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A Better Bar: Why and How the Existing Bar Exam Should Change

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A Better Bar: Why and How the Existing Bar Exam Should Change

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I. INTRODUCTION

Despite the fact that competent lawyers should possess a wide range of knowledge, skills, and qualities¹ and the fact that different kinds of lawyers need different strengths,² the entire process used to select lawyers—from the Law School Admission Test (LSAT), through law school, and up to the bar exam—overemphasizes some skills and completely disregards others. Those most likely to become lawyers are those equipped to take timed tests that emphasize the ability to analyze and apply legal rules. Although these abilities are important, they certainly are not the only ones competent lawyers need. In fact, a blue-ribbon commission of lawyers, judges, and law professors conducted an in-depth study and concluded that competent lawyers must also be able to do legal research, conduct factual investigations, problem solve, communicate effectively, counsel clients, negotiate, organize and manage legal work, recognize and resolve ethical dilemmas,

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1. For a comprehensive list of the kinds of skills competent lawyers need, see SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 139-41 (1992) [hereinafter MACCRATE REPORT].
 2. After surveying practicing lawyers, one commentator noted that the kind of skills lawyers need depends on their practice. For example, public interest lawyers may need the ability to research intensively and imaginatively and think and strategize about individual and systemic problems, while prosecutors working on misdemeanor cases need to think quickly on their feet and negotiate and try a large volume of cases with little time for research or preparation. Transactional lawyers must be able to read and draft complex documents, work on the same project for long periods of time, and work in a team setting, while solo practitioners must be able to handle a wide variety of tasks for numerous clients and be able to manage their own law office. See Deborah A. Schmedemann, *Recalling Atticus Finch: Conversations with Practicing Lawyers*, WM. MITCHELL MAG., Spring 2001, at 28, 28.

and, in some instances, litigate and effectively use alternative dispute resolution procedures.³ Most of these skills, however, are not tested on the bar exam, are only cursorily assessed during law school, and are not factored into the law school admissions process. Further, qualities like a demonstrated commitment to promote social justice, a sense of fairness and morality, and the willingness to perform public service activities,⁴ although given lip service,⁵ are not accounted for in any meaningful way in the process of deciding who may get a law license.⁶

This Essay focuses on the bar exam, the final step in the process of deciding who may practice law.⁷ Currently, the exam is over-inclusive, allowing those with a very narrow range of skills to obtain a law license. It is also under-inclusive. By testing a very narrow range of skills in a way that is unrelated to the practice of law⁸ and via a methodology that is weighted in favor of those from middle- and high-socio-economic backgrounds,⁹ the existing bar exam delays or excludes people from the practice who may be competent lawyers and who may be the lawyers most likely to do pro bono work and serve under-represented communities.¹⁰ This Essay explores ways to modify existing bar examination requirements to account for the wide variety of skills, knowledge, and qualities competent lawyers should possess,

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3. MACCRATE REPORT, *supra* note 1, at 139-41.
 4. See MACCRATE REPORT, *supra* note 1, at 211-15 (noting that these qualities are important ones for lawyers to possess).
 5. These are qualities the legal profession purports to value. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.1 (1993) (setting forth an aspiring goal of fifty hours per year of pro bono work); see also ASS'N OF AM. LAW SCHS, PRO BONO PROJECT REPORT, LEARNING TO SERVE, pt. 2, at <http://www.aals.org/probono/report2.html> (last visited July 5, 2002) (documents from this website also on file with author) (noting that "few lawyers disagree that the provision of free services is a morally worthy undertaking to which good lawyers aspire").
 6. This was recognized by the authors of the *MacCrate Report*. See MACCRATE REPORT, *supra* note 1, at 211-15. Although some law schools do take into account an applicant's prior work within the community, most only do so if the applicant has a borderline LSAT score and GPA, and, at most schools, community service history is far less important than the applicant's LSAT score and undergraduate GPA. Likewise, with the exception of a small percentage of law schools, public service activities are not part of the required law school curriculum, and pro bono work is not accounted for in any way in the law school grading process. Finally, pro bono work is not considered by states when deciding who is entitled to a law license. For a brief discussion of law school pro bono programs, see *infra* notes 242-45 and accompanying text.
 7. There is no one national bar exam. However, as discussed in *infra* section II.B, all states' exams are substantially similar in format and methodology. Thus, this Essay uses the term "bar exam" as if it were a singular exam, rather than different versions of the same type of exam.
 8. See *infra* notes 40-69 and accompanying text.
 9. See *infra* notes 74-78 and accompanying text.
 10. See *infra* notes 100-20 and accompanying text.

keeping in mind that all lawyers need not possess exactly the same proficiencies. This Essay suggests that the concept of a competent lawyer should be defined broadly in order to account for a wide variety of qualities and skills, perhaps even including an applicant's commitment to perform public service and serve underrepresented legal communities.¹¹

When considering changing the entire process for selecting lawyers, numerous reasons exist for beginning with the current bar exam. First, unlike law schools, the bar exam's main purpose is to protect the public from incompetent new lawyers.¹² It is wrong to represent to the public that bar licensing requirements¹³ ensure minimal competence when, in fact, these requirements screen for only a narrow range of skills that competent lawyers should possess. Second, the pretense that the existing exam actually screens for competence means that the response to the real and perceived problems of licensing incompetent lawyers is to raise the passing score on the bar exam¹⁴ rather than to examine and address the public's actual concerns¹⁵ and the underlying causes of lawyer incompetence. Third, changing the bar exam may have a trickledown effect. For many law students, the bar exam is a

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11. All lawyers need not be committed to serving underserved legal communities or doing pro bono work. However, if a state bar determines these qualities are important, then that bar should consider giving some credit to those who have a history of community service and pro bono work. For a more in-depth discussion of this issue, see *infra* notes 239-45 and accompanying text.
 12. In numerous constitutional challenges to the existing bar exam, courts repeatedly have noted that the purpose of the exam is to measure examinees' competence to practice law. See, e.g., *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975) (stating that the bar exam is "designed solely to assess the legal competence of bar examinees"); accord *Delgado v. McTighe*, 522 F. Supp. 886, 896 (E.D. Pa. 1981); *Pettit v. Gingerich*, 427 F. Supp. 282, 294 (D. Md. 1977) *aff'd sub nom. Pettit v. Ginerich*, 582 F.2d 869 (4th Cir. 1978).
 13. This Essay uses the term "licensing" to refer to the requirements upon which states condition the granting of a license to practice law. Because many of the proposals suggested in this Essay are not technically an examination, this Essay often uses the term "licensing," rather than "examination," to describe the alternative processes this Essay suggests states use when deciding to whom a law license should be granted.
 14. See Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 936-941 (2001) (noting that some states argue that they need to raise the passing score because law graduates today are less competent than their predecessors); see also William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control and Racial and Ethnic Performance Disparities* (under submission to LAW & SOC. INQUIRY) (unpublished manuscript at 3-20, on file with author) (also available in the University of Nebraska Law College Library) (arguing that the move to raise passing scores on the bar exam is not to protect the public but is to reign in the supply of lawyers in a tight market).
 15. For a description of the public's concerns, as manifested through malpractice claims, bar disciplinary complaints, and public surveys, see *infra* notes 83-98 and accompanying text.

driving force in curriculum choices.¹⁶ If the bar exam measures a wider breadth of skills and qualities, law students and some faculty are likely to push for changes within law schools that mirror the new exam requirements. This, in turn, may change some of the types of courses offered and the skills and qualities assessed in law school classes. If law schools modify how they measure student achievement, then the LSAT, which purports to predict law school success for at least first-year law students,¹⁷ must also change or risk becoming less of a cornerstone in the law school admissions process. Finally, the current bar exam disproportionately delays or excludes people of color from the practice of law.¹⁸ If the exam does not actually measure minimum competence to practice law, and yet bar examiners continue promulgating this test, the profession perpetuates a system in which eradicating racial bias in our courts is a spoken panacea rather than a real commitment.¹⁹

Many will argue that changing the bar exam to reflect a broader picture of competent lawyers is unrealistic. They will contend that attributes like a commitment to social justice, a willingness to perform public service activities, and the likelihood of one's serving underserved segments of the population cannot be measured. They will argue that the ability to conduct factual investigations, do legal

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16. See MACCRATE REPORT, *supra* note 1, at 278 (noting that the bar examination influences law schools in developing their curricula to overemphasize substantive courses covered by the exam and influences law students to choose substantive law courses that are the subject of bar examination questions); see also Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Challenge and Proposal for Change* (forthcoming) (manuscript at 12, on file with author) (noting that the decisions by bar examiners as to which subjects to test has a huge impact on the courses students choose to take). A shorter version of Glen's essay, entitled *When and Where We Enter: Rethinking Admission to the Profession*, is scheduled to appear in the *Columbia Law Review* in October 2002. The full-length essay will be the subject of a symposium at Pace University Law School in October 2002 and is tentatively scheduled for publication in the *Pace Law Review* in the summer of 2003.
 17. There is an on-going debate as to the value of the LSAT as a predictor of law school success both overall and in the first year of law school. For a comprehensive discussion of why the LSAT is not a valid predictor of law school success, see William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001). See also Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593 (2001) (arguing against standardized testing, including the LSAT).
 18. See *infra* notes 121-24 (discussing the LSAC study detailing the different first-time and repeat passage rates for examinees who are white versus those who are people of color).
 19. Numerous state commissions have the articulated goal of erasing racial bias within their judicial systems. For an in-depth discussion of this issue, see *infra* notes 108-14 and accompanying text.

research, and orally communicate and negotiate are skills that either cannot be reliably measured or to do so would be prohibitively expensive. This Essay discusses why those arguments are unpersuasive and how many of the skills and qualities that currently play no role in the licensing process can, in fact, be assessed.

The foremost hurdle to implementing the changes suggested in this Essay is that a substantial amount of time, effort, and money will be required to change the existing system. Inertia is a powerful force, and it is easy to simply sit back and accept the status quo. People must be motivated to change. This Essay discusses the reasons the bench, bar, and legal academy should accept the challenge to examine and modify the bar examination process.

Part II of this Essay begins with a discussion of the recent move by many states to increase bar exam passing scores in order to more effectively screen out incompetent lawyers. It discusses why raising the passing score on the existing bar exam makes no sense unless and until states look at the skills, knowledge, and qualities that competent lawyers should possess. It argues that if states honestly assess what it takes to be a minimally competent lawyer, they will conclude that their licensing processes account for only a very narrow range of skills. It then discusses why, even if states are willing to test for only a few of the skills competent lawyers should possess, the existing exam inadequately measures those skills. It also discusses other problems with the existing exam, such as its complete failure to address the kinds of issues giving rise to the bulk of bar disciplinary complaints, malpractice lawsuits, and negative public perceptions of lawyers. Part II also discusses how the existing bar exam hinders the development of a more diverse bench and bar.

Part III examines numerous ways of measuring various competencies that are not now accounted for. It looks at some of the methods used in other professions' licensing processes. It discusses using computer-based testing to measure a broader array of skills lawyers need and to measure those skills in a manner more reflective of how they are used in practice. It looks at alternative means of ensuring new lawyers have basic lawyering skills, such as a mandatory apprenticeship or a postgraduate teaching term that teaches, and then assesses, applicants' abilities to integrate practical skills with the substantive law and with professional responsibility issues. It proposes various means of measuring oral communication and negotiation skills. Finally, it discusses structuring licensing requirements to reflect the value the profession purportedly places on public service and pro bono work.

The last Part of this Essay examines barriers to revising the existing bar licensing requirements. Among these barriers are arguments that may be raised by the bench and bar, exam-administering

bodies, law faculties, and law students. It discusses how and why these barriers should be overcome. The Essay concludes with the assertion that changing the bar licensing process is feasible and critical in ensuring competent new lawyers and a more diverse bench and bar.

II. SHORTCOMINGS OF THE EXISTING BAR EXAM

A. The Pretense That the Exam Protects the Public from Incompetent Lawyers

Some states have recently made their bar exams more difficult to pass by raising their passing scores.²⁰ The ostensible purpose for raising the scores is to protect the public from tuition-hungry law schools that admit and graduate incompetent lawyers.²¹ There are several problems with this justification for increasing bar exam passing scores. First, as some scholars have noted, there is little reason to believe that incompetent lawyers receive licenses because bar exam passing scores are too low.²² Second, addressing the problem of incompetent lawyers by simply raising bar exam passing scores, while leaving the bulk of the system that selects and trains potential lawyers intact, makes no sense. Competence to practice law is developed through education and training, not through studying a little harder to memorize more legal rules in order to answer more multiple-choice questions correctly. Third, if states are raising the passing scores because of the need to protect the public from incompetent lawyers, the first question should be this: in what ways are today's lawyers more incompetent than their predecessors?²³ Without answering this question, states cannot accurately determine what should be done to remedy the real and perceived problem of new lawyer incompetence.

20. See Merritt et al., *supra* note 14, at 929 (stating that "at least a dozen states have raised the score required to pass their bar exams during the last decade, with several more evaluating proposed increases"); see also Kidder, *supra* note 14 (unpublished manuscript at 1-2) (noting more than a dozen states have raised their bar passing scores, including Texas, Illinois, Pennsylvania, Rhode Island, Nebraska, and Maine, and that Florida, Minnesota, and New York are considering a similar change).

21. Merritt et al., *supra* note 14, at 936.

22. Kidder, *supra* note 14 (unpublished manuscript at 7) (noting that although there was a slight drop in absolute performance on the MBE in the late 1990s (from 143.4 to 141.0), the 1999 average MBE score was still higher than all the annual averages from 1980 to 1991); accord Merritt et al., *supra* note 14, at 936-941 (discussing why the data on bar exam scores fail to support the claim that today's examinees are less competent than their predecessors).

23. In fact, empirical studies question the premise that new lawyers today are less competent than their predecessors. See Kidder, *supra* note 14 (unpublished manuscript at 7) (noting that MBE scores have been higher in recent years than ever before); see also Merritt et al., *supra* note 14, at 936 (noting that empirical evidence demonstrates that recent bar examinees are not less qualified than their predecessors).

Finally, if states genuinely want to protect the public, they should look at the kinds of complaints the public has about lawyers and how those complaints can be addressed.

The move to raise existing bar exam passing scores because of the need to protect the public from incompetent lawyers operates from the premise that the existing bar exam accurately measures competence. However, no state that has raised bar exam passing scores has outlined all the skills, qualities, and knowledge that make one a minimally competent lawyer. Nor has any state carefully examined its existing bar exam to verify whether it tests for these skills and qualities and for this knowledge.

To screen for competence without first defining the term makes no sense. As one commentator noted,

Clearly, in order for a bar examination to be a legitimate test of minimum competence to practice law, it must be rooted in a reasonable definition of the very quality it professes to measure. However, not only have bar examiners noticeably failed to articulate a reasonable definition, but they have also failed to enunciate any definition at all.²⁴

In fact, at one conference on the bar exam, chairmen of the national and state bar examining boards could not even agree as to the purpose of the bar exam or what it tests.²⁵ The failure to define minimum competence and the disagreement over the exam's purpose and what it actually tests reflect a problem with the bar exam itself: it is a poor measure of who is ready to practice law due to the narrow range of skills it tests and the manner in which it tests those skills.²⁶

Many proponents of the existing bar exam believe that the exam screens for minimally competent lawyers²⁷ because it tests mastery of basic skills and knowledge.²⁸ As one commentator noted,

24. Cecil J. Hunt, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 764 (1996).

25. Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, N.Y. ST. B.J., July/Aug. 1991, at 34, 36.

26. For an in-depth discussion of the skills competent lawyers need and why those skills are necessary, see MACCRATE REPORT, *supra* note 1, at 135-216. The authors of the *MacCrate Report* have stated that the report should not be used as a list of skills and values in which every lawyer must be versed before being admitted to a bar. *Id.* at 133. However, they do believe that they are the skills that every lawyer must have before he or she is ultimately responsible for representing a client. *Id.* at 125. They also recognize that "modifying the bar examination to give appropriate weight to the importance of acquiring lawyering skills and professional values would encourage law students in their efforts to develop their personal skills and values." *Id.* at 285.

27. See, e.g., Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609, 611-12 (2001); see also Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81 (1974) (arguing the importance of bar examinations in legal education).

28. Stephen P. Klein, a long-time consultant for the National Conference of Bar Examiners and a consultant for many state bars, told a journalist that the bar exam

If, in speaking of the practice of law, one means the whole range of activities which typically make up the work of a lawyer, such as researching, counseling, negotiating, arguing, litigating and otherwise persuading clients, colleagues, adversaries, judges, administrators and the public to do what the lawyer wants them to do, then clearly the bar examination does not measure 'minimum competence,' by almost any definition of the term.²⁹

Nevertheless, this commentator concluded that the bar exam can realistically test only the knowledge and skills unique to lawyers—knowledge of the law and the application of legal reasoning—given the limitations of time, money, and the large number of applicants.³⁰

Even if one accepts the contention that the bar exam should test only for basic skills unique to lawyers, the existing bar exam still fails to test for the ability to do legal research and to read and comprehend judicial opinions, statutes, and other sources of the law, all skills also unique and critical to lawyers.³¹ These skills are as much related to practicing law competently as are the skills of legal analysis and reasoning. In fact, in a study of Federal Trade Commission lawyers, researchers found virtually no correlation between performance on the bar exam and a lawyer's actual accomplishments.³² Thus, state bar examiners who pretend to produce more competent lawyers by raising

is "not designed to determine what kind of lawyer a person will be. It's designed to determine whether people have mastered certain basic skills and knowledge. It's a test of minimum competency, no different from the medical boards or a CPA exam or a driver's test." Tracy Breton, *Success Eludes Many R.I. Law School Grads*, PROV. J.-BULL., Dec. 10, 2001, at A01. This argument fails on two counts. First, the CPA exam and driver's test actually assess the gamut of skills one needs to be an accountant and to drive, while the medical boards, recognizing that the skills assessed are in no way all the skills doctors need, require hands-on training in the form of internship and residency. Second, does learning how to better answer multiple-choice questions to achieve a passing score really mean that the person who failed the first time but passed later is now minimally competent to practice law, especially since, according to an LSAC study, only 5.2% of the test takers who persist never pass? LINDA F. WIGHTMAN, LAW SCH. ADMISSIONS COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 31 tbl.9 (1998) [hereinafter LSAC STUDY].

29. Charles T. Beeching, Jr., *A Bar Examiner's Perspective on Minimum Competence*, B. EXAMINER, Nov. 1996, at 6, 6.
30. *Id.* at 12.
31. Some may claim that the ability to read and comprehend judicial opinions is tested by the new Multi-State Performance portion of the bar exam. The MPT, however, does not address the issue of whether someone can perform the critical skill of legal research. Although the MPT attempts to address some of the other skills not tested by the existing exam, it falls far short of what is needed. For a more in-depth discussion of the MPT, see *infra* notes 58-69 and accompanying text.
32. Leatta M. Hough, *Development and Evaluation of the "Accomplishment Record" Method of Selecting and Promoting Professionals*, 69 J. APPLIED PSYCHOL. 135, 135-46 (1984). For a discussion of this study and its findings, see Kidder, *supra* note 14 (unpublished manuscript at 38-39).

the passing score on the bar exam are being naive, at best, and deceptive, at worst.

B. Overview of the Bar Exam

In virtually every state, one must pass a bar exam before receiving a license to practice law.³³ While each state administers its own version of the exam, the exams are actually all quite similar. For example, virtually all states require that students take and achieve a certain minimum score on the Multi-State Bar Exam (MBE), a 200-question multiple-choice test covering six substantive legal areas. The MBE score is then combined and often scaled with an applicant's score on the essay portion of the exam and, in some states, also with the applicant's score on a performance exam. Depending on the state, the bar exam is either a full two- or three-day ordeal. In addition to the bar exam, applicants in most states must take and pass the Multi-State Professional Responsibility Exam (MPRE), a multiple-choice test on professional responsibility.³⁴ In most states, after taking and passing a state's bar exam and the MPRE, a person may be sworn in as a lawyer.³⁵

Because most states' bar exams have at least three different sections (the MPRE, the MBE, and the essay exam) and other states' exams have a fourth (the MPT, a "performance test"), it is logical to assume that these exams test a wide variety of skills. This, however, is not the case. All these different sections of the bar exam essentially test the same narrow range of skills: the applicant's ability to identify issues and analyze and apply the law. For example, no section of the bar exam tests, or purports to test, skills like the applicant's ability to perform legal research, perform factual investigation, negotiate, coun-

33. To get a law license, one must pass the bar exam in every state except Wisconsin, which allows students graduating from a Wisconsin law school to be licensed in Wisconsin without taking the Wisconsin bar exam. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 648. For a brief discussion of the diploma privilege, see *infra* notes 228-33 and accompanying text.

34. For a list of jurisdictions requiring the MPRE, see NAT'L CONFERENCE OF BAR EXAM'RS, MULTISTATE EXAMINATION USE, at <http://www.ncbex.org/tests.htm> (last visited July 5, 2002) (documents from this website also on file with author) (charting which jurisdictions use the MBE, MEE, MPRE, and MPT).

35. A few states have additional requirements before licensing. For example, North Carolina requires bar applicants to meet briefly with members of the practicing bar for an ethics interview, N.C. R. ADMIS. § .0604 (2002), and Vermont and Delaware have an apprenticeship requirement. VT. R. ADMIS. § 6 (2001); DEL. R. SUP. CT. R. 52 (2002). Many states also require attendance at a short "Bridge the Gap" program as a prerequisite to admission. See Robert M. Jarvis, *Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS, 359, 392 (1996); accord MACCRATE REPORT, *supra* note 1, at 290 n.46.

sel clients, or orally argue a legal issue.³⁶ Thus, what at first glance seems like an examination that tests for a wide range of skills is in fact a lengthy exam that focuses on testing the same skills in slightly different ways.

Some argue that it is unrealistic to expect a bar exam to measure competence by testing skills in a way that parallels how those skills are used by practicing lawyers.³⁷ They argue that time limitations, financial restrictions, and the effort to avoid subjectivity in grading all impede the development of an exam that tests a broader range of skills.³⁸ Thus, they argue, the existing bar exam, while not perfect, is the best that can be done to accurately predict minimal competence, at least as to those skills it is designed to test.³⁹ This Essay later suggests ways to better test a broader range of skills. The next section, however, first looks at the skills each section of the existing bar exam claims to test and argues that the exam fails to accurately measure minimal competence in even those skills it purports to measure.

C. Critiques of the Existing Bar Exam

1. Problems with the MBE

One component of the bar exam is the Multi-State Bar Exam (MBE), a closed-book, 200-question multiple-choice exam covering six substantive legal areas. The National Conference of Bar Examiners (NCBE) proposed the MBE in the early 1970s in response to a concern among state bar examiners about the burden of preparing and grading

36. As Professor Weinstein points out in his article, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247 (2001), Howard Gardner's theory of multiple intelligences includes a "linguistic intelligence." This type of intelligence may be expressed either orally or in writing; however, the ability to communicate well orally does not necessarily mean one can communicate well in writing, or vice-versa. *Id.* at 256. In only testing for written linguistic intelligence, the bar exam assumes that all lawyers must equally possess this ability. However, this is not the case. For example, prosecutors and public defenders in misdemeanor court rarely, if ever, submit written material. On the other hand, they must possess strong oral linguistic ability in order to do their jobs well. This is just one example of how the existing bar exam fails to account for different kinds of intelligence and how it fails to account for the fact that different kinds of lawyers need to be proficient in different skills. For a more in-depth discussion of how students who test well on an oral exam may not test well on a written exam, and vice-versa, see John M. Burman, *Oral Examinations as a Method of Evaluating Law Students*, 51 J. LEGAL EDUC. 130 (2001).

37. Beeching, *supra* note 29; Rachel Slaughter et al., *Bar Examinations: Performance or Multiple Choice?*, B. EXAMINER, Aug. 1994, at 7.

38. See Slaughter et al., *supra* note 37, at 8-11.

39. See, e.g., *id.* at 16 (arguing the MBE produces reliable scores for the purpose of making pass/fail decisions on whether the examinee knows the law and can apply it to cases the examinee has not seen before).

bar exams in light of the anticipated increase in bar applicants.⁴⁰ Today, virtually all states use the MBE.⁴¹ The MBE is designed to measure "legal reasoning and knowledge that is material to the practice of law."⁴² The NCBE has concluded, based on content and empirical validity studies, that the MBE does actually test legal reasoning and knowledge.⁴³ To test the MBE's content validity, the NCBE conducted two studies, one in 1980 and another in 1992. Both studies used independent panels of law professors and practicing lawyers and found, "with few exceptions, that the MBE covers topics that are material to the practice of law and that the exam requires legal reasoning skills and knowledge."⁴⁴

The first issue to address here is the NCBE's assumption that the MBE tests legal "knowledge." What does it mean to say that the MBE tests legal "knowledge"? If "knowledge" is equated to "understanding," the closed-book format of the exam makes no sense, since it certainly is unnecessary to memorize legal rules in order to understand them. The closed-book format makes sense only if the drafters of the exam equate knowledge of the law with memorization of legal rules and principles, which is apparently exactly what they do. In response to a critique that the MBE is a test of memory and test-taking ability, not of legal knowledge or analytical skill, the NCBE noted that experts in its 1992 content validity study found that the emphasis of the questions was "balanced between legal reasoning skills and memorization of legal principles."⁴⁵

The NCBE contends that the MBE accurately measures "baseline content knowledge important to all lawyers." If the exam actually does measure critical baseline content, presumably that "knowledge" should be retained long after the exam is administered. Thus, perhaps a more accurate study of content validity would be to ask the professors and lawyers engaged in the NCBE study to retake the MBE and see how well they know the content tested. One might suspect that few would volunteer for this kind of study because the reality is that most lawyers forget relatively quickly most of the rules they memorized in order to pass the bar exam. Thus, to the extent the ex-

40. John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, B. EXAMINER, Feb. 1996, at 14, 15.

41. See NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 34 (charting which jurisdictions use the MBE, MEE, MPRE, and MPT).

42. Slaughter et al., *supra* note 37, at 14.

43. *Id.* at 14-15.

44. Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, B. EXAMINER, Feb. 1999, at 25, 28; see also Slaughter et al., *supra* note 37, at 13 (explaining the findings of the NCBE's research on whether the MBE meets necessary standards).

45. *Myths and Facts About the MultiState Bar Examination*, B. EXAMINER, Feb. 1995, at 18, 18.

isting bar claims that it tests minimum competence by testing for baseline knowledge of the substantive law, it operates on the faulty premise that memorization of the law in order to pass the bar exam equates to knowledge of the law.⁴⁶ Testing for memorization of legal principles makes no sense. Good lawyers research, rather than memorize, the law. In fact, relying on one's memory rather than on one's research of the law may lead to Rule 11 sanctions⁴⁷ or malpractice liability.⁴⁸

Some may argue that lawyers eventually come to know the substantive law in the area in which they teach or practice, and that it is reasonable to ask new lawyers to know the law in many substantive areas since most new lawyers do not yet have a specialty. Then, as the lawyer begins to specialize, it is less important to know the substantive law in other areas of practice. However much surface appeal this argument has, it does not justify requiring memorization of hundreds of black letter law rules because it assumes that most people who memorize the law retain what they have memorized, at least until they begin to specialize. Additionally, the argument assumes that the MBE actually tests for the kind of baseline knowledge all new lawyers should have. Although some basic knowledge of a broad range of substantive legal areas is important, the current examination does not test for basic knowledge, but instead often tests obscure rules of law.⁴⁹

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46. Any lawyer who believes that the MBE tests legal "knowledge" (i.e., information that is retained for any length of time after being memorized for the test) should go to NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 34, click on "Test Books," take the sample thirty-question MBE exam, and see how many questions he or she answers correctly.
 47. *See, e.g.,* Ward v. Dapper Dan Cleaners and Laundry, Inc., 828 S.W.2d 833 (Ark. 1992) (discussing attorney's request for prejudgment attachment three years after the prejudgment attachment statutes had been declared unconstitutional and noting that it is a Rule 11 violation to fail to make reasonable inquiry into the law); *see also* Margaruite L. Butler, *Rule 11 Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681 (2002) (noting the imposition of Rule 11 sanctions for failure to adequately research a case prior to filing a lawsuit).
 48. *See, e.g.,* Shopsin v. Siben & Siben, 702 N.Y.S.2d 610 (Gen. Term 2000) (upholding denial of summary judgment in a legal negligence case based on allegations of financial injury resulting from attorney's failure to perform adequate legal research in a property dispute case).
 49. Examples of the kinds of information examinees are expected to know include: the appropriate remedy in an action for conversion; whether a kidnap victim must know she has been kidnapped in order for the State to bring a kidnapping or attempted kidnapping charge; whether a notation in a medical record stating "patient says he was attacked by 'X'" is admissible to prove that "X" was the attacker; whether a motion to suppress evidence is appropriate at a grand jury hearing; whether, as a matter of constitutional law, a senator and her aide have immunity for statements the senator made during a speech on the senate floor. *See* NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 34. These are questions from the sample exam posted on the website. Click on "Test Books."

The other significant problem with the MBE is that its format is completely unrelated to how lawyers apply their legal knowledge to a client's problem. No practicing lawyer has ever been asked to choose one of the "most correct" of four given answers after being given 1.8 minutes⁵⁰ to apply a memorized legal principle to a set of facts she has never seen before. No lawyer can competently make decisions without more context for the case and without the ability to ask more questions or clarify certain issues. Again, if a lawyer were to come up with the best answer based on only a snippet of information and without asking questions to clarify assumptions, she might be subject to Rule 11 sanctions⁵¹ or a malpractice lawsuit for failure to do appropriate factual research.⁵²

Using a multiple-choice test to measure competency to practice law is a fundamentally flawed concept because the test methodology is unrelated to the skills needed to practice. To the extent bar examiners insist on continuing to use this methodology, at a minimum, they should allow those taking the test to look up the applicable legal rule. At least with this change, applicants' understanding of the law can then be tested by seeing if they can appropriately find and then apply the legal rule to a given fact situation. That is much more in line with what practicing lawyers actually do.

2. *Problems with the Essay Questions*

In addition to the MBE, virtually every state has an essay-question portion of the bar exam. Some states use questions that test the state's own laws, while others use the Multi-State Essay Examination (MEE).⁵³ The MEE, developed and promulgated by the NCBE, is a three-hour exam consisting of six or seven questions covering nine

One of the NCBE's justifications for questions seeking this kind of information is that in a 1992 study, "expert panelists reported that they believed MBE items were generally easy, correctly estimating that about 66% of candidates would select the right answer to a typical item." *Myths and Facts About the Bar Examination*, *supra* note 45, at 18. One might suspect that the 34% of the people who did not choose the correct answer might disagree with the expert's assessment that the questions were easy.

50. See Kuechenmeister, *supra* note 44, at 28 (noting that applicants have six hours to answer 200 multiple-choice questions).

51. See, e.g., *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 984-86 (Fed. Cir. 2000) (upholding Rule 11 sanctions granted because of failure to investigate the facts before filing a patent infringement suit).

52. See STANDING COMM. ON LAWYERS' PROF'L LIAB., AM. BAR ASS'N, PROFILE OF LEGAL MALPRACTICE CLAIMS, 1996-1999, 25, 26 (2001) (noting that a large percentage of malpractice claims are due to a lawyer's failure to perform an adequate factual investigation).

53. As of July 2003, fourteen states and the District of Columbia will be using the MEE. For a complete breakdown of the states using the MEE, see NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 34.

topics.⁵⁴ Generally, the MEE tests majority and minority legal rules rather than a specific state's legal rules.⁵⁵ The MEE and state essay tests are designed to test an applicant's ability to identify legal issues, apply the applicable legal rule, and present a reasoned analysis of relevant issues in a clear and concisely written answer.⁵⁶

Conceptually, it is appropriate to ask an applicant to identify a legal issue and to draft a well-written legal analysis of the issues. Lawyers often do just that. However, it is questionable whether the bar exam's timed essay questions actually test these skills.

One problem with the essay questions is that they require analysis based on memorization rather than analysis based on research and case law, which is the kind of analysis practicing lawyers do. Also, because of the time pressure, applicants do not have time to thoroughly think about their solution, write, and then rewrite their answers. In practice, lawyers faced with a legal problem usually have time to think about the issue, research the law, and consult with colleagues if the problem deals with an unfamiliar area of law. Most good lawyers never turn in a first draft of an analysis. Rather, they spend time writing and rewriting to make sure that they have clearly presented the issue and analysis. In answering the essay questions, however, there is little time for thought, no ability to research, and no opportunity to rewrite an answer. Because the essay exam format is so unreflective of the practice of law, it is a stretch to say that essay exams validly measure whether a new lawyer will be able to identify legal issues, apply the applicable legal rule, and present a reasoned analysis of relevant issues in a clear and concisely written answer.⁵⁷

Some might argue that graders are not judging the essay answers the same way that one would judge something that the writer had time to think about and edit. However, this begs the question since the issue is whether the exam actually measures the ability to practice law. The artificial timeframe means that someone who could actually solve the problem in practice if they had the time to think about the problem, research the issue, and organize their thoughts by writing and rewriting their answer may never get that chance because they

54. Jane Patterson Smith, *The New Multistate Essay Examination*, B. EXAMINER, Nov. 1992, at 13, 13.

55. See NAT'L CONFERENCE OF BAR EXAM'RS, at <http://www.ncbex.org/tests/mee/meetxt.htm> (last visited Aug. 5, 2002) (documents from this website also on file with author). The NCBE notes that absent an instruction to use the law of the jurisdiction administering the exam, examinees should apply "fundamental legal principles rather than local case law or local statutory law." *Id.*

56. Kuechenmeister, *supra* note 44, at 30; see also Hulett H. Askew, *Why Georgia Adopted Performance Testing*, B. EXAMINER, Feb. 1998, at 30, 31 ("essay questions are intended to be a test of an applicant's ability to recall rules and then apply them as well as be able to communicate effectively").

57. Kuechenmeister, *supra* note 44, at 30.

have a kind of intelligence not credited by the format of the existing exam.

3. *Problems with the Multi-State Performance Test*

The last section of the bar exam, the Multi-State Performance Test (MPT), has gained popularity since its introduction by the NCBE in 1997. As of July 2003, it will be administered in twenty-seven states and in the District of Columbia.⁵⁸ In many states, it replaces one or two essay questions. The MPT is designed to “measure an applicant’s ability to use fundamental lawyering skills by requiring the applicant to complete a task that a beginning lawyer should be able to carry out.”⁵⁹ It seeks to test “factual analysis, legal analysis and reasoning, communication, problem solving, organization and management of a legal task, and recognition and resolution of ethical dilemmas.”⁶⁰ In essence, the MPT is an attempt to address many of the issues this Essay raises about the narrow range of skills tested by the traditional bar exam and some issues raised by the *MacCrate Report*.⁶¹ Unfortunately, because the MPT requires the applicant to digest a lot of information in a short amount of time and then produce a written product with no time for editing, it is questionable whether it really measures skills different than those measured by the essay portion of the exam.

The MPT uses a case file consisting of factual documents like written summaries of client interviews, police reports, and contracts, as well as case law and statutes.⁶² Some of the factual documents are ambiguous or contain conflicting information. Some of the law contained in the problem is irrelevant.⁶³ The case files are approximately fifteen pages in length.⁶⁴ The test taker is given ninety minutes to read and digest all this material and perform the appointed task, whether it be drafting a persuasive brief, writing an objective opinion letter to a client, or drafting a settlement proposal, discovery plan, or a closing argument.⁶⁵

This portion of the bar exam does give applicants tasks much like those they will face in practice. However, it presents situations most lawyers seldom face: the need to read and digest the applicable law and a large amount of information about a new case and draft a legal

58. For a complete list of those states administering the MPT, see NAT’L CONFERENCE OF BAR EXAM’RS, *supra* note 34.

59. Kuechenmeister, *supra* note 44, at 31.

60. *Id.*

61. *See id.* at 30-31.

62. *Id.* at 31.

63. *Id.*

64. Sample MPT questions are available at the National Conference of Bar Examiners’ website. *See* NAT’L CONFERENCE OF BAR EXAM’RS, *supra* note 34. Click on “Test Books” and then on “MPT 2002 Information Booklet.”

65. Jane Smith, *Testing, Testing*, B. EXAMINER, May 1999, at 46, 46.

document with virtually no time for reflection or editing. In fact, applicants taking MPT problems for the first time often state that they cannot finish in the allotted time.⁶⁶

Research indicates a correlation between applicants' performance on the MPT and their performance on other portions of the bar exam, especially the essay section.⁶⁷ One must wonder whether this is simply because the MPT is just another way of testing the same skills tested by other portions of the exam.⁶⁸ One interesting question is whether such a high correlation between the MPT and other sections of the bar exam would exist if bar examinees had more time to complete the MPT portion of the exam, or if they at least received the case packet a few weeks before the bar exam so that they could study the facts and law before being asked to perform a task related to the case. This certainly should be the subject of additional study.⁶⁹

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66. Charles S. Kunce & Scott E. Arbet, *A Performance Test of Lawyering Skills: Candidate Perceptions*, B. EXAMINER, May 1995, at 43, 45 (noting that of 1,751 bar applicants participating in a pilot test of the MPT in three jurisdictions, about 75% of all candidates felt that they had either less than enough or much less than enough time to complete the MPT); Stella L. Smetanka, *The Multi-State Performance Test: A Measure of Law Schools' Competence to Prepare Lawyers*, 62 U. PITT. L. REV. 747, 757 (2001) (reporting that a study in which the MPT was administered to volunteer students found that students had a great deal of trouble with the time constraints).
67. Stephen P. Klein, *The Costs and Benefits of Performance Testing on the Bar Examination*, B. EXAMINER, Aug. 1996, at 13, 16.
68. The NCBE's own study of the MPT confirmed that it mainly tests skills already tested elsewhere in the exam. The study found that legal and factual analysis accounted for 84-88% of the content of the tasks. The study also found that while the MPT did a good job of testing the applicant's legal analytical ability and ability to identify and apply the facts, it was not a good measure of the applicant's problem-solving ability. See Marcia A. Kuechenmeister, *A Performance Test of Lawyering Skills: A Study of Content Validity*, B. EXAMINER, May 1995, at 23, 27. There also is some question as to whether the MPT tests skills as they are used in practice. A survey of 1,751 bar candidates found that the MPT score did not improve with the number of years an applicant reported to have been in practice. Kunce & Arbet, *supra* note 66, at 46. *But see* Klein, *supra* note 67, at 16 (noting that analysis of California, Georgia, and Virginia data shows that attorneys with four or more years of practice experience score higher on the MPT section than would be expected on the basis of their scores on the rest of the exam). It seems that the main difference between the MPT and the other sections of the bar exam is that the MPT does not test content knowledge because examinees are given the applicable substantive law. In this way, the MPT is certainly an improvement over other sections of the bar exam because it is more reflective of real-life lawyering tasks in which lawyers are not required to memorize the substantive law.
69. As a purely anecdotal example, in the fall of 2001, I gave my evidence students an exam that required them to read a case file and hand in two motions in limine prior to the in-class exam. Then, the in-class portion of the exam consisted of short answer questions based on the case file. Many students who did really well on the motions in limine did not do as well on the in-class questions. When I asked one student why she thought there was such a difference, she said, "I really need time to think about a problem, gather my thoughts and organize my answer."

4. *Problems with the MPRE and Moral Fitness Screening*

Most states require applicants to pass the Multi-State Professional Responsibility Exam (MPRE).⁷⁰ This exam is a fifty-question multiple-choice test that measures familiarity with professional codes of conduct. It does not test an applicant's commitment to professional values, nor is it supposed to.⁷¹ The exam simply tests whether the applicant has memorized the ethics rules and can apply them to a multiple-choice question. Although it is important to test for a basic knowledge of ethical rules, one wonders whether this single test is sufficient. This test, after all, in no way reflects whether new lawyers will actually follow the rules of ethics. Moreover, the entire moral fitness screening process does not even attempt to measure important qualities like a commitment to promote social justice and a willingness to perform public service,⁷² qualities some members of the bench and bar repeatedly emphasize as extremely important.⁷³

5. *Problems with the Weight Given to the MBE*

By failing to test a wider breadth of skills, the existing bar exam is over-inclusive in that it allows bar applicants with a very narrow range of skills to get a law license. The exam is also under-inclusive. By testing a very narrow range of skills in a way that is unrelated to the practice of law, the existing bar exam may be excluding people from the practice who would be competent lawyers.

The under- and over-inclusiveness of the exam is exacerbated by the weight examiners give to the MBE. As discussed above, the MBE equates short-term memorization of the law with knowledge of the

I don't get that kind of time when I take an in-class exam." When we base licensing requirements on how well people do on timed tests, are we really measuring who will ultimately be competent lawyers, or are we measuring which kind of people can think best in a timed-test situation?

70. All but Maryland, Washington, and Wisconsin use the MPRE. See NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 34.
71. MACCRATE REPORT, *supra* note 1, at 283.
72. The entire screening process for whether applicants have "moral character" does not play any role in assessing whether new lawyers are likely to contribute to the community and be responsive to client needs. The screening process for "moral fitness" is designed to "weed out the exceedingly small number of candidates whose past misconduct is viewed as a portent of future wrongdoing." *Id.*
73. See, e.g., Kenneth L. Jacobs, *How to Institutionalize Pro Bono at Your Office*, MICH. B.J., Jan. 1999, at 52, 52 (noting that the Michigan Bar's Voluntary Standard for Pro Bono Participation calls on each lawyer to volunteer a minimum of thirty hours annually to pro bono service or represent three low income individuals or contribute \$300 to approved pro bono agencies); Robert E. McBeth, *Judicial Activism*, JUDGES' J., Winter 2001, at 12, 12 (noting the importance of judges playing a role in encouraging lawyers to do pro bono work); Robert N. Weiner, *Boosting Pro Bono*, A.B.A. J., Dec. 2000, at 61, 61 (noting the ABA's commitment to encouraging pro bono work).

law. Its multiple-choice question format also has virtually no relationship to the skills needed to apply legal knowledge to a client's problem. Additionally, studies have found that what standardized tests⁷⁴ measure most reliably is the test taker's family income and parental education level.⁷⁵ One study found that bar passage rates also positively correlate with candidates' socioeconomic status: the higher the socioeconomic status, the higher the pass rate.⁷⁶ Empirical evidence also indicates that members of minority groups who have achieved the same grades in the same classes at the same school as their white counterparts do significantly worse on standardized tests.⁷⁷ Thus, the

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74. Some will undoubtedly take issue with the grouping of the MBE with other standardized tests like the SAT, LSAT, and GRE because the MBE ostensibly tests actual knowledge of specific legal rules in addition to purportedly testing analytical ability, reasoning skills, and general reading comprehension skills other standardized tests attempt to measure. However, the format of the tests is virtually identical. All the tests "reward rote performance, guessing, gamesmanship and the ability to sort artificial alternatives quickly under timed conditions." Delgado, *supra* note 17, at 607. And, of course, all the tests are susceptible to good coaching: one must learn how to take the tests, not just learn the information itself. In fact, many students now feel compelled to take both a Bar-Bri course, which covers the essay exam and multiple-choice portion of the exam, and the PMBR, a course that focuses solely on the skills needed to pass the MBE, or a supplemental essay-writing preparation course. In fact, the City University of New York found that providing the six-day PMBR course in how to take the MBE resulted in higher MBE scores for its graduates. See COMM. ON BAR ADMISSIONS AND LAWYER PERFORMANCE & RICHARD A. WHITE, AALS SURVEY OF LAW SCHOOLS ON PROGRAMS AND COURSES DESIGNED TO ENHANCE BAR EXAMINATION PERFORMANCE 21 (available from the American Association of Law Schools) (also available in the University of Nebraska Law College Library) [hereinafter COMM. & WHITE].
75. See, e.g., Delgado, *supra* note 17, at 601-02 (noting that family income, social class, and even zip codes produce a high correlation with scores on standardized tests like the SAT); see also PETER SACKS, STANDARDIZED MINDS 8 (Perseus Publishing 1999) (noting the "Volvo Effect," the correlation between standardized tests and family income and education); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 988-89 (1996) (noting the correlation between income level and test performance within every racial and ethnic group and across gender).
76. Stephen P. Klein & Anthony McDermott, *An Examination of Possible Item, Test, and Grader Bias in the California Bar Examination*, 4 BLACK L.J. 553, 558 (1975). The study's authors did note that even when the minority students' parents had the same education level as the white students' parents, the minority group members' bar exam scores were still significantly lower than the white students' scores. This conclusion is not surprising since parental education level is only one measure of socioeconomic status. Moreover, in the early 1970s, even more so than today, whites were statistically wealthier than African Americans of the same education level, and in the 1970s, as today, similar parental education levels do not guarantee white and African American children similar educational opportunities and benefits.
77. See Kidder, *supra* note 17; see also Delgado, *supra* note 17, at 601-02 (noting that even when family income levels are the same, minorities do not perform as well as whites on standardized tests).

portion of the test that is most likely to be weighted in favor of white bar applicants from affluent backgrounds comprises one-half to one-third of the bar exam.⁷⁸

The MBE also is the yardstick by which essay answers are scored. Each year, in order to ensure consistency between exams, the NCBE scales the MBE scores by converting raw scores to a scaled score based on the test takers' answers to certain "equator" questions.⁷⁹ Most states then use the MBE scaled scores to scale essay scores. Thus, for example,

[if] examinees who took the Ohio bar exam in July 1999 averaged 142 points on the MBE and had a standard deviation of 15 points on that portion of the exam, their scores on the second part of the exam [the state essay portion] would be transformed so that those scores also averaged 142 with a standard deviation of 15.⁸⁰

As Professor Merritt and her colleagues note, "This practice rests on the assumption that relative performances on the two portions of the exam are equivalent,"⁸¹ and it "assumes that any changes over time in a state's average scores on the MBE is mirrored in a corresponding change in the essay score."⁸² In essence, the MBE has become the tail that wags the dog. Because a standard deviation spread may amplify minor differences in raw score points, scaling the MBE may be especially problematic in years when there are small differences in raw scores because the scaled MBE may magnify small differences in raw scores. This creates the illusion of a greater score spread than actually exists. This problem is then exacerbated because the scale used for the MBE is also used for the essay questions, where, again, small differences in raw scores may end up becoming much larger differences in scaled scores. Assuming one believes the bar exam is a valid measure of competency, the way the scaled scores are calculated has the effect of altering a bar examination from a test designed to measure a specific level of competency to practice law to an exam that

78. No study has looked at performance on the MBE in relation to family income or family education level. Also, no one has replicated the study that William Kidder did for LSAT scores by looking at MBE scores of applicants who had the same law school GPAs from the same schools in the same courses that were the subject of the MBE questions to see if there was a racial disparity in the raw scores.

79. Merritt et al., *supra* note 14, at 932-34. Professor Merritt and her colleagues explain that the NCBE includes new and repeat questions on each exam in an effort to ensure that the MBE reflects the same level of knowledge from exam to exam. The repeat questions, or "equators," are used to measure whether test takers are doing better or worse, on average, than previous test takers. The NCBE scales up the current examinees' total scores on the MBE if the current test takers are performing better, on average. Likewise, if current examinees' performances on the "equator" questions are worse, on average, the NCBE scales down the current examinees' total MBE scores.

80. *Id.* at 933-34.

81. *Id.* at 934.

82. *Id.* at 934-35.

measures relative competence and always excludes a certain proportion of test takers, even if the differentiation in actual competency is quite small.

The MBE has become the key to how the entire exam is scaled and scored in order to ensure consistency between various examinations. Consistency between bar exams is important, and it is understandable why state bar examiners would want to use as objective a measure as possible to establish the long-term reliability of bar exam scores. However, it is wrong to use that portion of the bar exam which is least reflective of actual lawyering skills and is most likely to be biased in favor of higher-income, more privileged applicants as the foundation upon which the house is built.

Great emphasis is put on examinees' abilities to take multiple-choice exams by using the MBE for up to one-half of the bar exam score, scaling the MBE, and then using it as the scaling device against which other portions of the exam are measured. As discussed earlier, important lawyering skills like one's ability to communicate well with a judge or jury, to negotiate well, to mediate, to counsel clients, to perform legal research, or to perform factual investigations are not tested. Thus, an applicant with all the foregoing skills may nonetheless have to suffer the time, expense, and humiliation of retaking the exam if the applicant does not do well on multiple-choice tests, or the applicant may end up not getting a license to practice at all.

6. *Failure to Screen for Issues Giving Rise to the Public's Complaints*

As set forth above, the existing bar exam fails to assess numerous technical skills and qualities lawyers should possess. Also, neither the qualities that generate the bulk of actual complaints against lawyers nor the qualities that lead to negative public perceptions about lawyers are screened for by the existing bar exam.⁸³ For instance, well over half of all malpractice claims from 1996 to 1999 involved the preparation, filing, and transmittal of documents,⁸⁴ failure to timely

83. Few people actually are complaining that lawyers are incompetent. See Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 61 (noting that, in a survey of 1,202 people, lawyer competency was not an issue). See also Merritt et al., *supra* note 14, at 939 (stating that "Florida's records show that only six out of 365 disciplinary actions in the most recent year involved incompetence"). One reason people may not complain that a lawyer is incompetent is that they may not realize that the lawyer does not know how to perform the necessary legal research, draft the crucial legal documents, or make the critical and persuasive legal arguments.

84. Among all claims, 25.24% fell into this category, which encompasses lawyer actions in preparing, transmitting, or filing documents that were not part of pleadings or related to a contested matter. Thus, it encompasses things such as the preparation of contracts, leases, deeds, formal applications, wills, and trusts, as

commence an action,⁸⁵ and investigation other than in litigation.⁸⁶ However, none of these skills is tested or measured in any way by the existing bar examination process. Likewise, failure to communicate with clients and lack of due diligence in working on a client's case, issues commonly raised in bar disciplinary complaints,⁸⁷ also are not assessed in the current licensing process. States that have raised the passing score on the bar exam under the guise of protecting the public from incompetent lawyers not only fail to address the inadequacy of the exam, but they also ignore the fact that raising the passing score on the existing bar exam does nothing to address the public's actual complaints.

Raising the passing score on the existing bar exam also does nothing to address the public perception that lawyers are self-interested and greedy.⁸⁸ An empirical study of 1,000 people found that 45% of those questioned believed that "most lawyers are more concerned with their own self-promotion than their client's best interest," and 43% believed that "most lawyers do not contribute enough to their community through donations of time, legal services, or money."⁸⁹ Lawyers

well as the handling, transmittal, and filing of those documents. STANDING COMM. ON LAWYERS' PROF'L LIAB., AM. BAR ASS'N, *supra* note 52, at 9, 24.

85. Among all claims, 15.66% fell into this category, which focuses on the formal activities involved in starting a contested proceeding and includes activities such as filing a claim with governmental or other agencies. *Id.* at 9, 23.
86. Among all claims, 16.84% were in this category, which refers to factual investigation and research of all kinds other than those during, or in preparation for, claims or anticipated litigation. *Id.* at 9, 24. The other claims were divided between title opinion (13.01%); pretrial, pre-hearing (8.18%); advice (6.79%); settlement/negotiation (6.38%); trial or hearing (5.10%); appeal activities (1.11%); post-trial or hearing (1.08%); ex parte proceeding (.39%); referral/recommendation (.38%); other written opinion (.22%); tax reporting (.20%). *Id.* at 9.
87. See J. Nick Badgerow, *The Lawyer's Ethical, Professional and Proper Duty To Communicate With Clients*, 7 KAN. J.L. & PUB. POL'Y 105, n.6 (1998) (noting that in 1997, the Kansas ethical rules most commonly violated were lack of communication and lack of due diligence); Bernadine Johnson, *What Are They Complaining About*, LA. B.J., Oct. 1995, at 290, 290 (stating that "inadequate lawyer-client communication is perhaps the most common complaint received by the [Louisiana] disciplinary agency"); Mary Robinson, *Avoiding ARDC Anxiety: A Disciplinary Primer*, ILL. B.J., Sept. 1996, at 452, 453 (noting that the most common disciplinary complaints in Illinois were that lawyers neglected cases or failed to communicate with clients).
88. In a nationwide telephone survey of 1,202 adults commissioned by the ABA, survey respondents were asked to volunteer in their own words what they like and dislike about lawyers. The most frequent complaints were that lawyers were "too expensive" and "greedy" or "money hungry." Those two unfavorable impressions came up more than any other single comment. Hengstler, *supra* note 83, at 62.
89. AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 71 (1999). This perception of lawyers as greedy is one that is consistently played out in the media. See, e.g., James O.E. Norell, *BB Guns and Gun Control ABCs*, AM. RIFLEMAN, Jan. 1, 2002, at 40, available at 2002 WL 8754870 (noting that "greedy trial lawyers began sharpening their knives" upon learning about a Consumer Product Safety

can work to overcome these perceptions by doing pro bono work, yet the current bar exam does nothing to assess new lawyers' commitment to pro bono work.⁹⁰ If nothing else, it finishes off what the LSAT starts. That is, research indicates that "like many similar tests, the LSAT correlates negatively with community activism, social empathy, a desire to help others in trouble, and wanting to make a contribution to knowledge."⁹¹ Likewise, law school grades, a predictor of success on the bar exam,⁹² also are negatively correlated with public interest work,⁹³ perhaps because many of those students getting the high grades spend their time studying, to the exclusion of all else.⁹⁴ By testing via a methodology akin to that used on law school exams,⁹⁵ and using a standardized test methodology that is weighted in favor of those from privileged backgrounds, the current bar exam delays or acts as a barrier to many who would be most likely to serve underserved communities and to do pro bono work.⁹⁶ Although it may be

Commission lawsuit to force a recall of Daisy air rifles); *Patients Bill of Rights Will Test New Political Order*, KNIGHT RIDDER TRIB. BUS. NEWS, June 14, 2001, available at WL 22770720 (noting that opponents of the Patients' Bill of Rights argued that the bill was just a boon for greedy trial lawyers); Rita Rubin, *You Might Feel a Bit of a Pinch: Malpractice Insurance Costs Push Doctors to Cut Services or Move*, U.S.A. TODAY, Dec. 4, 2001, at D.07, available at 2001 WL 5477748 (noting that doctors blame greedy trial lawyers for the increase in malpractice premiums); Terri Somers, *Nursing Homes State Case on Suits: TV Ads Aimed at Legislators Say the Industry is in Trouble Because of 'Greedy Lawyers'*, S. FLA. SUN-SENTINEL, Feb. 13, 2002, at 6B, available at 2002 WL 2946827 (noting that the nursing home industry began running TV ads saying that nursing homes are in trouble because of "greedy trial lawyers").

90. For a description of how this assessment could be made, see *infra* notes 239-45 and accompanying text.
91. Delgado, *supra* note 17, at 608; see also William C. Kidder, *The Rise of Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 202 (2000) (reviewing national studies conducted by Educational Testing Systems and UCLA that note the negative correlation between LSAT scores and social activism).
92. Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 T. MARSHALL L. REV. 517 (1991). Professor Howarth points out, "Bar examiners tend to justify their work in part by pointing to the correlation between bar passage rates and law school success." Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 930 (1997). She goes on to say, "That correlation proves very little, however, given the similarity between most law school tests and the bar exam. We can say with assurance that the students getting top grades in law schools show a great aptitude for bar exam testing, and vice versa, but we are certain of little else." *Id.*
93. See David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through the Law School*, 25 LAW & SOC. INQUIRY 395, 407-487 (2000).
94. Lani Guinier, *Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 574 (2000) (citing Chambers et al., *supra* note 93, at 489).
95. See Howarth, *supra* note 92, at 930.
96. For a discussion of how the bar exam is weighted in favor of those from privileged backgrounds, see *supra* notes 74-78 and accompanying text. For a discussion of bar passage rates, see *infra* notes 121-24 and accompanying text. For a discus-

difficult to assess whether a lawyer will return phone calls,⁹⁷ it is less difficult to predict whether a new lawyer is likely to be involved in pro bono or community service work.⁹⁸

7. *The Exam Hinders the Ability to Create a More Diverse Bench and Bar*

Finally, the existing bar exam serves as yet another barrier to achieving the declared goal of developing a more diverse bench and bar.⁹⁹ According to Census 2000 data, African Americans comprise 12.3% of the U.S. population,¹⁰⁰ Latino/Latina 12.5%,¹⁰¹ Asians 3.6%,¹⁰² and American Indians and Alaska Natives 0.9%.¹⁰³ How-

sion of who is most likely to serve underserved communities and to perform public service, see *infra* notes 115-20 and accompanying text.

97. Under the current examination system, it is impossible to assess a bar applicant's likelihood to keep in touch with a client and to timely file legal documents. However, *infra* section III.D discusses the apprenticeship model, and *infra* section III.F discusses Dean Glen's proposed public service alternative to the bar exam. In both these alternative assessment scenarios, qualities like timeliness, keeping the client appraised, and the ability to prepare documents and conduct investigations could be part of what supervising lawyers and faculty members are asked to report to the applicable bar licensing authority. Thus, these things could be assessed under a different licensing model.
98. As Professor Delgado has noted, "Past accomplishments are the best predictor of future accomplishments." Delgado, *supra* note 17, at 612. One way to predict future likelihood to perform pro bono work is to look at whether the applicant has performed pro bono work while in law school. Of course, it is important to recognize that some individuals who have financial and family commitments during law school that prevent them from doing pro bono may end up being able to commit the time to pro bono and public service work once they are in practice. For a more in-depth discussion of why and how to consider pro bono work as part of the bar admissions process, see *infra* notes 239-45 and accompanying text.
99. For a discussion of states' commitments to creating more representative benches and bars, see *infra* notes 108-14 and accompanying text (discussing reports of state commissions on racial bias in the courts). States considering raising the bar passage score should also consider how doing so will affect minority bar applicants. See Merritt et al., *supra* note 14, at 965-67 (arguing that increasing the bar passage rate will have a disproportionate impact on minority bar applicants); see also Kidder, *supra* note 14 (unpublished manuscript at 25-28) (explaining how the increase in bar passage scores will negatively impact minority bar pass rates). *But see* STEPHEN P. KLEIN, PANELIST AND READER JUDGMENTS REGARDING THE PASSING SCORE ON THE FLORIDA BAR EXAM 5 (Aug. 12, 1999) (on file with author) (also available in the University of Nebraska Law College Library) (arguing that any change in passing score would equally affect minority and non-minority pass rates).
100. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2001) (available in the University of Nebraska Law College Library).
101. *Id.* Of these, approximately 7.3% are Mexican, 1.2% Puerto Rican, 0.4% Cuban, and 3.6% classify themselves as "Other Hispanic or Latino." *Id.*
102. *Id.* Of these, approximately 0.6% are Asian Indian, 0.9% are Chinese, 0.7% are Filipino, 0.3% are Japanese, 0.4% are Korean, 0.4% are Vietnamese, and 0.5% classify themselves as "Other Asian." *Id.*

ever, U.S. Bureau of Labor Statistics data for 2000 indicate that only 5.4% of all U.S. attorneys are African American,¹⁰⁴ and only 3.9% Latina/Latino.¹⁰⁵ There is no breakdown for Asians or American Indians, let alone for discrete categories within the Asian community where anecdotal observations suggest that populations such as Vietnamese, Laotian, and other Asian communities may be even more underrepresented. Such statistical disparities are troubling for a number of reasons.

For example, this lack of diversity among members of the bench and bar undermines community confidence in all aspects of the legal system and especially in the criminal justice system, where a disproportionate number of those charged and convicted are people of color.¹⁰⁶ As a Minnesota state prosecutor noted, prosecutors make all sorts of discretionary decisions that "have a tremendous impact in communities of color. . . . [B]eing as diverse as possible is a big part of the legitimacy of our work and an incredibly important part of the perspective we bring in making the kind of discretionary decisions that prosecutors have to make."¹⁰⁷ Community confidence in the system is undermined when the community sees that the bench and bar fail to reflect the racial and ethnic diversity of a state's citizenry.

Recognizing this problem, commissions on racial and gender bias were established by numerous states and federal circuits in the late 1980s and throughout the 1990s.¹⁰⁸ The commissions held public hearings and invited input from lawyers, judges, and other partici-

103. *Id.*

104. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS 2000 179 (2001); see also Denny Chin, *Access to the Legal Profession for Minorities: Introductory Remarks*, 2 J. INST. FOR STUDY LEGAL ETHICS 49, 52 (1999) (noting that the Second Circuit Task Force Report states that approximately 27.6% of the general population of the states within the Second Circuit were members of minority groups, yet only 6.6% of the lawyers in the Second Circuit were people of color).

105. U.S. DEP'T OF LABOR, *supra* note 104, at 179.

106. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 841 n.3 (1997) (noting that, in 1993, African American men constituted approximately 13% of the overall male population but 50.8% of the male population in federal and state prison, African American and Latino men comprise approximately three quarters of new admissions to prison, and that African Americans are incarcerated at a rate of more than six times that of whites); see also Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1621-25 (1985) (discussing racial disparities in the judicial system); Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 113 (1988) (discussing racial discrimination in the justice system).

107. Paul Scoggin, Assistant Hennepin County Attorney, Testimony at a Public Meeting of the Minnesota Board of Law Examiners (Mar. 9, 2000) (transcript on file with author).

108. See Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, app. (1999) (listing states that formed task forces to study racial and gender bias in the court system).

pants in the legal system, as well as from the public at large.¹⁰⁹ Some even conducted empirical studies, did surveys or focus groups, and consulted experts.¹¹⁰ Among other conclusions, these commissions found that people of color were underrepresented in the legal profession on both a state and national level,¹¹¹ that there is a perception of racial and ethnic bias in the court system, and that there is evidence that this perception is based on reality.¹¹² To begin to achieve a more racially and ethnically balanced justice system, many commissions recommended that each state take affirmative steps to increase minority representation in the bench and bar.¹¹³ In one instance, this included a recommendation that the state's board of bar examiners pay attention to studies indicating a disparate passage rate between white and minority test takers and consider whether it should do further study or take action with regard to the existing bar examination.¹¹⁴

Achieving a more diverse bench and bar not only improves public perceptions about the justice system. It also impacts the availability of legal services to underserved segments of our population. An Amer-

109. Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias In the Courts*, 16 HAMLINE L. REV. 923, 928 (1993).

110. *Id.* at 928.

111. *See, e.g., id.* at 929, 932 (citing to findings in reports from task forces in Michigan, Washington, New York, and Florida); STATE OF IOWA, FINAL REPORT OF THE EQUALITY IN THE COURTS TASK FORCE 11, 13 (Feb. 1993) (available in the University of Nebraska Law College Library) (noting that minorities were underrepresented in both the judiciary and bar); accord GA. SUPREME COURT COMM'N ON RACIAL AND ETHNIC BIAS IN THE COURT SYS., LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY, FINAL REPORT ch 4 (Aug. 1995) (available in the University of Nebraska Law College Library); REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL AND ETHNIC FAIRNESS IN THE COURTS 15-16 (1997) (available in the University of Nebraska Law College Library); *see also* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (providing statistics which demonstrate the small percentage of state court African American judges).

112. *See* Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 177-78 (1996) (reporting findings of the D.C. Circuit Commission that the percentage of African American lawyers reporting having "been mistaken for a non-lawyer by a federal judge on at least three occasions was twenty times the percentage for white lawyers"); Scarnecchia, *supra* note 109, at 930; *see also* Terry Carter, *Divided Justice*, 85 A.B.A. J. 42 (Feb. 1999) (describing differing perceptions of the extent of racial bias in the justice system).

113. *See e.g.,* Scarnecchia, *supra* note 109, at 938-39 (detailing the recommendations of Washington, Michigan, Florida, and New York); GA. SUPREME COURT COMM'N ON RACIAL AND ETHNIC BIAS IN THE COURT SYS., *supra* note 111, at 16-20; STATE OF IOWA, *supra* note 111, at 35, 89; TENN. SUPREME COURT COMM'N ON RACIAL AND ETHNIC FAIRNESS, FINAL REPORT OF THE TENNESSEE SUPREME COURT COMMISSION ON RACIAL AND ETHNIC FAIRNESS 62-65 (Feb. 1997) (available in the University of Nebraska Law College Library).

114. STATE OF IOWA, *supra* note 111, at 35.

ican Bar Association national study found that the most common way for low- and moderate-income families to find a lawyer is through someone they know or through a referral by a friend.¹¹⁵ People of color compose a greater portion of the economically disadvantaged and are thus proportionally more likely to be from low- and moderate-income families.¹¹⁶ A study of University of Michigan law school graduates found that “[a]ll Michigan alumni are disproportionately likely to serve same-race clients, so minority alumni provide, on average, considerably more service to minority clients than white alumni do.”¹¹⁷ Many states, especially the more populated ones, have a large number of people from very diverse cultures and backgrounds. Yet, the bench and bar are primarily white in virtually all states.¹¹⁸ This lack of racial and ethnic diversity makes it more difficult for non-white people to find lawyers from their communities.¹¹⁹

States have yet another reason to be concerned about a lack of a diverse bar. A more diverse bar is likely to be a more publicly-minded bar. For instance, the Michigan study also noted that among graduates who enter the private practice of law, “minority alumni tend to do more pro bono work, sit on the boards of more community organizations, and do more mentoring of younger attorneys than white alumni do.”¹²⁰

Why are existing benches and bars not as diverse as they could be? One reason is the existing bar exam. A six-year longitudinal study done by the Law School Admissions Council (LSAC) found a large disparity in the pass rates for first-time bar exam takers across the coun-

115. AM. BAR ASS'N, REPORT ON THE LEGAL NEEDS OF THE LOW- AND MODERATE-INCOME PUBLIC, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994).

116. Recent U.S. Census data indicate that non-whites are disproportionately poor. The poverty rate for whites was 9.4%; it was 22.1% for African Americans and 21.2% for Latina/Latino. Even under various adjustments, people of color comprise a disproportionate number of poor people in this country. See JOSEPH DALAKER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 2000 16 (Sept. 2001).

117. Chambers et al., *supra* note 93, at 401.

118. See U.S. DEP'T OF LABOR, *supra* note 104, at 179 (noting that 5.4% of all lawyers and 5.7% of all judges were African American, while 3.9% of all lawyers and 4.1% of all lawyers and judges were Latina/Latino); see also Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender and Educational Debt*, 70 N.Y.U. L. REV. 829, 860 tbl.12 (1995) (noting that, in 1993, the national percentage of law students that were African American was 7.2%, 4.9% for Latino/Latina, 5.1% for Asian Americans, and 0.7% for American Indian).

119. See, e.g., GA. SUPREME COURT COMM'N ON RACIAL AND ETHNIC BIAS IN THE COURT SYS., *supra* note 111, at 68 (noting that, in Georgia, the number of lawyers who are Hispanic, Asian, or of other ethnic backgrounds and who can understand and communicate in the language of many of the new immigrants to Georgia is very small and that most practice in the Atlanta area).

120. Chambers et al., *supra* note 93, at 401.

try. The study found that first-time pass rates were 92% for whites, compared to 61% for African Americans, 66% for Native Americans, 75% for Mexican Americans/Hispanics, and 81% for Asian Americans.¹²¹ The disparity between pass rates narrowed when applicants retook the bar; eventual pass rates were 97% for whites, 92% for Asian Americans, 88% for Mexican Americans, 82% for Native Americans, and 78% for African Americans.¹²² However, the study also indicated that the persistence rates, the rate at which applicants retake the bar, are greater for whites than for people of color. The study noted that 2% of white and Asian American examinees did not make a second attempt at the bar examination, as compared to 5% of Latino/Latina and 11% of African American examinees.¹²³ However, Rennard Strickland, chair of the LSAC, has pointed out correctly that these percentages are misleading since they compare those not retaking the exam with the total number of examinees for that group, that is, those who passed and those who failed. The calculation should compare those not retaking the exam with the total number of examinees for that group who failed the first time. When computed in that way, the data reveal that 24% of whites, 28% of African Americans, 21% of Latino/Latina, and 12% of Asian Americans who failed on the first attempt did not try again.¹²⁴

There are several explanations for this disparity in bar passage rates. One is that those who do poorly on the bar exam are those who did poorly in law school and on the LSAT. "Research indicates that differences in mean scores among racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores or performance test scores."¹²⁵ This is a false measure of validity since all it really says is that people perform similarly when tested the same way.¹²⁶ Yet, this false correlation leads to too heavy of reliance on the LSAT in admission decisions, especially at the non-elite law schools, which are concerned with bar passage rates.¹²⁷ If law school grades were based on

121. LSAC STUDY, *supra* note 28, at 27.

122. *Id.* at 32.

123. *Id.* at 56.

124. Rennard Strickland, *The Persistence Facts*, ASS'N AM. LAW SCHS. NEWSL., Nov. 2000, at 5.

125. *Myths & Facts about the Multistate Bar Examination*, *supra* note 45, at 19; see also Klein, *supra* note 92 (noting that the strongest predictor of bar exam passage rates is law school GPA).

126. Howarth, *supra* note 92, at 930.

127. *Id.* at 928; see also Glen, *supra* note 16 (manuscript at 10) (noting that if law schools "take students who know how to take a test almost exactly like the bar exam and know how to take it successfully, as the LSAC study tells us is the case with the LSAT, you don't actually have to do much with these students in law school in order to assure their success on the bar exam").

tests that more closely paralleled what lawyers actually do, it is likely that there would not be a very high correlation between law school grades and bar exam results. Likewise, if the format of the bar exam changed, it is likely one would see a much lower correlation between bar exam and LSAT scores.

A second explanation for the disparity may be the different responsibilities borne by poor people since people of color are disproportionately poor. For example, those who must work to support themselves or their families while in law school or while studying for the bar exam may have a lower pass rate than those who have the financial resources that permit them not to work. Likewise, financially strapped bar applicants may forego a bar review course, which can cost nearly \$3,000.¹²⁸ The LSAC study did not have enough data to make any valid conclusions about how bar passage rates are impacted by an examinee's need to work while in law school.¹²⁹ The information LSAC did have about bar applicants' need to work was limited to information about applicants' employment while in college and upon incoming law students' predictions of their need to work during law school. The amount applicants worked during law school or while studying for the bar exam was not studied.¹³⁰ LSAC also did not have sufficient data to determine how serving as the family's primary caretaker impacts bar passage rates.¹³¹ However, the LSAC study did find that a larger proportion of African Americans than any other group reported having primary responsibility for themselves and their own child or children when they started law school.¹³²

An informal survey conducted by Professor Paula Lustbader at the University of Seattle concluded that financial and familial obligations do impact bar passage rates. Lustbader's informal survey of bar applicants from the University of Seattle found that those applicants more likely to fail the bar exam were those who did not have money to take a bar review course or who had to work to support their families, giving them less time to study.¹³³ A more formal study based on the

128. The cost of bar review courses varies from state to state and from company to company. Many students sign up for both Bar-Bri and a companion course, the PMBR, a course that concentrates only on the MBE. The combined cost for these two review courses can be over \$3,000 in some states. For a sample of Bar-Bri costs, see *infra* note 263 and accompanying text.

129. LSAC STUDY, *supra* note 28, at 66.

130. *Id.* at 65-66.

131. *Id.* at 66.

132. *Id.*

133. Paula Lustbader, Oral Report at the Association of American Law Schools 2001 Conference in San Francisco, California (on file with author). See also COMM. & WHITE, *supra* note 74, at app. (noting that CUNY reported an increase in its MBE scores upon providing its students with the PMBR course free of charge); Glen, *supra* note 16 (manuscript at 7-8) (discussing her anecdotal experiences as Dean of CUNY which confirm Lustbader's findings).

questions asked by Professor Lustbader should be performed to determine if the need to work to support family members correlates inversely with bar passage rates, and if people of color are disproportionately affected by financial restrictions that limit their ability to take a bar review course or devote sufficient time to studying for the bar.¹³⁴

Other explanations for the disparity in bar exam passage rates include the disparity in educational benefits from preschool onward,¹³⁵ the impact of stereotype threat,¹³⁶ and the fact that test questions are not drafted in a vacuum, but are instead drafted by individuals who “reflect the culture and surroundings in which they were raised. The situations and circumstances they incorporate into test questions, and more importantly, the meanings and thought patterns they deem ‘right’ will inevitably favor test takers who share those meanings and thought patterns.”¹³⁷

Whatever the reason for these disparities, there is no question that the existing bar exam disproportionately impacts people of color. One cannot say for certain whether other forms of examination or entrance requirements might also have this impact.¹³⁸ However, given what we know about the existing exam, we must ask whether its disproportionate impact on people of color can be justified. Even if the bar exam were a valid and good screening device, we would have to ask these questions. Given that the existing exam is not a good measure for determining competency, retaining it without trying to find a better

134. Assuming the more formal study validates what seems a relatively obvious proposition, it is yet another reason to consider changing the bar licensing process so that obtaining a license to practice is not dependent on whether the applicant has the time and money to devote to a review course that spends a considerable amount of time telling students the areas most likely to be tested and providing them with tricks to help them memorize hundreds of legal rules.

135. Delgado, *supra* note 17, at 602, 605.

136. See Kidder, *supra* note 17, at 1085-1089 (discussing Claude Steele and Joshua Aronson's work on stereotype threat).

137. Delgado, *supra* note 17, at 605-06; see also Glen, *supra* note 16 (manuscript at 88) (discussing Jay Rosner's research with the SAT demonstrating that prescreening SAT questions results in test questions that are weighted toward those on which whites perform better than minority students).

138. See, e.g., Weinstein, *supra* note 36. As Professor Weinstein's empirical study of his clinic students suggests, disparities may continue even with different assessment modalities, both because of the “gross inequalities that characterize American education generally” and because of unconscious attitudes of teachers and others within largely white institutions about who should and should not be a successful law student or lawyer. *Id.* at 283. But see Glen, *supra* note 16 (manuscript at 80 n.580) (noting that the proposed PSABE would likely increase the diversity of the bench and bar by creating a nondiscriminatory alternative to the present bar, thus making legal education more attractive to more minority students).

assessment tool is morally indefensible. The question, then, is what alternatives to the current exam and process exist.

III. ALTERNATIVE METHODS TO MEASURE BAR APPLICANTS' COMPETENCE

"The bar exam is embedded in the culture of lawyers as a terrible, wasteful ordeal, but not as something to be changed."¹³⁹ One reason people are reluctant to change from the existing format to a markedly different system for bar entrance is the idea that the current bar exam, even if not wonderful, is the best that we can do given time and financial constraints.¹⁴⁰ However, it is wrong to claim that the current exam is the best we can do until we have made a full and good faith effort to do something better.

Since each state administers its own exam, the move to create a new licensing process will have to come from within each state. States may devise new licensing requirements through the work of their bar associations or through commissions like those established to study racial or gender bias in the court system. States could work together or in conjunction with the National Conference of Bar Examiners, which is also looking at these issues.¹⁴¹ In looking at these issues, states should make sure to include representatives of all those who need legal services rather than just those who benefit from the status quo.

A. The First Step: Defining Competence

First, those working on changing the exam must decide what skills, knowledge, and qualities new lawyers should possess. Data already exist about the kinds of skills and knowledge new lawyers should have. Both the *MacCrate Report* and a comprehensive American Bar Foundation survey of Chicago lawyers¹⁴² developed lists of

139. Howarth, *supra* note 92, at 936.

140. See, e.g., Beeching, *supra* note 29, at 12. Another reason there may be reluctance to revise the exam is that it is a hazing ordeal; once survived, it gets perpetuated because the survivors no longer have to worry about it. Additionally, those surviving the ordeal may be loathe to admit that they went through all that for no good reason.

141. For example, in 1999, the NCBE sponsored a writing contest seeking essays on computer-based testing for the bar exam; how the bar exam and bar admission processes can enhance the professional commitment of newly admitted lawyers to integrity, civility, and advancement of basic societal values in the practice of law; and whether bar admission processes should be changed in the twenty-first century. See Chi.-Kent Coll. of Law, Ill. Inst. of Tech., *The Record Online*, (1999), at <http://www.kentlaw.edu/depts/acadadm/writing/rec-sept-13-99.html> (last visited July 30, 2001) (documents from this website also on file with author).

142. Hunt, *supra* note 24, at 764-65. Hunt sets out the findings from an American Bar Foundation survey of Chicago lawyers designed to solicit views on the skills and

skills and knowledge necessary to successfully practice law. Additionally, the LSAC has awarded a grant for an in-depth study of the kinds of skills and qualities lawyers should possess.¹⁴³ The results of that study will be published. Given the existing data, it should not take a great deal of time, energy, or money to determine the kinds of skills competent lawyers need. However, states investing the time and money to reconceptualize the bar admissions process should think broadly about the kinds of future lawyers they want. For example, states may decide that a propensity toward pro bono work is something to be valued. In which case they might think about ways to include propensity toward community service in their licensing process.¹⁴⁴

Once a state has decided upon the qualities and skills it wants its new lawyers to possess, the work begins. States must research and develop new methodologies to screen bar applicants and must do this work with the assurance from those in power that there is a commitment to implementation. The section below outlines some alternative ways to think about licensing lawyers.

B. Computer-Based Testing: An Examination of Other Professions and How the Legal Profession Can Adopt What They Do

With the advent of complex computer programs, states are no longer bound by a paper and pencil bar exam. States should consider using computer-based testing (CBT) to test both knowledge and preparation for practice in the twenty-first century because CBT may open the door to testing a broad range of skills in a way more reflective of how those skills are used in practice.

Numerous other professions are incorporating CBT into their licensing examinations.¹⁴⁵ For example, the Architect Registration Examination (ARE) consists of multiple-choice and graphics-division

knowledge necessary to practice law. That survey compiled the following hierarchy of skills and knowledge comprising legal competence: 1. The ability to marshal facts; 2. The ability to gather facts; 3. The ability to instill confidence in others; 4. Effective oral expression; 5. The ability to read and comprehend written judicial opinions, statutes, and other sources of law; 6. Knowledge of substantive legal principles; 7. The ability to conduct legal research; 8. The ability to conduct effective negotiations; and 9. The ability to draft precise legal documents.

143. Professors Marjorie M. Shultz and Christopher Jencks at The University of California, Berkeley are working on a multiphase study. The first phase seeks to identify criteria that determine lawyer success and contribution to the profession and community. Later phases of the project will seek to develop predictors of those characteristics and competencies. For more information about this study, contact Professor Shultz by e-mail at m_shultz@law.berkeley.edu.

144. For specific suggestions on how to do this, see *infra* subsection III.H.2.

145. This section discusses CBT as used in the licensing processes for doctors and architects. Other fields are using or are considering using CBT. For example, the

sections administered by computer.¹⁴⁶ The graphics section presents vignettes and requires applicants to use computer-generated graphics to compose a solution to the problem.¹⁴⁷ Within the multiple-choice section, the applicant is able to access reference material that may be helpful when answering questions.¹⁴⁸ If computer programs can be designed to test architects and give them reference materials, surely it would not be difficult to do the same for bar examinees. Computer programs could be designed to make available statutes, treatises, and cases, which could be used if the bar applicant needed to research the law. Thus, the emphasis of the test could shift from one where memorization is the key to success to one where the ability to look up information is equally, if not more, important.

Similarly, computers are used to administer all three parts of the United States Medical Licensing Examination (USMLE).¹⁴⁹ Additionally, the National Board of Medical Examiners is studying various ways to use CBT in its licensing process by using virtual patients. For example, one study presented students with a computer simulation of a patient examination.¹⁵⁰ Following each encounter with a standardized virtual patient, the students were given seven minutes to write a free-response note, which was either a list of significant positive and negative historical and physical findings or a written chart documenting findings and counseling.¹⁵¹ The study looked at the relationship between the entries recorded in the post-encounter note and actions captured on a checklist.¹⁵² The study suggested that this methodology of testing provided unique information about students' abilities to document the gathering of information, understand the significance of the information gathered, and translate verbal information into the written word. Researchers concluded that "poor concordance between the checklist and the student's post encounter note

aeronautics industry uses CBT to test pilots with flight simulators. See Mary Sandifer, *Testing, Testing*, B. EXAMINER, Feb. 1999, at 37, 39.

146. NAT'L COUNCIL OF ARCHITECTURAL REGISTRATION BDS. (NCARB), ARCHITECT REGISTRATION EXAMINATION GUIDELINES 3-4 (2002), available at <http://www.ncarb.org/certification/index.html> (documents from this website also on file with author) [hereinafter NCARB].

147. *Id.* at 4-5.

148. *Id.* at 3.

149. See FED'N OF STATE MED. BDS. OF THE U.S., INC. & NAT'L BD. OF MED. EXAM'RS, UNITED STATES MEDICAL LICENSING EXAMINATION, 2002 USMLE BULLETIN, at <http://www.usmle.org/bulletin/2002/testing.htm> (last visited Aug. 3, 2002) (documents from this website also on file with author).

150. See NAT'L BD. OF MED. EXAM'RS, 2000 ANNUAL REPORT, 2-3 (2001), <http://www.nbme.org/AnnualReport/2000/rd.htm> (documents from this website also on file with author).

151. *Id.*

152. *Id.*

suggested that students may have limited skills to properly synthesize, interpret and record findings from a clinical encounter.”¹⁵³

This format could be adapted to a bar examination question with relative ease. For example, applicants could be presented with a virtual initial client interview. They could then be asked to write down questions they would want to ask in a follow-up interview, additional investigation they would want to do, where they would begin their factual investigation, and so on. The answers could be scored against a previously developed checklist. Alternatively, applicants could watch a virtual negotiation, mediation, or client-counseling session and could then be asked to write out questions or issues that should have been raised or concerns they had about the process. Also, computer simulations could better test knowledge of the rules of evidence by presenting a short vignette with testimony and then asking applicants to type in their objections and reasons for the objections. Or, applicants could be given a contract to review and then be asked to write out issues they might need to consider before allowing their client to sign the contract.¹⁵⁴

Using computers may also allow examiners to design a test that recognizes that different lawyers need different kinds of skills. Some questions could be universal, while, in other areas, applicants might be allowed to choose a particular task. For example, if one wanted to test the ability to investigate facts, applicants could choose to develop a factual investigation plan for a civil tort case, or a criminal case, or a securities fraud claim, or a tax issue. Applicants could be asked to choose to review a contract, or to review and analyze a cross-examination or client interview in a criminal case, or to assess a law office management problem. In short, there are potentially endless ways to use this model of CBT to assess a broader range of skills than are now tested and to test in a way that recognizes that different lawyers require proficiency in different skills.

In addition to exploring the viability of the CBT models currently used by architectural and medical licensing boards, bar examiners may want to consider whether CBT could be used to completely eliminate the current “memorize the law” model. For example, rather than have tests that look at whether an applicant can memorize the law, bar examiners might devise tests that ask applicants to research the law. Bar applicants could be given a computer terminal and access to

153. *Id.*

154. I once gave externship students a release and had them negotiate the release before signing it. It is amazing how few students realized that the language of the contract released not only the defendant in the case, but other potential defendants as well. This is one of the kinds of skills bar applicants should have: the skill to apply the law of contracts and torts in a way that reflects real-world problems.

the Internet or a CD-ROM containing legal opinions from the state's courts. The applicant could then be asked to answer a series of questions based on the state's law. Questions could range from those designed to measure applicants' abilities to find a specific answer to a given legal question (e.g., what the correct statute of limitations is) to those designed to test applicants' abilities to apply the law to a broader fact situation. The questions could be grouped by subject matter. For example, an applicant could choose to research an issue related to business law, or civil litigation, or criminal procedure, or property law. This would allow test takers a certain level of comfort and base knowledge, which could allow for a more complicated research problem.

One trap states should not fall into is using CBT merely as another way to test the same kinds of skills already tested for. For example, it would not make sense to simply mirror what has happened with the GRE¹⁵⁵ and use CBT as another way to measure applicants' abilities to answer multiple-choice questions.¹⁵⁶ Instead, CBT should be viewed as a potential way to test a broader range of skills, including the abilities to perform legal research and react to simulated events like negotiations, mediations, client interviews, or counseling sessions.¹⁵⁷

Of course, CBT brings its own set of potential problems. Using computers may disadvantage lower-income, non-white applicants. Wealthier applicants may have had experience researching the Internet from the time they were young children, while those from more

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155. For a description of the GRE's computer-based testing, see the GRE website, <http://www.gre.org/cbttest.html> (last visited Aug. 3, 2002) (documents from this website also on file with author), then click on "Test Preparation" and "Test-Taking Strategies" and download the materials. The GRE uses a concept called "computer adaptive testing," which allows test takers to be given an exam that tailors questions to the test taker's previous answer.
156. In fact, to do so really just increases the role of coaching in the scoring process. As one commentator noted, computerized multiple-choice exams are more susceptible to coaching because of the smaller pool of questions that appear on the exams. This is significant because good coaching can significantly raise scores on standardized tests. See Robert H. Kelly, *The Washington Civil Rights Initiative: The Need For a Meaningful Dialogue*, 34 GONZ. L. REV. 81, 95 (1999).
157. Another on-going study by the National Board of Medical Examiners (NBME) is the use of video clips of patients to evaluate examinees' skills in interpreting abnormal physical exam findings. This study is intended to gather initial evidence of the validity and reliability of using video vignettes to assess examination skills in interpreting and reasoning about patients with common physical findings. See NAT'L BD. OF MED. EXAM'RS, *supra* note 150. Both the methodology and the findings of this study could be used as a guide to developing computer-based tests using real-life simulations for questions about interviewing, counseling, and negotiation. For a discussion of using videotaped vignettes as a law school examination modality, see Lawrence Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996).

economically disadvantaged backgrounds may have had limited access to a computer both while growing up and while in law school.¹⁵⁸ However, this disadvantage can be somewhat neutralized if the computer-based research is the basic kind of research and factual investigation lawyers must perform and if questions are devised so that no advantage is given to those with strong keyboarding skills.¹⁵⁹ The idea of using the computer is not to require extraordinary proficiency or familiarity with computers or the Internet. Rather, it is to develop a new mechanism to screen for skills lawyers should possess and to recognize that tomorrow's lawyer must have at least some proficiency in computer-based skills.

Additional issues with CBT include, but are not limited to, security, psychometrics (ensuring validity, reliability, and consistency), economics, and logistics.¹⁶⁰ These issues must be researched; however, these are not insurmountable problems, and both the medical and architectural models could provide many of the answers. In fact, foundations may be willing to award grants to develop CBT for the bar exam, much like is being done in the medical field. Additionally, the NCBE or some other entity will likely be motivated to work to overcome these problems if enough states push for computer testing.

C. The Canadian Model

Another alternative to the existing bar examination is to develop a bar admission program modeled on the admission program used in Canada. Like our system of licensing, the Canadian system is designed to ensure that new lawyers are competent to practice,¹⁶¹ and

158. See NAT'L TELECOMM. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET app. (1999), at <http://www.ntia.doc.gov/ntiahome/ftn99/appendix.html> (documents from this website also on file with author). This extensive government study indicates that those from households with higher incomes were much more likely to own computers than those from low-income households. Also, race and ethnic origin remain closely correlated with computer ownership, with white households owning nearly twice the number of personal computers as African American and Latino/Latina households. The factors of income and race also play a role in how likely someone is to be connected to the Internet: those enjoying the most connectivity are typically those in high-income households. The least connected, generally, are low-income, African American, Latino/Latina, or Native American.

159. For a discussion of the advantage those with strong keyboarding skills have when taking law school issue-spotting exams, see Kif Augustine-Adams et al., *Pen or Printer: Can Students Afford to Handwrite Their Exams?*, 51 J. LEGAL EDUC. 118 (2001).

160. See Sandifer, *supra* note 145, at 37.

161. See LAW SOC'Y OF B.C., ADMISSION PROGRAM TASK FORCE INTERIM REPORT 3 (Nov. 26, 2001), available at http://www.lawsociety.bc.ca/library/frame_reports.html (documents from this website also on file with author) [hereinafter ADMISSION PROGRAM REPORT]. This report is also available from the Law Society of British Columbia, 8th Floor, 845 Cambie Street, Vancouver, B.C. V6B 4Z9.

the Canadian view of what constitutes a competent lawyer closely mirrors the areas of competency outlined in the *MacCrate Report*.¹⁶² Although the specific licensing requirements vary from Canadian province to province, most provinces ensure competency by requiring graduation from law school, a six- to twelve-month period of articling (apprenticeship), and successful completion of a six-week to six-month teaching term where students are given practical skills training via various substantive law and professional responsibility issues.¹⁶³

Each Canadian province has slightly different rules that govern a student's articling experience. Many provinces require the supervising lawyer (the articling principal) and the student to submit an education plan outlining how the student will gain experience in professional responsibility, interviewing, advising, fact investigation, legal research, problem analysis, file and practice management, office systems, writing, drafting, negotiation, and advocacy.¹⁶⁴ Some provinces require apprentices to submit one or more assignments to the teaching-term faculty for review and feedback.¹⁶⁵ Some also require supervising attorneys and apprentices to complete a checklist of mandatory and optional skills and practice areas in which the student has received practice experience.¹⁶⁶ In at least one province, the supervising attorney is required to certify or evaluate the apprentice's competence in various areas.¹⁶⁷ However, little, if any, supervision is given to the apprenticeship program in other provinces.¹⁶⁸

The teaching-term portion of the Canadian admissions program also varies from province to province.¹⁶⁹ However, the teaching term

162. *See id.* at app. C.

163. *See id.* *See also* Raquel M. Goncalves, Customizing Standardized Evaluation Devices for Assessing and Improving Student Legal Practice Skills 1 (detailing Canadian licensing requirements) (on file with author) (also available in the University of Nebraska Law College Library) (the Goncalves piece is a part of the materials from the Institute for Law School Teaching, Gonzaga University School of Law's Assessment, Feedback and Evaluation, Eighth Annual Conference of the Institute for Law School Teaching, July 13-14, 2001, Spokane, Washington); Douglas M. Roche, *Practice Skills Teaching and Testing as Part of the Bar Admissions Process*, B. EXAMINER, Feb. 1995, at 27 (discussing Canadian admissions programs).

164. ADMISSION PROGRAM REPORT, *supra* note 161, at 6 (noting that Alberta, Manitoba, Ontario, Quebec and Newfoundland require articling principals and students to agree to a comprehensive, detailed educational contract); Roche, *supra* note 163, at 31.

165. ADMISSION PROGRAM REPORT, *supra* note 161, at 6.

166. *Id.* at 7.

167. *Id.*

168. *Id.* at 5.

169. Each province designs its own course, although the courses are similar in that they help develop students' abilities to integrate substantive areas of the law like civil procedure, business law, criminal procedure, family law, and public law, and they provide simulations and assessments based on the kinds of issues a practicing lawyer might face. Roche, *supra* note 163, at 31.

in all provinces is geared toward helping students develop practical skills and integrating the substantive law in core substantive areas.¹⁷⁰ It is a hands-on, problem-based educational experience with problems geared toward presenting participants with the kinds of problems lawyers face, such as dealing with a “client who is in the midst of reorganizing her business affairs, and is also getting married and is considering a marriage contract and an estate plan.”¹⁷¹ The teaching term also devotes a substantial amount of time to the development of the information and skill necessary to manage a law practice and to ethical problems.¹⁷² In all provinces, students are tested during the teaching term to determine whether they are minimally competent in specific lawyering skills and whether they understand basic concepts of the applicable substantive law.¹⁷³ In British Columbia, students also must pass two exams, each three hours in length, which test their knowledge of ten core substantive areas.¹⁷⁴

There are many benefits to the Canadian model. The articling experience serves as a bridge from theory to practice by providing supervised practical experience. It teaches students how to apply the substantive and procedural law and how to deal with issues like time and project management, calendaring, risk avoidance, and billing and accounting, all issues especially important for those students who will be entering solo practice or who will otherwise be largely unsupervised.¹⁷⁵ The teaching term provides skills training, and it provides feedback and assessment on a much wider variety of skills than bar examinations administered in the United States.¹⁷⁶ It also assesses applicants’ abilities to integrate knowledge from various substantive legal areas and apply that knowledge to real-life problems.¹⁷⁷

At the same time, problems exist with the Canadian model. It greatly adds to the time and expense potential lawyers must incur before getting a license to practice.¹⁷⁸ Also, especially in those provinces where little, if any, supervision occurs, apprenticeships have been criticized for “inconsistent quality in articling experiences, incon-

170. *Id.*

171. *Id.* at 32.

172. *Id.*

173. *Id.*; Goncalves, *supra* note 163, at 2.

174. Goncalves, *supra* note 163, at 2. The test questions are a combination of short answer, multiple-choice, and true/false. The subjects tested are civil litigation, commercial law, company law, creditors’ remedies, criminal law, family law, real estate law, tax law, wills and estates, and professional responsibility. There are also some questions concerning law office management. A copy of a 1999 sample exam is on file with the author.

175. See ADMISSION PROGRAM REPORT, *supra* note 161, at 4.

176. For the kind of feedback provided, see Goncalves, *supra* note 163, at app.

177. *Id.* at 2; Roche, *supra* note 163, at 30.

178. In 1995, the per student cost for the 4.5 month teaching-term course in Ontario was approximately \$2,100 in U.S. dollars. Roche, *supra* note 163, at 34.

sistent supervision and feedback, inconsistent instruction about professional values and attitudes, and powerlessness of students to ensure they receive a satisfactory quality of articles.”¹⁷⁹ Further, the logistics involved in administering both an apprenticeship and a teaching term may be insurmountably difficult given the time and financial resources of most boards of bar examiners.¹⁸⁰ Thus, states may examine whether either the apprentice model or the teaching term, but not both, is a viable alternative to the existing bar exam.

D. The Apprentice Model

An alternative to the current bar exam is the apprentice model. Legal apprenticeships are required in Canada and in other countries, and, in the United States, many professions have an apprenticeship requirement.¹⁸¹ Like law school externship programs, an apprenticeship can be a valuable learning experience if carefully monitored. A well-supervised apprenticeship program, like a well-supervised externship program, can ensure that the applicant has a meaningful learning experience and can serve as a bridge from theory to practice.¹⁸²

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179. ADMISSION PROGRAM REPORT, *supra* note 161, at 5. There is also concern that Aboriginal law students face a more difficult time obtaining an articling experience than their white counterparts. See LAW SOC'Y OF B.C., REPORTS: ADDRESSING DISCRIMINATORY BARRIERS FACING ABORIGINAL LAW STUDENTS AND LAWYERS 37 (Apr. 2000), available at [http://www.lawsociety.bc.ca/library/report/body_resource_reports-0004\(Aboriginal\).html](http://www.lawsociety.bc.ca/library/report/body_resource_reports-0004(Aboriginal).html) (last visited July 13, 2002) (documents from this website also on file with author). For a discussion of how to deal with some of these problems, see *infra* notes 195-98 and accompanying text.
180. Roche suggests that, in order to minimize costs of developing an effective skills training program, states should work with the NCBE and national associations. Roche, *supra* note 163, at 34.
181. 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. L. REV. 1191, 1222-29 (1995) (discussing internship requirements in England, Wales, and Australia); Maureen K. Monahan, *Mandatory Internships in the United States: A Comparison to European Legal Education Systems*, B. EXAMINER, Nov. 1994, at 54. Also, virtually all states require that doctors and architects serve a substantial apprenticeship (internship). For a discussion of these requirements, see *infra* notes 188-94 and accompanying text. Numerous other professions also have internship requirements. See, e.g., ARK CODE ANN. § 17-92-307 (2001) (pharmacists); CAL. EDUC. CODE § 44259 (1993) (teachers); FLA. STAT. ch. 491.005 (2001) (social workers); 225 ILL. COMP. STAT. 15/4 (1998) (psychologists); MINN. STAT. § 151.01 (1998) (pharmacists); OKLA. STAT. tit. 59, § 1463 (2000) (polygraph examiners); S.D. CODIFIED LAWS § 36-27A-12(3) (2001) (psychologists); TEX. OCC. CODE ANN. § 1703.208 (2002) (polygraph examiners); W. VA. CODE § 18A-3-2b (2001) (teachers). Even interior designers have internship and work experience requirements. See the website for the National Council for Interior Design Qualification, <http://www.ncidq.org/faqs/htm> (last visited July 13, 2002) (documents from this website also on file with author).
182. Here, I must admit my bias. Along with teaching substantive courses, I co-direct the externship program at the Georgia State University College of Law. My work

In devising the requirements of an apprenticeship program, states could adopt various elements from different models. For example, in addition to looking at the foregoing Canadian model,¹⁸³ states could look at what Delaware does. There, bar applicants must perform an aggregated full-time service of at least five months in a law office, as a judicial law clerk, or working for various federal, state, or legal services agencies prior to their admission to the state bar. The five-month time period need not be continuous, and the work may be done while in law school.¹⁸⁴ During the apprenticeship, the bar applicant must complete a list of thirty tasks, including attending trials and hearings in various courts and drafting various legal documents.¹⁸⁵ Both the bar applicant and a member of the Delaware Bar who has agreed to serve as the applicant's preceptor must certify that the applicant performed the required tasks.¹⁸⁶

with the externship program has convinced me that well-supervised externship programs provide students an incredible learning experience. However, the learning experience is directly correlated to having checks and balances in place to ensure that the site supervisor is a good mentor who provides the student with strong day-to-day supervision and feedback and gives the student a variety of meaningful work.

183. See *supra* notes 161-80 and accompanying text. States could also look at apprenticeship programs in other countries. See, e.g., Hansen, *supra* note 181; Monahan, *supra* note 181.
184. DEL. R. SUP. CT. R. 52 (2002). In addition to Delaware, Vermont requires an apprenticeship period before licensing. However, the rules in Vermont do not specify that any specific skills be developed or tasks be completed during the apprenticeship period. See VT. R. ADMIS. § 6(i)(1)-(2) (2001).
185. The bar applicant must attend the following: one complete civil trial in a Justice of the Peace Court and one in Superior Court; a trial or hearing in the Court of Chancery; one criminal trial in the Court of Common Pleas and one in Superior Court; an arbitration; one session of arraignments; one session of sentencing; a jury selection; a half-day visit to Family Court; an uncontested divorce hearing in Family Court; a civil or criminal trial in District Court; a sheriff's sale; an interview of a witness, client, or litigant; a deposition; a real estate closing; a hearing of an administrative agency; an argument (or audit a tape recording of an argument) in the Supreme Court after reviewing the briefs and principal authorities relied on; and a motion in Superior Court after reviewing the motion papers and principal authorities. Additionally, applicants must review the Rules of Family Court; participate in the preparation of papers relating to an actual or mock motion in the Superior Court; participate in the preparation of papers relating to perfecting an actual or mock appeal to the Delaware Supreme Court; participate in the preparation of papers relating to the commencement of an actual or mock lawsuit; prepare three memoranda of law; prepare one draft will or trust instrument, or review and digest three recently probated wills with the Register of Wills; and participate in a complete incorporation of a new company. Finally, bar applicants must also participate in the administration of one estate, or review the records of two recently closed estates, and they must complete a title search under supervision. The checklist containing this information can be found at the website for the Delaware Courts, <http://courts.state.de.us/bbe/cc.htm> (last visited July 13, 2002) (documents from this website also on file with author).
186. DEL. R. SUP. CT. R. 52(a)(8) (2002).

There are two main pedagogical problems with the Delaware model. First, it does not require that the assigned tasks be completed competently. Second, apprentices in Delaware spend a large percentage of their time observing rather than participating. Although there is a lot to be learned from watching someone, there is even more to be learned when one does something oneself. Many professions in the United States, including the medical and architectural professions, recognize this fact.¹⁸⁷

For example, although each state has its own licensing requirements for doctors, virtually all states require, at minimum, that graduates from medical school successfully complete at least one year of postgraduate internship or residency training at a hospital approved for such training, and pass all three steps of the United States Medical Licensing Examination before receiving a medical license.¹⁸⁸ However, most medical school graduates actually complete a graduate medical education consisting of training in a three- to seven-year residency program where the resident performs procedures on patients under the supervision of senior physician educators.¹⁸⁹

Architects are another group of professionals who cannot be licensed without an extensive apprenticeship. Architects must obtain a professional degree in architecture,¹⁹⁰ intern in an architectural firm, and pass a multifaceted examination.¹⁹¹ The architectural internship involves obtaining training and experience in design and construction

187. For a list of some of the other professions that require internships, see *supra* note 181.

188. For examples of states' medical licensing requirements, see, for example, section 12-36-107 of the Colorado Revised Statutes and title 32, section 3271 of the Maine Revised Statutes Annotated. For an in-depth description of the three steps of the United States Medical Licensing Examination, see the United States Medical Licensing Examination website, <http://www.usmle.org> (last visited July 13, 2002) (documents from this website also on file with author).

189. See AM. MED. ASS'N, BECOMING AN MD, at <http://www.ama-assn.org/ama/pub/category/2320.html> (last updated June 12, 2001) (documents from this website also on file with author).

190. There are many ways to obtain a professional degree in architecture. For example, one could obtain a Bachelor of Architecture degree upon completing a five-year program at an undergraduate institution, or one could qualify through attendance in a Master of Architecture program (a two- to four-year program, the length of which depends on the student's prior experience and education). See NAT'L COUNCIL OF ARCHITECTURAL REGISTRATION BODS, ABOUT NCARB, at <http://www.ncarb.org/general/about.html> (last visited July 13, 2002) (documents from this website also on file with author).

191. Although each state has its own licensing requirements and may have its own internship requirements, virtually all states will license someone who is certified by the National Council of Architectural Registration Boards (NCARB). Thus, rather than review the requirements in each state, this Essay briefly discusses the NCARB requirements. For a complete description of these requirements, see the NCARB website, <http://www.ncarb.org> (last visited July 13, 2002) (documents from this website also on file with author).

documents, construction administration, management, and related activities like professional and community service.¹⁹² Under the supervision of a licensed architect, the intern must complete a certain number of units in each task in each of these areas.¹⁹³ After completion of the internship, the intern must pass all sections of the Architectural Registration Exam before receiving a license.¹⁹⁴

The various apprenticeship models discussed above, the Delaware model, the medical model, and the architectural model all require that prospective licensees take a test as well as serve an apprenticeship. I am not familiar enough with either the medical or architectural licensing examinations to say whether those tests accurately measure competency. However, for the reasons stated herein, the current bar examination is not a valid or useful test in measuring lawyer competency. One alternative to the current bar examination is a well-monitored, well-supervised apprenticeship in which the apprentice must satisfactorily perform numerous tasks. If states adopt this alternative, it should be unnecessary for bar applicants to also demonstrate that they can memorize legal principles well enough to pass a multiple-choice test and answer essay questions.

In setting up a system in which a law license is obtained after successful completion of a legal apprenticeship, rather than after passing the existing bar exam, states would have to decide how long the apprenticeship should last. In doing so, they should balance how long it might take to get experience in numerous areas against the financial obligations already incurred by bar applicants during law school. This would especially be the case because apprenticeship sites, like governmental or public interest offices, would be unable to pay apprentices much, if anything.

In order to control the quality of the apprenticeship, states could adopt the checks put into place in many Canadian provinces.¹⁹⁵ States could enforce those checks by hiring apprenticeship faculty¹⁹⁶ to monitor apprenticeship sites and to eliminate those sites that fail to provide applicants with meaningful educational experiences and qualified supervising lawyers. Apprenticeship faculty also could supervise

192. For a more detailed description of what is involved in each of these categories, see the NCARB website, <http://www.ncarb.org/idp/howidpworks.htm> (last visited July 13, 2002) (documents from this website also on file with author).

193. *Id.* It may take an architectural intern from three to five years to complete the required hours in each of the tasks in all four areas. Conversation with John Klooster, Licensed Architect (May 5, 2002).

194. NAT'L COUNCIL OF ARCHITECTURAL REGISTRATION Bds, ABOUT NCARB, at <http://www.ncarb.org/general/about.htm> (last visited July 13, 2002) (documents from this website also on file with author).

195. See *supra* notes 164-67 and accompanying text.

196. For a discussion of how to raise money to cover the costs of administering this program, see *infra* notes 263-65 and accompanying text.

bar applicants, getting regular reports from them about what work they are doing, what they are learning, and the level of feedback they are receiving. They also could obtain and review copies of student substantive work. In fact, if bar applicants were required to submit regular progress reports, this kind of program might indicate how likely a bar applicant is to timely submit paperwork; those who miss deadlines might be exactly the kinds of lawyers who would be likely to miss filing deadlines and have malpractice claims filed against them.¹⁹⁷

The list of tasks to be completed during an apprenticeship could be flexible and take into account that not all lawyers need to be proficient in all skills. For guidelines on what skills to include, states could look to the *MacCrate Report*, to what is done in some Canadian provinces, or to the Delaware apprenticeship checklist.¹⁹⁸ The tasks could include both mandatory and optional skills, and even the mandatory skills could be demonstrated in a variety of ways, depending on the apprenticeship site. Thus, a tax lawyer apprentice would not be required to show proficiencies in all of the same skills as an apprentice in a prosecutor's office.

Of course, one would have to rely largely on the on-site supervisors' assessments of whether the apprentice had the necessary skills and had performed the tasks satisfactorily. However, the bar examiners could develop guidelines as to what constitutes satisfactory performance. Also, to help control for misrepresentation on either the part of the site supervisor or the apprentice, the bar could require site supervisors to complete evaluation forms and to certify, under oath, that the apprentice has satisfactorily performed each task. Likewise, the apprentice would have to certify, under oath, that he or she has performed each task.¹⁹⁹ Disciplinary sanctions for misrepresentation could be severe. Finally, as an additional check, bar examiners could ask for portfolios from each apprentice and could review the written work to make certain that it is satisfactory.

There are many advantages to using an apprenticeship model as a substitute for the existing bar examination. First, the model would help ensure that new lawyers are competent in a wide variety of areas not currently assessed by the licensing process. Second, as to those skills ostensibly measured by the current bar exam—legal knowledge, issue spotting, and the ability to present a well-written, well-reasoned

197. See *supra* notes 84-85 and accompanying text (discussing the fact that a large percentage of malpractice claims are due to late filings and missed deadlines).

198. See *supra* note 185 (discussing the Delaware checklist); MACCRATE REPORT, *supra* note 1, at 139-41 (discussing skills competent lawyers should have); *supra* note 164 and accompanying text (discussing the Canadian skills checklist).

199. This is similar to the Delaware requirement. See *supra* note 185 and accompanying text.

legal analysis²⁰⁰—it would ensure that new lawyers are able to apply those skills in the real world rather than in the context of a multiple-choice or an essay question. Third, it could be flexible enough to recognize that different kinds of lawyers need proficiency in different skills. Finally, it might help avoid the disparate impact the current examination has on minority bar applicants.

Setting up an apprenticeship program presents some problems, but not insurmountable ones. In Canada, for example, there is a shortage of internship positions and disparity in the quality of internship experiences.²⁰¹ In the United States, the same shortage of positions may not exist, given the number of grossly understaffed non-profit agencies, government law departments, businesses with legal departments, and large and small law firms.²⁰² However, lack of supervision and lack of quality assurance may still be an issue in the United States. Bar applicants and lawyers in states that currently have or that have had apprenticeship requirements,²⁰³ as well as Canadians,²⁰⁴ have raised these concerns. Thus, it would be important for states implementing this program to take steps to develop a well-supervised apprenticeship program. The foregoing paragraphs outline what some of those steps might be. In addition to working with Canadian provinces studying their apprenticeship model,²⁰⁵ states could find detailed information about how to ensure a meaningful learning experience by working with law schools that have well-run externship programs. States could similarly look at the model be-

200. See Kuechenmeister, *supra* note 44 (discussing the various skills each section of the existing bar examination is supposed to assess).

201. Roche, *supra* note 163, at 33.

202. In Canada, students must find their own apprenticeships. Rather than adopting this model, states might consider limiting the apprenticeship sites to government and non-profit agencies and using a "match system" much like that used to match medical residents with hospitals. This would help ensure that all graduates were able to find an internship and make it less likely that minority groups would experience the same kind of bias that many Canadian Aboriginal law graduates have experienced in their search for an apprenticeship. For more information about the medical residency match system, see the National Resident Matching Program website, http://www.nrmp.org/res_match (last visited Aug. 5, 2002) (documents from this website also on file with author). For more information about the experience of Canadian Aboriginal graduates, see LAW SOC'Y OF B.C., *supra* note 179.

203. See MACCRATE REPORT, *supra* note 1, at 287-89; see also Barry J. London et al., Comment, *Admission to the Pennsylvania Bar: The Need for Sweeping Change*, 118 U. PA. L. REV. 945, 969-71 (1970) (critiquing the Pennsylvania clerkship requirement on the ground that it lacks uniformity in the amount and quality of skills training provided).

204. See *supra* note 179 and accompanying text.

205. Currently, many Canadian provinces are studying how to improve their admissions programs. See ADMISSION PROGRAM REPORT, *supra* note 161, at 2-3.

ing developed in Arizona for an Americorps-type alternative to the bar examination.²⁰⁶

Finally, setting up and running this kind of apprenticeship program will be expensive. However, the need for students to spend thousands of dollars on bar review courses and three months studying for the bar would be eliminated if an apprenticeship program were to serve as a substitute for the bar exam or if states devised an examination where students were asked to research rather than memorize the law. Students could spend their time doing an apprenticeship, and the money formerly spent on bar review courses could be used to hire faculty supervisors to monitor apprenticeship experiences. Additionally, perhaps some of the required time spent in an apprenticeship could be satisfied through successful completion of a law school's externship or clinical program if, in addition to the school's requirements, the student and supervising attorney complied with the state bar's requirements for an apprenticeship program. Finally, state bars might consider offsetting the cost of this kind of training program by adding a small fee to their existing attorney licensing fees. Although this would be controversial, it could be justified on the theory that many lawyers would ultimately save money they otherwise would have spent training associates. Additionally, a better-trained bar should benefit the entire profession, even though a better-trained bar comes with a price.

E. A Postgraduate, Pre-Admission, Graded Skills-Assessment Course

Even if states did not want to adopt an apprenticeship program, the teaching-term portion of the Canadian program is a viable alternative to the existing bar exam. The teaching term provides a hands-on approach and helps students integrate substantive material with practical skills and professional responsibility issues.²⁰⁷ At the end of the term, students are tested. At the end of the teaching term in British Columbia, for example, students must achieve a score of seventy in assessments of interviewing, advocacy, legal writing, and legal drafting skills.²⁰⁸ The assessments are based on skills lawyers actually use. That is, the legal writing assessment may require the student to write a letter to a client giving an opinion on the client's legal problem and on ethical and professional breaches committed by the client's for-

206. A proposal has come out of the University of Arizona for an Americorps-type alternative to the bar exam that explores ways to handle many of the issues discussed in this Essay. For more information about that proposal, contact Sally Simpson by e-mail at sally.simpson@law.arizona.edu.

207. BRITISH COLUMBIA'S PROFESSIONAL LEGAL TRAINING COURSE: OVERVIEW (on file with author) (also available in the University of Nebraska Law College Library).

208. See Goncalves, *supra* note 163, at 2.

mer lawyer.²⁰⁹ The legal drafting assessment may require a student to custom draft a service contract addressing specific client concerns and presenting some potential risks for the client.²¹⁰ The interviewing assessment may ask a student to interview a new client and provide advice on a simple legal matter.²¹¹ The advocacy assessment requires students to argue opposing sides of a contested motion.²¹² The assessments are pass/fail; however, because the teaching term seeks to integrate skills with knowledge of substance and professional responsibility issues, a student could fail if he or she was not well versed in all three areas.²¹³ Thus, in “the Interviewing Assessment, if the student’s interviewing techniques are sound, but the student has insufficient knowledge of the substantive law to question the client effectively, the student’s performance could be graded as a ‘fail.’”²¹⁴

The Canadian teaching terms are staffed by professional faculty, who in many cases are practitioners with at least five years of experience,²¹⁵ and by guest instructors.²¹⁶ In British Columbia, there are Skills Guides, which provide “a checklist of general criteria that are fundamental to each skill and encompass matters of both form and substance,”²¹⁷ available to help teaching-term faculty assess the students’ skills and to help students understand what it is they should be learning. The guides are published to both students and teachers. Not only do the guides help the students prepare for the assessment by letting them know what the objective standards are, but they also impose consistent objective standards on the assessing process so that the grader must justify a pass or fail against the criteria. A student who fails can then see where he or she fell short.²¹⁸

Some may claim that a portion of the Canadian teaching term described above is being accomplished through various states’ “Bridge the Gap” programs.²¹⁹ However, most “Bridge the Gap” programs last for only a few days and deliver information in a lecture format with little opportunity for hands-on training and virtually no opportunity for feedback.²²⁰ Although the “Bridge the Gap” programs and CLE

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. BRITISH COLUMBIA’S PROFESSIONAL LEGAL TRAINING COURSE: OVERVIEW, *supra* note 207, at 6.

214. *Id.*

215. Goncalves, *supra* note 163, at 2.

216. Roche, *supra* note 163, at 31.

217. Goncalves, *supra* note 163, at 2.

218. *Id.* at 3.

219. Most states have “Bridge the Gap” programs that are similar in form and content. MACCRATE REPORT, *supra* note 1, at 290.

220. *Id.* at 290-97. A few states require a longer period of skills training through continuing legal education programs. *Id.*

training requirements are a step in the right direction in terms of assuring new lawyers have the necessary skills to competently practice, their limited time frame, largely lecture format, and failure to assess applicants to see if they have actually learned the skills taught make them incomparable to the Canadian teaching term. Most importantly, while attendance may be a prerequisite to licensing in some states, these courses occur after someone is admitted to the bar, and licensing does not hinge on successfully completing the tasks or mastering the skills the "Bridge the Gap" courses cover.

There are many advantages to a teaching-term model. It helps make certain that all lawyers have some of the basic skills needed to practice, skills not tested by the existing bar exam. It also presents a much more integrated way of using the law than do single-issue essay or multiple-choice questions. Most importantly, students not only get experience doing the tasks, but they also get feedback, one of the most valuable learning tools.²²¹

If states feel that law school graduation, coupled with successful completion of the teaching term, still insufficiently measures whether one is ready to be a lawyer, they could adopt the short substantive test administered in Canada. It should be noted that this test covers only nine substantive areas, as well as professional responsibility questions. Unlike their U.S. counterparts, who are tested on over twice as many substantive areas,²²² Canadian students do not feel compelled to spend months and thousands of dollars taking review courses in order to pass the test.²²³ If U.S. students were freed from this time and financial burden, money bar applicants now spent on review courses could be used to help pay staff and faculty in a teaching-term program.

221. See GREGORY S. MUNRO, *OUTCOME ASSESSMENT FOR LAW SCHOOLS* 151 (2000) (noting that "the learning loop is complete only if what the teacher learns about the student's performance is communicated to the student, so that the student knows how to improve").

222. The MBE alone covers eight substantive areas (constitutional law, contracts/sales, criminal law/criminal procedure, evidence, real property, and torts), and there is a separate exam for professional responsibility law. State bar exams often cover state law in these areas and cover additional subjects as well. For example, New York tests applicants' knowledge of New York law on agency, commercial paper, conflicts of laws, corporations, domestic relations, equity, estate taxation, federal jurisdiction, future interests, insurance (no fault), mortgages, New York practice and procedure, New York professional responsibility, partnership, personal property, secured transactions, trusts, wills, workers' compensation, and the New York distinctions for all MBE subjects. BAR-BRI BAR REVIEW, available at http://www.nybarbri.com/bar_exam.html (last visited July 13, 2002) (documents from this website also on file with author).

223. To the extent there are review materials, they are distributed by the provinces' law societies rather than by commercial entities.

F. The Public Service Alternative to the Bar Exam

Another alternative to the existing bar exam is Dean Kristin Glen's proposal of a public service alternative. Glen proposes the development of a pilot project to test the viability of allowing bar applicants to choose between taking the existing bar exam or participating in what she labels the "public service alternative to the bar exam" (PSABE).²²⁴ Those choosing the PSABE would work for 350 hours over ten weeks within the court system, where they would be rotated through a variety of assignments in which competence on at least six of the MacCrate skills would be evaluated by trained court personnel and law school clinical teachers.²²⁵ In order to make the training and assessment viable and worthwhile to supervising lawyers and judges in the court system, those choosing the PSABE would commit to performing 200 hours of court-attached pro bono work over the following two to three years.²²⁶

Glen's proposal merits serious attention for numerous reasons. First, it is a way to make certain that lawyers actually possess the broad array of skills that lawyers, scholars, and judges believe competent lawyers should have. Second, this alternative is a concrete way to encourage public service work, which the bar says is important. Finally, with two cohort groups (those taking the existing bar exam and those opting for the public service option), we open the door to empirical studies that can compare the two methods of licensing new lawyers to determine whether one produces more competent lawyers than the other.²²⁷

G. The Diploma Privilege

Professor Beverly Moran suggested yet another proposal for change. Moran's suggestion is that states consider readopting the diploma privilege, once standard practice.²²⁸ The diploma privilege grants a state's law license to all those who graduate from an ABA accredited school located within that state. Moran outlines the numerous advantages of a diploma privilege. First, it avoids the bar exam's disparate impact on minority applicants.²²⁹ Second, it allows

224. See Glen, *supra* note 16 (manuscript at 4).

225. *Id.* (manuscript at 48-49).

226. *Id.*

227. Glen raises the idea of an empirical study in her essay and suggests that one way to measure whether one system produces more competent lawyers than the other is to look at bar disciplinary complaints and malpractice claims. Glen, *supra* note 16 (manuscript at 87).

228. For a survey of the arguments for and against the diploma privilege, see George N. Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15 (1977).

229. Moran, *supra* note 33, at 653.

students in law school to relax and learn.²³⁰ Finally, it makes lawyers and judges more active participants in legal education.²³¹

Moran notes that the diploma privilege works well in Wisconsin, largely because Wisconsin has these characteristics: (1) it is a small state with a relatively small practicing bar; (2) there is a close relationship between the bar, the judiciary, the legislature, and the law schools within the state; and (3) there is great regard between the public and the bar for the state's law schools.²³² She suggests that other states with similar characteristics are potential candidates for a diploma privilege.²³³

H. Modifications to the Existing Process

1. *Testing Legal Research and Drafting*

The existing bar exam should change. Even if the exam is not changed completely, some serious adaptations could still be made. For instance, one of the most important tasks a lawyer must be able to do is research the law and then explain what he or she found. To test legal research and drafting skills, bar examiners could incorporate a take-home legal drafting or legal writing assessment, much like the drafting assessments used by the Canadians. There could be a variety of assignments from which to choose, allowing bar applicants to complete the assignment that best reflects the skills they need in their intended area of practice. Bar applicants could have a week or two to complete the assignment, giving them ample time to think about and adequately edit their work. These written products could then be graded much like the Canadians assess the work product at the end of the teaching term.²³⁴ For example, a contract drafting exercise could

230. *Id.*

231. *Id.* at 654.

232. *Id.* at 655.

233. *Id.*

234. For an example of the Canadian assessment sheet for written work, see Gonçalves, *supra* note 163, at app.

be assessed by looking at the content,²³⁵ organization²³⁶ and language²³⁷ of the contract drafted.

Of course, one concern with a take-home exam is that bar applicants would not do their own work. One way to address this problem is to use the software currently available at The Plagiarism Resource Center at the University of Virginia. All of a state's examinees' answers could be run through a computer program such as this to check for cheating by copying another examinee's answer.²³⁸ Of course, this does not handle the problem of bar applicants who get someone else to write out their answers to the exam questions. Obviously, all bar applicants could be required to certify, under threat of severe sanction, such as license revocation, that the work is their own. Further, all examinees could be asked to submit a writing they completed in law school or during a summer job that could be used as a basis for comparison in the event there is a question about the authenticity of the examinees' work. In the end, however, there is no absolute way to make certain that there is no cheating on a take-home exam. That is just one more reason to have a strong ethics screening process in place. If bar applicants cannot be trusted to honestly certify that their work is their own, surely they should not be given a law license.

2. *Credit for Pro Bono Work*

State bars could also relatively easily and quickly begin giving credit for pro bono work. A bar applicant's having done pro bono work

235. For example, did the writer address all relevant facts and legal issues? Did she use the correct legal language? Did she confer the legal rights and impose legal obligations correctly? Did she avoid imposing unreasonable or unnecessary obligations on her own client, the other party, and non-parties? Did she avoid internal contradictions and inconsistencies? These criteria are taken from the Canadian grading sheet. *See id.*

236. For example, did she divide, classify and sequence the material logically? Did she use correct paragraphing, subparagraphing, and numbering? Did she avoid unnecessary cross-referencing? Did she create and use headings and definitions appropriately? Did she meet formal requirements by correctly describing the parties, creating and using recitals appropriately, using a consideration clause, using correct execution and attestation clauses, and indicating the date of signing the agreement? These criteria are taken from the Canadian grading sheet. *See id.*

237. Did she use correct grammar, punctuation, diction, and spelling? Did she avoid complex sentence structure? Was she concise? Did she use precise language and concrete words? Did she use active rather than passive voice? Did she avoid legal jargon? Did she write in the present rather than the future tense? Did she use consistent language? These criteria are taken from the Canadian grading sheet. *See id.*

238. For information about the Plagiarism Resource Center, see the website of the Plagiarism Resource Center at the University of Virginia, <http://www.plagiarism.phys.virginia.edu/Wsoftware.html> (last updated July 3, 2002) (documents from this website also on file with author).

in the past serves as an indication that he or she is likely to do it in the future.²³⁹ Thus, bar examiners could consider giving credit to those applicants who have done pro bono or community service work or who have worked with underserved legal populations while in law school.²⁴⁰ Of course, this might motivate many more law students to do pro bono work while in law school,²⁴¹ but there certainly is no harm in that.

Some may argue that it is unwise to have people do work they are not committed to doing, presumably because they will do substandard work. However, if the worry is about the quality of work, state bars could require a certification by the supervising lawyer that the student performed "x" hours of public service lawyering, performed "x" substantive tasks, and performed them well. A modified grading system of check minus, check, and check plus could even be instituted, and the amount of credit towards the final bar score could be based on that grade.

Another concern with what may become de facto compulsory pro bono work is that students will never again do pro bono work after they complete their service, so that pro bono work done in law school would not be a predictor of future proclivity to serve the greater community interests. This concern could be dealt with by doing an empirical study of graduates of law schools that require pro bono legal work before graduation,²⁴² perhaps comparing those students to graduates from schools without that requirement and to graduates of the same

239. It is not a novel proposition to say that we can often, although not always, predict how someone will act by looking at what they have done. *See, e.g.*, Delgado, *supra* note 17, at 612 (noting that past accomplishments are the best prediction of future accomplishments).

240. What constitutes "pro bono" will have to be defined. One place to look for definitions of "pro bono" is law schools that have a mandatory pro bono program. For example, one law school defines "pro bono" as work that "is substantially related to the provision of legal services to the poor"; another defines it as "unpaid non-clerical, law-related work for non-profit organizations, public interest law firms, legal aid offices, pro bono projects, or government agencies"; another defines it as "uncompensated legal work on behalf of indigent individuals, members of a disadvantaged minority, or victims of discrimination. Work for government agencies is included in this definition." *See* Caroline Durham, *Law Schools Making a Difference and Examination of Public Service Requirements*, 13 *LAW & INEQ.* 39, 41-43 (1994) (charting the pro bono requirements and definitions of "pro bono" from various law schools with mandatory pro bono requirements).

241. This emphasis on pro bono could have a spillover effect: it might encourage law schools to admit the kind of applicants who will be a valuable addition to the bar, that is, those who will do pro bono work and those who are likely to serve underserved populations.

242. At least twenty-four law schools have some sort of mandatory pro bono requirement. *See* Sabrina A. Hall & Tammy R. Wavle, *A Vision for the Future: Mandatory Pro Bono Programs in Texas Law Schools*, *HOUS. LAW*, Jan./Feb. 2001, at 18, 22 n.61 (listing the schools with a mandatory pro bono requirement).

schools who graduated prior to the pro bono requirement.²⁴³ At any rate, even if pro bono work in law school does not substantially increase the likelihood of pro bono work as a lawyer, it does broaden a lawyer's perspective by exposing her to people and situations that she may otherwise never see. It also provides students with real-world experience and gives many students their "only direct knowledge of how the system functions, or fails to function, for the 'have nots.'"²⁴⁴ This broader perspective is certainly a quality that could justifiably be considered an important one for new lawyers to have.²⁴⁵

3. *Assessing Oral Communication Skills*

Oral communication skills should be tested, given how important they are to the majority of lawyers.²⁴⁶ Developing a reliable and valid test for this skill will take some time to study, but it is certainly worth studying. One potential way to begin the study is to develop a pilot project in which applicants do mock interviews or client-counseling sessions. This might be done with actors serving as "standardized clients."²⁴⁷ This model, already used in the medical licensing examination process²⁴⁸ and in some law school classes,²⁴⁹ could be adapted to a pilot test in a bar examination scenario.²⁵⁰ One way to handle the logistics of an oral exam would be to use trained, volunteer lawyers as

243. Student surveys at several schools that require pro bono work indicate that performing pro bono work during law school has increased their willingness to contribute pro bono services after graduation. Deborah L. Rhode, *Professionalism in Professional Schools*, 27 FLA. ST. U. L. REV. 193, 201 (1999).

244. *Id.* at 200.

245. One issue with giving credit for doing pro bono work is that it may disadvantage those who, because of family or financial obligations, do not have the time to devote to pro bono work while in law school. These students will not get credit in terms of additional raw points added to their bar exam scores; however, assuming that states do not raise their passing scores when they give credit for pro bono, these students will not be any worse off under a system crediting pro bono than they are under the current system.

246. This is especially true because at least one study of law school examinations (which are similar to the bar examinations) demonstrates that the current system, which relies totally on written exams, unfairly benefits those who write well but do not explain legal matters well in person and unfairly punishes those who perform well orally but not in writing. See Burman, *supra* note 36, at 138.

247. For a discussion of the use of a "standardized client" in a law school class, see Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. LEGAL EDUC. 212 (2001).

248. *Id.* at 233.

249. Grosberg, *supra* note 247.

250. Grosberg notes that the medical analog is already part of the medical exam and that the legal profession should begin empirical work on using this model in the bar examination. *Id.* at 233-34.

graders.²⁵¹ States could work with law faculty²⁵² and practitioners to develop both a script for a client interview and training for the actors and the lawyers/assessors. To ensure the integrity of the process, and to check for validity and reliability, all mock interview sessions could be videotaped, and the tapes could be spot-checked to see if there was concordance between graders. States that implemented this idea might simply have the assessors grade the interviews as pass/fail and could look to the Skills Guides from British Columbia as a guide to criteria.²⁵³ Additionally, states could work with university psychometricians and other experts to develop a reliable and valid format and assessment. As noted earlier, foundation money should be considered to help finance the initial costs involved in developing ways to assess new lawyers' oral communication skills.

I. Beginning the Process of Change

The foregoing ideas are only a starting point as we begin to reconceptualize the bar licensing process. The bar exam has recently become the subject of scholarly study, and many more ideas are likely to be articulated and studied in the next few years.²⁵⁴ The key is to begin the process of change now because all change takes time.

As states begin to look at changing the process, they should get input from a wide constituency, including lawyers, judges, academics, law students, and members of the community at large. It is especially important to give a voice to people from all walks of life in the community in order to ensure that the effort to reform how we decide whom

251. For an idea of how to recruit lawyers and handle the logistics, states could look to the North Carolina ethics screening process in which all bar applicants have an interview with a practicing lawyer in the bar district in which they reside. See N.C. R. ADMIS. § .0604 (2002) (stating that every applicant to the North Carolina Bar must meet with a bar candidate committee in the judicial district in which the applicant resides to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law). The local bar districts recruit volunteer lawyers who then meet with a limited number of bar applicants for fifteen to twenty minutes to discuss the applicant's application and general ethics issues. The work is done as a pro bono service to the bar.

252. For example, Professor Burman has now given oral exams to large law school classes for a number of years. See Burman, *supra* note 36, at 137. Professor Grosberg has also already done substantial work developing this model. See Grosberg, *supra* note 247.

253. See *supra* notes 235-37 and accompanying text (discussing the various aspects of the British Columbia teaching-term assessments).

254. For example, other significant efforts to rethink educational assessment in legal education and the bar examination are underway under the auspices of Professor (and former Dean) Judith Wegner at the University of North Carolina, judithwegner@unc.edu, working with the Carnegie Foundation for the Advancement of Teaching, <http://www.carnegiefoundation.org>. Also, Arizona is in the midst of developing an Americorps-type alternative to the bar exam. See *supra* note 206.

to license is not controlled only by those with an interest in maintaining the status quo. By inviting and acting upon a wide range of views, states are more likely to create bar licensing requirements that reflect a much broader view of what kinds of skills, qualities, and knowledge a competent lawyer should possess.

IV. BARRIERS TO REVISING THE ENTRANCE REQUIREMENTS

Before any change in the bar exam can happen, numerous constituencies must support, or at least must not actively oppose, the process. These constituencies include (1) the bench and bar, (2) the bodies that govern and administer the existing bar exam (each state's board of bar examiners, state supreme courts, and the NCBE), and (3) the law schools' faculties and students.

A. The Existing Bench and Bar

Some members of the bench and bar will resist any move to modify the existing system. For some, the existing exam is seen as the main way to control the influx of new lawyers. In fact, William Kidder uses empirical data to explain how the recent move in some states to raise bar exam passing scores is an "anti-competitive response to a perception there was an excess supply of lawyers or insufficient demand for legal services (or both)."²⁵⁵ Even among those who do not view the existing bar exam as outright protectionism, many will still fear that their states will be beset with an influx of lawyers from other states, due to perceived easy access to a law license, if their states move from the traditional format before other states change their admission requirements.

Also, some practicing lawyers and judges may be uncomfortable with a new licensing system because it deviates from the predictability and certainty of the existing exam and process. The quality of lawyers admitted under a different testing format is unknown, and the unknown always carries risks. The question is what happens if the new system of testing does a worse job of screening for competent lawyers than the present system.

Whether a new system will be better or worse will not be known until it has been in place for some time. Nonetheless, fear of the unknown cannot be allowed to paralyze the legal profession because the status quo is unacceptable. This Essay neither argues that all licensing requirements should be eliminated, nor does it suggest that the requirements should somehow become easier than taking the current bar exam. The point of studying the current system is to look at viable

255. Kidder, *supra* note 14 (unpublished manuscript at 8).

alternatives to the present system—alternatives that would assess a broader range of the skills, knowledge, and qualities that the state bench and bar believe qualify someone to practice law—and then to implement those alternatives in order to create a system that produces more competent lawyers. Additionally, many members of the bench and bar should consider how they were licensed. Those entering the profession before the early 1970s did not take a multiple-choice test. Some took no test at all, either because of the diploma privilege or the rule in some states that exempted veterans from the bar exam.²⁵⁶ These lawyers and judges, and their colleagues, should ask themselves if they are any less competent than those admitted under the current licensing system.

The bench and bar also should consider that change might produce tangible benefits. Developing a system that tests for a broader range of lawyering skills means that bar applicants must gain a proficiency in those skills before licensure.²⁵⁷ This should result in monetary savings for many law firms since some of the cost of training new lawyers will have been absorbed earlier in the process. Broadening our view of competence to include qualities like a commitment to pro bono work or a willingness to serve underserved communities also brings benefits. Namely, we will be likely to improve the public's view of lawyers,²⁵⁸ which benefits the entire profession.

B. The Administering Bodies

In most states, the board of bar examiners is an administrative agency of that state's supreme court.²⁵⁹ The state supreme courts and the boards of bar examiners (as well as other members of the bench

256. Although Wisconsin is currently the only state with a diploma privilege, a number of states had the privilege until the early 1980s. *See, e.g.*, In the Matter of Proposed Amendments Concerning the Bar Exam and Admission to the Practice of Law in the State of Mont., 609 P.2d 263 (Mont. 1980) (abolishing the diploma privilege in Montana); *Quelch v. Daugherty*, 306 S.E.2d 233 (W. Va. 1983) (overturning a statute abolishing the diploma privilege in West Virginia); *see also* Glen, *supra* note 16 (manuscript at 72) (discussing New York's exemption of veterans from the bar examination requirement).

257. As one commentator noted in his support of the MPT, screening for a broader range of values and skills is consistent with the bench and bar's goal of increasing the level of professionalism within the legal community. *Askew, supra* note 56, at 33.

258. *See supra* notes 88-90 and accompanying text.

259. *See, e.g.*, GA. CODE ANN. § 15-2-8 (2002); KY. REV. STAT. ANN. § 21A.130 (2001); ME. REV. STAT. ANN. tit. 4, § 801 (2001); MASS. GEN. LAWS ANN. ch. 221, § 35 (2001); OR. REV. STAT. § 9.210 (2001).

and bar) will no doubt have concerns about a new test's cost, practicality, reliability, corruptibility, and validity.²⁶⁰

1. *Cost and Practicality Concerns*

Cost and practicality considerations will be a major factor in determining the viability of new bar admission requirements. The practicality considerations will necessarily depend on the type of modification proposed.²⁶¹ Cost considerations also will vary depending on changes adopted. It is true that any substantial change will likely be initially expensive.²⁶² However, depending on the change, the year-to-year cost may not differ greatly from costs already associated with the current licensing process. It is important to remember that bar applicants already may spend close to \$3,000 for bar review courses²⁶³ and may pay substantial bar application fees as well.²⁶⁴ If a new system eliminated the need for a bar review course, then that money could be applied to increased administrative costs. Additionally, as one commentator noted, a promising and cost-efficient approach to developing and administering new licensing criteria is to work with the NCBE, other state bar examiners, and national associations with expertise and interest in the bar admissions process.²⁶⁵

2. *Validity and Reliability Concerns*

Another concern of those administering the bar licensing process is that a new assessment methodology must be both valid and reliable.

260. These are the issues generally set forth by measurement experts concerning the challenges in implementing performance testing on a broader scale. For a more in-depth review of these criteria, see Slaughter et al., *supra* note 37, at 11.

261. In describing the various options to replace or modify the existing exam, this Essay has attempted to address some of the cost and practicality concerns. Until a state seriously explores a specific option, it will be difficult to calculate the exact cost and all the logistical issues that may arise.

262. Dean Glen suggests that there may be foundations willing to fund initial costs of revamping the existing bar exam, especially if the changes will have the effect of creating a more diverse bench and bar. Glen, *supra* note 16 (manuscript at 83-85).

263. Different courses in different states cost different amounts. For example, for the summer 2002 course, Bar-Bri cost \$2,650 in California and \$1,850 in Arizona, and a Peiper bar review course in New York cost \$2,195. This information may be obtained from the Bar-Bri and Peiper websites. In addition to paying for Bar-Bri, many students also feel compelled to take the PMBR, a course designed only to help with the MBE, or an additional course to help pass the essay exam.

264. For example, the bar application fee in North Carolina is \$500 if the applicant is not a member of any other bar and \$1,000 if a member of another bar. This information can be found at <http://www.stu.findlaw.com/thebar/results/nc.html> (last visited Aug. 3, 2002) (documents from this website also on file with author). The information is also available from the Board of Law Examiners of the State of North Carolina, One Exchange Plaza, Suite 700, Raleigh, NC 27602.

265. Roche, *supra* note 163, at 34.

Validity means that the examination adequately and accurately tests the kinds of knowledge and skills relevant to the profession²⁶⁶ in a way that minimizes the influences of characteristics other than the skills, knowledge, or attributes intended to be assessed from the measurement process.²⁶⁷ Reliability deals both with the concept of score reliability (whether the results of a sample can be used to make an inference about how well an applicant would have performed had she answered all questions in the universe)²⁶⁸ and consistency of measurement.²⁶⁹

These issues will require working with experts in the test-development field. Hopefully, the NCBE or other national organizations with testing expertise and a desire to develop a more meaningful bar examination will consult with state bars to ensure new measures are both valid and reliable. However, it is important to remember that no one is going into totally uncharted waters here. We already have two tests, the essay test and the MPT, which are subjective tests. For both tests, validity and reliability measures have been developed. For example, to ensure validity of both the MEE and MPT, the NCBE has a substantial pretest validity screening process.²⁷⁰ Likewise, it provides mechanisms that enhance reliability in the assessment process. For example, with the MPT, graders are given a "Drafters' Point Sheet and Grading Guidelines that describe the factual and legal points encompassed within the lawyering task to be completed by the applicant."²⁷¹ Immediately following the administration of the MPT, bar examiners and other graders are invited to participate in a national grading workshop where participants are trained in the grading process.²⁷² Likewise, techniques exist to increase reliability of essay grading.²⁷³ As the Canadian system has demonstrated, these same techniques are available for assessing other nonobjective measurements of lawyering skills.²⁷⁴ Additionally, the proposals set forth above are very similar to the concept of performance-based assessment, a concept that has been extensively studied by educators and scholars across the country.²⁷⁵ The work of these scholars and educa-

266. LeAnn M. Gamache, *Fairness in Testing*, B. EXAMINER, May 1991, at 29, 30; Kuechenmeister, *supra* note 68, at 23.

267. Gamache, *supra* note 266 (discussing the ways in which tests should be checked to minimize or eliminate the influence of factors other than those being assessed).

268. Klein, *supra* note 67, at 14.

269. Slaughter et al., *supra* note 37, at 14.

270. For a description of that process, see Smith, *supra* note 65, at 48.

271. *Id.* at 46.

272. *Id.*

273. Julia C. Lenel, Ph.D., *The Essay Examination: Part III: Grading the Essay Examination*, B. EXAMINER, Aug. 1990, at 16, 18.

274. See *supra* notes 235-37 and accompanying notes.

275. For a list of some of the numerous articles on performance-based assessment, see Sturm & Guinier, *supra* note 75, at 1013 n.255. See also U. OF MD. DEPT OF

tors can also provide a resource for helping to ensure the tests are valid and reliable.

C. Law Schools

Many law faculty members and deans may resist a change in the bar exam because of a fear that a change in the exam will force curriculum changes.²⁷⁶ In fact, some of the strongest opposition to the *MacCrate Report* came from law school deans, who claimed that the Commission was trying to impose “a unitary answer on all of the 157 law schools accredited by the ABA,”²⁷⁷ and that it was simply trying to push the cost of skills training from law firms on to the law schools.²⁷⁸ Any change in the format of the bar exam may be viewed as a threat to both the kinds of courses taught and the methods of student evaluation. If the bar examiners say, for example, that essay and multiple-choice questions are not the best measures of competence to practice law, the question becomes whether professors will still be able to justify one three-hour final essay question exam or the increasingly popular multiple-choice exam.²⁷⁹ Likewise, if the bar begins testing a wider breadth of skills, law schools may be forced to teach more practical skills.

These fears should not stand in the way of reforming the bar exam for numerous reasons. First, many law schools have already expanded their practical skills courses in response both to the *MacCrate Report* and student demand.²⁸⁰ Additionally, there is the beginning of a movement to change the method of law school assessment from a one-time exam to a series of assessments that are more related to the

MEASUREMENT AND STATISTICS EVALUATION, EDUC. RES. INFORMATION CTR. CLEARINGHOUSE ON ASSESSMENT AND EVALUATION, U.S. DEP'T OF EDUC., at <http://www.ericae.net> (1999-2001) (documents from this website also on file with author) (a website with links to numerous academic articles about performance-based assessment).

276. See Askew, *supra* note 56, at 33 (noting that law faculties worry about how bar exam changes might impact curriculum); see also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 118-19 (2001) (describing many law school deans' negative reaction to the *MacCrate Report*).
277. Paul Brest, *When Should A Lawyer Learn The Way To the Courthouse*, STAN. LAW., Fall 1993, at 3, 3.
278. John L. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 176 (1993).
279. See Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV., 657, 684 (1997) (noting that the interest in law school administration of multiple-choice test questions followed the advent of the multi-state bar exam).
280. Engler, *supra* note 276, at 123 (noting that published articles in the years after the *MacCrate Report* indicated that at least some schools had made curricular changes either consistent with the Report's recommendations or as a result of those recommendations).

kinds of tasks new lawyers might be asked to complete.²⁸¹ Thus, law schools may not have to change as much as many faculty members might fear. Second, even if change is required, as Felix Frankfurter once said, "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."²⁸²

This Essay does not advocate that a change in the bar exam will or should result in law schools moving from teaching theory to focusing mainly on skills. There is, and should be, a place for both within every law school. After all, it is the responsibility of law schools to provide a well-rounded education to their students. This means not just teaching them lawyering skills and the black letter law or "to think like a lawyer." It also means engaging students to think about the political, social, and ethical dimensions of the law and challenging them to recognize their responsibility for the development of our laws, and thus, our society. This can be done in a myriad of ways. As one commentator noted,

[T]he more variations students are exposed to—in teaching methodology, personal visions, interdisciplinary concepts and the like—the more likely they are to emerge as well-rounded, thoughtful, mature professionals, capable of making their own decisions about how to conduct themselves effectively in the world of law practice and human interaction into which we send them.²⁸³

Law faculties need to be open to change in the bar examination process. Changing that process does not mean that every faculty member will not be able to teach his or her favorite courses or must teach courses with an emphasis toward assessing a broader range of lawyering skills. Rather, a change in the lawyer licensing process may open the door to a broader conception of what a law school education can and should encompass. It also may lead to law schools relying less on the LSAT and adopting entrance requirements that more clearly correlate with skills and qualities lawyers should have.²⁸⁴ For example, the University of Michigan Business School is moving from reliance on the GMAT to a test that aims to gauge who is able to learn from mistakes, handle changing situations, and cope with less than perfect information—the kinds of challenges working people face every day.²⁸⁵ Without a bar exam that tested in a way similar to the LSAT, law schools might be willing to try something similar.

281. MUNRO, *supra* note 221.

282. Letter to Rosenwald, May 13, 1927, *quoted in* Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, B. EXAMINER, Feb. 1995, at 36, 38.

283. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 64, 73 (1992).

284. For a discussion of why law schools feel compelled to rely on the LSAT during the admission process, see Glen, *supra* note 16 (manuscript at 10).

285. David Leonhardt, *On Testing for Common Sense: A Business School Thinks It Makes Sense. Yes? No?*, N.Y. TIMES, May 24, 2000, at C1.

D. Bar Applicants

Law students may also feel threatened by new bar entrance requirements. Students may dread the current bar exam, but they at least know what to expect and how to study for it. Students from the more elite schools may feel especially threatened because they are generally the students from more privileged backgrounds who usually do well on standardized tests.²⁸⁶ Additionally, there may be resistance from students who have done well in law school, fearful that the methodology they developed for achieving high grades in law school courses may not be the methodology that works in taking the bar exam. In fact, there may be resistance from all students because people fear change and uncertainty. As one commentator noted, bar applicants often react negatively to change because "any change tends to dissemble them and start a search for hidden agendas."²⁸⁷ Today's law students, especially those from the more elite institutions, are justified in being worried about changing the existing system of licensing attorneys. If we develop a new system of licensing attorneys, and the system filters down through the law school assessment and admissions process, it may change the socioeconomic, racial, and ethnic makeup of those able to become lawyers.²⁸⁸ The bench and bar will then become a less homogenous, and hence, to some, a less comfortable group.

On the other hand, bar applicants may welcome a new test. Many examinees felt the MPT was a good addition to the bar exam because it tested in a way that was more reflective of skills they needed as lawyers.²⁸⁹ If bar applicants understand the purpose of the changes and feel that the changes are valid measures of a wider breadth of lawyering skills, they may support, or at least not resist, the changes.

V. CONCLUSION

It is time to stop pretending that the existing bar exam is a valid measure of minimum competence to practice law. It does not begin to test the breadth of skills minimally competent lawyers need. And those skills the current exam does test are tested in a way that has little relationship to how the skills are used in practice. The existing exam is set up as a one-size-fits-all exam that does not take into ac-

286. See *supra* notes 74-78 and accompanying text.

287. Askew, *supra* note 56, at 33.

288. As Dean Glen notes, when the barrier of the bar examination is removed, more people of color may be willing to enter law school and the profession. Glen, *supra* note 16 (manuscript at 26-27).

289. See Smetanka, *supra* note 66, at 755 (noting that surveys of bar applicants indicate that applicants felt the MPT was a significantly better measure of their ability to practice than the MBE or essay questions).

count that different lawyers need to be proficient in different skills and different substantive areas.

Pretending the existing exam is a valid screening measure brings unfortunate results. First, the current exam may delay or exclude from the practice some people who might be quite capable of being good lawyers—the kind of lawyers who research and think about a question before answering it, who look up the law that they do not know, who consult with more experienced counsel for issues they cannot answer, and who are more apt to work with underserved communities and do public service work. Thus, the exam may delay or exclude from the practice people who might be good lawyers but who are not good multiple-choice or timed test takers. The second unfortunate result of the current exam is that it admits into the practice people who do not possess the necessary breadth of skills new lawyers need. Under the current licensing process, people who can answer multiple-choice questions may get a law license even though they cannot stand up in court and answer a judge's question, cannot research the law, and cannot negotiate or perform factual investigations. Can we really claim to protect the public from incompetent lawyers when our licensing process does nothing to measure these skills that are so critical to good lawyering?

If we genuinely want to protect the public from incompetent lawyers, develop a bar that is inclined toward public service, and create a more diverse bench and bar, then we must be willing to push for the changes that will create those results. One of those changes must be a revamping of the entire process of what it takes to gain admission to the bar so that the process actually assesses the skills, qualities, and knowledge competent lawyers should possess. As demonstrated in this Essay, many feasible alternatives exist. What is needed now is the commitment to explore and enact them.