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

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

This was not the first salvo in the battle of words following the

¹ University Professor and Clayton N. Little Professor of Law, University of Arkansas School of Law.

² Erica Moeser, *President's Page*, *THE BAR EXAMINER* 4 (Dec. 2014) (hereinafter “Moeser, *President's Page*”).

³ *Id.*

⁴ *Id.*

⁵ Moeser, *President's Page*, *supra* note 2, at 6.

⁶ *Id.* at 7.

announcement of sharply lower bar passage rates across the country. In October of 2014, President Moeser delivered a memo to law school deans defending the bar exam and raising concerns about the abilities or preparedness of that particular applicant group.⁷ This memo touted the efforts of the NCBE to ensure that “no error occurred in scoring the examination or in equating the test with its predecessors.”⁸ President Moeser asserted that “[b]eyond checking and rechecking our equating, we have looked at other indicators to challenge the results. All point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013.”⁹

Not surprisingly, these comments prompted a number of academic leaders to respond. The debate is highlighted in a Law Blog post authored by Jacob Gershman and hosted by The Wall Street Journal, entitled “Decline in Bar Exam Scores Sparks War of Words.”¹⁰ This blog particularly noted the prompt response by Dean Nicholas W. Allard of Brooklyn Law School, who responded to the October 2014 memo by saying that President Moeser’s assertions were unconvincing, and demanding a thorough investigation of the exam and its methodology.¹¹

The next month, Dean Kathryn Rand of the University of North Dakota forwarded a statement endorsed by 79 law school deans from across the United States (the “Dean’s Statement”) to the NCBE, asking for the NCBE to investigate the exam, to make transparent the results of that review, to examine the integrity and fairness of the exam as well as the reliability of the MBE components from that administration, to provide the data concerning the reliability and fairness of the 2014 exam, and in particular to provide evidence relied on “in making the statement that the takers of the bar exam in July 2014 were less able than those in 2013.”¹²

⁷ Memorandum from Erica Moeser, dated October 3, 2014, available online at <https://www.law.upenn.edu/live/files/3889-multistate-bar-exam-memo-oct-2014pdf> (last visited January 2015) (hereinafter called “*October Memorandum*”).

⁸ *Id.* at 1.

⁹ *Id.*

¹⁰ Jacob Gershman, Law Blog, Nov 10, 2014, available online at <http://blogs.wsj.com/law/2014/11/10/decline-in-bar-exam-scores-sparks-war-of-words/> (last visited January 2015).

¹¹ *Id.*

¹² Letter of Dean Kathryn Rand of the University of North Dakota, dated November 25, 2014, available online at http://online.wsj.com/public/resources/documents/2014_1126_randletter.pdf (last accessed

In addition to the December 2014 Bar Examiner comment mentioned earlier, President Moeser wrote a letter directly in response to the Dean's Statement.¹³ The tone of that response was telling. President Moeser reiterated the NCBE's "confidence" in the scoring of the July 2014 exam. However, while she reported that "[e]very aspect of [the exam's] ... methodology and execution has been reviewed and re-reviewed," she also insisted that the results of those studies would "not be revealed publicly."¹⁴ NCBE "systems are proprietary, and security is essential."¹⁵ Her letter also stated bluntly that the concerns about exam integrity "hardly merits response."¹⁶ President Moeser referred those who might question the exam to prior commentary on the bar exam, and in particular the feature in the Bar Examiner known as the Testing Column, as likely to be "instructive for those who wish to gain greater understanding...."¹⁷ Finally, President Moeser defended her use of the phrase "less able" to describe the July 2014 cohort by explaining that "less able" is a term of art consistently used among measurement professionals to express comparative information about performance,¹⁸ and further justified her statement by saying that "[t]he fact remains that the candidates who sat for the July 2014 MBE performed less well..."¹⁹

Even before the July 2014 Bar Results were announced and this particular dispute between the NCBE and academic leaders heated up, there were long-standing mutterings about the merits of the Bar Exam as currently configured. On January 14, 2014, the ABA Journal posted a brief on-line article titled: "A second state considers allowing its law-school grads to skip the bar exam."²⁰ While it may have been noteworthy that

January 2015). The statement attached to that letter is referred to herein as the "*Dean's Statement*."

¹³ Letter from Erica Moeser, December 18, 2014, available online at <http://taxprof.typepad.com/files/ncbe.pdf> (last accessed January 2015) (hereinafter called "*December Response*").

¹⁴ *Id.* at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *December Response, supra* note 13 at 2.

¹⁹ *Id.* at 3.

²⁰ Debra Cassens Weiss, "A second state considers allowing its law-school grads to skip the bar exam," ABA JOURNAL, Law News Now, Jan 14, 2014 available online at http://www.abajournal.com/news/article/a_second_state_considers_allowing_its_law-

Iowa was considering joining Wisconsin in allowing graduates of an accredited in-state law school to be licensed and admitted to the practice of law without the necessity of taking a bar exam at all, it was the comments that were posted to the article by members of the public who accessed the articles (many of whom at least claimed to be licensed attorneys) that were the most revealing.

Some commentators seemed to think it would be unfair to them to remove the bar exam for others. One irate reader replied “What?! That’s bunk! The rest of us had to pass [it]...”²¹

Many of the more negative comments revealed a rather profound lack of trust in law schools and law professors. One poster argued that “the bar exam arguably protects the public and is at least some minimal guarantee of legal knowledge--unlike law school...”²² Another respondent complained that:

The distinguishing prestige of the law profession stems from passing the bar exam. It is common knowledge that all law schools are not the same in graduating quality law students. So far, the bar exam appears to be the only method of determining the quality of education a law school delivers. Eliminating the bar exam as a qualifying method will vest too much power on law school professors in determining who becomes a lawyer.²³

On the other hand, even more replies reported a perceived disconnect between the information tested on the bar exam and the skills actually needed to practice law. One commentator wrote: “I think that the Bar examinations in the USA are a waste of time. It’s [sic] like a lottery.”²⁴ Another argued (with some humor) that “[t]he bar exam is a ridiculous rite of passage (pun intended). All it proves is that someone listened in his/her BarBri course. A good standardized test taker is no substitute for someone with common sense.”²⁵ Another poster reported that “I took the three day bar exam and passed the first time, only because I spent three months studying for it, and paid for one of the bar passing courses that give you

school_grads_to_skip_the_bar_exam/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (hereinafter “Weiss, *Second State*”) (last accessed January, 2014).

²¹ Reply No. 4, to Weiss, *Second State*, *supra* note 20.

²² Reply No. 9, to Weiss, *Second State*, *supra* note 20.

²³ Reply No.17, to Weiss, *Second State*, *supra* note 20.

²⁴ Reply No. 16, to Weiss, *Second State*, *supra* note 20.

²⁵ Reply No. 23, to Weiss, *Second State*, *supra* note 20.

strategy hints and practice exams. Frankly, I could have skipped the \$90,000 law school and passed the bar by taking the strategy course.”²⁶ The bar exam is criticized as an “anachronism,”²⁷ an “artificial industry created to add another layer of expense to the profession,”²⁸ and “a test of endurance” not competence.²⁹

This type of commentary makes it worth continually re-examining the way in which we license individuals to practice law. Does the bar exam protect the public? Does it raise standards? Or is it merely another obstacle increasing the difficulty and expense of becoming an attorney without providing real indicia of ability to serve as a competent, ethical member of the legal profession?³⁰ Are there other factors that should be considered when examining the question of whether our bar exam really does what we hope and intend?

This article does not take the position that we would be better off without a bar exam, although there may well be a case to be made in support of that proposition. There is enough evidence that the public, and the profession’s, confidence in legal academia is not universally strong enough to support turning the decision on licensing over to law schools alone. However, a review of what is generally tested on the bar exams does suggest that current bar exams are unlikely to be testing the right things, in the right way, if we really want them to be a measure of competence to practice law. Certainly the current test does not seem to be asking questions that should allow anyone to conclude that applicants who fail are “less able” to practice law, at least as ordinary speakers of the English language use that phrase.³¹

²⁶ Reply No. 24, to Weiss, *Second State*, *supra* note 20.

²⁷ Reply No. 33, to Weiss, *Second State*, *supra* note 20.

²⁸ Reply No. 43, to Weiss, *Second State*, *supra* note 20.

²⁹ Reply No. 56, to Weiss, *Second State*, *supra* note 20.

³⁰ This is not the first time that questions like this have been raised. Bar Examinations have been drawing criticism since they were first imposed. *See, e.g.*, Leon Green, *Why Bar Examinations?*, 33 NW. U. L. REV. 908 (1939) (cons). It is not true that they are universally condemned, and some proponents have set out valid arguments supporting at least the notion of bar examinations. *E.g.*, Erwin N. Griswold, In *Praise of Bar Examinations*, 60 A.B.A. J. 81 (1974). There is certainly something to be said about independent and uniform, comprehensive examinations, as are common in many other learned professions. This article, however, does not take issue with the idea of bar examinations, but merely with the way in which they currently operate.

³¹ *Cf. October Memorandum*, *supra* note 7, in which President Erica Moeser draws precisely this conclusion, although see also the *December Response*, *supra*

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

Part I of this article begins with an overview of the current examination process. Part II discusses the skills widely regarded as being essential to practicing law as a competent and ethical attorney, and Part III considers the extent to which there is a disconnect between the skills that have generally been identified as important for successful and ethical attorneys and what we, as a profession, are testing with our current bar exams. Part III also includes an overview of some of the ways that this disconnect may be encouraging law schools to make choices that do not advance the goal of producing competent professionals able to successfully engage in the practice of law. Part IV suggests some possible directions for change, assuming that we are really serious about implementing a meaningful licensing examination process in this country rather than sticking with the familiar, which superficially appears to be rigorous, but in reality is less relevant than it should be.

I. The Modern American Bar Exam

Requirements for admission to the bar and bar examinations have changed dramatically in this country. In the first 50 years of this country’s existence, legal education and bar admission were typically based on apprenticeships alone, or at most, a stated apprenticeship and an informal oral exam, and requirements varied widely from jurisdiction to jurisdiction.³² Written bar examinations became prevalent only after lawyers started choosing to practice in states other than those where they

note 13, in which she explains that in testing circles “more able” and “less able” “are terms of art that are in common usage among measurement professionals,” and are used to “express comparative information about performance,” which is confirmed by the fact that July 2014 candidates performed less well than previous cohorts.

³² Jacob A. Stein, *How Adams Beat Jefferson and a Few Thoughts about*

attended law school.³³ Written examinations are now the norm, even though significant differences exist between the exams required by different American jurisdictions.

Every American jurisdiction³⁴ today has its own standards for admission to the bar and its own approach to bar examinations, so it is a little difficult to speak in broad generalities about “the” bar exam. Each jurisdiction, however, incorporates significant portions of the work product of the (NCBE).³⁵ This can include the Multistate Professional Responsibility Exam (MPRE), the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), and/or the Multistate Performance Test (MPT).

The MPRE is required for admission in all American jurisdictions except Maryland, Wisconsin and Puerto Rico.³⁶ This examination consists of 60 multiple-choice questions that must be answered within two hours.³⁷ The express purpose of this exam “is to measure the examinee’s knowledge and understanding of established standards related to a lawyer’s professional conduct.”³⁸ The exam is not designed to be a substitute for the character and fitness requirements imposed by state licensing authorities, focusing on the rules of conduct for the profession “currently articulated in the American Bar Association (ABA) Model Rules of Professional

the Bar Exam, 13 GREENBAG 447, 449 (2010).

³³ *Id.*

³⁴ The NCBE prepares bar exams for use in and includes all 50 states plus the District of Columbia, Guam, Northern Mariana Islands, Palau, Puerto Rico and the Virgin Islands in its documentation of bar licensing standards. See NCBE, “*Comprehensive Guide to Bar Admission Requirements 2014*,” (hereinafter “*Comprehensive Guide*”), available online at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (last accessed August, 2014).

³⁵ For a thorough and fascinating recitation of the history of the NCBE, see Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 249 (Winter 2005). This article also addresses in compelling fashion the revenue generating character of the bar examination process.

³⁶ NCBE, “*The Multistate Professional Responsibility Examination (MPRE)*” (hereinafter “*The MPRE*”) available online at <http://www.ncbex.org/about-ncbe-exams/mpre/> (last accessed August, 2014).

³⁷ NCBE, “*Overview of the MPRE*,” (hereinafter “*Overview of the MPRE*”) available online at <http://www.ncbex.org/about-ncbe-exams/mpre/overview-of-the-exam/> (last accessed August, 2014). The time limit may be adjusted as an accommodation for persons with disabilities in accordance with standards and procedures announced by the NCBE.

³⁸ *Id.*

Conduct, the ABA Model Code of Judicial Conduct, and controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules.”³⁹ The MPRE is unusual insofar as the multistate exams are concerned, because it does not need to be taken after graduation, but instead may be taken while the applicant is still in law school.⁴⁰ It is also unusual in that, even though it is copyrighted by the NCBE (as are the other Multi-state examinations described here), it is actually administered by the Law School Admission Council (LSAC).⁴¹

The most widely used NCBE product is the MBE, required in all but two American jurisdictions: Louisiana and Puerto Rico.⁴² The MBE consists of 200 multiple-choice questions distributed among the following topics: constitutional law, contracts, criminal law and procedure, evidence, real property and torts.⁴³ Effective with the February 2015 bar exam, civil

³⁹ *Id.*

⁴⁰ At one point Florida was a lone holdout, requiring that applicants graduate from an accredited law school prior to taking the MPRE. Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193, 196 n.9 (1996) (commenting on the fact that Florida was the sole exception to the practice of allowing law students to sit for the MPRE). However, Florida no longer retains that rule, and now allows law students to take the MPRE prior to graduation. Fla. Bar Admiss. R. 4-13.1(a) (effective May 8, 2008).

Some jurisdictions do allow law students to take the bar exam prior to graduation, but the conditions on this option are usually quite restrictive. According to the NCBE, Arizona, the District of Columbia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New York, North Carolina, Texas, Vermont, Virginia, West Virginia and Wisconsin all permit law students to sit early under at least some circumstances. *Comprehensive Guide*, *supra* note 34, details at Chart 1 at p.1 and notes following at pp.2-3. However, six of those states require students to have completed the requirements for graduation prior to the bar exam, and another requires applicants to be on active overseas duty during the last semester of law school if they have not completed all requirements. Two states limit the right to students with five or fewer credit hours remaining; six allow students to sit if they will graduate within one or two months of taking the exam; and Arizona has a 120 day window but only for students who need fewer than 8 credit hours to graduate at the time of the exam. *Id.*

⁴¹ “*The MPRE*,” *supra* note 36.

⁴² According to the official website of the National Conference of Bar Examiners (NCBE), “[t]he Multistate Bar Examination (MBE) is developed by the National Conference of Bar Examiners” and “is required for admission to the bars of all but two U.S. jurisdictions (Louisiana and Puerto Rico).” NCBE, “*The Multistate Bar Examination (MBE)*” (hereinafter “*The MBE*”) available at <http://www.ncbex.org/about-ncbe-exams/mbe/> (last accessed August, 2014).

⁴³ NCBE, “*Overview of the MBE*,” (hereinafter “*Overview of the MBE*”)

procedure will be added to this list.⁴⁴ The stated purpose of this exam “is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.”⁴⁵ The weight given to this examination and the scores required to pass varies by jurisdiction,⁴⁶ but “[i]n most states, the MBE represents 50 percent of the applicant's total score.”⁴⁷

The MEE is also required by a majority of American jurisdictions.⁴⁸ This portion of the exam includes up to six 30-minute essay questions, and the stated purpose of these questions is:

to test the examinee’s ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.⁴⁹

available at <http://www.ncbex.org/about-ncbe-exams/mbe/overview-of-the-mbe/> (last accessed August, 2014).

⁴⁴ NCBE “*Multistate Bar Examination News*,” Sept 2013, available online at <http://www.ncbex.org/home/multistate-bar-examination-news/> (last accessed August, 2014).

⁴⁵ “*Overview of the MBE*,” *supra* note 43.

⁴⁶ According to the NCBE “[e]ach jurisdiction determines its own policy with regard to the relative weight given to the MBE and other scores. (Jurisdictions that administer the Uniform Bar Examination [UBE] weight the MBE component 50%.)” NCBE, “*The MBE*,” *supra* note 42.

⁴⁷ Michael Moiso, *Administering the Bar Exam*, 68-NOV. OR. ST. B. BULL. 62 (2007) (hereinafter “Moiso”).

⁴⁸ Thirty one jurisdictions administer the MEE as part of their licensing process. NCBE, “*MEE FAQs*,” (hereinafter “*MEE FAQs*”) available online at <http://www.ncbex.org/about-ncbe-exams/mee/mee-faqs/> (last accessed August, 2014). The American jurisdictions relying on this examination, which include more than the 50 states, include: Alabama, Alaska (eff. July 2014), Arizona, Arkansas, Colorado, Connecticut, District Columbia, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Northern Mariana Islands, Oregon, Palau, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

⁴⁹ NCBE, “*Overview of the MEE*,” (hereinafter “*Overview of the MEE*”), available at <http://www.ncbex.org/about-ncbe-exams/mee/overview-of-the-mee/> (last

The subjects that may be covered by the MEE are also broader than the list of subjects in the MBE.⁵⁰

The most recent addition to the list of possible bar examination formats prepared by the NCBE is the MPT.⁵¹ It consists of 90-minute items⁵² that are “designed to test an examinee’s ability to use fundamental lawyering skills in a realistic situation.”⁵³ This test is “not a test of substantive knowledge,” and instead is intended “to examine six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise.”⁵⁴ The enumerated skills are the ability to:

- (1) sort detailed factual materials and separate relevant from irrelevant facts;
- (2) analyze statutory, case, and administrative materials for applicable principles of law;
- (3) apply the relevant law to the relevant facts in a manner likely to resolve a client’s problem;
- (4) identify and resolve ethical dilemmas, when present;
- (5) communicate effectively in writing; and
- (6) complete a lawyering task within time constraints.⁵⁵

It does this by including, for each item, a file and a library as well as an assigned task for the examinee to complete within the time allotted.

The file for each MPT question includes source documents with the facts for the case that come from a memo from the supervising attorney and other materials such as “transcripts of interviews, depositions, hearings or

accessed August, 2014).

⁵⁰ The MEE can include essays that deal with substantive or procedural law covering business associations (agency and partnership; corporations and limited liability companies), conflict of laws, constitutional law, contracts, criminal law and procedure, evidence, family law, federal civil procedure, real property, torts, trusts and estates (decedents' estates; trusts and future interests), and Uniform Commercial Code (negotiable instruments and bank deposits and collections; secured transactions, although negotiable instruments is being dropped as of February, 2015). *MEE FAQs*, *supra* note 29.

⁵¹ NCBE, “*The Multistate Performance Test (MPT)*” available online at <http://www.ncbex.org/about-ncbe-exams/mpt/> (last accessed August, 2014).

⁵² Jurisdictions participating in the MPT may offer either or both of the two items, and jurisdictions using the Uniform Bar Exam (UBE) include both. *Id.* Jurisdictions also weight the MPT differently, with those following the UBE assigning 20% to the MPT portion of the exam. *Id.*

⁵³ NCBE, “*Overview of the MPT*,” available online at <http://www.ncbex.org/about-ncbe-exams/mpt/overview-of-the-mpt/> (last accessed August, 2014).

⁵⁴ *Id.*

⁵⁵ *Id.*

trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer’s notes.”⁵⁶ A typical file may include relevant and irrelevant information, ambiguous and incomplete information, or possibly conflicting data, just as in real life. “Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.”⁵⁷ The library for each item on the MPT consists of legal authorities such as cases, statutes, regulations or rules. Like the file, the library may include extraneous information.⁵⁸ The examinee is expected to derive the applicable law and principles necessary to perform the assigned task from the library; it is expected that “the Library materials provide sufficient substantive information to complete the task.”⁵⁹

Forty-one American jurisdictions now administer the MPT as part of their bar exam.⁶⁰ While the MPT comes with grading guidelines, and the NCBE offers instruction on grading for these items, each jurisdiction is independently responsible for scoring the MPT.⁶¹ “Unfortunately, the MPT in most states only counts for 12.5 percent of the overall score.”⁶²

In addition to the multistate components of the bar exam, 35 American jurisdictions add state specific or local materials to their bar exams.⁶³ The state or local materials can be in the form of essay, multiple

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ “Overview of the MPT,” *Supra* note 53.

⁵⁹ *Id.*

⁶⁰ NCBE, “MPT FAQs,” available online at <http://www.ncbex.org/about-ncbe-exams/mpt/mpt-faqs/> (last accessed August, 2014). The jurisdictions that rely on the MPT are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District Columbia, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Northern Mariana Islands, Ohio, Oregon, Palau, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁶¹ NCBE, “MPT FAQs,” *supra* note 60.

⁶² Moiso, *supra* note 47.

⁶³ The jurisdictions adding state or local questions to their bar examinations as of January, 2014 included: Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Wisconsin, Guam, Northern Mariana Islands, Palau, Puerto Rico, and the Virgin Islands. “Comprehensive Guide,” *supra* note 34, Chart 8 at 25, and notes at 26.

choice or performance tests.⁶⁴ While a few states have recently eliminated the state-specific materials on their bar exams, most of these jurisdictions plan to continue asking locally developed questions generally based on law of the particular jurisdiction or a particular part of law in the jurisdiction.⁶⁵

Not surprisingly, given the substantial variation in exam composition, not to mention the differences in scaled scores required and how the distinct parts of the exam are weighted in each jurisdiction,⁶⁶ average pass rates vary fairly significantly from jurisdiction to jurisdiction. Overall pass rates in 2012 varied from around 51% in California and the District of Columbia,⁶⁷ to more than 90% in Montana.⁶⁸ If data is limited

⁶⁴ Many of the jurisdictions that include state and local material only add essay questions in the state or local section of their bar exam, including Delaware (eight), Georgia (four), Illinois (three), Indiana (six), Kansas (17), Kentucky (six), Maine (six), Louisiana (nine), Maine (six), Maryland (10), Massachusetts (10), Michigan (15), Mississippi (six), Nevada (eight), North Carolina (12), Ohio (12), Oklahoma (16), Rhode Island (three), South Carolina (six), South Dakota (one, on Indian law); Tennessee (nine), Vermont (four), Guam (one), Northern Mariana Islands (two), Palau (three or four), and Virgin Islands (covering 12 subjects of local law). A few states impose a combination of essay and other question formats in their state or local materials: California asks six locally developed essay questions and also uses two performance tests; Florida asks three essays and 100 multiple-choice questions; New York asks five essay questions and 50 multiple-choice questions; Pennsylvania requires six essays and one performance test; Texas has 20 short answer questions each on civil and criminal procedure and 12 essay questions. Oregon and Wisconsin can administer any combination of multistate and local essay questions that the examiners decide upon in a given year. Puerto Rico only examines applicants on local law, asking 184 multiple-choice questions and eight essay questions. Hawaii adds only 15 multiple-choice questions, all based on Hawaii's rules of professional conduct. *Id.*

⁶⁵ Two of the states (Alabama and Alaska) eliminated their state-specific essays effective with the July, 2014 bar exam. The remaining states in this list currently have not published any intent to eliminate the state or local materials. *Id.*

⁶⁶ Specific information on scoring and minimum passing scores on bar examinations in the various jurisdictions is not easy to acquire. The "Comprehensive" Guide to Bar Admissions has a "Code of Recommended Standards for Bar Examiners," which (among other things) specifies that no individual who is not a member of another bar in the United States should be "admitted to practice until the person has passed a written bar examination." *Comprehensive Guide, supra* note 34, at ix. No guidance is given as to how different parts of the examination should be scaled or scored. The Comprehensive Guide does note that different jurisdictions use different tests (see Chart 8, at 25), include varied state specific questions (see notes at 26), and it also reports that the vast majority of states have both multiple choice and exam type questions and scale the written component and the MBE in some fashion (Chart 9, at 29-30). How the scores are scaled and weighted is not reported.

⁶⁷ *2012 Statistics*, 82 THE BAR EXAMINER, March 2013, p. 8, available online at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf (last accessed March 2014) (hereinafter

to persons graduating from ABA approved law schools, pass rates still varied tremendously. In 2012, several jurisdictions had pass rates under 60% for graduates of ABA approved law schools,⁶⁹ while several other jurisdictions had pass rates over 85%.⁷⁰ Pass rates for first-time takers also varied significantly among the jurisdictions imposing bar examination requirements.⁷¹ The 2012 data is not an aberration; 10 year average pass rates, also show the extreme variation between jurisdictions.⁷²

Regardless of the variables, the bar exam is clearly a significant hurdle to be overcome before becoming a lawyer.⁷³ One commentator has suggested that probably about 150,000 law school graduates have taken one or more bar exams but have never passed the test.⁷⁴ In 2007, the national average for passing the bar exam was 60% for first-time takers.⁷⁵ For those who failed the first time, the average pass rate dropped to approximately 50% on the second attempt, and to 40% on successive attempts.⁷⁶ To make matters worse, the risk of failing is not felt evenly among white and minority law school graduates,⁷⁷ and not only the bottom of the class or

“2012 Statistics”). Also at the low end of pass rates, Wyoming had a pass rate of 53%. *Id.* at pp. 8-9. Palau had a pass rate of 30%, but had only 16 applicants. Puerto Rico had a pass rate of 36%. *Id.* at 9.

⁶⁸ *Id.* at 8. The Northern Mariana Islands had a 100% pass rate, but there were only 8 applicants in 2012. *Id.*

⁶⁹ Puerto Rico had a pass rate of 37%; Wyoming’s was 53%, Guam was at 57%, Michigan was at 58% and both Louisiana and the District of Columbia were at 60%. *Id.* at 10-11.

⁷⁰ Minnesota and New Hampshire had pass rates of 85%; Iowa had an 88% pass rate; Missouri was at 89%; Montana was at 91% and the Northern Mariana Islands had a 100% pass rate. *Id.*

⁷¹ Pass rates for first time takers in American states in 2012 (thus excluding Puerto Rico and smaller jurisdictions like Palau and the Northern Mariana Islands) ranged from a low of 60% (Wyoming) to a high of 93% (Montana). *Id.* at 12-15.

⁷² *Id.* at 22-23. For example, California’s pass rate between 2003 - 2012 never goes over 54% overall or 71% for first time takers. Minnesota’s never drops below 81% overall or 88% for first time takers. *Id.*

⁷³ One commentator has characterized the exam as “a particularly grueling and potentially unfair right of passage.” Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U SAN FRANCISCO L REV 927 (1997) (hereinafter “Howarth”). She also describes bar exams in general as being “terribly flawed.” *Id.* at 936.

⁷⁴ Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates who Fail the Bar Exam*, 60 J. LEGAL ED. 3 (2010) (hereinafter “Yakowitz”).

⁷⁵ Moiso, *supra* note 47.

⁷⁶ *Id.*

⁷⁷ Yakowitz, *supra* note 74 at 3. Statistical data supporting this contention is presented at pp. 19 - 21. Gender and socio-economic differences are also reported at 22 - 23. Statistical data is also reported in “Howarth,” *supra* note 73 at 931; see especially fn

graduates of lower-tier law schools can fail the exam.⁷⁸ Perhaps most infamously, Kathleen Sullivan, then-dean of Stanford Law School and a nationally renowned expert on Constitutional Law, failed the bar exam in California in 2005 after a long and extraordinarily distinguished career in academia.⁷⁹ For those who have not looked for information on “famous” jurists who failed the bar exam on their first attempt, it might be interesting to note that the “long, proud tradition of gifted attorneys who failed the bar, at least on their first try,” includes: Hillary Clinton, Michelle Obama, Franklin D. Roosevelt, Jerry Brown, Pete Wilson, and Benjamin Cardozo (who reportedly sat for the bar six times).⁸⁰

Notwithstanding this information, which is widely available and often-discussed, state licensing authorities continue to maintain that the bar examination is an impartial, statistically verified test of minimum competency that demonstrates an applicant’s understanding of fundamental legal principles and basic skills. The data, however, strongly suggests that it is worth considering in much more detail what the legal profession thinks minimum critical skills for a lawyer should be. After all, how can one ascertain minimum competency or understand what constitutes a fundamental principle or basic skill if one does not know the ultimate skill set required for the competent practice of law?

II. What makes a competent and ethical attorney?

Law schools do not train students to become experts in “the law.” Instead, what law schools have done for decades, and are generally regarded as doing well, is train students to “think like lawyers.” The “law” changes dramatically over time, and is often (perhaps almost always) ambiguous. The trick for lawyers is to become proficient at gathering and looking at specific facts, determining legal issues arising out of those facts, ascertaining the rules that might apply to those facts (which generally requires research and review of various legal authorities), and predicting, persuading or prescribing for third parties (whether clients, judges, juries,

24 to 26, reporting data from the California bar exam.

⁷⁸ Elizabeth Wurtzel, *A Badly Run Law Business Begins with the Bar Exam: An Opinion*, 10-11 LAW OFF. MGMT & ADMIN REP. 7 (2010) (hereinafter “Wurtzel”).

⁷⁹ Wurtzel, *supra* note 78.

opposing advocates or contractual participants) how those rules should govern the situation at hand. That is why it takes months to teach first year law students “Contracts,” when the same subject matter is covered in a matter of a few hours in a bar exam class. Law school classes are not as focused on teaching students the acceptable substitutes for consideration or the mechanics of the current statute of frauds as bar preparation courses are. Of course the class may cover those issues, but not in a “here are the rules” fashion. Instead, law school (and particularly the first year curriculum at most institutions) focuses on basic skills like spotting legal issues, understanding multiple sides of those issues, separating the relevant facts from those that are not outcome-determinative, and deriving legal rules from complicated and often ambiguous statutes, regulations and judicial opinions. Considerations like the evolution of legal doctrine, and how public policy and economic considerations impact the development of law are also important in most classes, as these considerations do come into place when lawyers act as counselors and advocates.

It is true that the end of semester or end of course exams typically test the student’s understanding of the material just covered, usually in essay exams that ask the student to review specific facts, and apply “the law” to those facts to generate a probable outcome.⁸¹ These questions are often very detailed and call for an in-depth understanding of the materials covered in the class. A number of reasons for the prevalence of this kind of exam have been advanced. First, we can place some blame (or credit, for those who are fans of the practice) on the accrediting standards imposed by the ABA, although those no longer absolutely require examinations in most law school classes.⁸² Second, and probably fairly significantly although not

⁸⁰ *Id.*

⁸¹ “During the typical law school examination, students are asked to demonstrate their ability to recognize complex bundles of information and to perform well on a single test that is worth 100% of their grade” Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails “Objectified” Exams*, 34 NEW ENG. L. REV. 785, 786 (2000). That is, in large part, what bar examination essay questions do, as well.

⁸² One of the ABA’s accreditation standards used to require the scholastic achievement of students be tested with a “written examination of suitable length and complexity,” excluding only clinical work and writing classes such as moot court, practice court, legal writing and drafting, seminars and individual research. ABA Standard 304(b) (prior to 1996; language moved to Interpretation 303-2 in 1996). In August of 1999, the language was amended to permit evaluation by examinations or papers or other documents, as well as assessment of performances of students in the role of lawyers. ABA Standards,

particularly pedagogically desirable,⁸³ a single examination at the end of the

Interpretation 303-1 (1999). The current interpretation (initially adopted with the ABA Standards for Accreditation in 2004-05) says that “[s]cholastic achievement of students shall be evaluated by examinations of suitable length and complexity, papers, projects, or by assessment of performances of students in the role of lawyers.” ABA Standards, Interpretation 303-1 (2013-14). This has been a very gradual, and somewhat reluctant movement away from requiring examination to permitting other measures of assessment.

In 2014, the Section of Legal Education and Admissions to the Bar proposed and then approved Revised Standards for Approval of Law Schools (August 2014) (hereinafter “August 2014 Revised Standards” and individual standards from this proposal will be referred to as “Revised Standard xxx” and individual interpretations will be referred to as “Revised Interpretation xxx”), available online at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf (last accessed August 2014). A redlined version of the revised standards may be found at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_redline.authcheckdam.pdf (last accessed August 2014).

The revised standards contain significant revisions to rules specifying how law schools must go about assessing student learning. Revised Standard 314 requires a law school to “utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.” Revised Interpretation 314-1 explains that “[f]ormative assessment methods are measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.” In addition, Revised Interpretation 314-2 clarifies that “[a] law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.”

Because the new standards embody a relatively substantial shift in the approach of the accrediting body, there are phase in periods for these new rules. ABA, Section of Legal Education and Admissions to the Bar, “Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools, August 13, 2014,” (hereinafter “Revised Standards Transition”), available online at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.authcheckdam.pdf (last accessed August, 2014). The new assessment rules included in Revised Standard 314 are to apply to 1L students, beginning in 2016-17. *Id.* at ¶ 4, p. 2.

⁸³ “Studies have shown that the best way to learn is to have frequent exams on small amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this.” James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991). While objective exams such as those in a multiple choice format have become more popular, in a 1995 survey of law professors teaching traditional doctrinal courses, only about one-third report using any objective questions, and most of those use them for no more than 25% of the class grade. Steve

class is rather easy and comfortable for most law professors.⁸⁴ The faculty member only has to grade one exam, and most law professors come from an academic background where that is what they were exposed to (and did well on). Third, this format is used on the bar exam and therefore is one we, as legal educators, must consider because our accreditation standards also require us to prepare our students for the bar exam.⁸⁵ Fourth (although logically this ought to be far more important to legal educators), a student's ability to pull the rules out of the material covered during the course and apply those rules to facts does reveal (to some extent at least) that student's ability to spot the issues, understand particular perspectives, and to communicate the legal rules within the context of the response.⁸⁶ In addition, because the material has (hopefully) recently been covered in the class, the classroom experience can be viewed as substituting for the research that a student might do when presented with legal problems in practice.

Regardless of whether traditional law school exams are the optimal assessment tool, the fact that law schools are teaching students "how to think like a lawyer" is a very good thing. Unless a client comes in to meet with a very experienced attorney with a very specialized practice, it is unlikely that the lawyer will be able to confidently spout off all the

Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis of Law School Final Exams*, 65 UMKC L. REV. 657, 686-87 (1997) (hereinafter "Sheppard").

⁸⁴ "The exam as the sole method of grading has led to some obvious advantages, particularly in reducing faculty work-load." Sheppard, *supra* note 83 at 693.

⁸⁵ ABA Standard 301 requires accredited law schools to have an educational program that prepares its students for admission to the bar. One of the interpretations of this provision requires consideration of bar passage rates in "assessing the extent to which a law school complies with this Standard." ABA Standards, Interpretation 301-3 (2013-14). Further guidance with regard to bar pass rates suggests that an average pass rate of 75% for the five most recent calendar years should be sufficient. ABA Standards, Interpretation 301-6 (2013-14). Consideration has been given to whether this percent should be increased, but the August 2014 Revised Standards (discussed *supra* note 82) retain the 75% pass rate. Revised Standard 316. For a more detailed description of this requirement, see *infra* notes 114-13 and accompanying text.

⁸⁶ There have been a number of very creative and supportive explanations of why essay examinations are an appropriate evaluative tool in law schools. One commentator concluded that traditional essay examinations evaluated a law student on the following for "complex but general attributes": (1) the ability to internalize legal doctrine; (2) demonstration of conventional legal imagination; (3) legal productivity; and (4) "the capacity for self-study and self-learning in diffuse, complex, and uncertain situations." Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 458 (1989).

applicable law that might be relevant to that situation. Statutes and regulations change, as does society. New cases are decided, and facts that might not have been specifically contemplated at the time the earlier authorities were promulgated will eventually arise. Legal problems that have not been addressed before arise all the time, and lawyers have to predict and persuade others how existing authorities should apply (or not apply) to those new situations. That reality makes it essential that a new law school graduate be able to “think like a lawyer” rather than simply have succeeded in memorizing a vast array of legal rules and doctrine.

Admittedly, a wide range of essential lawyering skills are also being increasingly emphasized in law school. Although many American law schools were already considering and adopting various academic reforms in an effort to improve how well law students are prepared for the modern practice of law, a 1992 report from the American Bar Association’s section on Legal Education and Admissions to the Bar has been given a great deal of credit for bringing attention to the need to further modernize legal education in this country. The committee responsible for the preparation of this report was chaired by Robert MacCrate, and is often simply referred to as “the MacCrate Report.”⁸⁷ Since that time, other influential publications have helped push legal education to include more practical and experiential learning opportunities.⁸⁸

Legal writing, for example, has gradually gained recognition as being a specific skill that deserves substantial attention in any program of legal education. The MacCrate Report advocated that law schools reform their programs of legal education to emphasize core competencies specifically including written communication.⁸⁹ One commentator has gone so far as to credit that document with being “instrumental in persuading almost all American law schools to provide legal-writing education to all their students in the first year of law school.”⁹⁰

⁸⁷ American Bar Association, Section of Legal Education and Admissions to the Bar (July 1992), *REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (hereinafter “MACCRATE REPORT”).

⁸⁸ See, e.g., The Carnegie Report abstract, entitled “Educating Lawyers: *PREPARATION FOR THE PRACTICE OF LAW*” (2007), and ROY STUCKEY ET AL, “*BEST PRACTICES FOR LEGAL EDUCATION*” (2007) (hereinafter “Best Practices”).

⁸⁹ See *MACCRATE REPORT*, *supra* note 87.

⁹⁰ Ian Gallacher, “*When Numbers Get Serious*”: *A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U. L. REV. 451, fn 1 (2013).

Accreditation standards now also emphasize skills training as a critical component of legal education. In addition to providing students with an education about the substantive law and legal writing training, law schools must now insure that “each” student obtains “substantial instruction” in “legal analysis and reasoning, legal research, problem solving, and oral communication,”⁹¹ and “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”⁹² Those skills have been identified (in the official interpretation of the standards for approval of American law schools) as including, without being limited to, “trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting.”⁹³ Clinical opportunities, pro bono and small group work are all required to be available, although the standards stop short of requiring that all students participate or have access to all of these opportunities.⁹⁴ The revised standards adopted in August of 2014 have continued to push law schools towards offering more effective skills training, and when they go into effect will mandate that law schools require students to satisfactorily complete a minimum of six credits of skills instruction, and to qualify, the experiential offerings would have to involve simulations, clinical, or field placement, meeting specified criteria.⁹⁵

⁹¹ Standard 302(a)(2). *Accord* Revised Standard 302(b), although the requirement becomes that the law school must establish learning outcomes including competency in these areas.

⁹² Standard 302(a)(4). *Accord* Revised Standard 302(d).

⁹³ Interpretation 302-2 and Revised Interpretation 302-1.

⁹⁴ Standard 302(b) provides that “ A law school shall offer substantial opportunities for: (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence; (2) student participation in pro bono activities; and (3) small group work through seminars, directed research, small classes, or collaborative work.”

⁹⁵ Revised Standard 303. CURRICULUM

- (a) The law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:
- (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;
 - (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and

Perhaps unsurprisingly, no authority suggests that the ability to recite “the law” on a dozen or more discrete subjects is an essential lawyering skill. Nor does anyone claim that the ability to write an essay answer predicting probable legal outcomes to clearly defined facts under extreme time pressure is such a skill. The ability to choose between possible outcomes or rules from a limited selection of options, such as those tested on a multiple choice test, is also never mentioned as a skill important for the actual practice of law.⁹⁶

Regrettably, much of the current debate and discussion about what it takes for new lawyers to succeed does not seem to focus on the kinds of knowledge that can be readily tested in an objective kind of examination.

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- (3) one or more experiential course(s) totaling at least six credit hours. An experiential course or courses must be: (i) simulation course(s); or (ii) clinical course(s); or (iii) field placement(s). To satisfy this requirement, a course must be primarily experiential in nature and must:
 - (i) integrate doctrine, theory, skills, and legal ethics and engage students in performance of one or more of the professional skills identified in Standard 302;
 - (ii) develop the concepts underlying the professional skills being taught;
 - (iii) provide multiple opportunities for performance; and
 - (iv) provide opportunities for self-evaluation.
 - (b) A law school shall provide substantial opportunities to students for:
 - (1) faculty supervised clinical courses or field placement(s); and
 - (2) student participation in pro bono legal services or law-related public service activities.

Revised Standard 303, *supra* note 82.

As this also involves a relatively significant change in the accreditation standards, there is a phase in period for this obligation as well with it going into effect in for 1L students who enter law school in 2016-17. Revised Standards Transition, *supra* note 82, at ¶ 4, p.2.

⁹⁶ For additional information about the kinds of skills that are being talked about as essential to future generations of lawyers, see generally *NYSBA REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION* (Linda L. Addison & T. Andrew Brown, eds. 2011) (“*TASK FORCE REPORT*”) at 46. The report can be found at http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108. See also ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century--Summit Recommendations* (Charles C. Bingaman, ed. 2009), at <http://www.equippingourlawyers.org/Summit-recommendations.cfm>; and JoAnne A. Epps, Thomas 2. Hayward & Charles C. Bingaman, *Equipping Our Lawyers: An Equal Opportunity Call to Action*, THE PILLAR (June 11, 2010), at http://pillar.tmc.cooley.edu/Resources/Documents/91332_Pillar_WEB.pdf. (last accessed August, 2014)

One commentator has suggested that core competencies for lawyers include analytical ability, attention to detail, logical reasoning, persuasiveness, sound judgment, writing ability, collaboration skills, emotional intelligence, financial literacy, project management, technological affinity and time management.⁹⁷ Another listing of things lawyers need to know includes the following: self-awareness, active listening, questioning, empathy, communicating/presenting, and resilience.⁹⁸ The final report of the California task force listed the following competencies: oral presentation and advocacy, advanced legal research and writing, negotiation and alternative dispute resolution, client counseling, witness interviewing and other investigation and fact-gathering techniques, law practice management, practical writing, pre-trial preparation skills, basics of the justice system, and professional civility and applied ethics.⁹⁹ Missing from these lists is an exposition of the information base that it takes to be a competent attorney.

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

III. The Disconnect Between Essential Lawyering Skills and What is Tested on the Bar.

Those who write and promote the various multistate bar exams give at least lip service to the notion that none of the tests are designed to require

⁹⁷ Jordan Furlong, *Core Competence: 6 New Skills Now Required of Lawyer* (July 4, 2008) available at <http://www.law21.ca/2008/07/core-competence-6-new-skills-now-required-of-lawyers/> (last accessed August, 2014). The first six of these were categorized as traditionally-recognized competencies, and the latter six were identified as “new” skills.

⁹⁸ Bill Henderson, *What Every Law Student Needs to Excel as an Attorney: Introducing the Fromm Six*, *THE NATIONAL JURIST* 20 (March, 2013).

⁹⁹ *State Bar of California Task Force on Admissions Regulation Reform: Phase I Final Report* (2013), available at [http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STAT E_BAR_TASK_FORCE_REPORT_\(FINAL_AS_APPROVED_6_11_13\)_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STAT E_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf) (last accessed August, 2014).

detailed knowledge of substantive law, but instead are supposedly testing basic information that “any” new attorney should be expected to know. While it is noteworthy that the same examination is imposed if an experienced practitioner wishes to move to a new jurisdiction, this article will focus on the claim that the exam (as currently offered) is suitable for those seeking to enter the profession initially.

According to the NCBE, “[t]he purpose of the MBE [the multiple choice exam] is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.”¹⁰⁰ The MEE (the essay examination) is designed:

to test the examinees’s ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probably solution of the issues raised by the factual situation.”¹⁰¹

The MPT is different in that it “is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task,” and it is designed to require:

examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client’s problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.¹⁰²

Putting aside the MPT for a moment, consider the stated intent of

¹⁰⁰ NCBE, *The MBE*, 2014 Multistate Bar Examination Information Booklet at p.4 (hereinafter “*MBE Booklet*”), available at http://www.ncbex.org/assets/media_files/Information-Booklets/MBEIB2014.pdf, last viewed August 2014.

¹⁰¹ NCBE, *The MEE*, 2014 Multistate Essay Examination Information Booklet at p.4 (hereinafter “*MEE Booklet*”), available at http://www.ncbex.org/assets/media_files/Information-Booklets/MEEIB2014.pdf, last viewed August, 2014.

¹⁰² NCBE, *The MPT*, 2014 Multistate Performance Test Information Booklet at p.4, available at http://www.ncbex.org/assets/media_files/Information-Booklets/MPTIB2014.pdf, last viewed August 2014.

the MBE and MEE. Both are designed to test an applicant's understanding of "fundamental" legal knowledge. A review of some of the questions actually posed on the exams, however, suggests that the questions might not be as fundamental as one might expect. This, for example, is the sample question from the 2014 Information Booklet on the MEE covering Criminal Law and Procedure:

At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. "It'll be funny," Adam said. "When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch." "That's a stupid idea," Bob said. "In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event." "Oh, I'll bet someone will come," Adam replied. "And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy."

At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.

At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.

Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called

“unlawful-act” involuntary manslaughter.

1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.
2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.¹⁰³

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

The multiple choice questions that are available are even more troubling, if the goal is to merely assess “fundamental” knowledge. This

¹⁰³ *MEE Booklet, supra* note 101 at 18.

example was released with the official 2014 Information Booklet covering the MBE:

4. A man has four German shepherd dogs that he has trained for guard duty and he holds for breeding purposes. The man has “Beware of Dogs” sign clearly posted around a fenced-in yard where he keeps the dogs. The man’s next-door neighbor frequently walks past the man’s house and knows about the dogs’ ferocity. One summer day, the neighbor entered the man’s fenced-in yard to retrieve a snow shovel that the man had borrowed during the past winter. The neighbor was attacked by one of the dogs and was severely injured. In a suit against the man, is the neighbor likely to prevail?
- (A) No, because the neighbor knew that the man had dangerous dogs in the yard.
 - (B) No, because the neighbor was trespassing when he entered the man’s property.
 - (C) Yes, because the neighbor was an invitee for the purpose of retrieving the shovel.
 - (D) Yes, because the man was engaged in an abnormally dangerous activity.¹⁰⁴

Consider “A” as a possible answer. Mere knowledge by the potential plaintiff that the dogs are dangerous does not seem (to me) a likely explanation of whether there would be liability. If you are walking down the street and see that sign every day, you could know the dogs are dangerous. If you are walking down the street on a new day, and the dogs are out of the yard and attack you, the fact that you knew of their ferocity would be irrelevant. By itself, the neighbor’s knowledge that the dogs are dangerous does not exonerate the dog owner at all. Besides, how are we to know from the facts as given that the dogs were in the yard, or that the neighbor knew the dogs were out when he entered the yard? Option “B” is not much better. First, we do not know whether or not this was trespass. Did the man tell the neighbor, “Sure come and get the shovel any time”? On the other hand, if this was trespass into an area the neighbor knew was dangerous, that might be a basis for refusing to impose liability, depending on the jurisdiction. While there are states that have abandoned this

¹⁰⁴ *MBE Booklet, supra* note 100 at 19.

approach, there are plenty of states that seem to be holding on to the general notion that property owners generally owe no duty of care to trespassers, if this was in fact a trespass.¹⁰⁵ “C” is an interesting option. If the neighbor was invited into the yard, a fact not specified but not inconsistent with the information given, and if the invitation contained either the explicit or implicit information that it would be safe to retrieve the shovel, this really could make a difference. As for answer “D,” the doctrine of abnormally dangerous activities is actually very complex. Courts conflate abnormally and inherently dangerous, for example, and there is considerable variation from jurisdiction to jurisdiction as to what is covered by this label. In some states, for example, driving ice-cream trucks may be so dangerous that liability can adhere even for acts of independent contractors.¹⁰⁶ The concept of abnormal danger has also been applied to dogs.¹⁰⁷ (For readers who are not torts experts, the answer listed as “correct” in the information booklet is “A.”)

It would not be impossible to have questions and answers to this kind of fact pattern that could test fundamental knowledge. For example, it would be possible to ask: Which of the following would be the least likely to be a profitable avenue for additional investigation based on the facts recited, if the applicant was considering how best to approach defending the man in a lawsuit brought by the neighbor:

- (A) Whether the applicable jurisdiction has a dog-bite statute.
- (B) Whether the applicable jurisdiction uses the status as

¹⁰⁵ See, *i.e.*, *Rotter v. Union Pacific R. Co.*, 4 F. Supp. 2d 872 (E.D. Mo. 1998), stating that the general rule is that a landowner owes no duty to a trespasser, because the landowner cannot foresee their presence on the land. For an extensive list of cases that continue to adhere to the common law rule that status of the entrant onto property as either a trespasser, licensee or invitee is determinative as to the duties owed by the property owner, see Vitauts M. Gulbis, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294 (originally published in 1983), available on Westlaw.

¹⁰⁶ See, *e.g.*, *Wilson v. Good Humor Corporation*, 757 F.2d 1293 (D.D.C. 1985).

¹⁰⁷ For example, in *Trager v. Thor*, 445 Mich. 95, 105-06, 516 N.W.2d 69, 75 (1994), the Michigan Supreme Court specifically talked about the potential for liability for injuries caused by a dog if there were abnormally dangerous characteristics associated with the animal, stating that “[i]n assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge.” See also *Hiner v. Mojica*, 271 Mich. App. 604, 609-10, 722 N.W.2d 914, 918-19 (2006).

trespasses, licensee or invitee to determine the appropriate degree of care that would be owed by the man or whether this approach has been abandoned.

- (C) Whether German Sheppards are frequently involved in dog bite cases.
- (D) Whether the man had any communication with the neighbor about when and how to retrieve the shovel.

A beginning lawyer ought to know that the first two legal issues could be relevant, and that the additional facts that might be revealed as a result of the inquiry suggested in “D” could also be profitable. However, the general traits of that breed of dog in general would be unlikely to be fruitful or relevant, and it might be reasonable to expect such a lawyer to know that “C” would not be a profitable avenue for research.¹⁰⁸ This kind of question, however, does not appear in any the sample MBE questions available for review.

As currently written, the multiple choice test and essay questions do not assess judgment and certainly do not seem to be limited to fundamental principles that every lawyer should know. (That is why lawyers who leave one jurisdiction and seek admission in a new state, where a bar examination is required, also have to pay out thousands of dollars for a “license,” even if they are widely acclaimed as talented and accomplished jurists.) Even a review of the very extensive outline of topics covered in the multistate exams pretty convincingly demonstrates that the scope of the current examination exceeds “fundamental” information. How often is a beginning lawyer going to need to spout, off the top of his or her head, the war, defense and foreign affairs powers of Congress? Or how often will he or she be called upon to discuss federalism-based limits on state authority to authorize otherwise invalid state action (without having time to research the issue)?¹⁰⁹ Nor is it only constitutional law that includes topics unlikely to be relevant to the practice of virtually any new attorney. How many of us dealt with defeasible fees simple, vested and contingent remainders, or

¹⁰⁸ On the other hand, it is far less clear that a beginning lawyer should immediately know in the actual test that “A” is the correct answer. *MBE Booklet, supra* note 100, Answer Key at 26.

¹⁰⁹ There are two of the topics covered in the Constitutional Law subject matter outlines for the MBE and MEE. *MBE Booklet, supra* note 100 at 7; MEE Information Booklet, *supra* note 101 at 7.

devisability of cotenancy?¹¹⁰ And assuming that there are a lot of readers who can say they did that kind of work, how many did it with no research and time for review?

It is worth noting that this disconnect cannot be fixed by adjustments to the Standards for Approval of Law Schools. In August of 2014, the American Bar Association Section of Legal Education and Admissions to the Bar approved major revisions to the Standards for Approval of Law Schools.¹¹¹ Included in the current recommendations is a specific standard on bar passage, apparently designed to bring legal education even closer in line with bar examinations.¹¹²

The new standard seeks to expand upon the basic objective of legal education, which is to prepare graduates “for admission to the bar, and for effective, ethical, and responsible participation as members of the legal profession.”¹¹³ In order to satisfy this obligation, a law school must have a 75% pass rate (in jurisdictions where most of the school’s graduates take the bar, which must include at least 70% of graduates).¹¹⁴ The standard also addresses various strategies that a law school might use to show that it is attempting to come into compliance with these levels, including:

- (3) Actions by the law school to address bar passage, particularly the law school’s academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school’s favor; ineffective or only marginally effective programs or limited action by the law school against it.
- (4) Efforts by the law school to facilitate bar passage for its

¹¹⁰ *MBE Information Booklet*, *supra* note 100 at 10-11; *MEE Information Booklet*, *supra* note 101 at 11.

¹¹¹ *See August 2014 Revised Standards*, discussed *supra* at note 82.

¹¹² Revised Standard 316. This standard is to go into effect immediately. Revised Standards Transition, *supra* note 82 at p.1. “The revised Standards ... become legally effective at the end of the ABA Annual Meeting on August 12, 2014.” *Id.* Standard 316 is not singled out for a deferred implementation.

¹¹³ Revised Standard 301.

¹¹⁴ Revised Standard 316(a)(1). The standard is a little more complicated than a simple 75% minimum pass rate. The rate must be either achieved as an average over the past five years or in at least three of the past five years. In addition, the school’s average pass rate in the same five year period cannot be more than 15 points lower than the average pass rate on the relevant exams for graduates of other ABA-approved law schools. Revised Standard 316(a)(2).

graduates who did not pass the bar on prior attempts: effective and sustained efforts by the law school will be considered in the school's favor; ineffective or limited efforts by the law school against it.¹¹⁵

Unfortunately, the fact that law school accreditation looks to the bar examination as an essential criteria for evaluating law school performance does mean that there has been an actual determination that the bar exam is testing anything that is truly important for practicing attorneys. Law Schools tend to test their students in certain ways, so the bar exam tests a certain way.¹¹⁶ That reinforces the way in which law schools teach and assess student learning, because law schools are required to determine whether graduates have been adequately trained by looking at bar exam results. Law schools even change their curriculum and testing protocols to promote high pass rates on that final examination. "Look," say the law schools, "the outcome of our program of legal education is good because so many of our graduates pass the bar!" "Look," say the bar examiners, "law schools teach the same things and test in the same way as we do, and use our pass rates as a measure of their successful outcomes!" Nowhere does this circular set of justifications directly relate to what lawyers actually do, and need to do, in the practice of law.

In 1997, Professor Joan Howarth considered how the bar exam was shaping legal education, and not necessarily for the better.¹¹⁷ The thesis of her article was that "[t]he bar examination permeates and controls fundamental aspects of legal education at law schools across the country."¹¹⁸ She listed a variety of ways in which this has happened: the influence of the bar examination on the entry standards for most law schools, because the LSAT justifies its utilization by the well-established correlation between it and bar passage;¹¹⁹ the impact on the curriculum at many law schools, with "bar subjects" becoming central at virtually every

¹¹⁵ Revised Standard 316(c)(3) & (4).

¹¹⁶ It is not uncommon to hear law professors defend time-pressured multiple choice examinations on the grounds that they are necessary to prepare students to take the bar examination. This is not the same as saying that the skills required in taking this kind of examination are those needed in the actual practice of law.

¹¹⁷ Howarth, *supra* note 73.

¹¹⁸ *Id.* at 927.

¹¹⁹ *Id.* at 928.

law school;¹²⁰ the role in determining academic success, when law professors utilize testing and evaluation approaches that mirror the bar exam in order to prepare students for it rather than for actual practice;¹²¹ and the way in which the bar exam influences who flunks out because of a perceived need to disqualify students who are unlikely to pass the bar.¹²²

This kind of influence might be acceptable except for the “two persistent, related, and fundamental criticisms” of the bar that Professor Howarth identifies,¹²³ and another related concern not mentioned in her article. The two problems she lists are first, the fact that “bar examinations do not test readiness or aptitude to practice law,” and second, the bar consistently gives “racially disparate results.”¹²⁴ The third problem is that, by tying law school outcomes to bar passage rates, we give a lot of vested interests a superficially viable claim to legitimacy, which in turn makes it harder to make a case about the urgent need for reform.

Not surprisingly, “bar examiners actively and aggressively promote the fairness of their procedures, tests and results.”¹²⁵ Their positions, their funding, and their influence depend on such claims. Their conclusions about the reliability and validity of the current exams, however, seem to be premised primarily on evidence that the same subjects are tested on the bar as in most law schools, that bar passage rates correlate highly with the LSAT and law school grades, and that the results are “reliable” in the sense that they are consistent and repeatable. As to racial disparities, the “differences in mean scores among racial and ethnic groups correspond closely to difference in those groups’ mean LSAT scores, law school grade point average, and score on other measures of ability to practice law, such as bar examination essay score or performance test scores.”¹²⁶

¹²⁰ *Id.*

¹²¹ Howarth, *supra* note 73 at 929. “Many of us excuse our lack of exploration of [our testing choices] ... in part because we are concerned about preparing for the bar exam.” *Id.* at 929-30.

¹²² *Id.* at 930.

¹²³ *Id.*

¹²⁴ *Id.*, citing Cecil J. Hunt, II, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 766-67 (1996). Katherine L. Vaughns, *Toward Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 T. MARSHALL L. REV. 425, 434-44 (1991).

¹²⁵ Howarth, *supra* note 73 at 933.

¹²⁶ *Myths and Facts about the Multistate Bar Examination*, 64 THE BAR EXAMINER 18, 19 (Feb. 1995), cited in Howarth, *supra* note 73 at 933.

A relatively recent “reflection” on the bar exam by the former Director of Research for the NCBE, offered the conclusion that “[b]ar examinations tend to have relatively high reliability, because the components included in most bar exams have high reliabilities...”¹²⁷ A comment such as this, written by an esteemed expert on testing, certainly makes a critique of the bar exam by someone like me (with very little training in testing protocols or theory, and virtually no recent experience in the field) seem unsupported. But “reliability” in this context means only that the results are consistent and can be repeated.¹²⁸ The multiple choice exam morning session results correlate highly with scores on the afternoon session, for instance.¹²⁹

As an educator, and someone who cares deeply about the legal profession and those seeking to enter it, the foundational question is not “reliability,” but “validity” of the exam.¹³⁰ And that is where the rhetoric makes perfect sense but the reality does not track the rhetoric. Supporters of the bar exam assert that “educational and testing requirements are designed to provide assurance that new practitioners have a broad base of knowledge, skills and judgment ... relevant to professional practice.”¹³¹ The stated purpose of the various multistate exams all focus on the purported goal of testing basic, foundational knowledge.¹³² The current Comprehensive Guide to Bar Exams, published by the NCBE, emphasizes that the bar exam should test “fundamental legal principles,” with the understanding that “[i]n the selection of subjects for bar examination

¹²⁷ Michael T. Kane, Ph.D., *Reflections on Bar Examining*, 78 THE BAR EXAMINER 6, 15 (Nov. 2009), available online at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780409_Kane.pdf (last accessed August 2014) (here in after “Kane.”)

¹²⁸ Dr. Kane does not attempt to hide this fact, although his explanation of what “reliability” means is found several pages away from the statement that the bar exam is reliable. “The reliability of test scores is defined in terms of their consistency (or dependability, or reproducibility) over repeated measurements.” *Id.* at 9.

¹²⁹ *Id.*

¹³⁰ Dr. Kane also speaks, extensively, in terms of the “validity” of the bar exam as a critical measure of whether the exam actually serves to protect the public. He reports that “validity refer to the degree to which evidence and theory support the interpretation of test scores entailed by proposed uses of tests.” *Id.* at 8, citing American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 9 (Washington DC, American Psychological Assoc. 1999).

¹³¹ Kane, *supra* note 127 at 7.

¹³² See *supra* notes 100-01 and accompanying text.

questions, the emphasis should be upon the basic and fundamental subjects that are regularly taught in law schools.”¹³³

The notion that the bar exam should cover “fundamental principles” seems beyond question, but there are huge problems with using subjects regularly taught in law schools as the hallmark for determining what is fundamental. First, of course, law schools are constrained to graduate students who are prepared for the bar. Naturally, this means law schools will consistently teach bar subjects. It does not mean that those are the subjects that all lawyers need to understand. Second, the purpose of law school classes is not primarily to teach “the law.” If that was the goal, there are a myriad of teaching approaches that would be more efficient and allow much greater coverage than the case method. Law schools, and law classes, teach students how to approach the law, how to derive rules from various authorities, how to frame the rules so derived either narrowly or broadly, and how to communicate those rules in an appropriate context. Admittedly, traditional law school exams do not excel at assessing all of that. But legal writing, as well as experiential courses and offerings, are increasingly part of the program of legal education in American law schools, and the result is (hopefully) graduates armed with the ability to actually practice law in a rapidly evolving and changing legal climate. The ability to recite the law is not the fundamental skill with which we need to arm our graduates, if indeed that was ever the essence of a good legal education.

One of the challenges currently faced by law schools is the need to make sure that we are evaluating our students appropriately. Perhaps driven by the changes to accreditation standards, law schools across the country are re-examining assessment methodologies. As part of the process, it is important that the bar examination also be reexamined to be determine whether it is a viable assessment, actually protecting the public by guaranteeing minimum competence in “fundamental” areas. The problem is that this does not appear to be happening.

The vehemence with which the NCBE defends its product as it currently exists is quite apparent from even a superficial review of comments written in *The Bar Examiner* over the years. A very telling commentary on the issue of rethinking assessments came from NCBE

¹³³ *Comprehensive Guide*, *supra* note 34 at ix.

President Moeser in 2004.¹³⁴ While acknowledging that it is “a healthy exercise” to rethink the process by which new attorneys are licensed,¹³⁵ the basic thesis of the comment is that any approach to licensing “must meet the essential measurement criteria of reliability and validity” and must be fairly and consistently administered.¹³⁶ The need for consistency and objectivity, utilizing a cost-effective approach, is emphasized.¹³⁷ Suggestions for reform that are met with approval seem to involve timing of portions of the exam, and ways to speed the grading process.¹³⁸ New ideas are seen as better additions to, rather than replacement of, the current approaches.

Supporters of the current bar exam continue to defend the existing approach as not only sound but essential. Dr. Geoff Norman, Ph.D., an academic in the medical field, acknowledges that “[i]t may be worth assessing legal skills more broadly than simply focusing on knowledge with a multiple-choice test. But the other test components, whatever they may be, should be additions to, not replacements for, the multiple-choice component....”¹³⁹ And testing experts employed by the NCBE have not been shy in telling law professors to stay away from critiquing the bar examination testing process. Dr. Susan M. Case, who had 40 years of experience in the field of licensure when she retired from the National Conference of Bar Examiners in 2013, was particularly blunt. “Give it up,” she wrote; “Let the experts in high-stakes testing do it. NCBE offers an array of services at no cost.”¹⁴⁰

Making sure that licensure exams are fair, impartial, reliable and consistent is, without a doubt, a complicated matter that demands specialized expertise. Checking for reliability only matters, however, if the competencies and skills being tested are the right ones. That goes back to validity. And a test that fails to accurately identify the core, fundamental knowledge can be as reliable, as consistent, as perfectly formatted as is

¹³⁴ Erica Moeser, *Rethinking Assessments and Alternatives to Assessments from the Perspective of a Bar Examiner*, 20 GA. ST. U.L. REV. 1051 (2004).

¹³⁵ *Id.* at 1051.

¹³⁶ *Id.* at 1052.

¹³⁷ *Id.* at 1053.

¹³⁸ *Id.* at 1054.

¹³⁹ Geoff Norman, Ph.D., *So What Does Guessing the Right Answer out of Four Have to Do with Competence Anyway?* 77 BAR EXAMINER 18, 21 (Nov. 2008).

¹⁴⁰ Susan M. Case, Ph.D., *The Testing Column, Final Musings*, THE BAR EXAMINER 23, 24 (Dec. 2013). Until November 1, 2013, Dr. Case served as the Director of Testing for the National Conference of Bar Examiners.

humanly possible, and still fail in the ultimate objective of protecting the public.

Given the vast difference between the stated purpose of the bar exam and the actual focus and content of the questions, it appears considerably past time for a reconsideration of the focus and content of this last hurdle for individuals wishing to practice law.

It is probably also worth emphasizing that this is not intended as a criticism of the intelligence, experience, abilities or competence of the professionals employed by the NCBE or those who assist the NCBE in examination writing. Indeed, the statisticians at the NCBE seem to do an exceptional job in assessing the reliability of the exam. And while the qualifications of the authors of various NCBE questions may not be specifically known, there is no reason to believe that they are anything less than true experts in their respective legal fields.

A phone interview with NCBE President Erica Moeser in August of 2014,¹⁴¹ confirmed that questions included on the various NCBE exams are drafted by well-respected legal experts. While there are no precise written standards as to who is eligible to assist in the exam writing and review process, there are procedures that are followed to ensure that the questions are well written, clear and unambiguous. The questions that appear on the MPT, the MPRE and the MBE are written by drafting committees of experts in the particular subjects being covered. Those committees include a mix of senior academics, federal judges and experienced practitioners. The academics comes from a range of institutions, but all are tenured and experiences, as well as being well regarded in their fields of expertise. Most if not all will be nationally recognized, and the practitioners will all be

¹⁴¹ Notes from phone interview between Carol Goforth and Erica Moeser on August 28, 2014, are in possession of the author. Erica Moeser, president and CEO of the National Conference of Bar Examiners (NCBE), is herself highly acclaimed and respected. For example, she was the 2013 recipient of the Robert J. Kutak Award sponsored by the national Kutak Rock law firm and the ABA Section of Legal Education and Admissions to the Bar. She has led the NCBE since 1994 and is a former chair of the ABA Section of Legal Education and Admissions to the Bar. She has also served as a law school site evaluator, as a member of the Section's Accreditation and Standards Review committees, and as the co-chair of the Section's Bar Admissions Committee.

The general qualifications of those who participate in the drafting process is confirmed in the December Response, *supra* note 13. In that letter, President Moeser described these persons as follows: "75% of our drafters are academics. The balance are drawn from the courts and private practice in roughly equal measure. Our test editors are all lawyers with strong credentials." *Id.* at 2.

experienced and similarly well regarded. For the multistate essay exam, questions are solicited from senior level academics around the country and then edited, with a great deal of work being put into the suggested analysis of the question.

The potential problem that this process creates is not that the wrong people are being asked to write the questions. The problem is that by choosing people with years, typically decades of experience with a certain exam focus and format (the traditional “issue-spotting” essay exam), the overwhelming tendency for such examiners is to stay with that format rather than asking whether what they have been doing for so long really serves the intended purpose. There are well-known and well-documented psychological reasons why people with decades of experience with the detailed fact patterns associated with traditional law school exams are likely to continue writing questions that ask for detailed responses requiring familiarity with a substantially greater range of very specific information than can rationally be identified as fundamental knowledge.

Empirical psychological research on human behavior, persuasion and decision-making provides evidence that individuals who have acquiesced to particular points of view in small ways are increasingly likely to continue to agree with the same points of view in the future. The well-documented cognitive dissonance phenomenon recognizes that when actions conflict with beliefs, the beliefs thereafter change to fit the action¹⁴² Human beings are, in fact, quite susceptible to pre-commitment bias. Once committed to a particular course of action, even in small ways, thereafter those things that support that course of action are more likely to be believed.¹⁴³ The foot-in-the-door premise, for example, suggests and supports the idea that subjects who first agree to a small request are substantially more likely to agree to a larger but related request later.¹⁴⁴ In

¹⁴² See generally LIONEL FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). SEE ALSO LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 65-67 (1991) (offering a classic illustration of the theory).

¹⁴³ ROBERT CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 50-85 (3d ed. 1993) provides an overview of research on pre-commitment and consistency-maintaining behavior.

¹⁴⁴ DANIEL O’KEEFE, PERSUASION: THEORY AND RESEARCH 169 (1990) (hereinafter “O’Keefe”); see also Kelton V. L. Rhoads & Robert Cialdini, *The Business of Influence: Principles that Lead to Success in Commercial Settings*, in the PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 513,

other words, past compliance is a powerful predictor of future compliance.¹⁴⁵

Some researchers have posited that the foot-in-the-door technique is effective because there is a change in self-perception, which occurs when a person performs or agrees to perform a certain task. The very act of acceding to the initial request produces a change in attitudes that translates to an increased likelihood of being the kind of person that will agree to similar requests in the future.¹⁴⁶ Basic psychology teaches us that people do indeed tend to derive their current attitudes and decisions from their own past behavior.¹⁴⁷

What does this have to do with why senior and distinguished law professors, jurists and practitioners might tend to be overly (and perhaps unconsciously) biased in favor of traditional issue-spotting analysis of complex and advance legal issues? They have all bought into and are products of the system that has overwhelmingly relied on such exams. They all graduated from institutions that almost certainly employed those kinds of testing techniques. For law professors, most of them will have utilized that kind of question throughout their academic careers. For experienced practitioners, they will have been exposed to the complex legal issues in their areas of expertise, and are used to thinking of those as critical and “basic” skills. And for the most part, once they are part of the system, even if they joined it with the goals of changing it, they are likely to be increasingly likely to buy-in to the system the more they participate and acquiesce in it.

It is most certainly not that these are individuals lacking great minds, legal talent or experience. Rather, the issue is that these are all people who are used to a particular kind of exam with a particular focus on detailed knowledge. The selection of individuals with that particular

525-26 (James Price Dillard & Michael Pfau eds., 2002); Michael Burgoon & Erwin P. Bettinghaus, *Persuasive Message Strategies*, in *Persuasion: NEW DIRECTIONS IN THEORY AND RESEARCH* 141, 155-57 (Michael E. Roloff & Gerald R. Miller eds., 1980) (hereinafter “Burgoon & Bettinghaus”).

¹⁴⁵ Burgoon & Bettinghaus, *supra* note 144, at 155.

¹⁴⁶ O’Keefe, *supra* note 144, at 170-71, Burgoon & Bettinghaus, *supra* note 144, at 156.

¹⁴⁷ Burgoon & Bettinghaus, *supra* note 144, at 156; O’KEEFE, *supra* note 144, at 75; Shelly Chaiken, Wendy Wood, & Alice H. Eagley, *Principles of Persuasion*, in *SOCIAL PSYCHOLOGY: A HANDBOOK OF BASIC PRINCIPLES* 705-06 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

background naturally tends to result in exams that mirror past exams.

If there was enough of a demand that these great minds instead seek to produce an exam that any great lawyer should be able to pass, without the need for an expensive and intensive review course, it is unlikely they would be unable to do so. Instead, we have a self-perpetuating system of intense, issue spotting analysis that overlooks the widely observed fact that we are not appropriately testing the essential lawyering skills. It is not “the law” that lawyers need to be armed with, but how to use it. Yes, there are certain basic fundamentals that all lawyers should know, and that kind of knowledge can certainly be tested. But those truly are basic and are unlikely to “weed out” potential sub-par practitioners, if that is the goal of the system. Instead of the current approach, we ought to be examining different things from the kinds of issues currently being tested.

IV. Suggestions for Change

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

One of the simpler revisions begins with the assumption that bar exams should only be testing “fundamental principles” that every lawyer should know. If this is true, there is little justification for 50 different state exams, with 50 different passing standards (even when the same questions are used). States might set different standards for character and fitness to practice, and impose differing continuing legal education requirements or different levels of pro bono experience or practice, but the essential licensing examination would only benefit from being more uniform. This is especially true when it is increasingly recognized that modern legal practice is rarely local in nature, but more typically national or even international in scope.

A more important issue, but one that is far more complex as well, involves the need to carefully decide on the knowledge and skills that really need to be tested. It is not enough to say that every lawyer needs to know the intricacies of criminal or contract or property or constitutional law. It is not enough to say that those are the subjects taught in every law school, so

the substance of those subjects (and other traditional first year or required courses) constitute “fundamental information” that every beginning lawyer should know. Instead, the question has to be, how are lawyers supposed to use the building blocks of knowledge imparted in those “foundational” courses when they graduate? The fact that a professor might use an issue spotting exam, even a complex one, to evaluate that course does not mean that the same kind of question should be used on a bar exam.

There are a number of reasons why a particular kind of examination might be appropriate at the end of a law school course but not appropriate for a licensing exam years later. First, the law school exam immediately follows the class coverage, and so an inappropriate emphasis on short term memorization is less of an issue. The professor can also tailor the exam to cover material that was emphasized in the class, so that it can be used to assess things like how well the student paid attention, or whether the student was putting in sufficient effort to understand and integrate the material into a coherent approach to the subject. In addition, a number of law school exams are open book, rather than relying on rote knowledge of legal rules. And, of course, there is also the reality that law school exams have traditionally followed the format they have taken for less defensible reasons: they are less time consuming to grade than other alternatives; law professors are used to them and generally did well on that kind of exam themselves; and that kind of exam trains students to pass the bar itself.

The starting point for analyzing what should be tested should be the various and repeated statements about what bar exams are intended to do. According to the stated goals of bar examiners and its supporters, the point is to test “fundamental principles,” core knowledge that is essential to minimum competency to practice at an entry level. What does it take to say that someone possesses a minimum or entry-level competency for the practice of law? Most of the statements about what law practice requires assumes a very basic understanding of things like terminology and authorities, albeit in a far narrower range of topics than is currently tested on most bar exams. The list of topics covered in basic law school classes is not an appropriate substitute for a serious consideration of what the basic principles and fundamental knowledge really is. The “problem” with this is that in all probability few law school graduates will fail this kind of test, and if everyone passes, the exam no longer “looks” as if it is rigorously

protecting the public.¹⁴⁸ Moreover, this is not the kind of exam for which it would be necessary to spend an additional thousand dollars or more for a review class. Those interested in maintaining appearances or their source of revenue are likely to be biased against changes in this direction.¹⁴⁹ However, the MBE type multiple-choice questions, if really focused on basic rather than specific and extremely narrow and detailed issues, could confirm that law school graduates really do possess this kind of information.

That leaves the question of what the essay questions should test. Virtually every bar exam includes a substantial essay-component, and certainly written communication skills are essential for the successful practice of law. The ability to write in a logical, organized, coherent and concise manner is certainly something that is an appropriate subject for evaluation, and probably an increased focus on this (both in law schools and on the bar) is warranted.

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

[G]ood lawyers seem to share certain ways of thinking. They ask relevant questions and pay close attention to the raw information that they obtain. They winnow the unimportant facts from the important ones. Then they order what is left into a coherent story that is both fundamentally truthful and calculated to serve a predetermined purpose.”¹⁵⁰

Another has described this skill as enabling those who possess it “to think with care and precision, distinguish good arguments from bad, and analyze

¹⁴⁸ The reality is that anyone who graduates from an accredited law school has already passed a fairly rigorous set of examinations.

¹⁴⁹ The bias does not even have to be conscious. Even assuming perfectly acceptable motives and intention, it is extremely difficult to avoid complications that stem from such conflicts of interest, especially in subjective areas such as a discussion of what constitutes suitably basic or foundational knowledge. Law schools and law professors are not immune from this kind of challenge either, as they have a vested interest in promoting the validity of their programs of education. This issue is one that will require participation from a number of constituencies, not merely those with these kinds of biases and interests.

¹⁵⁰ Molly Sheppard, *How, Exactly, Do Lawyers Think?* 26 MONT. LAW. 4 (Feb 2001).

the facts and evidence presented in a case.”¹⁵¹ Still another verbalization of the skill is that it allows a lawyer to “easily see both sides of an argument, anticipate a counter argument, and know how to rebut it,” even if it is counter to the lawyer’s personal beliefs.¹⁵²

These three explanations come from bar journals, written for and by legal practitioners, not academics. There are, of course, academic discussions of what this concept entails,¹⁵³ and from such sources, attributes like the ability to identify and diagnose problems, generating alternative solutions, developing and implementing a plan of action, keeping an open mind, and thinking strategically are often emphasized.¹⁵⁴ The ability to develop coherent theories, arguments and analysis is also identified as a critical component of “thinking like a lawyer.”¹⁵⁵ The ability to use inductive and deductive reasoning,¹⁵⁶ the ability to perceive (and sometimes exploit) ambiguities,¹⁵⁷ to see multiple sides to problems and solutions,¹⁵⁸ and to attend to details¹⁵⁹ are all also important aspects of the skill.

It might be assumed that bar examination essay questions test these kinds of cognitive abilities and skills. In fact, the NCBE, in explaining their vision of the MEE, have claimed the following purposes for this exam: (1) can the examinee identify legal issues; (2) can the examiner separate out the relevant information; (3) can the examinee communicate a clear, concise, and organized written analysis of the issues, and (4) can the examinee demonstrate an understanding of the “fundamental legal principles” raised by the question.¹⁶⁰

One problem in this approach is that it does not allow an examiner to tell if the applicant is struggling with knowledge of the substantive rules being focused on in the exam question (item 4 above) or with the analytic and

¹⁵¹ Paula Davis-Laack, *Think This Way and That Way: Developing Mental Resilience*, 87. WIS. LAW 41 (Mar. 2014).

¹⁵² Andrew Dufour, *Think Like a Lawyer*, 81-Feb J. KAN. B.A. 14 (Feb.2012).

¹⁵³ For a collection of various approaches, see Larry O. Natt Gantt, II, *Deconstructing Thinking like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007) (here in after “Natt”).

¹⁵⁴ *Id.* at 437-38.

¹⁵⁵ *Id.* at 441-42.

¹⁵⁶ *Id.* at 457-63.

¹⁵⁷ *Id.* at 455-57.

¹⁵⁸ Natt, *supra* note 153 at 468-70.

¹⁵⁹ *Id.* at 470-72.

¹⁶⁰ *Overview of the MEE*, *supra* note 49.

cognitive skills (such as those identified in items 1 - 3). Of course, the essay questions could be refocused to ask what issues the applicant would research, what preliminary hypotheses might be developed, and what general advice could or should be offered (with an understanding that sometimes the answer should be that any “client” would need to be told to give the attorney time to do additional investigation). Alternatively, the essays could be based on law given to the applicants. The same research file could be used for a number of different questions, since questions are given in order. Additional information or resources might be provided at each step, to change the direction of the inquiry or to test different skills.

The point of these suggestions is to make it clear that there are essay questions that can be developed to parse out and test different skills. The problem is that our current bar examination simply does not do that. Nor have those who write bar examination questions been asked to do so. They are simply charged with writing questions in their applicable areas of expertise, and given that background, it is not at all surprising that we see the same kind of question being asked year after year.¹⁶¹

None of the foregoing is intended to suggest that the ability to communicate effectively in writing is not an essential lawyering skill. Certainly, those who can write a coherent essay under the various pressures of the bar examination have demonstrated some ability in this arena. The problem is that those who fail might also be competent communicators, and yet fail not because of deficient writing skills, but because current bar questions attempt to assess too many things (and too many of the wrong things) at the same time.

What other skills can be parsed out and tested? Certainly, any lawyer should be able to read and understand cases, constitutional provisions, statutes, regulations, and secondary authorities. They should be able to understand the relative significance of these varied authorities, and be able to construct explanation, arguments or provisions in an agreement based on these authorities. In doing so, they should also be able to sort out and distinguish between relevant and irrelevant information and authorities. They should be able to identify ambiguities and construct arguments for and against given propositions, ideally based on authorities that they are not compelled to memorize in advance. And different forms of written

¹⁶¹ See *infra* notes 142-147 and accompanying text.

communication can be tested. The ability to construct a predictive analysis of a proposed plan of action, the ability to make a persuasive argument and to identify the most likely counters to that argument, and the ability to prescribe a course of conduct by including language that might go in an agreement of some sort can all be tested through something like an essay examination.¹⁶²

These suggestions probably reflect a bias against multiple choice questions. The bias stems not from an inherent objection to this kind of question in the abstract but from the way in which they have been used. First, they form a substantial portion of current bar exams even though I have never heard of a single lawyer ever being called upon to answer multiple choice questions in practice. (Lawyers do at least write up memos, analyze problems, and do things similar to the kind of written response called for in essay exams, even though they typically have time to research and reflect on the topics being considered.) Second, the scope of existing questions is simply ridiculous if the goal is really to test fundamental knowledge. Yes, “ridiculous” is a strong word, but if anything, it is probably not strong enough. By covering in depth knowledge of a wide variety of subjects, the testing process consistently produces a group of applicants who fail and gives rise to the appearance that the public is being protected from incompetence. In reality, it flunks out those who tend to do less well on standardized tests, which disproportionately affects minority applicants, and realistically shows who does well at memorization and regurgitation of rules (or who can afford the best bar review classes). It certainly does not test whether the test takers would be good lawyers.¹⁶³ Multiple choice questions could be written to really test such skills as issue identification, hypothesis generation, or truly fundamental knowledge, but none of the questions available for review for free for potential applicants seem to fit this description.¹⁶⁴

¹⁶² The MPT does seek to do this, and one of the most important and easiest changes to the bar examination would be to dramatically increase the focus on this type of question.

¹⁶³ Plenty of good and even great lawyers have failed at least one bar exam, and regrettably, plenty of poor or even abysmal lawyers have passed at least one.

¹⁶⁴ NCBE, *MBE Sample Test Questions*, available online at http://www.ncbex.org/assets/media_files/MBE/MBE-Sample-Test-Questions.pdf (last accessed August 2014) (offering 21 questions designed to “be similar to those on the MBE.”) See also NCBE, *MBE Civil Procedure Sample Test Questions*, available online at http://www.ncbex.org/assets/media_files/MBE/MBE-Civil-Procedure-SampleTest-

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

Legal educators and deans are immensely and appropriately concerned with the need to educate students for the modern practice of law. Skills training is, for example, a critical component of modern educational reforms.¹⁶⁵ It is tragic that this particular effort has been called out as one "possible" reason¹⁶⁶ why law students are being labelled as "less able."¹⁶⁷ Instead, what may well be happening is that law schools are doing a better job of preparing students for the practice of law, instead of merely focusing on teaching for the bar examination. The solution is not to return to a practice, that we know failed our students, but to consider whether the bar exam is failing the public and the profession. Perhaps it is not that law schools are not willing to contend with the results of the bar exam; perhaps it is the examiners who are unwilling to consider the possibility that the test simply asks the wrong things. However carefully the questions are equated by qualified psychometricians, however stringent the quality control procedures for scoring exams might be, however reliable or replicable the data is from morning to afternoon sessions--if the exam tests things that do not relate to the "real" practice of law, the bar exam does us all a disservice, and at potentially heavy costs to the profession and the public.

Questions.pdf (last accessed August 2014) (offering a sample of 10 civil procedure based questions, in preparation for the addition of this subject to the MBE beginning in February, 2015).

¹⁶⁵ See *infra* notes 87-95 and accompanying text.

¹⁶⁶ Moeser, *President's Page*, *supra* note 2, at 6.

¹⁶⁷ *October Memorandum*, *supra* note 7.