending the bar exam and raising concerns about the abilities or preparedness of that particular applicant group.[8] This memo touted the efforts of the NCBE to ensure that "no error occurred in scoring the examination or in equating the test with its predecessors."[9] President Moeser asserted, "[b]eyond checking and rechecking our equating, we have looked at other indicators to challenge the results. All point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013."[10]

Not surprisingly, these comments prompted a number of academic leaders to respond.[11] The debate is highlighted in a Law Blog post authored by Jacob Gershman and hosted by *The Wall Street Journal*, entitled "Decline in Bar Exam Scores Sparks War of Words."[12] This blog particularly noted the prompt response by Dean Nicholas W. Allard of Brooklyn Law School, who responded to the October 2014 memo by saying that President Moeser's assertions were unconvincing and demanding a thorough investigation of the exam and its methodology.[13] The next month, Dean Kathryn Rand of the University of North Dakota forwarded a statement endorsed by seventy-nine law school deans from across the United States to the NCBE, asking the organization to do the following: investigate the 2014 exam and disclose the results of that review; examine and provide all data concerning the integrity and fairness of the 2014 exam as well as the reliability of the MBE components; and, particularly, "provide the evidence it relied on in making the statement that the takers of the bar exam in July 2014 were less able than those in 2013."[14]

In addition to the December 2014 *Bar Examiner* comment mentioned earlier, President Moeser wrote a letter responding to the Dean's Statement.[15] The tone of that response was telling. President Moeser reiterated the NCBE's "confidence" in the scoring of the July 2014 exam.[16] However, while she reported that "[e]very aspect of [the exam's] methodology and execution has been reviewed and re-reviewed," she also

8. Memorandum from Erica Moeser, President, Nat'l Conf. of B. Exam'rs, to Law School Deans (Oct. 23, 2014) *available at* https://www.law.upenn.edu/live/files/3889-multistate-bar-exam-memo-oct-2014pdf [hereinafter *October Memorandum*].

9. *Id.*

10. *Id.*

11. *See, e.g.*, Jacob Gershman, *Decline in Bar Exam Scores Sparks War of Words*, WALL ST. J. (Nov. 10, 2014, 6:45 PM), http://blogs.wsj.com/law/2014/11/10/decline-in-bar-exam-scores-sparks-war-of-words/.

12. *Id.*

13. *Id.*

14. Letter from Kathryn Rand, Dean, U. of N. D., to Erica Moeser, President, Nat'l Conf. of B. Exam'rs (Nov. 25, 2014) *available at* http://online.wsj.com/public/resources/documents/2014_1126_randletter.pdf [hereinafter *Dean's Statement*].

15. *December Response*, *supra* note 7.

16. *Id.*

insisted that the results of those studies would "not be revealed publicly."[17] NCBE "systems are proprietary, and security is essential."[18] Her letter also stated bluntly that the concern about exam integrity "hardly merits response."[19] President Moeser referred those who might question the exam to prior commentary on the bar exam and, in particular, the feature in the *Bar Examiner* known as the "Testing Column," as likely to be "instructive for those who wish to gain greater understanding of how [NCBE] licensing tests are constructed and scored."[20] Finally, President Moeser defended her use of the phrase "less able" to describe the July 2014 cohort by explaining that "less able" is a term of art consistently used among measurement professionals to express comparative information about performance,[21] and further justified her statement by asserting, "[t]he fact remains that the candidates who sat for the July 2014 MBE performed less well than did the candidates that sat the previous July."[22]

Even before the July 2014 bar results were announced and this particular dispute between the NCBE and academic leaders heated up, there were long-standing mutterings about the merits of the bar exam as currently configured.[23] On January 14, 2014, the ABA Journal posted a brief on-line article titled, "A Second State Considers Allowing its Law-School Grads to Skip the Bar Exam."[24] While it may have been noteworthy that Iowa was considering joining Wisconsin in allowing graduates of an accredited in-state law school to be licensed and admitted to the practice of law without the necessity of taking a bar exam at all, the comments that were posted by members of the public (many of whom at least claimed to be licensed attorneys) were the most revealing.[25]

Some commentators seemed to think it would be unfair to remove the bar exam for this generation of law students. One irate reader replied, "That's bunk! The rest of us had to pass the bar exam."[26] Many of the more negative comments revealed a rather profound lack of trust in law schools and law professors, with one poster arguing that "the bar exam

17. *Id.*
18. *Id.*
19. *Id.*
20. *December Response*, *supra* note 7.
21. *Id.*
22. *Id.*
23. *See* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 364-65 (2002).
24. Debra Cassens Weiss, *A Second State Considers Allowing its Law-School Grads to Skip the Bar Exam*, A.B.A. J., (Jan. 14, 2014, 11:45 AM), http://www.abajournal.com/news/article/a_second_state_considers_allowing_its_law-school_grads_to_skip_the_bar_exam.
25. *Id.*
26. WHAT?!, Comment to Weiss, *supra* note 24.

arguably protects the public and is at least some minimal guarantee of legal knowledge—unlike law school . . . ."[27] Another respondent complained:

> The distinguishing prestige of the law profession stems from passing the bar exam. It is common knowledge tha [sic] all law schools are not the same in graduating quality law students. So far, the bar exam appears to be the only method of determining the quality of education a law school delivers. Eliminating the bar exam as a qualifying method will vest too much power on law school professors in determining who becomes a lawyer.[28]

On the other hand, even more responses reported a perceived disconnect between the information tested on the bar exam and the skills actually needed to practice law.[29] One commentator wrote: "I think that the Bar examinations in the USA are a waste of time. Its [sic] like a lottery."[30] Another argued (with some humor) that "[t]he bar exam is a ridiculous rite of passage (pun intended). All it proves is that someone listened in his/her BarBri course. A good standardized test taker is no substitute for someone with common sense."[31] Another poster reported:

> I took the three day bar exam and passed the first time, only because I spent three months studying for it, and paid for one of the bar passing courses that give you strategy hints and practice exams. Frankly, I could have skipped the $90,000 law school and passed the bar by taking the strategy course.[32]

Additionally, the bar exam is criticized as an "anachronism,"[33] an "artificial industry created to add another layer of expense to the profession,"[34] and "a test of endurance" not competence.[35] This type of commentary warrants the continual re-examination of the way in which we license individuals to practice law. Does the bar exam protect the public? Does it raise standards? Or is it merely another obstacle increasing the difficulty and expense of becoming an attorney without providing real indicia of ability to serve as a competent, ethical member of the legal profession?[36] Are there

27. df, Comment to Weiss, *supra* note 24.
28. Mike Okeke, Atlanta, GA, Comment to Weiss, *supra* note 24.
29. *See generally* Comments to Weiss, *supra* note 24.
30. Bingo Wong, Comment to Weiss, *supra* note 24.
31. g, Comment to Weiss, *supra* note 24.
32. California Crazy, Comment to Weiss, *supra* note 24.
33. ACOP, Comment to Weiss, *supra* note 24.
34. Midwest Lawyer, Comment to Weiss, *supra* note 24.
35. C Law, Comment to Weiss, *supra* note 24.
36. This is not the first time that questions like this have been raised, as bar examinations have been drawing criticism since they were first imposed. *See, e.g.*, Leon Green, *Why Bar Examinations?*, 33

other factors that should be considered when examining the question of whether our bar exam really does what we hope and intend?

This article does not take the position that we would be better off without a bar exam, although there may well be a case to be made in support of that proposition. There is enough evidence that public and the profession's confidence in legal academia is not universally strong enough to support turning the decision on licensing over to law schools alone.[37] However, a review of what is generally tested on bar exams does suggest that it is unlikely that current bar exams are testing the right things in the right way as a proper measurement of competence to practice law.[38] Certainly the current test does not seem to be asking questions that should allow anyone to conclude that applicants who fail are "less able" to practice law, at least as ordinary speakers of the English language use that phrase.[39]

In fact, there is substantial evidence that the bar exam itself is helping shape the legal education system into one that is failing at least some of its constituents.[40] If we want to "raise the bar" with our professional licensing examination, we need to make sure that we are testing the skills that are important for being a competent attorney.[41] We also want to make sure that law schools are teaching the skills that are necessary to the practice of law, not just those that will aid in the passing of an arbitrary examination.[42]

Part I of this article begins with an overview of the current examination process.[43] Part II discusses the skills widely regarded as essential to practicing law as a competent and ethical attorney.[44] Part III considers the extent to which there is a disconnect between the skills that have generally been identified as important for successful and ethical attorneys and what the legal community is testing on current bar exams.[45] Part III also includes

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NW. U. L. REV. 908, 908-13 (1939). It is not true that they are universally condemned, and some proponents have set out valid arguments supporting at least the notion of bar examinations. *See, e.g.*, Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81, 81-82 (1974). There is certainly something to be said about independent and uniform, comprehensive examinations, as are common in many other learned professions. This article, however, does not take issue with the idea of bar examinations, but merely with the way in which they currently operate.

37. Elie Mistal, *Law Deans Blame the Bar Exam, Instead of Themselves*, ABOVE THE L. (Mar. 20, 2015, 1:28 PM), http://abovethelaw.com/2015/03/law-deans-blame-the-bar-exam-instead-of-themselves/

38. *See* Curcio, *supra* note 23, at 364-67.

39. *Cf. October Memorandum*, *supra* note 8 (President Erica Moeser draws precisely this conclusion); *see December Response*, *supra* note 7 (Moeser explains that in testing circles "more able" and "less able" "are terms of art that are in common usage among measurement professionals," and are used to "express comparative information about performance," which is confirmed by the fact that July 2014 candidates performed less well than previous cohorts.).

40. *See* Curcio, *supra* note 23, at 422-23.

41. *See, e.g.*, *id.* at 411-14, 422-23.

42. *Id.* at 420-21.

43. *See infra* Part I.

44. *See infra* Part II.

45. *See infra* Part III.

an overview of some of the ways that this disconnect may be encouraging law schools to make choices that do not advance the goal of producing competent professionals capable of successfully engaging in the practice of law.[46] Part IV suggests some possible directions for change, assuming that we are really serious about implementing a meaningful licensing examination process in this country rather than sticking with the familiar—a superficial method that, while seemingly rigorous, lacks relevance.[47]

I. THE MODERN AMERICAN BAR EXAM

Requirements for admission to the bar and bar examinations have changed dramatically in this country.[48] In the first fifty years of this country's existence, legal education and bar admission were typically based on apprenticeships alone or, at most, a stated apprenticeship and an informal oral exam for which the requirements varied widely from jurisdiction to jurisdiction.[49] Written bar examinations became prevalent only after lawyers began to practice in states other than those where they attended law school.[50] Written examinations are now the norm, even though significant differences exist between the exams required by different American jurisdictions.[51]

Today, because every American jurisdiction has its own standards for admission to the bar as well as its own approach to bar examinations, it is difficult to speak in broad generalities about "the" bar exam.[52] Each jurisdiction, however, incorporates a significant portion of the tests created by the NCBE.[53] This can include the Multistate Professional Responsibility Exam ("MPRE"), the MBE, the Multistate Essay Examination ("MEE"), and/or the Multistate Performance Test ("MPT").[54]

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46. *See infra* Part III.

47. *See infra* Part IV.

48. *See* Jacob A. Stein, *How Adams Beat Jefferson and a Few Thoughts about the Bar Exam*, 13 GREEN BAG 447, 449-50 (2010).

49. *Id.* at 449.

50. *Id*.

51. *Id.*

52. *See* NAT'L CONF. OF B. EXAM'RS & A.B.A., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2015 v, 29 (Erica Moeser & Claire Huismann eds., 2015) *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf [hereinafter COMPREHENSIVE GUIDE]. The NCBE prepares bar exams for use in, and includes in its documentation of bar licensing standards, all fifty states plus the District of Columbia, Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. *See id.* at 29.

53. For a thorough and fascinating recitation of the history of the NCBE, *see* Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 249-50 (2005). This article also addresses in compelling fashion the revenue generating character of the bar examination process.

54. Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admissions to the Legal Profession*, 18 NAT'L BLACK L.J. 63, 71 (2005).

The MPRE is required for admission in all American jurisdictions except Maryland, Wisconsin, and Puerto Rico.[55] This examination consists of sixty multiple choice questions that the test taker must answer within two hours.[56] The express purpose of this exam "is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct."[57] The exam is not designed to replace the character and fitness requirements imposed by state licensing authorities, focusing instead on the rules of conduct for the profession "currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, and the ABA Model Code of Judicial Conduct, as well as controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules."[58] The MPRE is unusual insofar as the multistate exams are concerned because the applicant does not have to wait until after graduation; the applicant may take the exam while still in law school.[59] The MPRE is also unusual in that, even though it is copyrighted by the NCBE (as are the other multistate examinations described here), the Law School Admissions Council ("LSAC") actually administers the exam.[60]

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55. *Jurisdictions Requiring the MPRE*, NCBE, http://www.ncbex.org/about-ncbe-exams/mpre/ (last visited Oct. 2, 2015) [hereinafter *The MPRE*].

56. *Id.* The time limit may be adjusted as an accommodation for persons with disabilities in accordance with standards and procedures announced by the NCBE. *MPRE Common ADA Accommodations*, NCBE, http://www.ncbex.org/exams/mpre/ada-accomodations/common-accomodations/ (last visited Oct. 2, 2015).

57. *The MPRE*, *supra* note 55.

58. *The Multistate Professional Responsibility Examination (MPRE)*, NCBE, http://clarkcunningham.org/PR/MPRE-Information.htm (last visited Oct. 2, 2015).

59. Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 L. & CONTEMP. PROBS. 193, 196 n.9 (1995). At one point, Florida was a lone holdout, requiring that applicants graduate from an accredited law school prior to taking the MPRE. *Id.* (commenting on the fact that Florida was the sole exception to the practice of allowing law students to sit for the MPRE). However, Florida no longer retains that rule and now allows law students to take the MPRE prior to graduation. FLA. BAR ADMISSIONS R. 4-13.1(a) (2015), *available at* https://www.floridabarexam.org/web/website.nsf/rule.xsp#4-131. Some jurisdictions do allow law students to take the bar exam prior to graduation, but the conditions on this option are usually quite restrictive. According to the NCBE, Arizona, the District of Columbia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New York, North Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin permit law students to sit early under at least some circumstances. COMPREHENSIVE GUIDE, *supra* note 52, at 1-3. However, six of those states require students to have completed the requirements for graduation prior to the bar exam, and another requires applicants to be on active overseas duty during the last semester of law school if they have not completed all requirements. *Id.* Two states limit the right to students with five or fewer credit hours remaining; five states allow students to sit if they will graduate within one or two months of taking the exam, and Arizona has a 120 day window for students who need fewer than eight credit hours to graduate at the time of the exam. *Id*.

60. *Test Day Policies*, NCBE, https://www.ncbex.org/exams/mpre/test-day-policies/ (last visited Oct 2, 2015).

The most widely used NCBE product is the MBE, which is required in all but two American jurisdictions: Louisiana and Puerto Rico.[61] The MBE consists of 200 multiple choice questions distributed among the following topics: constitutional law, contracts, criminal law and procedure, evidence, real property, and torts.[62] Effective for the February 2015 bar exam, the NCBE has added civil procedure to this list.[63] The stated purpose of this exam "is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns."[64] The weight given to this examination and the score required to pass varies by jurisdiction,[65] but "[i]n most states, the MBE represents 50 percent of the applicant's total score."[66]

A majority of American jurisdictions also require the MEE.[67] This portion of the exam includes up to six thirty-minute essay questions, and the stated purpose of these questions is as follows:

> The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.[68]

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61. *Jurisdictions Administering the MBE*, NCBE, http://www.ncbex.org/exams/mbe/ (last visited Oct. 2, 2015) [hereinafter *The MBE*]. According to the official website of the National Conference of Bar Examiners, the MBE is developed by the NCBE and "is required for admission to the bars of all but two U.S. jurisdictions (Louisiana and Puerto Rico)." *Id.*; *Information About Bar Admission and Examination*, PENN ST. L., https://pennstatelaw.psu.edu/office-student-services/information-about-bar-admission-and-examination (last visited Oct. 2, 2015).

62. *Preparing for the MBE*, NCBE, http://www.ncbex.org/exams/mbe/preparing/ (last visited Oct. 2, 2015).

63. *Id.*

64. *The MBE*, *supra* note 61.

65. *Id.* According to the NCBE, "[e]ach jurisdiction determines its own policy with regard to the relative weight given to the MBE and other scores. . . . Jurisdictions that administer the Uniform Bar Examination [UBE] weight the MBE component 50%." *Id.*

66. Michael Moiso, *Administering the Bar Exam*, 68 OR. ST. B. BULL. 62, 62 (Nov., 2007).

67. *The MBE*, *supra* note 61. Thirty one jurisdictions administer the MEE as part of their licensing process. *Id.* The American jurisdictions relying on this examination include: Alabama, Alaska (effective July 2014), Arizona, Arkansas, Colorado, Connecticut, District Columbia, Guam, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Northern Mariana Islands, Oregon, Palau, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id*.

68. *Id.*

The subjects that may be covered by the MEE are also broader than those covered by the MBE.[69]

The most recent addition to the list of possible bar examination formats prepared by the NCBE is the MPT.[70] The MPT consists of ninety-minute items[71] that are "designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation."[72] This test is "not a test of substantive knowledge," rather its intent is "to examine six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise."[73] The enumerated skills are the ability to:

> (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.[74]

The MPT does this by including for each item a file, library, and assigned task to be completed within the allotted time period.[75]

Each MPT question includes a file containing a supervising attorney's memo, facts of the case, source documents, and other materials such as "transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes."[76] As in real life, a typical file may include relevant and irrelevant information, ambiguous and incomplete information, or possibly conflicting data.[77] "Examinees are expected to

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69. *Preparing for the MEE*, NCBE, http://www.ncbex.org/exams/mee/preparing/ (last visited Oct. 2, 2015) The MEE can include essays that deal with substantive or procedural law covering business associations (agency, partnership, corporations, and limited liability companies), conflict of laws, constitutional law, contracts, criminal law and procedure, evidence, family law, federal civil procedure, real property, torts, trusts and estates (decedents' estates, trusts, and future interests), and Uniform Commercial Code (negotiable instruments, bank deposits and collections, and secured transactions—although, negotiable instruments is being dropped as of February, 2015). *Id.*

70. *Jurisdictions Administrating the MPT*, NCBE, http://www.ncbex.org/about-ncbe-exams/mpt/ (last visited Oct. 2, 2015) [hereinafter *The MPT*].

71. *Id.* Jurisdictions participating in the MPT may offer either or both of the two items, and jurisdictions using the Uniform Bar Exam (UBE) include both. *Id.* Jurisdictions also weight the MPT differently, with those following the UBE assigning 20% to the MPT portion of the exam. *Id.*

72. *Id.*

73. *MPT: General*, NCBE, http://help.ncbex.org/mpt (last visited Oct. 2, 2015).

74. *Preparing for the MPT*, NCBE, https://www.ncbex.org/exams/mpt/preparing/ (last visited Oct. 2, 2015).

75. *Id.*

76. *Id.*

77. *Id.*

recognize when facts are inconsistent or missing and are expected to identify sources of additional facts."[78] The library for each item on the MPT consists of legal authorities such as cases, statutes, regulations, or rules.[79] Like the file, the library may include extraneous information.[80] The examinee is expected to derive the applicable law and principles necessary to perform the assigned task from the library; it is expected that "the Library materials provide sufficient substantive information to complete the task."[81]

Currently, forty-two American jurisdictions administer the MPT as part of their bar exam.[82] While the MPT provides grading guidelines, and the NCBE offers instruction on grading for these items, each jurisdiction is independently responsible for scoring the MPT.[83] "Unfortunately, the MPT in most states only counts for 12.5 percent of the overall score."[84]

In addition to the multistate components of the bar exam, thirty-five American jurisdictions add state-specific or local materials to their bar exams.[85] The state or local materials can be in the form of essay, multiple choice, or performance tests.[86] While a few states have recently eliminated

78. *Id.*

79. *Preparing for the MPT*, *supra* note 74.

80. *Id.*

81. *Id.*

82. *The MPT*, *supra* note 70. The jurisdictions that rely on the MPT are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District Columbia, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Northern Mariana Islands, Ohio, Oregon, Palau, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

83. *Id.*

84. Moiso, *supra* note 66, at 62.

85. COMPREHENSIVE GUIDE, *supra* note 52, at 25-26. The jurisdictions that add state or local questions to their bar examinations as of January 2014 include: Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana , Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Wisconsin, Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. *Id.*

86. *Id.* Many of the jurisdictions that include state and local material only add essay questions in the state or local section of their bar exam, including Delaware (eight), Georgia (four), Illinois (three), Indiana (six), Kansas (seventeen), Kentucky (six), Maine (six), Louisiana (nine), Maine (six), Maryland (ten), Massachusetts (ten), Michigan (fifteen), Mississippi (six), Nevada (eight), North Carolina (twelve), Ohio (twelve), Oklahoma (sixteen), Rhode Island (three), South Carolina (six), South Dakota (one, on Indian law), Tennessee (nine), Vermont (four), Guam (one), Northern Mariana Islands (two), Palau (three or four), and Virgin Islands (covering twelve subjects of local law). *Id.* A few states impose a combination of essay and other question formats in their state or local materials: California asks six locality-based essay questions and also uses two performance tests; Florida asks three essays and 100 multiple choice questions; New York asks five essay questions and fifty multiple choice questions; Pennsylvania requires six essays and one performance test; Texas has twenty short answer questions each on civil and criminal procedure and twelve essay questions. *Id.* Oregon and Wisconsin can administer any combination of multistate and local essay questions that the examiners decide upon in a given year. COMPREHENSIVE GUIDE, *supra* note 52, at 25-26. Puerto Rico only examines applicants on local law, asking 184 multiple choice questions and eight essay questions. *Id.* Hawaii adds only fifteen multiple choice questions, all based on Hawaii's rules of professional conduct. *Id.*

the state-specific materials on their bar exams, most of these jurisdictions will continue asking locality-based questions—those derived from the law of the particular jurisdiction or a particular part of law in the jurisdiction.[87]

Not surprisingly, given the substantial variation in exam composition (not to mention the differences in scaled scores required and how the distinct parts of the exam are weighted in each jurisdiction), average pass rates vary significantly from jurisdiction to jurisdiction.[88] Overall pass rates in 2012 varied from around 51% in California and the District of Columbia[89] to more than 90% in Montana.[90] Even if data is limited to persons graduating from ABA approved law schools, the pass rates still varied tremendously.[91] In 2012, several jurisdictions had pass rates under 60% for graduates of ABA approved law schools,[92] while several other jurisdictions had pass rates over 85%.[93] Pass rates for first-time takers also varied significantly among the jurisdictions imposing bar examination requirements.[94] The 2012 data is not an aberration; ten-year average pass rates also show the extreme variation between jurisdictions.[95]

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87. *Id.* at 25, 28. Two of the states (Alabama and Alaska) eliminated their state-specific essays effective with the July 2014 bar exam. *Id.* The remaining states in this list currently have not published any intent to eliminate the state or local materials. COMPREHENSIVE GUIDE, *supra* note 52, at 25, 28.

88. *See id.* at vii, ix. Specific information on scoring and minimum passing scores on bar examinations in the various jurisdictions is not easy to acquire. *Id.* The "Comprehensive" Guide to Bar Admissions has a "Code of Recommended Standards for Bar Examiners," which specifies that no individual who is not a member of another bar in the United States should be "admitted to practice until the person has passed a written bar examination." *Id.* No guidance is given as to how different parts of the examination should be scaled or scored. *Id.* The Comprehensive Guide does note that different jurisdictions use different tests (*see* COMPREHENSIVE GUIDE, *supra* note 52, at 25 Chart 8) and include varied state-specific questions (*see id* at 26); it also reports that the vast majority of states have both multiple choice and essay questions, and scale the written component and the MBE in some fashion (*see id.* at 29-30 Chart 9). How the scores are scaled and weighted is not reported.

89. *2012 Statistics*, B. EXAMINER 6, 8 (2013), *available at* http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf. Also at the low end of pass rates, Wyoming had a pass rate of 53%. *Id*. at 9. Palau had a pass rate of 30%, but had only ten applicants. *Id*. Puerto Rico had a pass rate of 36%. *Id*.

90. *Id.* at 8. The North Mariana Islands had a 100% pass rate, but there were only eight applicants in 2012. *2012 Statistics*, *supra* note 89, at 9.

91. *See id.* at 10-11.

92. *See id.* Puerto Rico had a pass rate of 37%, Wyoming's was 53%, Guam was at 57%, Michigan was at 58%, and both Louisiana and the District of Columbia were at 60%. *Id.*

93. Minnesota and New Hampshire had pass rates of 85%, Iowa had an 88% pass rate, Missouri was at 89%, Montana was at 91%, and the Northern Mariana Islands had a 100% pass rate. *Id.*

94. *See 2012 Statistics*, *supra* note 89, at 12-15. Pass rates for first-time takers in American states in 2012 (thus excluding Puerto Rico and smaller jurisdictions like Palau and the Northern Mariana Islands) ranged from a low of 60% (Wyoming) to a high of 93% (Montana). *Id.*

95. *See id*. at 22-23. For example, California's pass rate between 2003-2012 never goes over 54% overall or 71% for first-time takers, and Minnesota's never drops below 81% overall or 88% for first-time takers. *Id*.

Regardless of the variables, the bar exam is clearly a significant hurdle to overcome before becoming a lawyer.[96] One commentator has suggested that about 150,000 law school graduates have taken one or more bar exams but have never passed the test.[97] In 2007, the national average for passing the bar exam was 60% for first-time takers.[98] For those who failed the first time, the average pass rate dropped to approximately 50% on the second attempt, and to 40% on successive attempts.[99] To make matters worse, the risk of failing is not felt evenly among white and minority law school graduates,[100] and it is not just lower-tier law school graduates or those who finished at the bottom of the class that fail the exam.[101] Perhaps most infamously, Kathleen Sullivan, then-dean of Stanford Law School and a nationally renowned expert on constitutional law, failed the California bar exam in 2005, after a long and extraordinarily distinguished career in academia.[102] Notably, the "long, proud tradition of gifted attorneys who failed the bar, at least on their first try," includes: Hillary Clinton, Michelle Obama, Franklin D. Roosevelt, Jerry Brown, Pete Wilson, and Benjamin Cardozo (who reportedly sat for the bar six times).[103]

Notwithstanding this widely available and frequently discussed information, state licensing authorities maintain that the bar examination is an impartial, statistically verified test of minimum competency that demonstrates an applicant's understanding of fundamental legal principles and basic skills.[104] However, this data begs for a more detailed consideration of how the legal profession views the minimum, critical skills that a lawyer needs. After all, how can one ascertain minimum competency or understand what constitutes a fundamental principle or basic skill if one does not know the ultimate skill set required for the competent practice of law?

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96. Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 927, 936 (1997). One commentator has characterized the exam as "a particularly grueling and potentially unfair right of passage." *Id*. at 227. She also describes bar exams in general as being "terribly flawed." *Id*. at 936.

97. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 15 (2010).

98. Moiso, *supra* note 66, at 62.

99. *Id.*

100. Yakowitz, *supra* note 97, at 3, 19-21, 22-23 (providing statistical data supporting this contention and gender and socio-economic differences). Statistical data is also reported in Howarth, *supra* note 96, at 930, 931 n.24-26 (reporting data from the California bar exam).

101. Elizabeth Wurtzel, *A Badly Run Law Business Begins with the Bar Exam: An Opinion*, 10-11 L. OFF. MGMT. & ADMIN. REP. 7, 7 (2010).

102. *Id.*

103. *Id.*

104. *See generally* COMPREHENSIVE GUIDE, *supra* note 52.

II. WHAT MAKES A COMPETENT AND ETHICAL ATTORNEY?

Law schools do not train students to become experts in "the law."[105] Instead, for decades, law schools have trained students to "think like lawyers."[106] The "law" changes dramatically over time, and it is often (perhaps almost always) ambiguous.[107] The trick for lawyers is to become proficient at gathering and looking at specific facts, determining legal issues arising out of those facts, ascertaining the rules that might apply to those facts (which generally requires research and review of various legal authorities), and predicting, persuading, or prescribing for third parties (whether clients, judges, juries, opposing advocates, or contractual participants) how those rules should govern the situation at hand.[108] That is why it takes months to teach first year law students contracts when the same subject matter is covered in a matter of a few hours in a bar exam class. Law school classes are not as focused on teaching students the acceptable substitutes for consideration or the mechanics of the current statute of frauds as are bar preparation courses.[109] Of course, the class may cover those issues, but not in a "here are the rules" fashion.[110] Instead, law school (and particularly the first year curriculum at most institutions) focuses on basic skills like spotting legal issues, understanding multiple sides of those issues, separating the relevant facts from those facts that are not outcome-determinative, and deriving legal rules from complicated and often ambiguous statutes, regulations, and judicial opinions.[111] Considerations like the evolution of legal doctrine and how public policy and economic considerations impact the development of law are also important in most classes, as these considerations do come into play when lawyers act as counselors and advocates.[112]

It is true that exams at the end of a semester or the end of a course typically test the student's understanding of the material just covered, usually in essay exams that require the student to review specific facts and apply "the law" to those facts to generate a probable outcome.[113] These

105. Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implications*, 94 NEB. L. REV. 1, 4-5 (2015).

106. *Id.* at 10.

107. *See* Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1528 (1996).

108. *See* Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 411-15 (1986).

109. *See* Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 86 (2012).

110. *Id.*

111. Krantz & Millemann, *supra* note 105, at 10-11.

112. *Id.* at 10-12.

113. Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails "Objectified" Exams*, 34 NEW ENG. L. REV. 785, 786 (2000) ("During the typical law

questions are often very detailed and call for an in-depth understanding of the materials covered in the class.[114] There are a number of reasons why this kind of exam has become so prevalent. First, we can place some blame (or credit, for those who are fans of the practice) on the accrediting standards imposed by the ABA, although those standards no longer absolutely require examinations in most law school classes.[115] Second, and

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school examination, students are asked to demonstrate their ability to recognize complex bundles of information and to perform well on a single test that is worth 100% of their grade . . . ."). That is, in large part, what bar examination essay questions do as well. *Jurisdictions Administering the MEE*, NCBE, www.ncbex.org/exams/mee/ (last visited Oct. 2, 2015) [hereinafter *The MEE*].

114. *See* Crane, *supra* note 113, at 786, 788-89.

115. *See* ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015, Standard 311(a) (2014) [hereinafter 2015 ABA STANDARDS AND RULES]. Prior to 1996, one of the ABA's accreditation standards used to require the scholastic achievement of students be tested with a "written examination of suitable length and complexity," excluding only clinical work and writing classes such as moot court, practice court, legal writing and drafting, seminars and individual research. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 304(b) (1995). This language was moved to Interpretation 303-2 in 1996. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 303-2 (1996). In August of 1999, the language was amended to permit evaluation by examinations or papers or other documents, as well as assessment of performances of students in the role of lawyers. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Interpretation 303-1 (1999). The current interpretation, initially adopted with the ABA Standards for Accreditation in 2004-2005, ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Interpretation 303-1 (2004), says that "[s]cholastic achievement of students shall be evaluated by examinations of suitable length and complexity, papers, projects, or by assessment of performances of students in the role of lawyers." ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Interpretation 303-1 (2013) [hereinafter 2013-2014 ABA STANDARDS AND RULES]. This has been a very gradual, and somewhat reluctant movement away from requiring examination to permitting other measures of assessment.

In August of 2014, the Section of Legal Education and Admissions to the Bar proposed and then approved Revised Standards for Approval of Law Schools. *See generally* ABA, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS (2014) [hereinafter 2014 ABA REVISED STANDARDS]. A redlined version of the revised standards is also available, *see* ABA, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_redline.authcheckdam.pdf (last visited Oct. 2, 2015).

The revised standards contain significant revisions to rules specifying how law schools must go about assessing student learning. *See generally* 2014 ABA REVISED STANDARDS, *supra* note 115. Revised Standard 314 requires a law school to "utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students." *Id.* at Standard 314. Revised Interpretation 314-1 explains:

> Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.

Id. at Interpretation 314-1. In addition, Revised Interpretation 314-2 clarifies that "[a] law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method." *Id.* at Interpretation 314-2.

probably significantly, although not particularly pedagogically desirable,[116] a single examination at the end of the class is rather easy and comfortable for most law professors.[117] The faculty member only has to grade one exam, and most law professors come from an academic background where that is what they were exposed to (and did well on).[118] Third, this format is used on the bar exam and therefore is one we, as legal educators, must consider because our accreditation standards also require us to prepare our students for the bar exam.[119] Fourth (although logically this should be far more important to legal educators), a student's ability to pull the rules out of the course material and apply them to facts reveals (to some extent, at least) that student's ability to spot the issues, understand particular perspectives, and to communicate the legal rules within the context of the response.[120] Additionally, because the material has (hopefully) recently been covered in the class, one could view the classroom experience as substituting for the

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Because the new standards embody a relatively substantial shift in the approach of the accrediting body, there are phase-in periods for these new rules. ABA, TRANSITION TO AND IMPLEMENTATION OF THE NEW STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 1 (2014) [hereinafter NEW STANDARDS TRANSITION]. The new assessment rules included in Revised Standard 314 are to apply to 1L students, beginning in 2016-17. *Id.* at 2.

116. "Studies have shown that the best way to learn is to have frequent exams on small amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this." James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991). While objective exams such as those in a multiple choice format have become more popular, in a 1995 survey of law professors teaching traditional doctrinal courses, only about one-third report using any objective questions, and most of those use them for no more than 25% of the class grade. Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis of Law School Final Exams*, 65 UMKC L. REV. 657, 685-86 (1997).

117. Sheppard, *supra* note 116 at 693 ("The exam as the sole method of grading has led to some obvious advantages, particularly in reducing faculty work-load.").

118. Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 266 (1999).

119. *NCBE Exams*, NCBE, http://www.ncbex.org/exams/ (last visited Oct. 2, 2015). ABA Standard 301 requires accredited law schools to have an educational program that prepares its students for admission to the bar. 2013-2014 ABA STANDARDS AND RULES, *supra* note 115, at Standard 301. One of the interpretations of this provision requires consideration of bar passage rates in "assessing the extent to which a law school complies with this Standard." *Id.* at Interpretation 301-3. Further guidance with regard to bar passage rates suggests that an average pass rate of 75% for the five most recent calendar years should be sufficient. *Id.* at Interpretation 301-6. Consideration has been given to whether this percent should be increased, but the August 2014 Revised Standards (discussed in *supra* note 116) retain the 75% pass rate. 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 316. For a more detailed description of this requirement, *see infra* notes 188-89 and accompanying text.

120. Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 440-41 (1989) (describing the intellectual functions essay examinations perform). There have been a number of very creative and supportive explanations of why essay examinations are an appropriate evaluative tool in law schools. *Id.* One commentator concluded that traditional essay examinations evaluated a law student on the following for "complex but general attributes": (1) the ability to internalize legal doctrine; (2) demonstration of conventional legal imagination; (3) legal productivity; and (4) "the capacity for self-study and self-learning in diffuse, complex, and uncertain situations." *Id.* at 458.

research that a student might do when presented with legal problems in practice.[121]

Regardless of whether traditional law school exams are the optimal assessment tool, the fact that law schools are teaching students how to "think like a lawyer" is a very good thing.[122] Unless a client comes in to meet with a very experienced attorney with a very specialized practice, it is unlikely that the lawyer will be able to confidently spout off all the applicable law that might be relevant to that situation. Statutes and regulations change, as does society.[123] New cases are decided, and facts that might not have been specifically contemplated at the time the earlier authorities were promulgated will eventually arise.[124] Legal problems of first impression arise all the time, and lawyers have to predict and persuade others how existing authorities should apply (or not apply) to those new situations.[125] That reality makes being able to "think like a lawyer" more useful to the law school graduate than mere memorization of a vast array of legal rules and doctrine.[126]

Admittedly, law schools are increasingly emphasizing a wide range of essential lawyering skills. Although many American law schools were already considering and adopting various academic reforms to improve students' preparation for the modern practice of law, a 1992 report from the ABA's Section of Legal Education and Admissions to the Bar has been credited for promulgating further modernization of the American legal education.[127] Robert MacCrate chaired the committee responsible for the preparation of this report, which is often referred to as the "MacCrate Report."[128] Since that time, other influential publications have helped push legal education to include more practical and experiential learning opportunities.[129]

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121. *See id.* at 487.

122. *See* Krantz & Millemann, *supra* note 105, at 10.

123. J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1409 (1996); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 836 (2008).

124. *See* Ruhl, *supra* note 123, at 1409.

125. Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 519 (2009).

126. *See* Kate E. Bloch, *Cognition and Star Trek™: Learning and Legal Education*, 42 J. MARSHALL L. REV. 959, 963 (2009).

127. *See* Krantz & Millemann, *supra* note 105, at 12-18 (providing specific examples of law schools that have added essential lawyering skills into their first-year curriculum); ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM 7-8 (Robert MacCrate et al. eds., 1992) [hereinafter MacCrate Report].

128. MacCrate Report, *supra* note 127.

129. *See, e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) ("Educating Lawyers provides an opportunity to rethink 'thinking like a lawyer'–the paramount educational construct currently employed, which affords students powerful

For example, legal writing has gradually gained recognition as being a specific skill that deserves substantial attention in any program of legal education.[130] The MacCrate Report advocated that law schools reform their programs of legal education to emphasize core competencies, specifically including written communication.[131] One commentator has gone so far as to credit the MacCrate Report with being "instrumental in persuading almost all American law schools to provide legal-writing education to all their students in the first year of law school."[132]

Accreditation standards now also emphasize skills training as a critical component of legal education.[133] In addition to providing students with an education about the substantive law and training on legal writing, law schools must now insure that each student obtains "substantial instruction" in "legal analysis and reasoning, legal research, problem solving, and oral communication,"[134] and "other professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[135] Those skills have been identified as including, without being limited to, "trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting."[136] Clinical opportunities, pro bono, and small group work are all required to be available, although the standards stop short of requiring that all students participate or have access to all of these opportunities.[137] The revised

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intellectual tools while also shaping education and professional practice in subsequent years in significant, yet often unrecognized, ways."); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP vii. (2007) ("The central message . . . is that law school should: broaden the range of lessons they teach . . . integrate the teaching of knowledge . . . and give much greater attention to instruction in professionalism.").

130. *See, e.g.*, Ian Gallacher, *"When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U.L. REV. 451, 453 (2013).

131. MacCrate Report, *supra* note 127, at 172-75.

132. Gallacher, *supra* note 130, at 451 n.1.

133. 2015 ABA STANDARDS AND RULES, *supra* note 115, at Standard 302.

134. 2013-2014 ABA STANDARDS AND RULES, *supra* note 115, at Standard 302; 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 302 (although, the requirement becomes that the law school must establish learning outcomes including competency in these areas).

135. 2013-2014 ABA STANDARDS AND RULES, *supra* note 115, at 21 Standard 302; 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 302.

136. 2013-2014 ABA STANDARDS AND RULES, *supra* note 115, at Interpretation 302-2; 2014 ABA REVISED STANDARDS, *supra* note 115, at Interpretation 302-1 (skills include "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.").

137. 2013-2014 ABA STANDARDS AND RULES, *supra* note 115, at Standard 302. Standard 302(b) provides:

> A law school shall offer substantial opportunities for: (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her

standards adopted in August of 2014 have continued to push law schools toward offering more effective skills training and, when they go into full effect, they will mandate law students to satisfactorily complete a minimum of six credits of skills instruction involving simulations, clinics, or field placements that meet specified criteria.[138]

Unsurprisingly, no authority suggests that the ability to recite "the law" on a dozen or more discrete subjects is an essential lawyering skill.[139] Nor does anyone claim that the ability to write an essay, under extreme time pressure, predicting probable legal outcomes in light of clearly defined facts is such a skill.[140] The ability to choose between possible outcomes or rules from a limited selection of options, such as those tested on a multiple choice test, is also never mentioned as a skill important for the actual practice of law.[141]

> performance and level of competence; (2) student participation in pro bono activities; and (3) small group work through seminars, directed research, small classes, or collaborative work.

Id.

138. 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 303. Standard 303 states:

> (a) The law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:
>
> (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;
>
> (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and
>
> (3) one or more experiential course(s) totaling at least six credit hours. An experiential course or courses must be: a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:
>
> (i) integrate doctrine, theory, skills, and legal ethics and engage students in performance of one or more of the professional skills identified in Standard 302;
>
> (ii) develop the concepts underlying the professional skills being taught;
>
> (iii) provide multiple opportunities for performance; and
>
> (iv) provide opportunities for self-evaluation.
>
> (b) A law school shall provide substantial opportunities to students for:
>
> (1) law clinics or field placement(s); and
>
> (2) student participation in pro bono legal services, including law-related public service activities.

Id. As this also involves a relatively significant change in the accreditation standards, there is a phase-in period for this obligation as well with it going into effect for 1L students who enter law school in 2016-2017. NEW STANDARDS TRANSITION, *supra* note115, at 2.

139. *See* JoAnn A. Epps et al., *Equipping Our Lawyers: An Equal Opportunity Call to Action*, NAT'L L. J. (Apr. 29, 2010), http://www.natlawreview.com/article/equipping-our-lawyers-equal-opportunity-call-to-action (for additional information about the kinds of skills that are being talked about as essential to future generations of lawyers).

140. *Id.*

141. *See* NEW YORK STATE BAR ASSOCIATION, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 39 (2011); *see also Summit Recommendations*, EQUIPPING OUR LAW,

Regrettably, much of the current debate and discussion about what it takes for new lawyers to succeed does not seem to focus on the kinds of knowledge that can be readily tested in an objective examination.[142] One commentator has suggested that core competencies for lawyers, which originally included analytical ability, attention to detail, logical reasoning, persuasiveness, sound judgment, and writing ability, have since expanded to include collaboration skills, emotional intelligence, financial literacy, project management, technological affinity, and time management.[143] Another list of things lawyers need to know includes the following: self-awareness, active listening, questioning, empathy, communicating and presenting, and resilience.[144] A 2013 final report of a task force for the California State Bar listed the following competencies: oral presentation and advocacy, advanced legal research and writing, negotiation and alternative dispute resolution, client counseling, witness interviewing and other investigation and fact-gathering techniques, law practice management, practical writing, pre-trial preparation skills, basics of the justice system, and professional civility and applied ethics.[145] However, these lists are missing an exposition of the information base that is necessary to become a competent attorney.

Surely there must be a basic minimum of information, be it an understanding of the jargon, the structure of law, its sources, or its appropriate use. And, just as surely, some things must be so fundamental that every lawyer must know them. Where is the discussion of this kind of "core" competency or fundamental knowledge? It is the lack of this discussion that seems to lead to the disconnect between what bar exams purport to test and the kinds of questions that are actually asked.

III. THE DISCONNECT BETWEEN ESSENTIAL LAWYERING SKILLS AND WHAT IS TESTED ON THE BAR.

Those who write and promote the various multistate bar exams give at least lip service to the notion that none of the tests are designed to require detailed knowledge of substantive law,[146] but are allegedly testing basic

http://www.equippingourlawyers.org/summit-recommendations.cfm (last visited Oct. 2, 2015); Epps, *supra* note 139.

142. *See supra* notes 139-42.

143. Jordan Furlong, *Core Competence: 6 New Skills Now Required of Lawyers*, LAW21 (July 4, 2008), http://www.law21.ca/2008/07/core-competence-6-new-skills-now-required-of-lawyers/. The first six of these were categorized as traditionally-recognized competencies, and the latter six were identified as "new" skills. *Id.*

144. William Henderson, *What Every Law Student Needs to Excel as an Attorney: Introducing the Fromm Six*, NAT'L JURIST 20, 20-21 (2013).

145. STATE BAR OF CALIFORNIA, TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 24 (2013)

146. *Preparing for the MPT*, *supra* note 74.

information that "any" new attorney should be expected to know.[147] While it is noteworthy that the same examination is imposed upon experienced practitioners who move to a new jurisdiction, this article focuses on the claim that the exam (as currently offered) is suitable for those seeking to enter the profession initially.[148]

According to the NCBE, "[t]he purpose of the MBE is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns."[149] Similarly, the MEE (the essay examination) is carefully designed:

> The purpose of the MEE is to test the examinees's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.[150]

The MPT is different in that it "is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task," and it is designed with its own requirements:

> The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.[151]

Putting aside the MPT for a moment, consider the stated intent of the MBE and MEE. Both are designed to test an applicant's understanding of "fundamental" legal knowledge.[152] A review of some of the questions actually posed on the exams, however, suggests that the questions might not be as fundamental as one might expect.[153] For example, this is the sample

147. *See* Curcio, *supra* note 23, at 370.
148. *See* J. Kirkland Grant, *The Bar Examination: Anachronism or Gatekeeper to the Profession?*, 70-JUN N.Y. ST. B.J. 12, 15-16 (1998).
149. *The MBE*, *supra* note 61.
150. *The MEE*, *supra* note 113.
151. *Preparing for the MPT*, *supra* note 74.
152. *See generally The MBE*, *supra* note 61; *The MEE*, *supra* note 113.
153. *See* Curcio, *supra* note 23, at 371.

question from the 2014 Information Booklet on the MEE covering Criminal Law and Procedure:

> At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. 'It'll be funny,' Adam said. 'When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch.' 'That's a stupid idea,' Bob said. 'In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event.' 'Oh, I'll bet someone will come,' Adam replied. 'And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy.'
>
> At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.
>
> At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.
>
> Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called "unlawful-act" involuntary manslaughter.
>
> 1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.

> 2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.[154]

Even if they do not expect to be prosecutors or defense attorneys, appreciation of the basic criminal law and procedure issues is arguably of fundamental importance for all licensed attorneys as they may be appointed to represent indigent defendants in criminal matters.[155] Realistically, it is important for attorneys to understand that there are such things as *mens rea* and *actus reus*, and to understand the limitations on intent to act versus intent to cause a particular outcome.[156] However, it seems lofty to expect all new attorneys to understand the elements of involuntary manslaughter at common law (which might not bear that much relation to the law in their jurisdiction) or to understand "unlawful-act" involuntary manslaughter (which actually seems irrelevant to the questions asked, but is probably enough to panic those sitting for the high-stakes, time-pressured exam).[157] In the real world, an attorney faced with these kinds of issues would research the relevant statute governing manslaughter (rather than knowing the common law) and read the applicable case law in the jurisdiction.[158] In fact, unless the individual in question is an experienced criminal attorney, well versed in involuntary manslaughter, it would be essential to do so.[159] How then does this question test a beginning lawyer's "fundamental knowledge?" It does not ask the applicant to identify the issues presented, possible research questions, or ask how the lawyer-to-be would approach the problem of representing either Adam or Bob.[160] Alternatively, perhaps an advocate should not approach the question from his or her perspective; maybe this issue—considering whether a jury instruction on involuntary manslaughter or accomplice liability is appropriate—is for a judicial clerk. Context matters and, as in most questions released by the NCBE for those studying for the bar, it is lacking in this question.[161]

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154. NCBE, JULY 2012 MEE QUESTIONS AND ANALYSES 4 (2012) *available at* http://www.law2.byu.edu/page/categories/student_resources/bar_prep/2013/July%202012%20MEE%20and%20Analyses.pdf (last visited Oct 3, 2015) [hereinafter MEE BOOKLET].

155. *See* ALLEN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (2000).

156. *See* Dr. John S. Baker Jr. & William J. Haun, *Criminal Law & Procedure: The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime*, 14 ENGAGE 24, 24 (2013), *available at* http://www.fed-soc.org/publications/detail/the-mens-rea-component-within-the-issue-of-the-over-federalization-of-crime.

157. *See* Curcio, *supra* note 23, at 377.

158. *See id.*

159. *See id.* at 376.

160. *See* MEE BOOKLET, *supra* note 154, at 4.

161. *See* Curcio, *supra* note 23, at 376.

The multiple choice questions that are available are even more troubling, if the goal is to merely assess "fundamental knowledge."[162] This example was released with the official 2014 Information Booklet covering the MBE:

> A man has four German shepherd dogs that he has trained for guard duty and he holds for breeding purposes. The man has 'Beware of Dogs' sign clearly posted around a fenced-in yard where he keeps the dogs. The man's next-door neighbor frequently walks past the man's house and knows about the dogs' ferocity. One summer day, the neighbor entered the man's fenced-in yard to retrieve a snow shovel that the man had borrowed during the past winter. The neighbor was attacked by one of the dogs and was severely injured.
>
> In a suit against the man, is the neighbor likely to prevail?
>
> (A) No, because the neighbor knew that the man had dangerous dogs in the yard.
>
> (B) No, because the neighbor was trespassing when he entered the man's property.
>
> (C) Yes, because the neighbor was an invitee for the purpose of retrieving the shovel
>
> (D) Yes, because the man was engaged in an abnormally dangerous activity.[163]

Consider "A" as a possible answer. Mere knowledge by the potential plaintiff that the dogs are dangerous does not seem (to me) a likely explanation of whether there would be liability. If you are walking down the street and see that sign every day, you could know the dogs are dangerous.[164] If you are walking down the street on a new day, and the dogs are out of the yard and attack you, the fact that you knew of their ferocity would be irrelevant.[165] By itself, the neighbor's knowledge that the

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162. *See generally The MBE*, *supra* note 61.

163. NCBE, MBE SAMPLE TEST QUESTIONS (2014), *available at* http://www.aplusebooks.com /wp-content/uploads/2014/10/MBE-Sample-Test-Questions.pdf [hereinafter MBE SAMPLE TEST QUESTIONS].

164. *See, e.g.*, Benton v. Aquarium, Inc., 489 A.2d 549, 553 (Md. Ct. Spec. App. 1985) ("Had [Appellant] equally heeded the sign on the warehouse door, which he must as a normal intelligent person be held to have understood and appreciated, there would not have been a risk of injury").

165. *See* FLA. STAT. ANN. § 767.04 (West 1997) ("The owner of any dog that bites any person while such person is on or in a public place, . . . is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owners' knowledge of such viciousness.").

dogs are dangerous does not exonerate the dog owner at all.[166] Besides, how are we to know from these facts that the dogs were in the yard, or that the neighbor knew the dogs were out when he entered the yard? Option "B" is not much better. First, we do not know whether this was a trespass. Did the man tell the neighbor, "Sure, come and get the shovel any time?" On the other hand, if this was a trespass into an area the neighbor knew was dangerous, that might be a basis for refusing to impose liability, depending on the jurisdiction.[167] While there are states that have abandoned this approach, there are plenty of states that seem to be holding on to the general notion that property owners generally owe no duty of care to trespassers, if this was in fact a trespass.[168] "C" is an interesting option. If the neighbor was invited into the yard (a fact not specified, but not inconsistent with the information given), and if the invitation contained either the explicit or implicit information that it would be safe to retrieve the shovel, this really could make a difference.[169] As for answer "D," the doctrine of abnormally dangerous activities is very complex.[170] For example, courts conflate abnormally and inherently dangerous,[171] and there is considerable variation among jurisdictions as to what is covered by this label.[172] In some states, for example, driving ice-cream trucks may be so dangerous that liability can attach to independent contractors.[173] The concept of abnormal danger has also been applied to dogs.[174] For readers who are not torts experts, the answer listed as "correct" in the information booklet is "A."[175]

It is not impossible to have questions and answers to this kind of fact pattern that could test fundamental knowledge. For example, based on the facts recited, which of the following would be the least likely to be a profitable avenue for additional investigation if the applicant was

166. *See id.* ("[A]ny negligence on the part of the person bitten that is a proximate cause of the biting incident reduces the liability of the owner of the dog by the percentage that the bitten person's negligence contributed to the biting incident").

167. *See generally* Vitauts M. Gulbis, J.D., *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294 (1983).

168. *See, e.g.*, Rotter v. Union Pac. R.R. Co., 4 F. Supp. 2d 872, 874 (E.D. Mo. 1998) (stating that the general rule is that a landowner owes no duty to a trespasser, because the landowner cannot foresee their presence on the land); *see* Gulbis, *supra* note 167.

169. FLA. STAT. ANN. § 767.04.

170. *See generally* Christine M. Beggs, Comment, *As Time goes By: The Effect of Knowledge and the Passage of Time on the Abnormally Dangerous Activity Doctrine*, 21 HOFSTRA L. REV. 205 (1992).

171. *See, e.g.*, Brandenburg v. Briarwood Forestry Servs., L.L.C., 847 N.W.2d 395, 401 (2014).

172. *See, e.g.*, Ellen S. Pryor, *Peculiar Risks in American Tort Law*, 38 PEPP. L. REV. 393, 401-02 (2011).

173. *See, e.g.*, Wilson v. Good Humor Corp., 757 F.2d 1293, 1301 (D.C. Cir.1985).

174. *See, e.g.*, Trager v. Thor, 516 N.W.2d 69, 75 (1994) ("In assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge."); *see also* Hiner v. Mojica, 722 N.W.2d 914, 919 (Mich. Ct. App. 2006).

175. MBE SAMPLE TEST QUESTIONS, *supra* note 163, at 6.

considering how best to approach defending the man in a lawsuit brought by the neighbor:

> (A) Whether the applicable jurisdiction has a dog-bite statute.
>
> (B) Whether the applicable jurisdiction uses the status as trespasses, licensee or invitee to determine the appropriate degree of care that would be owed by the man or whether this approach has been abandoned.
>
> (C) Whether German Sheppards are frequently involved in dog bite cases.
>
> (D) Whether the man had any communication with the neighbor about when and how to retrieve the shovel.

A beginning lawyer should know that the first two legal issues could be relevant, and that the inquiry suggested in "D" might reveal additional facts that could be profitable. However, the general traits of that dog breed would be unlikely to be fruitful or relevant, and it might be reasonable to expect such a lawyer to know that "C" would not be a profitable avenue for research.[176] However, this kind of question does not appear in any the sample MBE questions available for review.

As currently written, the multiple choice test and essay questions do not assess judgment and are certainly not limited to fundamental principles that every lawyer should know.[177] Hence, lawyers who leave one jurisdiction and seek to be admitted to the bar in another state under circumstances where a bar examination is required also have to pay thousands of dollars for a "license," despite any acclaimed talent and accomplishments.[178] Even a review of the extensive outline of topics covered in the multistate exams convincingly demonstrates that the scope of the current examination exceeds "fundamental" information.[179] How often is a beginning lawyer going to need to spout off the top of his or her head topics such as the war, defense, and foreign affairs powers of Congress?[180] Or, without having researched the issue, how often will he or she be called upon to discuss

176. On the other hand, it is far less clear that a beginning lawyer should immediately know "A" is the correct answer in the actual test. *Id*.

177. *See* Curcio, *supra* note 23, at 376.

178. *See* Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L. Q. 737, 747 (2003).

179. *See* NCBE, 2016 MBE SUBJECT MATTER OUTLINE (2015), *available at* http://www.ncbex.org/pdfviewer/?file=%2Fdms document%2F182.

180. *See id.*; Michael Paulsen, *The Uselessness of Constitutional Law*, LIBR. L. & LIBERTY (Jan. 31, 2012), http://www.libertylawsite.org/liberty-forum/the-uselessness-of-constitutional-law/.

federalism-based limits on state authority to authorize otherwise invalid state action?[181] Constitutional law is not the only bar subject that includes topics that are unlikely to be relevant to the practice of virtually any new attorney.[182] How many of us dealt with defeasible fee simples, vested and contingent remainders, or devisability of co-tenancy?[183] And assuming that there are a lot of readers who can say they did that kind of work, how many did it with no research and time for review?

It is worth noting that this disconnect cannot be fixed by adjusting the "Standards for Approval of Law Schools."[184] In August of 2014, the American Bar Association Section of Legal Education and Admissions to the Bar approved major revisions to the "Standards for Approval of Law Schools."[185] Included in the current recommendations is a specific standard on bar passage, apparently designed to bring legal education even more in line with bar examinations.[186]

The new standard seeks to expand upon the basic objective of legal education, which is to prepare graduates "for admission to the bar, and for effective, ethical, and responsible participation as members of the legal profession."[187] In order to satisfy this obligation, a law school must have a 75% pass rate (in jurisdictions where most of the school's graduates take the bar, which must include at least 70% of graduates).[188] The standard also addresses various strategies that a law school might use to show that it is attempting to come into compliance with these levels, including:

> (3) Actions by the law school to address bar passage, particularly the law school's academic rigor and the demonstrated value and

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181. These are two of the topics covered in the constitutional law subject matter outlines for the MBE and MEE. *See* 2016 MBE SUBJECT MATTER OUTLINE, *supra* note 179.

182. *See* Nelson Lund, *The Usefulness of Constitutional Law*, LIBR. L. & LIBERTY (Jan. 31, 2012), http://www. libertylawsite.org/liberty-forum/the-usefulness-of-constitutional-law/.

183. 2016 MBE SUBJECT MATTER OUTLINE, *supra* note 179.

184. *See* Deanell Reece Tacha, *No Law Student Left Behind*, 24 STAN. L. & POL'Y REV. 353, 376 (2013).

185. NEW STANDARDS TRANSITION, *supra* note 115, at 1; 2014 ABA REVISED STANDARDS, *supra* note 115.

186. 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 316; *see generally* Letter from Jackie Gardina et al., Co-Presidents and President, Soc'y of Am. L. Tchrs. and Clinical Legal Educ. Ass'n, to Dean Emeritus Jeffrey E. Lewis, Standards Review Committee Chair (Oct. 8, 2013) (on file with Clinical Legal Education Association). "The revised Standards . . . become legally effective at the end of the ABA Annual Meeting on August 12, 2014." NEW STANDARDS TRANSITION, *supra* note 115, at 1. Standard 316 is not singled out for a deferred implementation. *See generally id*.

187. 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 301.

188. *Id.* at Standard 316. The standard is a little more complicated than a simple 75% minimum pass rate. *See id.* The rate must be either achieved as an average over the past five years or in at least three of the past five years. *Id.* In addition, the school's average pass rate in the same five year period cannot be more than fifteen points lower than the average pass rate on the relevant exams for graduates of other ABA-approved law schools. *Id.*at Standard 316.

> effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school's favor; ineffective or only marginally effective programs or limited action by the law school against it.
>
> (4) Efforts by the law school to facilitate bar passage for its graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school's favor; ineffective or limited efforts by the law school against it.[189]

Unfortunately, the fact that law school accreditation looks to the bar examination as a law school performance evaluator means that there has been an implicit determination that the bar exam tests practice-worthy concepts. Law schools tend to test their students in certain ways because the bar exam tests a certain way.[190] Thus, because law schools are required to determine whether graduates have been adequately trained by looking at bar exam results, the bar shapes the way law schools teach and assess student learning.[191] Law schools even change their curriculum and testing protocols to promote high pass rates on the final examination.[192] "Look," say the law schools, "the outcome of our program of legal education is good because so many of our graduates pass the bar!" "Look," say the bar examiners, "law schools teach the same things and test in the same way we do, and use our pass rates as a measure of their successful outcomes!" Nowhere does this circular set of justifications directly relate to what lawyers actually do—or need to do—in the practice of law.

In 1997, Professor Joan Howarth considered how the bar exam was shaping legal education, and not necessarily for the better.[193] The thesis of her article was that "[t]he bar examination permeates and controls fundamental aspects of legal education at law schools across the country."[194] She listed a variety of ways in which this has happened: the

189. 2014 ABA REVISED STANDARDS, *supra* note 115, at Standard 316.

190. Tacha, *supra* note 184, at 359. It is not uncommon to hear law professors defend time-pressured multiple choice examinations on the grounds that they are necessary to prepare students to take the bar examination. Denise Riebe, *A Bar Review For Law Schools Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 298-99 (2007). This is not the same as saying that the skills required in taking this kind of examination are those needed in the actual practice of law. *See* Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 566 (2015).

191. *See* Lorenzo A. Trujillo, *The Relationship Between Law School And The Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 70 (2007).

192. Tacha, *supra* note 184, at 359-60.

193. *Howarth*, *supra* note 96, at 930.

194. *Id.* at 927.

influence of the bar examination on the entry standards for most law schools, because the LSAT justifies its utilization by the well-established correlation between it and bar passage;[195] the impact on the curriculum at many law schools, with "bar subjects" becoming central at virtually every law school;[196] the role in determining academic success when law professors utilize testing and evaluation approaches that mirror the bar exam in order to prepare students for it rather than for actual practice;[197] and the way in which the bar exam influences who fails out because of a perceived need to disqualify students who are unlikely to pass the bar.[198]

This kind of influence might be acceptable except for the "two persistent, related, and fundamental criticisms" of the bar exam that Professor Howarth identifies,[199] and another related concern not mentioned in her article. The two problems she lists are first, the fact that "bar examinations do not test readiness or aptitude to practice law," and second, the bar consistently gives "racially disparate results."[200] The third problem is that, by tying law school outcomes to bar passage rates, we give a lot of vested interests a superficially viable claim to legitimacy, which in turn makes it harder to make a case about the urgent need for reform.[201]

Not surprisingly, "bar examiners actively and aggressively promote the fairness of their procedures, tests and results."[202] Their positions, funding, and influence depend on such claims.[203] Their conclusions about the reliability and validity of the current exams, however, seem to be premised primarily on evidence that the same subjects are tested on the bar as in most law schools, that bar passage rates correlate highly with the LSAT and law school grades, and that the results are "reliable" in the sense that they are consistent and repeatable.[204] As to racial disparities, the "differences in mean scores among racial and ethnic groups correspond closely to difference in those groups' mean LSAT scores, law school grade point

195. *Id.* at 928.

196. *Id.*

197. *Id.* at 929. "Many of us excuse our lack of exploration of [our testing methods] . . . in part because we are concerned about preparing for the bar exam." *Howarth*, *supra* note 96, at 929-30.

198. *Id.* at 930.

199. *Id.*

200. *Id.* (citing Katherine L. Vaughns, *Toward Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 T. MARSHALL L. REV. 425, 434-44 (1991)).

201. *See generally* Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"–"Do the Work!"*, 40 CAL. W. L. REV. 321 (2004).

202. *Howarth*, *supra* note 96, at 933.

203. *See generally* Byron D. Cooper, *The Bar Exam and Law Schools*, 80 MICH. B.J. 72 (2001).

204. *See* Howarth, *supra* note 96, at 928-29; Michael T. Kane, Ph.D., *Reflections on Bar Examining*, 78 B. EXAMINER 6, 9 (2009), *available at* http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780409_Kane.pdf.

averages, and scores on other measures of ability to practice law, such as bar examination essay score or performance test scores."[205]

A relatively recent "reflection" on the bar exam by the former Director of Research for the NCBE offered the conclusion that "[b]ar examinations tend to have relatively high reliability, because the components included in most bar exams have high reliabilities. . . . "[206] A comment such as this, written by an esteemed expert on testing, certainly makes a critique of the bar exam, by someone like me with very little training in testing protocols or theory and virtually no recent experience in the field, seem unsupportable. But "reliability" in this context merely means that the results are consistent and can be repeated.[207] For instance, the multiple choice exam morning session results correlate highly with scores on the afternoon session.[208]

As an educator who cares deeply about the legal profession and those seeking to enter it, the foundational question is not "reliability," but "validity" of the exam.[209] That is where the rhetoric makes perfect sense but the reality does not track the rhetoric.[210] Supporters of the bar exam assert that "educational and testing requirements are designed to provide assurance that new practitioners have a broad base of knowledge, skills and judgment . . . relevant to professional practice."[211] The stated purpose of the various multistate exams all focus on the purported goal of testing basic, foundational knowledge.[212] The current *Comprehensive Guide to Bar Exams*, published by the NCBE, emphasizes that the bar exam should test "fundamental legal principles," with the understanding that "[i]n [the] selection of subjects for bar examination questions, the emphasis should be upon the basic and fundamental subjects that are regularly taught in law schools."[213]

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205. Howarth, *supra* note 96, at 933 (citing *Myths and Facts about the Multistate Bar Examination*, 64 B. EXAMINER 18, 19 (1995)).

206. Kane, *supra* note 204, at 15.

207. *See id.* at 9. Dr. Kane does not attempt to hide this fact, although his explanation of what "reliability" means is found several pages away from the statement that the bar exam is reliable. *See id.* at 9, 15. "The reliability of test scores is defined in terms of their consistency (or dependability, or reproducibility) over repeated measurements." *Id.* at 9.

208. *Id.*

209. Dr. Kane also speaks, extensively, in terms of the "validity" of the bar exam as a critical measure of whether the exam actually serves to protect the public. Kane, *supra* note 204, at 8, 12. He reports that "validity refers to the degree to which evidence and theory support the interpretation of test scores entailed by proposed uses of tests." *Id.* at 8 (quoting AM. EDUC. RES. ASS'N ET AL., STANDARDS FOR EDUC. AND PSYCHOLOGICAL TESTING 9 (1999)).

210. *See id.* at 7.

211. *Id.*

212. *The MBE*, *supra* note 61; *The MEE*, *supra* note 113.

213. COMPREHENSIVE GUIDE, *supra* note 52, at ix.

The notion that the bar exam should cover "fundamental principles" seems beyond question, but there are huge problems with using subjects regularly taught in law schools as the hallmark for determining what is fundamental.[214] First, of course law schools are constrained to graduate students who are prepared for the bar.[215] Naturally then, law schools will consistently teach bar subjects.[216] It does not mean that those are the subjects that all lawyers need to understand.[217] Second, the purpose of law school classes is not primarily to teach "the law."[218] If that was the goal, there are a myriad of teaching approaches that would be more efficient and allow much greater coverage than the case method. Law schools and law classes teach students how to approach the law, how to derive rules from various authorities, how to frame the rules so derived either narrowly or broadly, and how to communicate those rules in an appropriate context.[219] Admittedly, traditional law school exams do not excel at assessing all of that. However, an increase in legal writing, experiential courses, and other offerings in the American legal education arm graduates with the ability to practice in a rapidly evolving legal climate.[220] The ability to recite the law is not, and has never been, the fundamental skill with which we need to arm our graduates.

Law schools currently face the challenge of appropriately evaluating student performance.[221] Perhaps driven by the changes to accreditation standards, law schools across the country are re-examining assessment methodologies.[222] As part of this process, a reexamination of the bar is necessary to determine whether it is a viable assessment that actually protects the public by guaranteeing minimum competence in "fundamental" areas.[223] The problem is: this does not appear to be happening.

The NCBE's vehement defense of its current product is quite apparent from even a superficial review of comments written in the *Bar Examiner*

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214. *See generally* Trujillo, *supra* note191.

215. *See* Howarth, *supra* note 96, at 930.

216. *See id.* at 928.

217. *Id.* at 930.

218. W. David Slawson, *Changing How We Teach: A Critique of the Case Method*, 74 S. CAL. L. REV. 343, 343 (2000).

219. *Id.* at 343-44.

220. *See* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice* (2015), *available at* https://law.fiu.edu/wp-content/uploads/sites/21/2015/07/Suzanne-Rowe-LRW-article-2015-rev1.pdf.

221. *See* Emily Zimmerman, *What do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 RUTGERS L.J. 1, 4 (2010).

222. *Id.*

223. *See, e.g.*, Daniel R. Hansen, *Do We Need The Bar Examination?: A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. 1191, 1205-06, 1232 (1995).

over the years.[224] A very telling commentary on the issue of rethinking assessments came from NCBE President Moeser in 2004.[225] While acknowledging that rethinking the process of licensing new attorneys is "a healthy exercise,"[226] the comment stresses that any approach to licensing "must meet the essential measurement criteria of reliability and validity" and must be fairly and consistently administered.[227] The need for consistency and objectivity, while utilizing a cost-effective approach, is emphasized.[228] Approved suggestions for reform seem to involve timing of portions of the exam and ways to speed the grading process.[229] New ideas are viewed as possible additions to, rather than replacement of, current approaches.[230]

Supporters of the current bar exam continue to defend the existing approach as not only sound, but essential.[231] Dr. Geoff Norman, Ph.D., an academic in the medical field, acknowledges that "[i]t may be worth assessing legal skills more broadly than simply focusing on knowledge with a multiple-choice test. But the other test components, whatever they may be, should be additions to, not replacements for, the multiple-choice component. . . ."[232] And testing experts employed by the NCBE have not been shy about telling law professors to stay away from critiquing the bar testing process.[233] Dr. Susan M. Case, who had forty years of experience in the field of licensure when she retired from the National Conference of Bar Examiners in 2013, was particularly blunt.[234] "Give it up," she wrote; "Let the experts in high-stakes testing do it. NCBE offers an array of services at no cost."[235]

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224. *See generally* Susan M. Case, Ph.D., *The Testing Column: Final Musings*, 82 B. EXAMINER 23, 23 (2013), *available at* http://ncbex.org/ assets/media_files/Bar-Examiner/articles/2014/830414-abridged.pdf.

225. *See* Erica Moeser, *Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner*, 20 GA. ST. U. L. REV. 1051, 1051 (2004) [hereinafter Moeser, *Rethinking Assessments and Alternatives*].

226. *Id.*

227. *Id.* at 1052.

228. *See id.* at 1053.

229. *See id.* at 1054-55.

230. *See* Moeser, *Rethinking Assessments and Alternatives*, *supra* note 225, at 1051.

231. *See* Elizabeth Olsen, *Bar Exam, the Standard to Become a Lawyer, Comes under Fire*, N.Y. TIMES, (March 19, 2015), http://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html.

232. Geoff Norman, Ph.D., *So What Does Guessing the Right Answer out of Four Have to Do with Competence Anyway?*, 77 B. EXAMINER 18, 21 (2008).

233. Case, *supra* note 224, at 23 (until November 1, 2013, Dr. Case served as the Director of Testing for the National Conference of Bar Examiners).

234. *Id.*

235. *Id.* at 24.

Ensuring licensure exams are fair, impartial, reliable and consistent is, without a doubt, a complicated matter that demands specialized expertise.[236] However, checking for reliability only matters if the right competencies and skills are tested,[237] which brings us back to validity.[238] Plus, a test that fails to accurately identify the core, fundamental knowledge can be as reliable, consistent, and perfectly formatted as possible, yet fail in the ultimate objective of protecting the public.[239] Given the vast difference between the stated purpose of the bar exam and the actual focus and content of its questions, the legal profession is overdue for a reconsideration of this last hurdle for individuals wishing to practice law.[240]

This is not intended as a criticism of the intelligence, experience, abilities, or competence of NCBE professionals or those who assist the NCBE in exam writing. Indeed, NCBE statisticians seem to do an exceptional job assessing the reliability of the exam.[241] While authorship qualification for various NCBE questions remains unclear, there is no reason to believe that the authors are anything less than true experts in their respective legal fields.[242]

A phone interview with NCBE President Erica Moeser in August 2014[243] confirmed that questions included on the various NCBE exams are drafted by well-respected legal experts.[244] While no precise eligibility standards have been written for those who assist in the exam writing and review process, various procedures ensure that the questions are well

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236. *See generally* C. Beth Hill, *MBE Test Development: How Questions are Written, Reviewed, and Selected for Test Administrations*, 84 B. EXAMINER 23, 24 (2015).

237. *See* BEN CLAY, IS THIS A TRICK QUESTION?: A SHORT GUIDE TO WRITING EFFECTIVE TEST QUESTIONS 10, 12 (2001).

238. *Id.* at 5.

239. *See* Curcio, *supra* note 23, at 369-70.

240. *See* Olsen, *supra* note 231.

241. *See* Hill, *supra* note 236, at 25.

242. *Id.* at 23.

243. Telephone Interview with Erica Moeser, President and CEO, Nat'l Conf. of B. Exam'rs (August 28, 2014) (on file with author) [hereinafter Phone Interview Notes]. Erica Moeser, president and CEO of the NCBE, is herself highly acclaimed and respected. For example, she was the 2013 recipient of the Robert J. Kutak Award sponsored by the national Kutak Rock law firm and the ABA Section of Legal Education and Admissions to the Bar. *Erica Moeser is 2013 Robert J. Kutak Award Recipient*, 44 SYLLABUS (2013), *available at* http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/summer-2013/erica-moeser-to-receive-kutak-award.html. She has led the NCBE since 1994 and is a former chair of the ABA Section of Legal Education and Admissions to the Bar. *Id.* She has also served as a law school site evaluator, as a member of the Section's Accreditation and Standards Review committees, and as the co-chair of the Section's Bar Admissions Committee. *Id.*

The general qualifications of those who participate in the drafting process is confirmed in the *December Response*, *supra* note 7. In that letter, President Moeser described these persons as follows: "75% of our drafters are academics. The balance are drawn from the courts and private practice in roughly equal measure. Our test editors are all lawyers with strong credentials." *Id*.

244. Phone Interview Notes, *supra* note 243.

written, clear, and unambiguous.[245] The questions that appear on the MPT, MPRE, and MBE are written by drafting committees of experts in the particular subjects.[246] Those committees include senior academics, federal judges, and experienced practitioners.[247] The academics come from a range of institutions, but all are tenured, experienced, and well-regarded in their fields of expertise.[248] Most, if not all, are nationally recognized, and the practitioners are also experienced and similarly held in high regard.[249] For the multistate essay exam, questions are solicited from senior-level academics from around the country and then edited with great emphasis on the proposed analysis portion of the question.[250]

The potential problem that this process creates lies not in those chosen to write the questions.[251] Rather, due to years, often decades, of experience under a certain exam focus and format (the traditional issue-spotting essay exam), examiners have an overwhelming tendency to remain loyal to that format and ignore the intended purpose of the exam.[252] Well-known and well-documented psychological reasons describe why experienced examiners of the traditional law school exams will likely continue writing questions that call for detailed responses, extending beyond fundamental knowledge.[253]

Empirical psychological research on human behavior, persuasion, and decision-making provides evidence that individuals who have acquiesced to particular points of view in small ways are increasingly likely to continue to agree with the same points of view in the future.[254] The well-documented cognitive dissonance phenomenon recognizes that when actions conflict with beliefs, the beliefs thereafter change to fit the action.[255] In fact, human

245. *See* Hill, *supra* note 236, at 24.

246. *Id.* at 23; Beth E. Donahue, *Recent Changes in NCBE's Multiple-Choice Examination Programs*, B. EXAMINER 25, 25 (2008).

247. Hill, *supra* note 236, at 23.

248. *Id.* at 24.

249. *See id.* at 23-24.

250. Judith A. Gundersen, *MEE and MPT Test Development: A Walk-Through from First Draft to Administration*, B. EXAMINER 29, 30 (2015).

251. *See* Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 372-73 (2003).

252. *See id.*

253. *See* Kelton V. L. Rhoads & Robert B. Cialdini, *The Business of Influence: Principles that Lead to Success in Commercial Settings*, *in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 513, 525 (James Price Dillard & Michael Pfau eds., 2002) [hereinafter Rhoads & Cialdini].

254. *See id.* at 525.

255. *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); *see also* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 66-67 (1991) (offering a classic illustration of the theory).

beings are quite susceptible to pre-commitment bias.[256] Once committed to a particular course of action, even in small ways, those things that support that course of action are more likely to be believed.[257] The "foot-in-the-door" premise, for example, suggests and supports the idea that subjects who first agree to a small request are substantially more likely to agree to a larger, but related, request later.[258] In other words, past compliance is a powerful predictor of future compliance.[259]

Some researchers have posited that the "foot-in-the-door" technique is effective because there is a change in self-perception, which occurs when a person performs, or agrees to perform, a certain task.[260] The very act of acceding to the initial request produces a change in attitude that translates to an increased likelihood of being the kind of person who will agree to similar requests in the future.[261] Basic psychology teaches us that people tend to derive their current attitudes and decisions from their own past behavior.[262]

What does this have to do with senior and distinguished law professors, jurists, and practitioners being overly (and perhaps unconsciously) biased in favor of a traditional issue-spotting analysis of complex and advanced legal issues? They have all bought into and are products of the old exam regime.[263] They all graduated from institutions that almost certainly employed those kinds of testing techniques.[264] Most law professors will have utilized such questioning throughout their academic careers.[265] Experienced practitioners will have been exposed to the complex legal issues in their areas of expertise and consider such methods as critical, "basic" skills.[266] The more the law professors and experiences practitioners participate and acquiesce in the system, even if they initially planned to change it, the more likely they are to buy into it.[267] These individuals are

256. *See generally* Samuel D. Bond et al, *Precommitment Bias in the Evaluation of a Single Option: The Importance of Evaluative Disposition*, 33 ADVANCES IN CONSUMER RES. 245, 245 (2003).

257. *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 50-51 (Catherine Woods et al eds., 3d ed. 1993) (providing an overview of research on pre-commitment and consistency-maintaining behavior).

258. DANIEL J. O'KEEFE, PERSUASION: THEORY AND RESEARCH 169 (1990); *see also* Rhoades & Cialdini, *supra* note 253, at 525-26; Michael Burgoon & Erwin P. Bettinghaus, *Persuasive Message Strategies*, *in* PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH 141, 155-57 (Michael E. Roloff & Gerald R. Miller eds., 1980) [hereinafter Burgoon & Bettinghaus].

259. Burgoon& Bettinghaus, *supra* note 258, at 155.

260. O'KEEFE, *supra* note 258, at 170.

261. *See id.* at 170-71; *see also* Burgoon & Bettinghaus, *supra* note 258, at 156.

262. *See* Burgoon & Bettinghaus, *supra* note 258, at 156; *see also* O'KEEFE, *supra* note 258, at 74; Shelly Chaiken et al., *Principles of Persuasion*, *in* SOCIAL PSYCHOLOGY: A HANDBOOK OF BASIC PRINCIPLES 702, 705-6 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

263. *See* Glen, *supra* note 251, at 372-73.

264. *See id.* at 394-95.

265. *Id.* at 372-73.

266. *See* Bloch, *supra* note 126, at 963-64.

267. *See generally* Hon. Thomas J. Bice, *Letter from the Chair*, B. EXAMINER 2 (2015).

certainly not lacking great minds, legal talent, or experience.[268] Rather, all are used to a particular kind of exam with a particular focus on detailed knowledge.[269] The selection of individuals with that particular background naturally tends to result in exams that mirror past exams.[270]

If demand were high enough, these great minds may instead seek to produce an exam that any great lawyer should pass without relying on an expensive and intensive review course. Instead, we have a self-perpetuating system of intense, issue-spotting analyses, which overlook essential lawyering skills.[271] It is not "the law" that lawyers need to be armed with, but how to use it. Yes, there are certain basic fundamentals that all lawyers should know, and that kind of knowledge can certainly be tested.[272] But, if the goal is to weed out sub-par legal practitioners, our current system is likely to fail.[273] Instead, we should be examining currently tested issues in a different light.

IV. SUGGESTIONS FOR CHANGE

Where might the bar exam go from here? There are a number of possible avenues for improvement.[274] Some of these potential changes would be relatively simple to implement and others are likely to take a great deal of effort. Other avenues are worthy of investigation, but may prove unworkable because of resource, cost, and reliability issues.

One of the simpler revisions begins with the assumption that bar exams should only be testing "fundamental principles" that every lawyer should know.[275] If this is true, there is little justification for fifty different state exams, with fifty different passing standards (even when the same questions are often used).[276] States might set different standards for character and fitness and impose differing continuing legal education requirements or different levels of pro bono experience or practice, but the essential licensing examination would only benefit from being more uniform.[277] This

268. *See* Hill, *supra* note 236, at 23.
269. *See* Glen, *supra* note 251, at 372-73.
270. *See id.*
271. *See id.* at 377, 392-94.
272. *See* Curcio, *supra* note 23, at 376.
273. *See* Glen, *supra* note 251, at 361-62.
274. *See* Trujillo, *supra* note 191, at 89 (for additional alternatives: the author lists four alternatives to the traditional bar exam).
275. *Id.* at 74.
276. *See* COMPREHENSIVE GUIDE, *supra* note 52, at 29.
277. For the character and fitness requirements, *see id.* at 4-7; for continuing legal education requirements for each state, *see generally MCLE Information by Jurisdiction*, AM. BAR ASS'N, http://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited: Oct. 3, 2015); for pro bono rules for individual states, *see generally* AM. BAR ASS'N, STATE-BY-STATE PRO BONO SERVICE RULES, *available at* http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html (last visited: Oct. 3, 2015).

is especially true in light of the fact that modern legal practice is rarely local in nature, but typically national or even international in scope.[278]

A more important, albeit more complex, issue involves the need to carefully decide on the knowledge and skills that really need to be tested. It is not enough to say that every lawyer must know the intricacies of criminal, contract, property, or constitutional law.[279] It is not enough to say that because those are the subjects taught in every law school, they (and other traditional first-year or required courses) constitute "fundamental information" that every beginning lawyer should know.[280] Instead, the question must be: How are lawyers supposed to use the building blocks of knowledge imparted from those "foundational" courses when they graduate? The fact that a professor might use an issue-spotting exam, even a complex one, to evaluate that course does not mean that the same kind of question should be used on a bar exam.[281]

There are a number of reasons why a particular kind of examination might be appropriate at the end of a law school course, but not appropriate for a licensing exam.[282] First, because the law school exam immediately follows the class coverage, an emphasis on short-term memorization is less problematic.[283] The professor can also tailor the exam to cover material that was emphasized in class in order to assess how well the student paid attention, understood, or integrated a coherent approach on the subject. In addition, a number of law school exams are open book rather than closed book, which requires students to rely on rote knowledge of legal rules.[284] And, of course, there is also the reality that law school exams have traditionally followed the format they have taken for less defensible reasons: they are less time-consuming to grade than other alternatives; law professors are familiar with them and generally did well on that kind of exam themselves; and that kind of exam trains students to pass the bar.[285]

The intent of the bar should be the starting point for analyzing what should be tested on the exam.[286] According to the stated goals of bar

278. Glen, *supra* note 251, at 363 (there is a juxtaposition between the local practice and larger firms who can do international practice, however, the law practice is not segmented and a practice can be diverse).

279. *See* Trujillo, *supra* note 191, at 75.

280. *See* Tacha, *supra* note 184, at 362-63 (the important part of first years classes is to teach analytical skills, because one encounters many situations "not covered in class").

281. *See* Crane, *supra* note 113, at 803.

282. *See* Trujillo, *supra* note 191, at 78 (critics of the bar exam says it over-emphasizes memorization when real life legal practice does not require that).

283. *Id.*

284. *Id.* at 86.

285. *See* Gerald Lebovits, *Writing Bad Briefs: How to Lose A Case in 100 Pages or More*, 82 N.Y. St. B.A J. 64, 56 (2010); *see* Trujillo, *supra* note191, at 110; Glen, *supra* note 251, at 372.

286. Trujillo, *supra* note 191, at 73 ("Any discussion of the bar exam's effectiveness should begin with the purpose of the bar exam.").

examiners and its supporters, the point is to test "fundamental principles," core knowledge that is essential to minimum competency to practice at an entry level.[287] What does it take to say that someone possesses a minimum or entry-level competency for the practice of law? Most of the statements about what law practice requires assumes a very basic understanding of things like terminology and authorities, albeit in a far narrower range of topics than is currently tested on most bar exams.[288] The list of topics covered in basic law school classes is not an appropriate substitute for a serious consideration of a lawyer's true basic principles and fundamental knowledge.[289] If all law school graduates pass this kind of test, the exam no longer appears as if it is rigorously protecting the public.[290] Moreover, this is not the kind of exam for which it would be necessary to spend an additional one thousand dollars or more for a review class.[291] Those interested in maintaining appearances or their source of revenue are likely to be biased against changes in this direction.[292] However, if multiple choice questions really focused on basic issues (rather than extremely narrow and detailed ones), it could be confirmed that law school graduates truly possess this kind of information.[293]

That leaves the question of what the essay questions should test. Virtually every bar exam includes a substantial essay component and, certainly, written communication skills are essential for the successful practice of law.[294] The ability to write in a logical, organized, coherent, and

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287. *Id.* at 74.

288. *See Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 448 (2002) [hereinafter *Society of American Law Teachers*].

289. *See* Trujillo, *supra* note 191, at 74-75.

290. Glen, *supra* note 251, at 361-62 (the bar exam provides a false sense of security for consumers that his or her lawyer will be competent). The reality is that anyone who graduates from an accredited law school has already passed a fairly rigorous set of examinations. *See* Trujillo, *supra* note 191, at 72 (the typical law school exam is timed with essays and multiple choice questions that imitate the bar exam).

291. Grant, *supra* note 148, at 16.

292. *See* Glen, *supra* note 251, at 351. The bias does not even have to be conscious. *See id.* (the focus on the bar exam can be linked to "a national obsession with 'standards'"). Even assuming perfectly acceptable motives and intention, it is extremely difficult to avoid complications that stem from such conflicts of interest, especially in subjective areas such as a discussion of what constitutes suitably basic or foundational knowledge. *See* Tacha, *supra* note 184, at 370 (private industry has emerged for bar prep which complicates law school by additional costs). Law schools and law professors are not immune from this kind of challenge either, as they have a vested interest in promoting the validity of their programs of education. S*ee* Trujillo, *supra* note 191, at 72. (law schools offer academic services that are primarily aimed at improving bar passage rates rather than improving a student's grades). This issue is one that will require participation from a number of constituencies, not merely those with these kinds of biases and interests.

293. *See* Glen, *supra* note 251, at 365-67 (explaining that the MBE only tests the "majority view" of legal principles; however, this can lead to lawyers committing errors in practice).

294. *See* Trujillo, *supra* note 191, at 76, 85-86.

concise manner is an appropriate subject for evaluation, and an increased focus on this (both in law schools and on the bar) is likely warranted.[295]

On the other hand, if law schools really do set out to teach students to "think like a lawyer," perhaps that is also an important focus for a bar examination.[296] Are law schools graduating individuals with this skill? And what does it mean to "think like a lawyer," anyway? One commentator explained what it means to "think like a lawyer" as follows:

> [G]ood lawyers seem to share certain ways of thinking. They ask relevant questions and pay close attention to the raw information that they obtain. They winnow the unimportant facts from the important ones. Then they order what is left into a coherent story that is both fundamentally truthful and calculated to serve a predetermined purpose.[297]

Another has described this skill as enabling those who possess it "to think with care and precision, distinguish good arguments from bad, and analyze the facts and evidence presented in a case."[298] Still another verbalization of the skill is that it allows a lawyer to "easily see both sides of an argument, anticipate a counter argument, and know how to rebut it," even if it is counter to the lawyer's personal beliefs.[299]

These three explanations come from bar journals, written for and by legal practitioners, not academics.[300] There are, of course, academic discussions of what this concept entails,[301] and from such sources, attributes like the ability to identify and diagnose problems, generating alternative solutions, developing and implementing a plan of action, keeping an open mind, and thinking strategically are often emphasized.[302] The ability to develop coherent theories, arguments, and analyses is also identified as a critical component of "thinking like a lawyer."[303] Also, the ability to use

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295. *See* Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 440-42 (2007) (the ability to think like a lawyer is connected with being able to write and communicate a coherent story).

296. *See* Andrew Dufour, *Think Like a Lawyer*, 81 J. KAN. B. ASS'N 14, 14 (2012) (the author asserts that the most valuable lesson from law school was the ability to think like a lawyer).

297. Molly Sheppard, *The President's Message: How, Exactly, Do Lawyers Think?: Their Mental Distillations Bear a Complex Blend*, 26 MONT. LAW. 4, 4 (2001) [hereinafter Sheppard, *The President's Message*].

298. Paula Davis-Laack, *Think This Way and That Way: Developing Mental Resilience*, 87 WIS. LAW. 41, 41 (2014).

299. Dufour, *supra* note 296, at 14.

300. *See* Sheppard, *The President's Message*, *supra* note 297, at 4; Davis-Laack, *supra* note 298, at 41; Dufour, *supra* note 296, at 14.

301. For a collection of various approaches, *see* Gantt, *supra* note 295, at 413-14.

302. *Id.* at 437.

303. *Id.* at 441-42.

inductive and deductive reasoning,[304] perceive (and sometimes exploit) ambiguities,[305] see multiple sides to problems and solutions,[306] and attend to details[307] are all important aspects of the skill.

It might be assumed that bar examination essay questions test these kinds of cognitive abilities and skills. In fact, the NCBE, in explaining their vision of the MEE, have claimed the following purposes for this exam: (1) Can the examinee identify legal issues?; (2) Can the examiner separate out the relevant information?; (3) Can the examinee communicate a clear, concise, and organized written analysis of the issues?; and (4) Can the examinee demonstrate an understanding of the "fundamental legal principles" raised by the question?[308]

However, this approach does not notify the examiner if the applicant is struggling with knowledge of the substantive rules (item 4 above) or with the analytic and cognitive skills (such as those identified in items 1-3).[309] Of course, the essay questions could be refocused to ask what issues the applicant would research, what preliminary hypotheses might be developed, and what general advice could or should be offered (with an understanding that, in some situations, the answer should be to tell the "client" that more time is required for additional research).[310] Alternatively, the applicants could be tested on the law provided to them. The same research file could be used for a number of different questions, since questions are given in order. Additional information or resources might be provided at each step, to change the direction of the inquiry or to test different skills.

The point of these suggestions is to make clear that there are essay questions that can be developed to parse out and test different skills.[311] Our current bar examination simply does not do that; nor have those who write bar examination questions been asked to do so.[312] They are simply charged with writing questions in their applicable areas of expertise and, given that background, it is not at all surprising that we see the same kind of question being asked year after year.[313]

None of the foregoing is intended to suggest that the ability to communicate effectively in writing is not an essential lawyering skill. Certainly, those who can write a coherent essay under the various pressures

304. *Id.* at 457.
305. *Id.* at 455-56.
306. Gantt, *supra* note 295, at 468-70.
307. *Id.* at 470-72.
308. *The MEE*, *supra* note 113.
309. *See* Trujillo, *supra* note 191, at 76 (discussing the fairness of different grading approaches).
310. *See Society of American Law Teachers*, *supra* note 288, at 447.
311. *See* Trujillo, *supra* note 191, at 74.
312. *Society of American Law Teachers*, *supra* note 288, at 447.
313. *See Trujillo*, *supra* note 191, at 75.

of the bar examination have demonstrated some ability in this arena.[314] The problem is that those who fail might also be competent communicators, and yet fail not because of deficient writing skills, but because current bar questions attempt to assess too many things (and too many of the wrong things) at the same time.[315]

What other skills can be parsed out and tested? Certainly, any lawyer should be able to read and understand cases, constitutional provisions, statutes, regulations, and secondary authorities.[316] They should be able to understand the relative significance of these varied authorities, and be able to construct explanation, arguments, or provisions in an agreement based on these authorities.[317] In doing so, they should also be able to sort out and distinguish between relevant and irrelevant information and authorities.[318] They should be able to identify ambiguities and construct arguments for and against given propositions, ideally based on authorities that they are not compelled to memorize in advance.[319] Different forms of written communication can also be tested. For example, an essay examination can test the ability to construct a predictive analysis of a proposed plan of action, make a persuasive argument and counter argument, and prescribe a course of conduct by including language that may be included in a particular agreement.[320]

These suggestions probably reflect a bias against multiple choice questions. The bias stems not from an inherent objection to this kind of questioning in the abstract, but from the way in which they are used.[321] First, they form a substantial portion of current bar exams even though I have never heard of a single lawyer ever being called upon to answer multiple choice questions in practice.[322] Lawyers do at least write up memos, analyze problems, and do things similar to the kind of written response called for in essay exams, even though they typically have time to research and reflect on the topics being considered.[323] Second, the scope of existing questions is simply ridiculous if the goal is really to test

314. *See* Curcio, *supra* note 23, at 367-77.

315. *Society of American Law Teachers*, *supra* note 288, at 448.

316. *See* SARAH E. REDFIELD, THINKING LIKE A LAWYER: AN EDUCATOR'S GUIDE TO LEGAL ANALYSIS AND RESEARCH xiii-xiv (2d ed. 2011).

317. Curcio, *supra* note 23, at 364-65.

318. Trujillo, *supra* note 191, at 86.

319. *See* Gantt, *supra* note 295, at 455-57.

320. Trujillo, *supra* note 191, at 85-86. The MPT does seek to do this, and one of the most important and easiest changes to the bar examination would be to dramatically increase the focus on this type of question. *Id.* at 74.

321. *See* Curcio, *supra* note 23, at 383.

322. Trujillo, *supra* note 191, at 79.

323. *See id.*

"fundamental knowledge."[324] Yes, "ridiculous" is a strong word, but, if anything, it is perhaps not strong enough. By covering in-depth knowledge of a wide variety of subjects, the testing process consistently produces a group of applicants who fail—giving rise to the appearance that the public is being protected from incompetence.[325] In reality, the exam fails those who tend to do worse on standardized tests, which disproportionately affects minority applicants, and realistically shows who is better at memorizing and regurgitating rules (or who can afford the best bar review classes).[326] It certainly does not test whether the test takers would be good lawyers.[327] Multiple choice questions could be written to test skills such as issue identification, hypothesis generation, or truly fundamental knowledge, but no freely available questions seem to fit this description.[328]

While it is exceedingly unlikely that they would stand for it, I would wager large sums on the proposition that if members of the American Law Institute all sat down and were given the bar examination today (without paying for a bar review class) most of them, myself included, would fail. That would not mean we are incompetent; it would simply mean the test is not asking the right questions—assuming the goal is to test fundamental knowledge or skills and to protect the public by weeding out the incompetent.[329] At the end of the day, that is what we should expect and ask of our profession's licensing exam. But as of today, it is not what we, or the members of the public, are getting.

Legal educators and deans are immensely and appropriately concerned with the need to educate students for the modern practice of law.[330] For example, skills training is a critical component of modern educational reforms.[331] It is tragic that this particular effort has been called out as one "possible" reason[332] why law students are being labeled as "less able."[333] Instead, law schools may be better preparing students for the practice of

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324. Curcio, *supra* note 23, at 377.

325. *See* Trujillo, *supra* note 191, at 73-74.

326. *See Society of American Law Teachers*, *supra* note 288, at 447, 449.

327. Wurtzel, *supra* note 101, at 7. Plenty of good and even great lawyers have failed at least one bar exam, and regrettably, plenty of poor or even abysmal lawyers have passed at least one. *Id.*

328. *See* MBE SAMPLE TEST QUESTIONS, *supra* note 163. (offering twenty-one questions designed to "be similar to those on the MBE."); *see also* NCBE, MBE CIVIL PROCEDURE SAMPLE TEST QUESTIONS (2014), *available at* https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F16 (offering a sample of ten civil procedure questions, in preparation for the addition of this subject to the MBE beginning in February 2015).

329. *See* Trujillo, *supra* note 191, at 77-78, 83.

330. *Id.* at 70.

331. Bryan R. Williams, *Letter From the Chair*, 83 B. EXAMINER 2, 3, (2014).

332. Moeser, *President's Page*, *supra* note 2, at 6.

333. *October Memorandum*, *supra* note 8.

law, not merely the bar exam.[334] The solution is not to return to a practice that failed our students, but to consider whether the bar exam is failing the public and the profession. Perhaps it is not that law schools are unwilling to contend with the results of the bar exam. Perhaps it is the examiners who are unwilling to consider the possibility that the test simply asks the wrong questions. However carefully the questions are equated by qualified psychometricians, however stringent the quality control procedures for scoring exams might be, however reliable or replicable the data is from morning to afternoon sessions, if the exam tests things unrelated to the "real" practice of law, the bar exam does us all a disservice, potentially at heavy costs to the profession and the public.

334. *See* Glen, *supra* note 251, at 368. (typically, "the bar exam tests test-taking skills, rather than the law or lawyering skills.").