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Articles

Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession

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Table of Contents

* Dean and Professor of Law, CUNY School of Law. I am grateful to my colleagues at CUNY who generously commented on a draft of this essay presented at a Faculty Forum, especially Jenny Rivera, and to Carol Sanger, Deborah Rhode and Eileen Kaufman for their close reading and thoughtful edits. Sarah Lazare Rebecca Prez, Dennis Torreggiani, Neil Singh and Rosardo Pla provided excellent research assistance. Al Lerner gave me the original idea and John Sexton encouraged me by his public support. Bob MacCrate, Larry Grosberg, Anthony Davis, Hal Edgar and Josh Pruzansky challenged my assumptions and, hopefully, clarified my thinking. I am grateful for suggestions, feedback and encouragement from Mary Lu Bilek, Bill Kidder, Susan Sturm, Diane Yu, David Cohen and Jay Conison. Dana Ramos magically transformed my unreadable scrawls into a real article. Judith Wegner's personal and intellectual support were enormously helpful, as is her unparalleled knowledge of, and commitment to, the issues raised here. Throughout, the amazing students and graduates of CUNY School of Law have been my unending inspiration.

I. Forward

Although not formally a part of the Pace Law Review's Symposium, "The MacCrate Report: Ten Years Later," the subject of this article– proposing an experiential, performance-based alternative bar exam—is deeply grounded in, and inspired by the content of the MacCrate Report[1] and its importance for legal education and the profession. The Report did not call for change in the existing bar exam regime, but its extraordinary exegesis of precisely what it is that lawyers do, and must learn, provides a lens on the bar exam which finds its present iteration lacking.

I was initially challenged to rethink the bar exam because of its unacceptable disparate impact on non-majority[2] takers,

1. A.B.A., Legal Educational and Professional Development—an Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter MacCrate Report].

2. I use the term non-majority students rather than "minority" students or "students of color" because of the implicit values I believe "minority" conveys in reinforcing a Caucasian norm, and because of changing demographics which deconstruct the notion of Caucasian or white students as a monolithic majority. "Students of color" does not include immigrants from the former Soviet Union, the Balkans, the Middle East or those of Arabic descent who may be categorized as "white." By non-majority students, I mean those who differ significantly, usually but not always by race or ethnicity, from the majority white, middle or upper-class students who comprise the majority population of legal education today.

but the more I explored the possibility of a different, non-discriminatory bar exam, the more convinced I became of the equal need for a better bar exam. By "better" I mean one that tests more validly what bar examiners have always posited as the bar exam's purpose, i.e. minimum competence to practice law unsupervised.[3] Here the connection to the skills outlined in the MacCrate Report—which the Report itself notes are necessary before a lawyer accepts sole responsibility for a client—is unmistakable, and essential. The model I propose is explicitly designed so that applicants can be evaluated on their performance of each of the skills in a real life, real time setting. When one understands the interconnection between those skills and the MacCrate fundamental values, it becomes clear that the setting—the court system—is also designed to further a commitment to improving justice and to providing pro bono service.

A much abbreviated version of the need for such an alternative bar exam, and a description of what I have called the Public Service Alternative Bar Exam or PSABE has been previously published,[4] but much of the research and thought which went into that proposal were omitted because of space constraints. Its publication, and release of the proposal for a pilot program developed by Committees of the Association of the Bar of the

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3. It is generally agreed that a major justification for the bar exam is to protect consumers of legal services from incompetent lawyers or, put differently, to guarantee "minimal competence." In answer to the question, "how do you judge minimal competence?," John Holt-Harris, a former Chair of the New York State Board of Law Examiners gave an answer to which I would certainly subscribe, although I do not believe it is in fact tested or ensured by the existing bar exam. He said,

> [T]he more I thought about [the question] the more elusive the answer became. I hereafter concluded and still maintain that the standard should be competence to practice law unsupervised. That standard is markedly different from the previous criterion which was to demonstrate minimal competence vis-à-vis the members of the peer group taking the same examination. More than seventy percent of all the 700,000 lawyers in the United States are solo practitioners or are members of a practice constituted of three or fewer lawyers; therefore it is vital that the standard be competence to practice law unsupervised.

Ann Fisher, *Examining Ourselves. Observations of a Bar Examiner. An Interview with John F. Holt-Harris, Jr.*, B. EXAMINER, May 1996, at 4.

4. Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002).

City of New York and the New York State Bar Association,[5] have generated many questions that this longer version addresses. I hope also that this article will be a useful beginning resource for others thinking about how we admit lawyers into the profession.[6]

The opportunity to publish the article in this issue of the Pace Law Review seems especially serendipitous for two reasons. First, of course, the connection and resonance with a celebration of the MacCrate Report is obvious. I am honored to be in the company of others who have thought so deeply and creatively about this milestone in legal education. Second, Pace is the location of a new Institute on Judicial Education, and, as such, is more directly connected to the state judiciary than any other law school in New York. Because my proposal looks to the court system—and because the Court of Appeals is ultimately responsible for setting the standards for admission to the bar—the judiciary's willingness to consider experimentation concerning the bar exam is critical.[7] The potential for synergy here is obvious, and I hope this publication will advance the goal of finding a better way to ensure competence in those admitted to practice law, as well as to advance our commitment to a more diverse and representative profession.

II. Introduction

Although the written bar examination is of relatively recent vintage, for those of us who practice law or work in legal

5. The Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of N.Y. and the N.Y. State Bar Association, *Public Service Alternative Bar Examination* (2002) (proposing a pilot of the PSABE) [hereinafter Bar Committee Report] (on file with author).

6. *See* Glen, *supra* note 4. The earlier article, like this one, is more a conception than a true proposal. A great deal of additional work by experts far more knowledgeable and experienced than I in a number of fields will be necessary to design and evaluate a pilot of the PSABE.

7. A study commissioned by the Court of Appeals in 1992, called for experimentation to increase the skills tested by the bar examination and provided strong support for an innovation like the PSABE. Jason Millman et al., *An Evaluation of the New York State Bar Examination* (May 2002) [hereinafter Millman study] (on file with author). The evaluation, and the particular ways in which it mirrors arguments made here, are discussed in the penultimate section of the article which is specifically directed to New York.

education, it seems always to have been there.[8] I have encountered the bar exam personally as a student, litigator, law teacher, trial and appellate judge, and most recently as a law school dean. I have also reflected on the bar exam as a member of various bar association committees on legal education.[9] Throughout these experiences, my opinion, like that of many other participant observers, is that the examination is both misguided in terms of what it purports to do, and pernicious in its effects. Yet despite the fact that lawyers are, above all, problem solvers,[10] little has been done about the bar exam as a problem[11]

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8. *See, e.g.*, Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359 (1996). The first written bar examination was given in Massachusetts in 1885, although oral examinations continued in many states for many years. *Id.* at 374; *see also* ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 100-01 (1921). Until 1933, citizens of Indiana were permitted to practice law without taking a bar exam, written or oral, and without even graduating from law school. Bernard C. Gavit, *Indiana's Constitution and the Problem of Admission to the Bar*, 16 A.B.A. J. 595, 595 (1930). Today, all states use written bar exams. Jarvis, *supra*, at 374. However, Wisconsin still employs a diploma privilege which permits graduates of the two Wisconsin law schools, University of Wisconsin and Marquette, to gain admission to its bar without taking the Wisconsin bar exam. *See* Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 643, 646 (2000).

9. I served as a member of the Committee on Legal Education and Admissions to the Bar of the Association of the Bar of the City of New York from 1993-95, immediately after publication of that Committee's critical report on the bar exam. *See* Comm. on Legal Educ. and Admission to the Bar, Ass'n of the Bar of the City of New York, *Report on Admission to the Bar in New York in the Twenty First Century — A Blueprint for Reform*, 47 THE RECORD 472, 484, 503-04 (1992) [hereinafter ABCNY *Bar Report*]. I also served as a member of the Committee on Legal Education and Admissions to the Bar of the New York State Bar Association from 1995 through the present, and am currently Vice Chair of the Diversity Committee of the ABA Section on Legal Education and Admissions to the Bar.

10. *See* Roy T. Stuckey, *Education for the Practice of Law: The Times They are A-Changin*, 75 NEB. L. REV. 648 (1996) for an excellent application of the importance of problem solving to practice, and discussion of teaching problem solving as a "lawyering skill." *See generally* Paul Brest & Linda Hamilton Krieger, *Lawyers as Problems Solvers*, 72 TEMPLE L. REV. 811 (1999); Janet Reno, *Lawyers as Problem Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999).

11. As at least one commentator has noted, one of the perplexing things about those who most vehemently question the current bar examination system — on a variety of grounds — is that rather than arguing for its elimination, they instead propose that it simply be altered. *See* Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justification for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1226 (1995). *But see, e.g.*, Tracy Gillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 25-29 (1995) (calling for radical change, and a "struggle against the tyranny we have permitted . . . the Bar Exam

besides studies,[12] hand wringing and modest tinkering.[13] However, the problem has not gone unnoticed. In the last several years, the Society of American Law Teachers (SALT) has undertaken a re-examination of the bar exam, holding a national conference, issuing a statement, and fostering several law review articles.[14] The Carnegie Foundation has begun a multi-year set of studies on professional education which, in the initial volume on legal education, examines and proposes changes in the bar examination.[15]

Much of the energy which could be employed to continue and expand this initiative has, however, been deflected into a defensive posture, in the face of a campaign to raise passing bar scores[16] and thus lower the percentage of applicants who pass.

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iners . . . over decisions about . . . who gets a job, who is thought of as smart, and who thinks well of herself once having arrived."); Joan Howarth, *Teaching in the Shadow of the Bar*, 81 U.S.F. L. Rev. 927 (1997) (collecting critiques of the bar examination regime in memory of Grillo's work).

12. To my mind, the most comprehensive study done of a particular state bar exam, with application for all existing bar exams, was done by the Association of the Bar of the City of New York, Committee on Legal Education and Admissions to the Bar. ABCNY *Bar Report*, *supra* note 9.

13. The three major changes which have occurred in the last three decades are adoption of the Multi-state Bar Examination (the MBE), a six-hour, 200 multiple-choice question exam prepared by the National Conference of Bar Examiners (NCBE), which is now used in forty-eight states, the Multi-State Professional Responsibility Examination (MPRE), a two-hour, fifty question test, used in forty-seven states, also prepared by the NCBE, and introduction of "performance test" questions which have been utilized by California since 1983, and which, in a variation authored by NCBE, have now been adopted by twenty-five states. Jarvis, *supra* note 8, at 374, 378, 384-85; Nat'l Conference of Bar Examiners & American Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admissions Requirements 2002, 21 Chart VI (Erica Moeser & Margaret Fuller Corneille eds., 2002) (hereinafter Comprehensive Guide). For more extensive discussion of the MPT, see *infra* notes 296-309. None of these changes has substantially affected the criticism of the bar exam made herein.

14. Soc'y of Am. Law Teachers, *Statement on the Bar Exam*, 52 J. Legal Educ. 446 (2002). *See also* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 Neb. L. Rev. 363 (2002); Howarth, *supra* note 11; Moran, *supra* note 8.

15. Judith Wegner, *Study of Legal Education* (forthcoming).

16. It should be noted at the outset that discussion of "bar pass rate" is almost always about *first time* pass rate, notwithstanding the fact that many applicants pass on their second or subsequent takings. This is largely true because the ABA requires law schools to report only first-time bar pass rates. *See* ABA, 2002 Annual Questionnaire, Part I, Section II, *Bar Passage Rates & Placement (Employment)*, *available at* www.abanet.org/ftp/pub/legaled/general.doc (on file with author). Partly, however, it is because bar examiners do not uniformly collect or

Law professors and law deans have mobilized in Florida and Minnesota and have, at least temporarily, halted the proposed increases.[17] New York is in the midst of a proposal to raise its bar pass score,[18] and other states can be expected to follow. The serious flaws in the arguments for raising scores—which take on a kind of "we're tougher than you are" competitive tone[19]—have been well examined in an excellent recent article by Professors Deborah Merritt, Lowell Hargens and Barbara Reskin.[20]

The movement to raise bar passage scores is linked,[21] as Merritt shows, to the current national obsession with "standards."[22] This obsession is unjustified in the context of licensing

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dissemmate—statistics on second-time passage. John A. Sebert, *Information that Bar Admissions Authorities Should Share with Law Schools*, Feb. 5, 2001, *in* Memorandum from John A. Sebert, Consultant on Legal Education, ABA Section of Legal Education and Admission to the Bar, to the Deans of ABA-Approved Law Schools (copy on file with author). Noting that "a number of law schools have suggested that the ABA-LSAC Official Guide contain data on both first-and second-time bar passage results." *Id.* at 2. The ABA Consultant on Legal Education has called on state bar examiners to separately report first, second, third and fourth time or more takers because such data "is important both for accreditation review and consumer information." *Id.*

17. Interview with Dean Joseph Harbaugh, Dean of Nova Southeastern University, in Seattle, Wash. (Feb. 9, 2003).

18. NEW YORK STATE BOARD OF LAW EXAMINERS, *Report and Recommendation of the New York State Board of Law Examiners to the Court of Appeals Regarding the Passing Standard on the New York State Bar Examination* (Mar. 2002) [hereinafter *Report and Recommendation*] (on file with author) (proposing an increase in the passing score in New York from 660 to 675).

19. Wegner sees this as part of the increasing movement to "sort," rather than to "weed," students/applicants. Wegner, *supra* note 15. *See* discussion *infra* note 106.

20. Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 89 U. CHI. L. REV. 929 (2001) (criticizing recent discussions to raise bar passage scores for lacking sufficient evidence that change was needed, as well as critiquing the social science model used to justify such increases).

21. For an alternative explanation, see William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification* (Jan. 8, 2003) (unpublished manuscript, under submission to LAW & SOCIAL INQUIRY, on file with author) [hereinafter *Dream Deferred*] (arguing that rather than increasing quality, changes in passing standards are a response to a perceived oversupply of lawyers).

22. *See, e.g.* Glen, *supra* note 4, at 1700; PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT (1999). For a critique of objective testing premised in the values of opportunity and inclusion, see Susan Sturm & Lani Guinier, *The Future of Affir-*

lawyers[23] and, along with other disadvantaging factors, may create an even greater and unjustified barrier to entry into the profession for non-majority students than does the present bar exam.[24] This additional danger underscores the need to think "out of the box"[25] with regard to the bar exam.[26]

I have, for some time, been thinking in this more expansive way about the bar examination and the role it plays—or doesn't play—in legal education and admission to the profession. I

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ative Action, Reclaiming the Innovative Ideal, 84 CAL. L. REV. 953 (1996). I place "standards" in quotes because I believe that the term is used, quite deliberately in the political area, to connote rigor and excellence, while it actually refers to arbitrary results on standardized tests which have historically disadvantaged non-whites and often women.

23. There has been no objective demonstration of a decrease in the quality of lawyers admitted pursuant to existing standards, nor of any other specific problem which the passing score is intended to address. *See* Merritt et al., *supra* note 20.

24. *Id.* at 930; *Dream Deferred*, *supra* note 21, at 33-36. I want to be clear that the existing and potentially greater barrier to admission for non-majority students as a result of the disparate impact of the current bar exam. I contend that this is a problem with the test and not the test-takers. *See* discussion *infra* at Section V.

25. *See, e.g.*, John Sexton's provocative address to the Section on Legal Education at the London 2000 meeting of the American Bar Association, John Sexton, *Thinking About the Training of Lawyers in the Next Millennium*, THE LAW SCHOOL, Autumn 2000, at 34, which resulted in the ABA Section on Legal Education and Admissions to the Bar creating an "Out-of-the-Box" Committee, first co-chaired by Dean Sexton and Dean John Attanasio of Southern Methodist Law School. In 2001 Dean Sexton resigned and was replaced by Diane Yu, a former chair of the section.

26. Others are also proposing significant changes to the existing bar examination. For example, Judith Wegner argues for a three-stage "examination" beginning in law school and concluding after the applicant has entered the profession and amassed a "portfolio of professional references." Wegner, *supra* note 19. Beverly Moran proposes expansion of the diploma privilege. Moran, *supra* note 6. Meanwhile, Daniel Hansen argues for a post-graduation clerkship based on, and modified from, the current Canadian system. Hansen, *supra* note 11. Curcio reviews the possibilities for changing the bar exam through computer-based testing (CBT). Curcio, *supra* note 14, at 294-96. The Dean and students at Arizona State Law School are developing a proposal for an Americorps-like post-graduate practice year in lieu of the current bar exam. *See* Glen, *supra* note 4, at 1702 n.15. This latter proposal is currently the subject of a Task Force convened by the Arizona State Bar Association. Interview with Dean Patricia D. White, Arizona State University College of Law Dean, Seattle, Wash. (Feb. 8, 2003). While I have some concerns about the practicality of the latter idea, all these reforms have value. My proposal, more like Wegner's, challenges the underlying justification for the existing process and attempts to create practical possibilities for bar examiners looking to make the examination a more tailored and accurate measure of an applicant's minimum competence to practice law.

have slowly developed, "with a [lot of] help from my friends,"[27] a plan for modest, but potentially real change. My proposal is for a new, experience and performance-based bar examination—which, because it would be conducted in a public service setting, I have called the Public Service Alternative Bar Examination (PSABE). The PSABE is intended to avoid many of the problems connected with the existing bar exam and, although not intended to entirely supplant that test (hence, the "Alternative"), to better evaluate and certify law graduates' minimum competence to practice law unsupervised.[28]

Over the last several years, I have discussed the possibility of a PSABE with lawyers, legal educators, bar examiners, bar association officials, judges and others interested in the profession.[29] These conversations, and the additional research they prompted, have persuaded me that there is now a window for real change. The combination of increasingly vocal criticism of the profession,[30] uncertainty within legal education,[31] and in-

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27. See The Beatles, *A Little Help From My Friends*, on Sergeant Pepper's Lonely Hearts Club Band (EMI/Capitol Records 1967).

28. *See* Fisher, *supra* note 3.

29. I have been informally discussing the idea of a public service alternative bar exam with many friends and colleagues, since it was first suggested to me by Alfred Lerner, then Presiding Justice, Appellate Division, First Department, New York State Supreme Court. They include the CUNY School of Law faculty, law deans from New York and New Jersey, judges and administrators in the New York State Unified Court system, members of the Committee on Legal Education and Admissions to the Bar of the New York State Bar Association and the Association of the Bar of the City of New York, members of the site visit team of the Carnegie Foundation Multi-Year Study on Professional Education, participants at the ABA, AALS, LSAC Conference on Diversity held in Denver in October, 2000, participants in the AALS Equal Justice Colloquium held at Pace Law School on October 26, 2000, and the ABA Deans Workshop held in January 2002 and February 2003. I first presented the outline of this article at the SALT Teaching Conference: Teaching, Testing and the Politics of Legal Education in the 21st Century, October 21, 2000, when I spoke on a panel entitled, "High Stakes Testing in Law Schools and the Legal Profession." I want to express my appreciation for all the ideas which have come from these conversations and which I have incorporated in my own thoughts about the issue.

30. *See, e.g.*, Deborah L. Rhode, *The Profession and the Public Interest*, 54 Stan. L. Rev. 1501, 1502-08 [hereinafter *Profession and Public Interest*] (discussing criticisms of, and problems in, the profession).

31. *See, e.g.*, Kenneth M. Casebeer, *2001: A Global Odyssey Prompted by the Merritt-Cohen Upper Level Curriculum Report of the AALS*, 30 U. Miami Inter-Am L. Rev. 415 (1999); Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 Wash. L. Rev. 505 (1994); Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 Clinical L. Rev. 457 (1994); Andrew J. Rath-

creasing scrutiny of, and concern about, the influence of high stakes testing[32] has created a space, and perhaps a demand, to ask basic questions about how the bar exam itself performs. The shifting terrain on which the profession and legal education now stands[33] provides the opportunity to imagine and advocate alternatives. This essay is intended to stimulate thought, encourage research[34] and challenge my colleagues in both legal education and the legal profession generally. For while this

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man, *Preparing Law School Graduates for Practice: A Blueprint for Professional Education Following the Medical Profession Example*, 61 RUTGERS L. REV. 675 (1999); Sexton, *supra* note 25; Amy Travison Jasiewicz, *Experts Contemplate Future of the Legal Profession, and How Attorneys Can Prepare*, N.Y. STATE B. NEWS, July-Aug. 2001, at 18.

32. *See, e.g.*, Mary C. Waters & Carolyn Boyes-Watson, *The Promise of Diversity*, in WHO'S QUALIFIED? 55, 66 (Susan Sturm & Lani Guinier eds., 2001) ("The argument that much standardized testing is of questionable value in predicting future success, and largely reflects the past cultural and economic advantages of the test taker is hardly new. But with the testing mania currently sweeping the nation, it is certainly worthy of broad dissemination."); Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL'Y 201 (2002) (describing the history of, and arguments in, the debate); Peter Sacks, *How Admissions Tests Hinder Access to Graduate and Professional Schools*, CHRON. OF HIGHER EDUC., June 8, 2001, at B11; Philip Shelton, *Admissions Tests: Not Perfect, Just the Best Measures We Have*, CHRON. OF HIGHER EDUC., July 6, 2001, at B16. The importance of standardized tests for college admissions has been seriously challenged by the University of California's decision to abandon the general SAT as a requirement for admission. *See UC Panel Recommends Replacing SAT, But No Earlier Than 2006*, at http://www.ucop.edu/pathways/ucnotes/mar02/sat.html (Mar. 2002); *Regents Response to Proposed Test Changes*, *available at* http://www.ucop.edu/pathways/ucnotes/nov02/regents.htm (May-June 2002). Responding to UC's decision, and other criticism, the College Board has recently announced its intention to revise the test. *See, e.g.*, Tamar Lewin, *College Board to Revise SAT After Criticism by University*, N.Y. TIMES, Mar. 23, 2002, at A10; James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002, § 6 (Magazine), at 46.

33. For example, consider the debate about multidisciplinary practice which goes to the very heart of what it means to be a professional. *See, e.g.*, Neil W. Hamilton, *MDPS: Viewing the Bigger Picture*, NAT'L L.J., Apr. 24, 2000, at A23; *MDP in NY: OCA Adopts Rules Proposed by NYSBA*, N.Y. STATE B. NEWS, July-Aug. 2001, at 1; Joseph P. Sullivan, *MDP Demands Critical Review*, N.Y. L.J., May 1, 2000, at S1. *See also* NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession*, *available at* http://www.law.cornell.edu/ethics/nidp/nidp1.htm.

34. As will be readily apparent to the reader, many complex areas of research and intellectual inquiry bear upon this proposal. More extensive explication awaits another day--and another author—as the purpose here is to suggest and provoke. This choice, and the justifiable criticisms of particular sections of this essay which it may engender, should not detract from the larger issues raised and the proposed movement to experiment and change.

proposal for a PSABE is primarily about testing, inclusion, and the responsibilities of legal education, it should also engage our highest aspirations for excellence in the profession, and our deepest commitments to diversity and democracy.

III. Some Perverse Effects of the Bar Exam

Many reasons for reforming the evaluation process for licensing legal professionals are embedded in the most cherished and oft-repeated beliefs of legal education and the profession. Given many of our values, like faculty control over curriculum, informed consumers, diversity, and competence, the bar exam is, to use the old gender-based equal protection language, "actually perverse."[35] What follows is a preliminary list, with no intent to rank the issues by the order in which they are presented.

a) *Relieving Law Schools of Responsibility*

Under ABA standards, law schools have an obligation to "prepare [their] graduates for admission to the bar and to participate effectively and responsibly in the legal profession,"[36] but, in many ways, the existence of the bar exam lets law schools off the hook. Over the years, I have heard many faculty conversations that include confessions about passing questionable students (or, at least, students whose work did not suggest total or adequate comprehension of the subject matter) for humane reasons.[37] I suspect that many more such conversations are held silently in the hearts of colleagues. These law teachers were, I imagine, comforted by the conscience-assuaging belief that their version of "social promotion" would not loose incom-

35. *See* Craig v. Boren, 429 U.S. 190, 213 (1976) (Stevens, J., concurring).

36. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 301(a) (2002) [hereinafter ABA STANDARDS]. In 1976, Professor Roy Stuckey expressed hope that the combination of new ABA Accreditation Standards, of which 301(a) was one, and the MacCrate Report, *supra* note 1, would, together with "unprecedented calls for reform [of legal education] from students, the public, and the legal profession" cause "law schools to improve the preparation of lawyers for practice." Stuckey, *supra* note 10, at 659. Unfortunately, his expectations have remained largely unrealized.

37. *See* Katherine L. Vaughns, *Towards 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, 464 (1991) ("At least one commentator has observed that law professors are 'loathe to fail anyone . . . .'") (citation omitted).

petent graduates upon the public; the bar exam could be expected to protect against that undesirable result. For many tuition-driven law schools, there are financial imperatives to admit as many students as possible (these schools tend to be those not so deeply concerned by *U.S. News and World Report*). They can do so, and pass those students through, collecting tuition along the way; (and also salving the consciences of their faculties in the ways described above) secure, although perhaps falsely, in the belief that the bar exam will separate the wheat from the chaff and fulfill the profession's responsibility of admitting only those who are competent to practice law.[38] Rather than relying on the bar exam, we should insist that law schools meet their obligations to their students and to the profession.

b) *Impact on Admissions Decisions*

There is another way in which the bar exam lets law schools off the hook. Because the goal of passing the bar, or rather of having a high bar pass rate, is one which is not invisible to admissions offices and directors,[39] they tend to admit only those students who show a high degree of likelihood that they

38. One of the original justifications for the bar exam was to prevent the public from the potentially ill-prepared graduates of a burgeoning number of law schools which lacked the high standards of earlier, more elite, institutions. *See, e.g.*, Hansen, *supra* note 11, at 1205-06; Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. Cal. L. Rev. 1231, 1245-46 (1991).

39. One of the frequently repeated justifications for the bar exam is that it forces law schools to keep "standards high," thus ensuring that if a school's students do not pass the examination, the school will be forced to improve its program. *See, e.g.*, Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81 (1974); Michael Hard & Barbara B. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 Conn. L. Rev. 393, 408 (1970). A more likely result—and a quicker "fix"—is that law schools will stop admitting students they believe have a lesser chance of passing the bar. *See, e.g.*, Wegner, *supra* note 15; Vaughns, *supra* note 37. The recent spate of law schools which have substantially downsized their entering classes suggests the validity of that supposition. *See* Patricia G. Barnes, *Cutting Classes: Many Law Schools Are Shrinking Along with the Job Market*, A.B.A. J., Dec., 1995, at 26, 26; Phillip J. Closius, *The Incredible Shrinking Law School*, 31 U. Tol. L. Rev. 581 (2000); Phillip S. Figa, *Colorado Bar Association President's Message to Members: The First Thing We Do, Let's Kill All the Law Schools (With Apologies to Dick the Butcher)*, Colo. Lawyer, May 1996, at 13-14; Alan B. Rabkin, *A Law School in Nevada? Why Should I Care?: Thoughts on Crossing the Bridge*, Nevada Lawyer, Jan. 1996, at 10, 11.

will pass the bar on the first try.[40] LSAT scores, which have some predictive value, thus take on excessive importance in the admissions process.[41] This pressure adds another incentive to give excessive weight to LSAT scores, provided by the much bemoaned, but hugely influential *US News and World Report* annual ranking of law schools.[42]

There is another more subtle consequence to this excessive reliance on scores. As a near-definitive Law School Admission Council (LSAC) study[43] tells us is the case with the LSAT, if you take students who know how to take a test almost exactly like the bar exam, and know how to take it successfully, you don't have to do much with those students in law school in order to assure their success on the bar exam.[44] They are pre-programmed to succeed on the examination, which ensures admission to the profession,[45] so the law school and its faculty are free to do

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40. *See, e.g.*, Howarth, *supra* note 11, at 928 ("[T]he bar exam is a key factor in determining who gets into law school. . . . All but the most elite law schools face constant pressure regarding bar passa[] rates."). Conversely, tuition-dependent, lower-tier law schools may engage in the equally unfortunate practice of admitting many questionably qualified applicants and then "impos[ing] [excessively] stringent retention requirements in order to enhance passa[] rates for graduates who take the bar." Wegner *supra* note 15.

41. Howarth, *supra* note 11, at 928 ("Given the correlation between [the LSAT and the bar exam] over reliance on the LSAT is largely driven at less elite law schools by bar passage pressure.").

42. For the importance of *U.S. News and World Report's* rankings to law schools, for example, Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News and World Report Shouldn't Want to be Compared to Time and Newsweek– or The New Yorker*, 60 Ohio St. L.J. 1087, 1088 (1999), in which she argues for the use of broad measures of quality for ratings, rather than ranking law schools.

43. Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study* (LSAC Research Rep. Series 1998) [hereinafter *LSAC Study*]; see discussion *infra* notes 164-84 and accompanying text.

44. An early American Bar Foundation study demonstrated that the bar exam merely verifies law school grades, which, at least in the first year, are correlated to LSAT scores. Alfred B. Carlson & Charles E. Werts, Law School Admissions Council, *Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results*, in 3 Reports Of LSAC Sponsored Research 211, 253 (1977). The more recent LSAC Bar Study reaches the same conclusion. *See LSAC Study*, *supra* note 43. This raises an additional question: If the bar exam basically verifies successful law school performance, is it not redundant, and why bother with the bar exam at all? *See* Hansen, *supra* note 11, at 1206.

45. Wegner demonstrates how students who have developed particular analytical skills prior to law school will not only score higher on the LSAT, but will carry that advantage into first-year grades. Once the advantage is "built in," it is difficult, if not impossible, for others who develop the skill later to catch up, since

as much or as little with those students during their three years as they desire.[46] In many instances, perhaps particularly in the elite schools,[47] this results more in intellectually interesting theoretical conversations disconnected from the practice of law than in learning the skills and substance required for effective practice.[48] I do not mean to devalue theory, interdisciplinary or other intellectual work conducted at a high level, all of which

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the bar exam not only correlates with law school grades, but is actually, to some degree, scaled to them, at least to the extent that the same skills tested on the bar exam are emphasized in most law school courses. *See, e.g.*, Howarth, *supra* note 11. A self-fulfilling prophecy emerges: if a law school can capture those students who have the relevant skills in its admissions process, it can be reasonably confident of their ultimate success, whatever it does with them over the ensuing three years. *See* Wegner, *supra* note 15. While Wegner does not explicitly make this argument, it can be fairly inferred.

46. Vaughns, *supra* note 27, at 471, citing Derrick A. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. Tol. L. Rev. 539, 555 ("[A]t some of the most highly regarded law schools the number of applicants exceed the number of admissions by so substantial a margin that the quality of student accepted is so high many of them could learn the law if the school merely provided them with the books."). *See also* Moran, *supra* note 8, at 651.

47. These elite institutions, which generally serve as gateways for the large firms, have also been able, at least in the past, to rely on the firms to supply training in lawyering skills, and even in some of the substantive law which the graduates will practice.

> Legal educators at elite schools produce what they must perceive to be a finished product, one capable of entering the practice of law upon graduation. Law firms, however, view that finished product as, at best, a diamond in the rough. They still must educate new associates about the intricacies of the practice of law. From the perspective of these firms, law schools do not produce lawyers. Some megafirms have adapted so well to this state of affairs that they actually prefer to train their attorneys within their own systems.

Johnson, *supra* note 39, 1245-46. Unfortunately, with the ever-increasing demand for billable hours, the opportunities for such in-house training are declining or disappearing. *See* Fulton Haight, *Law Schools Are Still Training People to Be Associates in Major Law Firms*, B. Examiner, Feb. 1990, at 24-25; Douglas D. Roehe, *Practice Skills Teaching and Testing as Part of the Bar Admissions Process*, B. Examiner, Feb. 1995, at 27; Deborah L. Rhode, *The Profession and Its Discontents*, 61 Ohio St. L.J. 1335, 1339 (2000); Colloquium, *The Lives and Times of Law School Deans: Local Leaders of Legal Academy Sound Off*, Legal Times, Sept. 7, 1998, at 532; *Legal Bill*, The American Lawyer, May 1997, at 7.

48. ABA accreditation standards have evolved to encompass the movement from a purely doctrinal and analytical mode of law school teaching tested on the bar to a requirement that law schools actually prepare graduates for law practice. *See* Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, B. Examiner, Feb. 1995, at 36, 37-38 (chronicling the amendment of Standard 301a to incorporate, in part, concerns expressed by the MacCrate Report).

are also important at schools like CUNY, but rather to suggest that commitment to an excessively theoretical pedagogy, to the exclusion of lawyering skills and practice-oriented instruction, fails to adequately serve the profession and the public.

c) *Control over Curriculum*

The next "perverse effect" of the bar exam relates to the curriculum. One of the major arguments made against the diploma privilege in Wisconsin and in the past, other states, is that the tradeoff for automatic admission to the bar is substantially greater state control over the curriculum of law schools in those states.[49] This flies in the face of the widely-accepted belief that a law school's faculty should control the law school's curriculum.[50] In fact, however, although the faculty may design and determine the curriculum, the decision by bar examiners as to which subjects to test[51] has a huge impact upon the choices

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49. The history of the diploma privilege is fully set forth in Moran, *supra* note 8. Wisconsin's diploma privilege has been characterized as "the most restrictive . . . ever written." Thomas W. Goldman, *Use of the Diploma Privilege in The United States*, 10 TULSA L.J. 36, 42 (1972). It requires that students take ten specific courses (or thirty credits) and achieve a grade point average of seventy-seven, and, further, that students take at least sixty of their law school credits in thirty subject areas also receiving at least a seventy-seven average. Moran, *supra* note 8, at 648.

50. *See, e.g.*, Geoffrey C. Hazard, Jr., *Curriculum Structure and Faculty Structure*, 35 J. LEGAL EDUC. 326, 329 (1985). For a more recent review, incorporating increased knowledge of and concerns about experiential learning and skills training, see Stuckey, *supra* note 10, at 663-65. Where state rules on Bar admission required that substantial curricular requirements be satisfied by applicants, the American Bar Association criticized them (in the case of Indiana and South Carolina) on the grounds that they "interfere[d] with the duty and responsibility of each individual law school faculty to determine and periodically to revise the law school curriculum . . . ." James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292, 297.

51. *See* George N. Stevens, *Diploma Privilege, Bar Examination or Open Admission*, B. EXAMINER, May 1997, at 15, 25 (surveying the reasons for, and value of, the bar exam, including the need for the State Bar to "retain a voice in the qualification process either through a bar examination or by insisting upon a direct voice in compulsory curriculum planning . . ."). In fact, the bar exam gives the state—through its bar examiners, if not the state bar itself—a substantial, if not compulsory, say in the law school curriculum. *See also* W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 HOW. L.J. 563, 566 n.14 (1989) (citing Charles D. Kelso, *In the Shadow of the Bar Examiner, Can True Lawyering be Taught?*, in LEARNING AND THE LAW 39, 45 (Charles D. Kelso ed., 1976)) ("Bar examinations have a tendency to turn law schools into high powered cram courses by forcing students to make curricular choices based on subjects tested by the bar.").

made by students in their course selection.[52] The law school curriculum is controlled *de facto*, as opposed to *de jure*, by the bar examiners.[53] Thus, whatever electives may be offered in any given institution, students almost invariably flock to those courses which are tested on the bar examination.[54] Whether or not this is a good thing for students and/or legal education,[55] the faculty's control of the curriculum is more illusory than real.

On the other hand, there is an additional "perverse effect" whereby the bar exam, as shaped by the bar examiners' choice of subjects to be covered, affects law school curricula. For example, several years ago in New York when the bar examiners decreased the number of subjects tested on the bar, they included administrative law[56] among the newly-purged subjects. Most observers of law practice as well as most practicing lawyers would confirm that administrative or agency law, after contracts, is perhaps the single subject most commonly encountered by lawyers in our state.[57] However, because administrative law is no longer tested, few schools now require

52. *See, e.g.*, Howarth, *supra* note 11, at 928; ABCNY *Bar Report*, *supra* note 9, at 479.

53. This was one of the arguments for the bar exam propounded by one of its great defenders, Erwin Griswold. J.R. Jubin, *Perceptions and Plans for Testing, Research & Development*, B. EXAMINER, May 1985, at 11, 12, 14 (remarks of Dean Griswold). *See* Carolyn E. Jones, *The Bar Exam: To Be or Not to Be; That is the Question*, B. EXAMINER, May 1994, at 15, 16.

54. *See* Hansen, *supra* note 11, at 1221 ("Even if a school has broad offerings, the students may select their courses with an eye toward the bar exam, taking only courses which they perceive will help them on the bar exam instead of courses they perceive will help them in their careers.")

55. The Working Group on Diversity of the ABA Out-of-the-Box Committee suggests that because "the topics covered on the exam make up a large part of most law students' actual curriculum . . . [the bar exam] constrains curricular offerings, especially in smaller law schools." Working Group on Diversity, *Position Paper* 19, Sept. 23, 2002, *in* Memorandum from Dean John Attanasio & Dean C. Yu, Esq., Co-Chairs, Out-of-the-Box Committee, ABA Section of Legal Education, to the Deans of ABA-Approved Law Schools [hereinafter *Position Paper*] (on file with author).

56. ABCNY *Bar Report*, *supra* note 9, at 476; N.Y. COMP. CODES R. & REGS. tit. 22, § 6000.6(b) (2000).

57. Significantly, familiarity with the administrative law process is among the skills in MacCrate Skills, Litigation and Alternative Dispute Resolution Procedures, § 3(a) "Knowledge of the Fundamentals of Advocacy in Administrative and Executive Forums. . . ." MacCrate Report, *supra* note 1, at 196.

it, few students choose it,[58] and a generation of law graduates may now enter practice with little or no understanding of this important area.

d) *Creating False Consumer Confidence*

The fourth "perverse effect" of the bar exam is that it creates an all-together false sense of security for consumers.[59] Most people believe that the bar exam is a rigorous test which weeds out those who are capable of practicing law from those who are not.[60] The belief that the bar examination in fact protects consumers of legal services is widespread.[61] And yet, this belief is, based on my experience and on the anecdotal experience of my judicial colleagues, as well as the recorded numbers of disciplinary complaints and malpractice actions, demonstrably untrue.[62] If we were to seriously hold law schools to a stan-

58. Recognizing the importance of administrative law to the actual practice of the law, CUNY has retained it as a required course. Only two of the other fourteen New York law schools require their students take a course containing a basic administrative law component. Columbia requires "Foundations of the Regulatory State," while Hofstra includes some Administrative Law in "Legislating Institutions," where instructional focus is shared with courts and legislatures. Cardozo encourages, but does not require, students to take Administrative Law. Review of all NY State law school catalogs and websites, June 2002.

59. This is probably more true for individuals than for high-end users of legal services like corporations. Given the proliferation of lawyer advertising, individuals are more likely to choose lawyers with whom they—or their friends or associates—have had no prior contact, so that the presumption of competence is especially (if not always in fact) important.

60. Bar examiners rely on this widely held belief. *Report and Recommendation*, *supra* note 18, at 21 ("The public is entitled to the assurance that the licensed lawyer has the requisite legal knowledge and skills to deliver competent representation."). For a full discussion of whether the bar exam tests minimal competency to practice law (which I argue it does not) and what constitutes competency, see Curcio, *supra* note 14, at 366 ("It is wrong to represent to the public that bar licensing requirements ensure minimal competence when, in fact, these requirements screen for only a narrow range of skills that competent lawyers should possess."); Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, N.Y. St. B. J., July-Aug. 1991, at 34, 35-36.

61. This is not inconsistent with the growing disregard in which lawyers are held. The public can—and I think does—believe that the bar exam weeds out graduates who are not competent, but that many of those once competent graduates who pass later become unacceptably careless, unethical, or more concerned with making money than with doing justice.

62. *See, e.g.*, Gary Spencer, *Steady Increase in Complaints Against Lawyers is Reported*, N.Y. L.J., Sept. 8, 1999, at 1; John Caher, *Hundreds of Lawyers Disciplined*, ALB. TIMES-UNION, Sept. 4, 1999, at B2; Denise Callahan, *Few Lawyers on*

dard of competence for graduating their students,[63] the bar examination would not be so significant a gatekeeper against inadequately prepared or incompetent practitioners. Instead, the law schools are let off the hook, and the bar exam becomes the only barrier.[64] Unfortunately, it is all too porous for those who are poorly or inadequately prepared, at the same time that it is far too solid a barrier for many of those whom anecdotal experience demonstrates would and will be excellent lawyers.[65]

e) *Reinforcing the Myth of a "Unitary Profession" and "Unitary Legal Education"*

Fifth, the bar exam perpetuates what I believe to be an unhealthy myth concerning the unitary nature of the profession and of legal education. Whatever the original reason for this mystification in seizing the power of self-governance of the profession,[66] the reality of today's practice makes a lie of the origi-

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Wrong End of Law: State Show Number of Sanctioned Solicitors is Rising, IND. LAW., Mar. 14, 2001, at 11. Though disciplinary complaints and sanctions have seemed to stabilize in some jurisdictions, see Tom Kertscher, *Fewer Lawyers Disciplined Last Year*, MILWAUKEE JOURNAL SENTINEL, Nov. 11, 2000, at 3B (graduates of law schools in Wisconsin, remember, enjoy the diploma privilege), such actions are generally on the rise. In some cases, this may be due to increased vigilance. *See* Joe Gyan, Jr., *La. High Court Says Crawford, Lawyer Disciplinary Actions Up*, THE ADVOCATE, June 1, 2000 at B10; Bruce Schultz, *Louisiana's Lawyer Discipline System Gets Tougher*, THE ADVOCATE, Nov. 19, 2000, at A1.

63 This is, presumably, the intent of the 1993 amendment to ABA accreditation Standard 301(a) discussed by MacCrate, *supra* note 46. *See also* Stuckey, *supra* note 10, at 668 ("The core purpose of legal education is to teach students 'to be minimally competent for their first professional jobs, supervised or unsupervised.'").

64 The ABA and the National Conference of Bar Examiners (NCBE) have consistently taken the position that "law schools should not be entrusted to certify competency." Rogers, *supra* note 51, at 576.

> The background of this position may be found in the "Minimum Standards of the American Bar Association for Legal Education" adopted in 1921 [and reaffirmed in 1971] which provided that: "[G]raduation from a Law School should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness."

Id. at 575 n.67 (citation omitted).

65. *See infra* Part XIII(C)(1).

66. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). For an interesting discussion of the history of (if not the rationale for) the development of the bar's self-governance, see Special Committee on the Law Governing Firm Structure and Operation, N.Y. State Bar Ass'n, *Preserving*

nal notion of unitary practice. I want, however, to be clear here that I am talking about the practice of the profession, not the underlying values which, in theory and aspiration, continue to unite its members.[67] Lawyers can and should reaffirm those core values regardless of the setting in which they practice.

In practice, however, there are probably few professions as segmented as the law.[68] At one end of the spectrum, there are small firm or solo practitioners who practice family or landlord-tenant law in the lower state courts, or who have practices involving counseling on matters of small economic value. At the other end, huge firms do incredibly sophisticated mergers and acquisitions work involving international commercial law and global capitalism at its most advanced.[69] Lawyers working at the two ends of the spectrum seldom utilize similar skills or similar knowledge bases.[70] The idea that a single law school

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the Core Values of the American Legal Profession, *available at* http://www.law.cornell.edu/ethics/mdp1.htm (last visited Feb. 10, 2003).

67. These values are well-described and persuasively presented in the MacCrate Report. MacCrate Report, *supra* note 1, at 87-103. The idea that there is a common set of ethical norms is a basic premise of the profession. *See* MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1983). *But see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2, at 64-56 (1986) (identifying and criticizing this idea).

68. *See* Paper of the Working Group on the Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition and Globalization, *in* Memorandum from Dean John Attanasio and Diane C. Yu, Esq., Co-Chairs, Out-of-the-Box Committee, ABA Section of Legal Education, to the Deans of ABA-Approved Law Schools [hereinafter *Structure of Legal Education*] (describing the increasing stratification of the legal profession and of legal education). This stratification is increasing. *See, e.g.*, Marc Galanter, *"Old and In the Way": The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1088 (1999) (demonstrating a shift from 1967, where businesses bought 39% of legal services, and individuals bought 55%, to 1992, when businesses' share increased to 51%, and individuals' decreased to 40%); *Profession and Public Interest*, *supra* note 30, at 1508-09.

69. A landmark study of the dichotomy of lawyers' work, focusing on the distinction between those who serve business or corporate clients, and those who serve personal clients, was conducted in Chicago in 1975, and again, showing an even more dramatic spread, in 1995. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998) [hereinafter *Changing Character of Lawyers' Work*]. This work coined the phrase, "two hemispheres," for describing the departure from a perceived "unitary profession." *Id.* at 752.

70. *See Profession and Public Interest*, *supra* note 30, at 1509 ("Legal workplaces vary considerably, and the professional lives of security specialists in a

education equips any lawyer to do every kind of legal work is as preposterous as the notion that a medical degree insures the competence of every medical school graduate to do sophisticated psychopharmacology, patient counseling, preventive medicine, or brain surgery. Yet the bar exam, which purports to test the qualifications of law school graduates to practice all varieties and levels of law, perpetuates the myth of a unitary profession, redounding to the detriment of consumers in potentially dangerous ways.[71]

On a more practical level, perpetuating the myth of the unitary practice of law and the unitary nature of legal education means that the students in individual institutions with differing client bases (by which I mean the clients to be served by the graduates of those institutions) may be seriously ill-served.[72] It is foolish, or even irresponsible, for law schools to pretend that all their graduates are going to large firms, and train them accordingly, when the reality is that more than half will be in solo

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large Wall Street firm bear little resemblance to those of small town divorce lawyers practicing on their own."). I do not mean to suggest that ordinary legal problems are necessarily less complex, but rather that *specialized* problems draw on specialized knowledge bases which are not part of a general legal education. Intellectual rigor and analytical skills can—and should—be deployed across the entire spectrum.

71. Gillian Hadfield offers an interesting and provocative critique of the way in which the myth of the unified profession injures consumers of legal services, especially personal legal services, by pricing them beyond most consumers' ability to pay, noting also the corresponding threat to lawyers' role in protection of individual rights.

> [B]y keeping under one roof the multiple roles for a modern legal system—management of the economy, individual justice, social control, and so on—the role that complexity and monopoly accord to wealth, rather than cost, in the market allocation of lawyers perpetuates a system that is heavily, and it seems increasingly, skewed toward managing the economy rather than safeguarding just relationships and democratic institutions.

Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953, 1004 (2000).

72. Phoebe Haddon is one of the few legal educators who has noted the importance of determining who will be served by a law school's graduates. Phoebe A. Haddon, *Redefining Our Roles in the Battle for Inclusion of People of Color in Legal Education*, 31 New Eng. L. Rev. 709, 721 (1997) ("Few schools examine their own teaching and curriculum holistically—with an eye toward the clients that lawyers will be serving . . . ."). *See also* Note, *The Relationship Between Equality and Access in Law School Admissions*, 113 Harv. L. Rev. 1449, 1457 (2000) (proposing that law schools evaluate their selection criteria in light of their missions) [hereinafter *Equality and Law School Admission*].

or small practice,[73] confronting entirely different legal issues and practice concerns. Such myopic training, aided, abetted and enforced by a unitary bar examination, fails to serve the actual client population.[74]

f) *Failure to Test the Law*

Sixth, the bar exam, or at least a major and especially important part of it, the Multi-State Bar Examination (or the MBE) does not, in fact, test the law which practitioners will actually encounter and apply when they enter the profession.[75] The MBE is a major component of almost all bar exams, generally taking up one full day of a standard two-day bar examination.[76] The MBE consists of 200 multiple-choice questions covering six subject areas[77] which *do not test the law of the state in which the exam is being administered*, but rather concern

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73. According to studies done by the ABA and American Bar Foundation in 1994, 38% of lawyers in private practice work in large firms of twenty or more, with another 10% working as corporate counsel or similar positions in private industry. American Bar Association, *Statistics, available at* http://www.abanet.org/solo/statistics.html (last visited Feb. 1, 2003). In 1995, 47% of all lawyers practicing in firms were solo practitioners. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, 7 (1999). For a discussion of the surprising increase in solo practitioners in the 1990's, see *Dream Deferred*, *supra* note 21, at 18.

74. *See* Mary Kay Kane, *What's Out There—Trends and Ideas Affecting Bar Examiners: A View from the Law School*, B. EXAMINER, Aug. 2000, at 20, 26 (arguing that there is a "widening gap between students pursuing small firm or government practice and those headed for large firm practice . . .").

75. Interestingly, this was the reason that New York rejected the MBE until 1979. Fisher, *supra* note 3, at 6 (quoting Holt-Harris) ("The New York Examination tested the proficiency of the candidate in New York Law, not in the general rule or the weight of authority. I felt that the 'best answer' was a red herring . . . ." Holt-Harris, former Chair of the New York State Board of Law Examiners, "changed [his] mind" after he "came to realize the value of 'national norming' and scaling to the national norm . . . ." *Id.*

76. The MBE contributes a substantial portion of the total examination score in most states, generally counting between one third and one half of the total score. More importantly, almost all states scale the scoring of the remaining portion of the exam (usually essays, and in New York, also including fifty short answer questions) to the applicant's score on the MBE. *See, e.g.*, Merritt et al., *supra* note 20, at 932, 933 n.15, 934 n.16. For a discussion of the theoretical bases for various ways of combining or scaling MBE and essay scores, see Stephen Klein, *Options for Combining MBE and Essay Scores*, B. EXAMINER, Nov. 1995, at 38.

77. The six subjects areas are Constitutional Law, Contracts, Criminal Law, Evidence, Legal Property, and Torts. Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, B. EXAMINER, Feb. 1999, at 25, 28.

multi-state law, allegedly the 'majority view'[78] of the application of legal principles. This majority view is sometimes directly opposite to the rule applied in the state of administration.[79] In the 1.8 minutes per question allowed for testing "in minute detail, under extraordinary pressure,"[80] the MBE requires the applicant to "ignore refinements and pick the proper response by drawing upon that assemblage of 'majority' rules, 'traditional' rules and 'trends' which [she] presumably carries in [her] head."[81] Not surprisingly, there is sometimes no right answer, just one which is least wrong.[82] This inappropriate emphasis on general or majority law, unrelated to the law of the state of administration, is compounded in states that, partly as a matter of economy,[83] also purchase essays created by the National Conference of Bar Examiners (NCBE), the Multi-State Essay Examination (MEE).[84]

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78. *See* NAT'L CONFERENCE OF BAR EXAMINERS, *Description of the MBE*, *available at* http://www.ncbex.org/tests.htm (last visited Feb. 1, 2003) (stating that the MBE calls for application of "fundamental legal principles rather than local case or statutory law").

79. *See, e.g.*, J. Kirkland Grant, *The Bar Examination: Anachronism or Gatekeeper to the Profession?*, N.Y. ST. B. J., May-June 1998, at 12, 14 ("An MBE answer may be even contradictory to New York law as it concentrates on the majority rule rather than applicable New York law where New York adopts the minority position.").

80. ABCNY *Bar Report*, *supra* note 9, at 480 (quoting Jeffrey F. Dubin, *Rethinking the Exam: The Case of Fundamental Change*, MANHATTAN LAWYER, June 1990, at 16).

81. *Id.* (quoting Max A. Pack, *The Case Against the Objective MultiState Bar Examination*, 25 J. LEGAL EDUC. 66, 67 (1973)).

82. *Id.*

83. Using the MEE results in substantial savings to states which choose to employ it rather than tailor their own essays. *See* Marygold Shire Melli, *The Multistate Essay Examination*, B. EXAMINER, Nov. 1988, at 5, 6.

84. The MEE consists of seven questions that are each intended to be answered in thirty minutes. It tests subjects not covered by the MBE: Agency & Partnership; Commercial Paper; Conflict of Laws (an area where states differ widely in the approach they have adopted); Corporations; Decedents' Estates; Family Law (again, an area with wide differences among the states); Federal Civil Procedure; Sales; Secured Transactions; and Trusts & Future Interests. *See* http://www.legaled.com/meeinfo.htm (last visited May 12, 2003). Fourteen jurisdictions currently use the MEE with Alabama joining in July 2003. COMPREHENSIVE GUIDE, *supra* note 13, at 21, Chart VI. Unlike the MBE, "[a] number of states instruct their applicants to answer the questions according to state law, but the majority of jurisdictions have their candidates answer according to generally accepted principles of law." Jane Smith, *Testing, Testing*, B. EXAMINER, Nov. 1996, at 24, 25. NCBE attempts to alleviate the tension between the majority view and

If a successful bar taker does not carefully separate (and discard) that which she has memorized for the MBE from that which she memorized for the state essays testing local law[85] (and, where given, state multiple-choice questions), she may well make serious errors in practice when she first encounters the tested subjects in the real world.[86] This is precisely the opposite result one would expect from an examination which purports to test—and, in some ways, ensure—competence in the basic substantive law of the state administering the exam. The MBE's testing methodology is equally disconnected from reality: think for a moment of the last time a judge gave a lawyer several choices when asking a pointed legal question, or when, in doing legal research, or making an evidentiary objection, there were only four distinct possibilities?[87]

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idiosyncratic state law through its *Checklist for Preparation of Essay Questions*, B. EXAMINER, Nov. 1995, at 36.

85. For example, the MBE tests the federal law of evidence which is quite different from New York evidentiary law. *See* ABCNY *Bar Report*, *supra* note 9, at 482-83.

86. Florida provides a good example. *See In re* Pet. of Fla. Bd. of Bar Exam'rs to Amend Rules of the Sup. Ct. Relating to Admissions to the Bar, No. 96, 689 (Fla. filed Apr. 6, 2000) (on file with author):

> Competent lawyers do not rely on what they remember from their bar review course when asked to advise a client. This is particularly true because half of the Florida Bar Exam, that is the Multi-State portion of the exam, tests common law rules that are no longer, and in some instances never were, applicable in Florida.

87. *See* Steven C. Bahls, *Standard Setting: The Impact of Higher Standards on the Quality of Legal Education*, B. EXAMINER, Nov. 2001, at 15, 16 (decrying multiple-choice questions and noting that "judges and clients don't ask questions and then give the lawyer four or five answers to choose from"). For a more radical critique, see Howarth, *supra* note 11, at 929:

> Even more insidious than the bar's influence on what areas of the law are deemed important, is the bar's influence on how the law is understood . . . .
>
> The bar reinforces teaching that the law is fixed, neutral, and natural, rather than contingent, mutable, and often deeply flawed. But, to understand what legal doctrine one should use on behalf of a client, we need to understand a doctrine's limitations and inequities . . . . The bar's memorization and analysis program undermines and defeats such knowledge, . . . assum[ing] that the rule's existence is justification enough—the end of legal analysis, rather than the beginning.

g) *Testing the Skills of Test-Taking, Not Knowledge of the Law*

The amount of time allocated to each MBE question (and to the multiple-choice questions on the state sections of bar exams) underscores the oft observed criticism that, in large part, the bar exam tests test-taking skills,[88] rather than the law or lawyering skills.[89] And, of course, as most applicants believe—else why would they invest in bar review courses[90]—it tests what you learn in those courses,[91] not the higher skills of synthesis actually required to practice law.[92]

In an extraordinarily thoughtful new examination of the nature of teaching and learning in legal education,[93] Judith

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88. ABCNY *Bar Report*, *supra* note 9, at 482. *See also* Hansen, *supra* note 11, at 1220 ("The bar exam places a premium on cramming and rote memorization . . . ."). "In addition, success on the bar exam depends on understanding the particular format, grading standards, and difficulty of the bar exam in the applicant's jurisdiction." Hansen, *supra* note 11, at 1220 n.146 (citation omitted).

89. The ABCNY report opines:

> While the Committee is cognizant of the concern that the examination test knowledge across a range of subject areas (that theoretically might be required for the unsupervised practice of law by some hypothetical generalist) the Committee is more concerned that the examination makes no attempt to test for the contextual use of legal knowledge that is employed by lawyers in the real world.

ABCNY *Bar Report*, *supra* note 9, at 481.

90. With the stakes today higher than ever, thanks to the many thousands of dollars it takes to finance the average J.D., graduating law students aren't shy about seeking help to tackle the bar exam. Most of them know they've forgotten what they learned in their first-year property class, anyway.
>
> That's why so many students and graduates are willing to plunk down large sums, often over $1,000 and even up to $5,000, for an intensive review course.

Rebecca Luczyki, *The Bar Review Choice*, NAT'L JURIST, Jan.-Feb. 2001, at 18-19.

91. This view gains support from Standard 302(f) of the ABA's accreditation standards. ABA STANDARDS, *supra* note 36, Standard 302(f), which prohibits law schools from offering credit for a "bar examination preparation course." At least one clear implication of this rule is that "bar examination preparation courses simply teach test-taking skills, which have no place in preparing students to practice law." Maureen Straub Kordesh, *Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test*, 30 U. MEM. L. REV. 299, 302 (2000).

92. *See* Hansen, *supra* note 11, at 210. This "fact," whether verifiably true, or deeply believed, also has serious consequences for those who cannot afford the exams, or who pay for them only by extra outside work which comes at the cost of bar review study time.

93. Wegner, *supra* note 15.

Wegner uncovers and explicates the serious dissonance between what is taught and what is tested in legal education,[94] and the unintended but disparate impact which that dissonance has on differing groups of students.[95]

Vastly simplified here, Wegner's thesis is that there is a disconnect between relevant (to lawyering skills) learning and assessment. Her "guiding principles" are "the importance of recognizing the multifaceted, progressive nature of legal learning; the wisdom of considering precise purposes for assessment; and the potential for enhancing learning through attention to the relationship of assessment systems used in legal education and the bar exam."[96] Law school grades, she asserts, often are part of what she refers to as the "hidden curriculum." Wegner draws on a well-known study done at MIT. That study described the official curriculum, emphasizing "high level educational goals such as those central to law school classrooms (development of independent thinking, analysis, and problem solving capabilities), [as] undercut by assessment and teaching practices that suggested, in the eyes of students, that it was most important to memorize facts and theories to achieve success."[97] The construct of the "hidden curriculum" may also be used to describe the difference between what bar examiners say they are testing and what, to the contrary, applicants, like the

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94 In her study of legal education, Wegner found, for example, that "classroom teaching in first year courses tends to focus primarily on certain intellectual tasks, including comprehension, analysis, application of legal principles to simple fact patterns, synthesis of related cases, and limited forms of 'internal' evaluation concerning logic and doctrinal consistency." *Id.* Looking, however, at the single, end-of-course exams that typically constitute a student's grade, she found that "strong performance on essay examinations requires demonstrated skill in just those skills that are not directly taught." *Id.*

95 There are distinct advantages for some students— "the existing mismatch between what is taught and what is tested appears significantly to advantage students who enter law school with 'expert-like' characteristics or who have a well-developed expertise in how to learn in the face of significant unknowns"—over others—"those who lack such characteristics and who have not had the opportunity to develop expertise in learning in unknown complex fields while operating very much on their own can be expected to perform much more poorly . . . ." *Id.* In addition, Wegner found that there are "[a] different set of disadvantages—implicit in the existing regime—one involving visible student characteristics (stereotype threat, *see* discussion *infra* Part VIII(b)) and the other invisible ones (cognitive styles, *see* discussion *infra* Part VII(b))." Wegner, *supra* note 15.

96. *Id.*

97. *Id.*

MIT students in Sambell and McDowell's study, actually experience. This assumes that the bar exam's main purpose is to ascertain minimum competence to practice law, and thus protect the consumer from incompetence. This has been the NCBE's position, articulated at its 1987 conference by Joseph R. Julin, at that time NCBE's Director of Testing, Research & Development.[98]

Wegner's study has major implications for the bar examination because of the relationship between the MBE (and, thus, bar examination scores)[99] and law school grades.[100] That is, to the extent there are distortions in law school grading,[101] those distortions, unrelated to the purpose of the bar exam,[102] carry over into and influence, in an entirely problematic fashion, the bar exam itself.[103] Similarly, Wegner's criticism of the assessment systems used in legal education strongly resonates with criticisms of the bar exam, including particularly its disparate impact on non-majority students.[104]

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98. Dubin, *supra* note 60, at 36.

99. *See* Moran, *supra* note 8, at 651.

100. Wegner, *supra* note 15 ("Multi-state bar examination questions are – validated with an eye to – performance in law school."). *See* Carlson & Werts, *supra* note 44, at 211. *See also* Merritt et al., *supra* note 20, at 211 n.14 (California MBE scores track LSAT scores closely). Hansen, *supra* note 11, at 1206.

101. For an excellent analysis and critique of law school grading, see E. Joshua Rosenkranz, *Law Review's Empire*, 39 Hastings L.J. 659, 892-94 (1998). Rosenkranz argues that the law school grading system is "inaccurate and imprecise, at best, and arbitrary, at worst." *Id.* at 893.

102. *See* Fisher, *supra* note 3.

103. Wegner conceptualizes law school grading as occurring "in the context of a multi-part legal assessment system, which includes admissions testing and post-graduate bar examination regimes." Wegner, *supra* note 15.

104. She writes:

> The current system of law school examinations thus has the potential for disadvantaging some students while it also advantages others. The exam performance of students vulnerable to "stereotype threat" may be depressed in situations where high-stakes examinations are seen to reflect ability and are perceived as reflecting stereotypical patterns of performance, as is often the case. Current exam formats that require students to process a great deal of information under significant time pressure may compound problems of stereotype threat that make it difficult for those affected to work quickly and to maintain focus, while also imposing special burdens on students whose physiological characteristics and cognitive styles causes them to process information more slowly or analyze problems presented in more wholistic terms.

Finally, her nuanced discussion of the difference in law school grading and assessment between "sorting" and "weeding" functions is important to another concern about the bar exam. Testing may be used to "sort" examinees, so as to create rankings which allow those who are relying on test scores to make educated choices among those who have demonstrated basic competence. Law school grades, for example, are utilized by employers to identify the "best" students, not those who are "merely" competent. Similarly, SAT scores permit colleges to admit the "best" high school graduates willing to come to their schools. Sorting is, ultimately, about creating and maintaining hierarchy. "Weeding," on the other hand, seeks to determine—and fail—those who lack minimum competence in the skills that the evaluative device is testing. Weeding is a blunt tool which gives no information about those who passed other than that they possess (if the device is valid) minimum competence. Unlike sorting, which depends on gradations (A+ to D-, 100-65), weeding can utilize a pass/fail standard. The stated purpose of the bar exam, unlike that of law school grades, is weeding, but "sorting" criteria and methodologies have been employed, partly because of a (in my view) misplaced belief that they permit validation of the examination.[105]

The bar exam's utilization of sorting rather than weeding explicates another counterintuitive[106] feature of the bar exam—that a single point difference in an applicant's score marks the difference between passing and failing, or the bar examiner's assessment that the applicant is or is not competent to practice law.[107] Even more counter-intuitively, a single point difference

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Wegner, *supra* note 15. For a discussion of "stereotype threat," see *infra* Part VII.B.

105. *See* discussion *infra* note 574.

106. If counterintuitive is also counterfactual, then it is also "mutually perverse," in several respects. Craig v. Boren, 429 U.S. 190, 213 (1976) (Stevens, J., concurring). The notion of the precise calibration used in determining the passing score for any bar administration creates entirely unwarranted consumer confidence in a process ("sorting") which is, itself, only marginally related to the assessment of minimum confidence ("weeding"). Weeding, apparently the goal of the bar examination, requires minimal gradations such as pass/fail. Use of a *sorting* system would thus appear antithetical to the bar exam's basic purpose. That the ultimate result of a bar exam is that one passes or fails, by as little as a single point, does not relieve the bar exam of its sorting function.

107. The ability of bar examiners to decide, arbitrarily as many would argue, *see supra* notes 16-26, and Merrit et al., *supra* note 20, that a given score is a pass

might have an entirely opposite result in a different jurisdiction.[108]

h) *Impact of the Bar Exam on Law School Assessment*

In the same way that the bar exam affects law school curricula, the bar exam also affects the way in which legal education assesses student performance. The tests which law professors administer, usually only at the conclusion of their courses, look remarkably like the bar exam. Most law school exams are three hours long and consist of a number of essays (averaging an hour or so in length) that, like the state essays and MEE, focus on issue-spotting, and/or multiple-choice questions (MCQ's).[109] There is an unsurprising connection between the form of assessment used by bar examiners and by law professors: for example, the use of MCQ's increased following adoption of the MBE.[110]

This might be an interesting observation, rather than a matter of concern, but for a basic premise of education, "assessment drives student learning."[111] As the Director of Testing for the NCBE has noted, it is critical to develop assessments in

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one year, and a fail the next demonstrates that something more complex than the question, "is this applicant minimally competent to practice law unsupervised?" is embedded in the examination and its calibrated scoring system. For the way in which states use and choose different "passing" scores, see Merritt et al., *supra* note 20. Also see my anecdotal example *infra* notes 546-54 and accompanying text.

108. For the way in which states use and choose different passing scores, see Comprehensive Guide, *supra* note 13, at 22 Chart VII; Merritt et al., *supra* note 20, at 941.

109. Issues of law school exam construction were extensively discussed in a panel at the most recent AALS Annual Conference, *How to Construct a Law School Exam*, Washington, D.C. (Jan. 3, 2003) [hereinafter Exam Panel]. Three of the five speakers were from the NCBE: Susan Case, Director of Testing, Michael Kane, Director of Research, and Erica Moeser, President. Two law professors, Charles Daye and Sheldon Kurtz, rounded out the panel on the issue of using a single device to assess competence or knowledge (whether a year-end law school exam or the bar exam). See Mueller, *supra* note 32, at 209 ("[W]ithin the psychometric community—a field well-known for taking polar stances on everything from school tracking to affirmative action—using a single assessment device for a high-stakes purpose does have an easy answer: don't do it.").

110. Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, With a Prospective Emphasis on Law School Final Exams*, 65 UMKC L. Rev. 657, 664 (1997).

111. Oral presentation by Susan Case, Exam Panel, *supra* note 109.

which teaching to the test is a valid use of instructional time, and studying for the test is an important use of a student's study time.[112] In the same way the bar exam encourages the study and use of lower order skills,[113] legal education's adoption of similar assessment devices[114] results in an emphasis on facility and, often, memorization rather than the complex set of skills used by lawyers in legal analysis.[115] By limiting what and how we test, we correspondingly limit what students study and what they are taught.

i) *Decreasing Access to Justice*

While the profession consistently expresses concern about the large proportion of the American public that lacks access to legal services and thus access to justice,[116] the bar exam restricts and/or postpones entry into the profession of successful law graduates who could increase access. This is perhaps a kinder way of stating the oft-made criticism that the bar exam is profoundly anti-competitive, a "guild" restriction rather than a genuine test and guarantee of competence.[117] In a recent article, William Kidder tracks the decision to increase passing bar scores as it corresponds with the availability of legal jobs.[118] Not surprisingly, for those who believe the guild argument, as available jobs decrease, passing scores increase, thus decreas-

112. *Id.*; Wegner, *supra* note 15.

113. *See, e.g.*, Curcio, *supra* note 14, at 664-65; Mueller, *supra* note 32, at 204-05.

114. This is entirely reasonable since law schools are judged, in large part, by their graduates' ability to pass the bar. At CUNY, over time, we have become persuaded that it is necessary to use such evaluative devices in order to give students proficiency, familiarity and some level of comfort with them. However, because CUNY requires that every course include at least two evaluative devices, we maintain the ability also to test students' learning differently and more extensively and, we hope, to direct their learning to higher level skills.

115. *See* discussion *infra* note 130, concerning the MacCrate skill of legal analysis.

116. Legal education has also expressed concern that "[t]he academy has failed to train lawyers who provide legal services to the middle and working-classes, which, of course, comprise the overwhelming majority of American society." John B. Attanasio, *Foreword: The Out-of-the-Box Dialogues 5*, in Memorandum from Dean John Attanasio & Diane C. Yu, Esq., Co-Chairs, Out-of-the-Box Committee, ABA Section of Legal Education, to the Deans of ABA-Approved Law Schools [hereinafter Attanasio] (on file with author).

117. *See, e.g.*, Coldman, *supra* note 49.

118. *Drexel Deferred*, *supra* note 21, at 13-19.

ing the number of lawyers in competition for those jobs.[119] And, of course, decreasing the number of lawyers also tends to increase the price of legal services,[120] thus making representation less accessible to persons of moderate means.

Since the vast majority of applicants eventually pass the bar,[121] the bar exam works perversely in limiting rather than increasing access to justice, unless it can be shown that the delay in passing results in more competent lawyers. To my knowledge no one has attempted to make this showing which is, at the very least, counterintuitive[122] assuming that law graduates engage in real learning while in law school.[123]

IV. Lawyer Competence

Thus far, I have noted a number of ways in which the bar exam works contrary to its intended goals, or to goals widely held by legal education and the profession. These goals, subverted by the "perverse effects" of the bar exam, include fostering legal education's responsibility for the competence of its graduates, protecting faculty control of curriculum, ensuring consumer confidence, acknowledging and preparing graduates for the multitude of roles they may assume within the profession, promoting knowledge of the law of the jurisdiction to which an applicant seeks admission, and increasing access to justice. While there are many other valuable criticisms of the bar examination,[124] the two most serious ways in which the bar

119. *Id.* at 52. Ironically, this may also subject the profession to increased criticism and scrutiny. Kidder cites sociologist Magali Larson for the proposition that when a profession responds to the perception of overproduction of its members by enacting more stringent licensing requirements, this will tend to increase that profession's susceptibility to challenge because "it is at this level that the monopolistic goal of the professional project enters into visible contradiction with the democratizing and rationalizing dimensions potentially defined by the market orientation." MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 52 (1977).

120. *See, e.g.*, Lindfield *supra* note 71.

121. *See, e.g.*, *LSAC Study*, *supra* note 43, at 27.

122. That is, the further one is from legal education, the less of what she has learned will be retained.

123. If this is not the case, then there is no reason for law school to be a prerequisite to entry into the profession.

124. A particularly intriguing one, the development of which is beyond the scope of this essay, is the way in which the bar exam may, like the LSAT's and other allegedly neutral criteria, contribute to a "lock in model" of racial discrimina-

exam thwarts the profession's stated goals relate to the most pressing challenges faced by the profession: lawyer competence and diversity.[125]

a) *Failure to Test the Skills Necessary for Lawyer Competence*

As this volume of the *Pace Law Review* details, the 1992 MacCrate Report provided legal education and the profession with a comprehensive analysis and description of the skills actually employed by attorneys in the practice of law. The Report lists ten skills deemed necessary to competent practice: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute resolution procedures; organization and management of legal work; and recognizing and resolving ethical dilemmas.[126] Each skill is meticulously dissected into numerous sub-skills. The Report is almost universally acknowledged as authoritative;[127] for me, as a practicing lawyer

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tion in legal education and the profession which can be conceptualized in anti-trust terms as legally prohibited anti-competitive conduct foreclosing competition and creating impermissible barriers to entry. See the extremely thoughtful and provocative article by Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000).

125. Concern about lawyer competence is, of course, long-standing. "Former Chief Justice Warren Burger has been quoted as saying that 75-90 percent of American trial lawyers are dishonest, incompetent or both. Meanwhile, about 40,000 new lawyers enter the legal profession each year, and without any practical experience whatsoever, they can begin practicing . . ." PR NEWSWIRE, June 23, 1986. While this blurb for a 1986 book misquotes the former Chief Justice (Burger actually opined that somewhere "between one-third and one-half of lawyers appearing in serious cases were 'not really qualified to render fully adequate representation'") it does reflect a widespread belief in American culture. Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 289 (1986) (quoting *Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists*, 60 A.B.A. J. 171, 173-74 (1974)). *See, e.g.*, Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 644 (describing the attorney competence problem as serious).

126. MacCrate Report, *supra* note 1, at 138-40.

127. *See, e.g.*, Patrick R. Hugg, *Comparative Models for Legal Education in the United States: Improved Admissions Standards and Professional Training Centers*, 30 VAL. U. L. REV. 51, 55-59 (1995) (noting also that there have been some "poignant and at times indigent" responses); *see also* Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 136 (2001) (noting that, after ten years, "[t]he original list of ten lawyering skills described in the Mac-

and judge for 30 years, reading the Statement of Skills is a true "ah ha!" experience, brilliantly capturing the essence of a lawyer's work. If the purpose of the bar exam is to test minimum competence to practice law unsupervised, one would expect it to test all or most of the skills identified by the Report.[128] Perversely, the existing bar exam does not.[129]

The bar examiners claim that the exam tests legal analysis and, to some extent,[130] this is true. They also claim that it tests communication skills and problem solving; these assertions

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Crate Report have [sic] been remarkably resilient"). *But see, e.g.*, Carrie Menkel-Meadow, *Symposium on the 21st Century Lawyer: Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report— of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 593-98 (1994) (arguing that the MacCrate skills omit other qualities necessary for competent law practice).

126. I recognize the Report's observation that many of the skills are developed in the course of practice, and hence not possessed fully by law school graduation and its caution that, for this reason, the Report should not be utilized as the basis for a bar exam. MacCrate Report, *supra* note 1, at 131-33. To say that, at least aspirationally, one becomes a better client counselor, negotiator, or developer of facts over time, does not negate the need for even neophyte lawyers to have some knowledge of, and minimum competence in, these skills as in other MacCrate skills. However, since the purpose of the bar exam is to test minimum competence to practice law unsupervised, that is, taking sole responsibility for a client, the Report's caution misses the mark.

129. *See, e.g. Structure of Legal Education*, *supra* note 68, at 5 ("There currently exists a gap . . . between the knowledge and skills that the bar examiners test for and the knowledge and skills that the employers of law graduates are demanding.").

130. In the Commentary to Skill 2, Legal Analysis and Reasoning, that the Statement "reflects the prevailing conception of legal analysis as a means of reasoning from existing law and applying rules and principles established in prior judicial decisions (as well as other sources of law) to a new factual situation." MacCrate Report, *supra* note 1, at 136. Clearly, the bar exam tests this formulation. However, the Commentary goes on to note that it "diverges from the traditional case-method approach to teaching legal analysis" by taking into account two ways in which legal analysis differs in real-life practice. *Id.* at 156. Since the bar is testing for minimum competence in practice, not in the classroom (where the first formulation of legal analysis has been taught and tested, over and over), this "divergence" is critical. The first of the two ways is the unbounded (as opposed to closed) universe of facts which confront the practitioner. The second involves the reality of imperfect or incomplete knowledge of law—precisely the opposite of what the bar exam posits and requires. The Commentary notes: "In the case method, students develop legal analyses in situations in which they are familiar with the law to be applied . . . . [I]n practice, lawyers are often called upon to develop legal analyses in situations in which the lawyer is not familiar with the applicable law[.]" thus taking into account the need for additional research. *Id.* at 156. Surely new lawyers need such self-awareness and humility, rather than the stock answers for which the bar exam necessarily calls.

seem more questionable, or at least more limited. The MacCrate skill of communication includes both oral and written communication; clearly none of the intricacies of the former can be assessed by a written instrument. Written communication, however, subsumes an equally complex set of skills including, *inter alia*, the effective use of factual material,[131] effective elaboration of legal reasoning,[132] "[s]ubstantive and technical requirements for specialized kinds of legal writing . . . "[133] and methods for effectively recording or memorializing oral communications.[134] Problem solving, the first MacCrate skill, requires "identifying and diagnosing a problem,[135] generating alternative solutions and strategies,[136] developing a plan of action, implementing the plan, and keeping the planning process open to new information and ideas."[137]

Implementing the plan requires far more than writing an answer based on a closed file; it incorporates reflection and self-assessment[138] that clearly have no place on the bar exam. These are only a few examples of the complexity and necessary

131. *Id.* at 174, Skill 5.2b(5). This in turn includes more subtle choices, completely inappropriate for a bar exam, such as "[d]etermining whether facts should be presented in an abstract or concrete fashion." *Id.* at 174, Skill 5.2b(5)(C).

132. MacCrate Report, *supra* note 1, at 174, Skill 5.2b(6). Again, the bar exam format does not permit testing of these requirements, including, for example, "[m]aking appropriate determinations of whether to anticipate and answer objections, to dismiss them summarily, or not to address them at all[,]" although this is a critical skill for practicing lawyers. *Id.* at 174, Skill 5.2b(6)(D).

133. *Id.* at 174-75, Skill 5.2(b)(iii). These include the "[d]rafting of executory documents (for example, contracts, wills, trust instruments, covenants, consent decrees and corporate charters); and [l]egislative drafting (for example, drafting of statutes, administrative regulations, and ordinances)." *Id.* at 174-75, Skill 5.2(b)(iii)(A) and 5.2 (b)(iii)(C).

134. *Id.* at 175, Skill 5.2(c).

135. While at first glance the MPT might seem to provide an opportunity to exercise this skill, it actually calls more for issue spotting than a complex process which includes a focus on the client, her perception, or misperception of the problem, economic constraints, her goals, and possible courses of action, ranked in order of her preferences, needs and interests. *See* MacCrate Report, *supra* note 1, at 142, Skills 1.1(a), (c), (d) and (e).

136. *Id.* at 143, Skill 1.2. This is the antithesis of a successful bar exam answer.

137. *Id.* at 142.

138. This includes determining, for example, whether the lawyer has sufficient skill, expertise and knowledge to implement the plan, or whether the requirement of competent representation suggests the matter should be referred to another lawyer, and assessing whether parts of the plan require expertise in fields other than the law. *Id.* at 145-46, Skill 1.4(a)(1)-(iv).

contextualization of the MacCrate skills, that simply cannot be meaningfully evaluated in one or two 90-minute MPT questions (or anywhere else on the bar exam). Talismanic repetition of the "skills" the bar exam allegedly tests should not obscure that, with all the effort and goodwill brought to it by the bar examiners, the bar exam is an extremely limited—and poor—proxy for the skills lawyers need to provide minimally competent unsupervised representation.

More to the point, the existing bar exam does not even purport to test the majority of MacCrate skills, some of which, like counseling, negotiation, and alternative dispute resolution procedures, simply are not amenable to written tests. Others, like factual investigation and organization and management of legal work, could not possibly be evaluated within the closed universe and time constraints of the existing bar. Although Title VII law does not require a valid employment test to evaluate *all* the skills necessary for a job[139] where licensure is required to protect the public,[140] more than a few of those skills acknowledged as critical should be tested, and tested in an appropriately nuanced manner.[141]

b) *Disincentives to Teach Lawyering Skills*

Directly connected to the first point, the bar exam not only fails to test the MacCrate skills, but, by its single-minded focus on particular areas of substantive law, and an even more single minded focus on the way in which these areas are tested, the bar examination actually discourages law schools from offering

139. *See* discussion *infra* notes 271-76. *See, e.g.*, Guardians Ass'n of N.Y. City Police Dep't v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980) (holding that a valid test need not test for all the skills required for by a particular job)

140. In Title VII law, licensure tests are treated differently than other kinds of employment tests, partially because they represent an exercise of the state's police power to protect the public. *See, e.g., Ass'n of Mexican Am. Educators v. California*, 231 F.3d 572, 582-83 (9th Cir. 2000).

141. Consider, for example, whether the public would be adequately protected by a medical licensure regime which tested diagnosis, but not treatment skills

courses[142] or preparing its students in the actual skills required for the practice of law.[143] As the MacCrate Report found:

> [t]he traditional bar examination does nothing to encourage law schools to teach and law students to acquire many of the fundamental lawyering skills identified in the Statement of Skills and Values. If anything, the bar examination discourages the teaching and acquisition of many of those skills, such as problem solving, factual investigation, counseling and negotiation, which the traditional examination questions do not attempt to measure. For example, the examination influences law schools, in developing their curricula, to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills. The examination also influences law students, in electing from among those courses offered, to choose substantive law courses that are the subject of bar examination questions instead of courses designed to develop lawyering skills. Finally, the examination discourages law professors from integrating skills training into their substantive law courses.[144]

The skills extolled by the MacCrate Report are most frequently taught and explored in law school clinical courses, but there are many financial disincentives,[145] as well as resistance within law school faculties themselves[146] to clinical education and to skills

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142. As Moran argues, the bar exam forces students into classes which cover subjects taught on the exam, rather than into skills-oriented courses, whose subject matter is not tested. Moran, *supra* note 6, at 652. Without sufficient student demand, law schools will have little reason to offer more expensive and labor intensive skills training courses.

143. This has been a consistent criticism of legal education over the last 75 years. *See* Hugg, *supra* note 127, at 55 n.22 (collecting "ABA reports, judicial committees and legal [education] commentators . . . call[ing] for improvements in legal education").

144. MacCrate Report, *supra* note 1, at 279.

145. The issue of the high costs of clinical legal education was raised at the inception of the clinical movement in the early 1970's. *See, e.g.* HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 46 (1972). For a thorough discussion of this argument against clinical education, and at least a partial refutation, see Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 21-30 & nn.91-93 (2000).

146. *See* Hugg, *supra* note 127, at 56 ("Many traditional scholars resist sacrificing any theoretical instruction to practical training . . . ."); Stuckey, *supra* note 10, at 650 (noting "resistance from law teachers" as one of "the two main impediments to reform"). Law teachers are primarily lawyers, not educators. They understand the law, which they attempt to convey to their students, but generally speaking, they have little or no training in the educational process. Consequently, much of law teaching is an attempt to convey substantive knowledge without the

instruction generally. Success on the bar is a major incentive for most prospective students, so law schools would be foolish not to ensure that their curriculum prepares their graduates for such success. Because no skills other than memorization[147] and a modest ability of legal analysis are required, law schools can teach "on the cheap" and be considered successful among their competitors if they manage, by such techniques, to guarantee high bar pass rates (although not the ability to successfully and appropriately practice law) to their graduates.[148] As so many critics have noted for so long, the bar exam is almost entirely unrelated to the successful practice of law.[149] Finding the bar

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expertise or sophistication necessary to engage and learn students in skills such as counseling, alternative dispute resolution, time management, and the like. Over the past twenty years, clinical teachers have developed a pedagogy for transmitting these skills which is quite different from that of most classroom teaching. *See* Barry et al., *supra* note 145, at 16-18 & 36-50 (describing the integration of clinical teaching and methodological insights into the law school curriculum), including serious attention to issues concerning feedback. *See, e.g.*, Victor M. Goode, *There Is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223 (2000).

147. The bar exam's excessive reliance on memorization and test-taking skills has been widely criticized. *See, e.g.*, ABCNY *Bar Report*, *supra* note 9, at 480-81; Yuki Zhao, *For Exam, Recollection Is Nine-Tenths of the Law*, N.Y. TIMES, June 27, 2001, at B11.

> The bar exam is all about memorization, about the nuts and bolts of New York State laws, about knowing facts, not necessarily understanding them, according to many veteran lawyers in New York City.
>
> . . .
>
> Because it requires preparation centered on mechanical memorization, the bar exam is facing increasing criticism. Many lawyers say that it has little to do with how law is practiced.

Id.

148. *See* Hansen, *supra* note 11, at 1220-21 ("[L]aw schools . . . have little incentive to introduce additional intensive theory courses that demand students to work harder analyzing and evaluating legal arguments. Instead, the schools have the incentive to 'teach the bar exam.'").

149. In 1939, Dean Leon Green of Northwestern Law School famously remarked why the bar examination should be eliminated:

> [T]here is not a single similarity between the bar examination process and what a lawyer is called upon to do in his practice, unless it be to give a curbstone opinion. Moreover, I have never heard anyone assert that his experience in the bar examination process was of any value to him as a lawyer.

Leon Green, *Why Bar Examinations?*, 33 NW. U. L. REV. 908, 911 (1939). *See, e.g.*, Bell, *supra* note 46, at 589-90. *See also* Zhao, *supra* note 147, at B11.

> I don't think it's a useful exercise at all because it doesn't test most of the core competence that a lawyer needs," said one partner at a Manhattan law firm. "Passing the bar exam does not equate to the competence to provide

exam responsible for lacunae in the law school curriculum, prominent clinicians have noted that "development of more competent professional education will be hampered until the apparent trend towards more professionally relevant testing[150] is refined."[151]

V Disparate Effect on Non-Majority Law Graduates

Of equal importance, the bar examination works in a perverse way, given our apparent and alleged commitment to diversifying the profession.[152] Innumerable studies and entreaties by the ABA, state bar associations, the AALS, a former President of the United States, the Justice Department, and others have called for greater diversity in the bar,[153] which, in turn, requires diversity in legal education.[154] These calls envi-

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legal service." The lawyer, an advocate of changing the bar exam, spoke on the condition of anonymity because of his close ties to the State Bar Association.

Id.

150. The reference here is to the MPT discussed *infra* which is described as "not all that distinguishable from other bar questions." Barry et al., *supra* note 145, at 38 n.150.

151. *Id.* at 38. The flip side of this is the observation that "bar exams [can] not be revised to recognize broad components of lawyer competence until those elements [are] reflected in the law school curriculum." Vaughns, *supra* note 87, at 142 n.74, citing CARLSON & WERTS, *supra* note 44, at 214. Since Carlson and Werts' research, law schools have adopted many more professional skills classes, so the impediment they observe may no longer be valid, or is at least less valid.

152. *See* Glen, *supra* note 4, at 1700 n.6 (collecting statistics that demonstrate serious under representation of African-Americans in the bar). A comprehensive discussion of this issue can be found in Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996).

153. *See* William Jefferson Clinton, *Call to Action*, 35 WEEKLY COMP. PRES. DOC. 1505, 1507 (July 27, 1999) (on file with author); ELIZABETH CHAMBLISS, ABA COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2000); Michael A. Cooper, *Our Commitment to Diversity*, 44TH STREET NOTES (The Ass'n of the Bar of the City of New York, New York, N.Y.), June 2000, at 16; RICHARD A. WHITE, AMERICAN ASSOCIATION OF LAW SCHOOLS, PRELIMINARY REPORT: LAW SCHOOL FACULTY VIEWS ON DIVERSITY IN THE CLASSROOM AND THE LAW SCHOOL COMMUNITY (May 2000); AALS Memorandum 00-19 from Carl C. Monk, Executive Director, Association of American Law Schools, to Deans of Member and Fee-Paid Schools, *available at* http://aals.org/00-19.html (June 29, 2000) (last visited Oct. 7, 2003); *Bar Association Finds Little Diversity*, N.Y. TIMES, July 9, 2000, § 1, at 22.

154. *See, e.g.*, Jeffrey M. Duban, *Banishing Bias: The Second Circuit's Draft Report on Gender, Racial and Ethnic Fairness in the Courts*, N.Y. ST. B.J., Dec.

sion a bar whose membership is as diverse as our citizenry and access to justice for all segments of the population.[155] The bar exam thwarts this goal through its persistent disparate effect on non-majority students,[156] unrelated to their ability to practice law. As psychometrician Stephen Klein notes,

> All the studies that we know about report large disparities in passing rates among groups . . . . On average, the passing rate for White first-timers is about 30 percentage points higher than the rates for Blacks. The rates for Asians and Hispanics generally fall in between those for Whites and Blacks. A study . . . of all takers (first-timers plus repeaters) on the July 1992 New York exam found that the [pass] rate for Whites was more than double the rate for Blacks.[157]

One particularly distressing set of statistics was developed by the New York State Judicial Commission on Minorities for those who took the exam in July and who were graduates of in-state law schools between 1985-88.[158] The overall pass rates were as follows:

1997, at 58; Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 Hastings L.J. 445 (2000). Haddon, *supra* note 72 (discussing the problems of racial and ethnic diversity); Linda F. Wightman *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997). The diversity programs of William Paul, ABA Pres. 1998-99 and Gregory Williams, AALS President 1999-2000 are discussed in Joan A. Lukey, *The Face of America*, B. B.J., Jan.-Feb. 2001, at 2.

155. *See Position Paper*, *supra* note 56. There is good circumstantial evidence that increasing the diversity of the bar increases access to justice for underserved communities. *See, e.g.*, Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 499-500 (2000); *see also* Charles R. Lawrence, III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F.L. Rev. 757, 775-77 (1997).

156. *See, e.g.*, Maureen Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, N.Y. St. B.J., Apr. 1989, at 42, 44; Hansen, *supra* note 11, at 1219-20; Hunt, *supra* note 152.

157. Stephen P. Klein, Ph.D. & Roger Bolus, Ph.D., *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, B. Examiner, Nov. 1997, at 8.

158. 4 Report of the New York State Judicial Commission on Minorities 75, (1991) [hereinafter JCM Report]. These figures were obtained through the Commission's survey of the law schools in New York State, all of which maintain information on both race and bar passage for individual students. As such, they are based on 59% of all takers, since the remainder attended out-of-state law schools and their pass rates and race could not be determined. This disadvantage occurs when the statistics are not gathered and maintained by the Bar Examiners. Data from a one-time study of all takers on the July 1998 bar exam done by the evalua-

Blacks	31.0%
Native Americans	33.3%
Hispanics	40.9%
Asian Americans	62.9%
Whites	73.1%

This disparity could, on its face, have any one of a number of explanations. It might mean, as Klein claims, that "[o]n the average, members of racial/ethnic minority groups do less well on the bar exam than their [white] classmates."[158] It might mean that for reasons not fully understood, blacks and other non-majority students of equal ability achieve significantly lower scores on timed, standardized paper and pencil tests[159] than whites of equal ability. What it most certainly does not demonstrate, however, is that non-majority law graduates are, as a group, any less likely to be able to possess the "minimum competence to practice law unsupervised" which the bar exam purports to test.[160]

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tion team commissioned by the Court of Appeals mirror the findings of the JCM-Millman study, *supra* note 7, at 10-14.

158. Klein & Bolus, *supra* note 157, at 15. By stating this argument, I do not mean to endorse it. The argument has been made more benign and more proactive, by Katherine Vaughns. *See* Vaughns, *supra* note 37. An alternative, and more critical way of looking at the preparation of non-majority students is that it is different, not "better." Rothmeyer, *supra* note 124, at 740. Drawing on the work of Barbara Shade, CULTURE, STYLE AND THE EDUCATIVE PROCESS, (Barbara Shade ed., 2d ed. 1989), Rothmeyer notes, "compared to whites, students of color are more oriented towards team problem-solving as opposed to individual learning, and active, hands-on, application-based learning with concrete examples as opposed to passive, lecture-based learning that emphasizes abstract principles." Rothmeyer, *supra* note 124, at 740 (citation omitted). If true, this difference in learning styles could account for lower scores on "abstract" tests, while suggesting that the problem-solving approaches students have learned and internalized will make them good, if not "better," lawyers.

159. *See* William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equality Achieving "Elite" College Students*, 89 CAL. L. REV. 1055, 1074 (2001) (hereinafter Kidder) (demonstrating that, when matched by undergraduate institutions, majors and undergraduate grade point averages (UGPA's), African-Americans scored 9.2 points, or a full standard deviation, lower than their white counterparts). One possible explanation for this disparity comes from the work of Claude Steele. *See* discussion *infra* notes 195-201. Or, as Kidder argues, and "set[s] out to demonstrate . . . that the bar exam, like other high-stakes tests, also imposes extra burdens" on non-majority takers. *Dream Deferred*, *supra* note 21, at 30.

160. Our experience at CUNY is that our non-majority graduates possess the same capacity and skills for successful law practice as their majority classmates.

The appalling statistics reported by Klein and others have, not surprisingly, resulted in a variety of efforts to attack and/or overcome the bar exam's disparate impact on non-majority law graduates. Besides a great deal of criticism,[162] they have prompted a major statistical study by the Law School Admissions Council (LSAC), litigation based on the constitutional guarantee of equal protection and on Title VII of the Civil Rights Act of 1964, and a noble experiment by California Bar Examiners in 1980.[163] I consider each of these *seriatim*, noting the ways in which each supports, inspires and gives direction to the proposal for a PSABE.

VI. The LSAC Study

In 1991, responding to concerns about non-majority bar passage,[164] the Law School Admission Council (LSAC) commis-

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We also take pride in the fact that, with far more attention to the bar exam than we would otherwise believe educationally valuable, we have increased non-majority pass rates to approximately those accomplished by our majority students. Although this success is important for our students, dispelling the myth of inferiority, it should not preclude criticism or debate about the current bar exam, nor impede efforts to experiment and change.

162. *See, e.g.*, ABCNY *Bar Report*, *supra* note 9; Hunt, supra note 152. Implicit critiques of the bar exam's race bias has been raised by Howarth, *supra* note 11, Rhode, *supra* note 30, and *LSAC Study*, *supra* note 43. *See also* James R. P. Ogloff et al., *More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 (2000); Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 19 (1998); Edna Wells Handy, *Blacks, The Bell Curve & the Bar Exam*, NAT'L. B. ASS'N MAG., Mar.-Apr. 1996, at 24; Judith C. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51 (1994).

163. *See* discussion of the California experiment which led to the current MPT *infra* Part XI.

164. Daniel O. Bernstine, *Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?*, B. EXAMINER, Aug. 1989, at 10.

> Although there are clearly discernible concerns and *sub silentio* discussions of the problem of minority bar passage among many law school faculties and in other circles as well, there are seldom any open and direct discussions which focus, with particularity, on possible solutions to the problem. Moreover, it is extremely difficult to compile accurate nationwide data because, for obvious reasons related to competition and prestige, law schools are unwilling to share data related to minority bar passage with each other. In addition, jurisdictions are careful to protect the confidentiality of a particular school's bar pass[] rates and will, in most instances, release data to a school about only its graduates.

Id.

sioned a national study of graduates of ABA accredited law schools. The purpose was to "obtain complete and accurate information about bar passl I rates . . . , as well as about factors that may influence performance in law school and success on the bar examination"[165] and, in particular, "to provide accurate and reliable data regarding minority performance on bar examinations nationally and within the individual states . . . ."[166]

"The class scheduled to enter ABA-approved law school in fall 1991 was selected as the study group"[167] and the bar pass rate of its members was studied over approximately six years.[168] The LSAC Report was released in 1998 and revealed the following information:

Ethnic Group	Pass	Fail
American Indian	66.36	33.64
Asian American	80.75	19.25
Black	61.40	38.60
Mexican American	75.88	24.12
Puerto Rican	69.53	30.47
Hispanic	74.81	25.19
White	91.93	8.07
Other	83.07	16.93

Adapted from Table 6[169]

165. Henry Ramsey, Jr., *Law Graduates, Law Schools and Bar Passage Rates*, B. EXAMINER, Feb. 1991, at 21 (reviewing the history of the LSAC study of which Dean Ramsey was a principal proponent).

166. *Id.* at 25.

167. *LSAC Study*, *supra* note 43, at vi. One hundred sixty three of the then 172 mainland ABA accredited law schools participated in the study, as did 36 of 50 jurisdictions invited. *Id.* at 5.

168. *Id.* at 75.

169. *Id.* at 27.

Although presented as reassuring,[170] and often as authoritative,[171] the LSAC study results are surely cause for continuing concern. For example, black law graduates are four times more likely than white graduates to fail the bar examination on the first taking.[172] There are, to be sure, two ways of looking at the data—by the percentage of applicants who pass, or those who

170. Because of concern that the Report might undermine affirmative action programs, the results were presented in a way that might best alleviate this fear. However, in response to implicit assumptions that the apparently lower bar pass rate of non-majority students is a valid argument against affirmative action, one typical proponent of affirmative action wrote:

> [s]ome see affirmative action as an undeserved handout and assume that it brings unqualified and incapable people into law schools. That assumption is simply not supported. The Law School Admission Council's National Longitudinal Bar Passage Study showed that within nine months of completing law school, 81 percent of minority graduates successfully passed the bar exam—the same exam administered to non-minority graduates.

Oldaker Christian Dark, *Principle 6: Good Practice Communicates High Expectations*, 49 J. Legal Educ. 441, 445 (1999) (citation omitted).

171. There are, however, a number of methodological flaws, or at least choices which are open to question. For example, a major problem with the LSAC statistics is that it fails to separate the first-time pass rate by jurisdiction. *See* Klein & Bolus, *supra* note 157, at 10 (raising concerns about methodology including the aggregations of data across states that vary significantly in both bar exam pass/fail standards and proportions of minority applicants). The LSAC statistics failure to separate the first-time bar pass rate by jurisdiction obscures the higher failure rate for minority takers in jurisdictions like New York which has pass rates lower than the national norm. In 2001-2002, for example, the first-time pass rate for the July administration in New York was 76% (6208 of 7086). N.Y. State Bd. of Law Exam'rs, *July 2002 Bar Exam Results*, at http://www.nybarexam.org/july2002.htm (last visited May 14, 2003). The first-time rate for the February administration was 62%. N.Y. State Bd. of Law Exam'rs, *February 2003 Bar Exam Results*, at http://www.nybarexam.org/feb2003.htm (last visited Aug. 22, 2003). The LSAC study did a great breakdown of first-time pass rates by region, with variations from a high of 92.83% in the Midwest, to a low of 82.90% in the Northwest. *LSAC Study*, *supra* note 43, at 21.

172. The LSAC study also examined comparative bar pass rates by law school clusters ("[l]aw schools were grouped with other schools most like themselves"), divided into six clusters (with LSAT scores and UGPA's as the major variables) and by applicants with LSAT scores at and above or below the grand mean of the 1991 fall entering law school class. *LSAC Study*, *supra* note 43, at 25. Results of these refinements are also disturbing, especially for African-Americans. Among students in cluster 1 schools, black students, who constituted approximately 5.4%, were almost six times more likely than white students to fail. (failure rates of 19.94% compared to 3.56%). *Id.* at 29 tbl.7. Even where black students with above average LSAT scores were compared to similar white students (where blacks constituted only approximately 1.13% of all students "at or above" the LSAT mean), the likelihood of failure was more than twice as great (11.83% to 4.64%). *Id.* at 30 tbl.8.

fail. The former is important, and certainly more comforting, but the latter, which would likely be used in the Title VII analysis discussed *infra*,[173] is quite disturbing.

The LSAC study endeavors to blunt the bad news by emphasizing "eventual pass[] rates" for study participants,[174] where the numbers look much better.[175] On closer examination, however, these reassuring numbers obscure the painful realities faced by many non-majority takers. First, of course, numbers cannot convey the costs—psychological as well as financial[176]—borne by those who are unsuccessful on their first "take," thus denying their entry into the profession by at least six months.[177] Second, the numbers are also somewhat misleading, in that an applicant is deemed to have eventually passed if

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173. *See* discussion of the use of the *Griggs v. Duke Power* test *infra* Part X and see *infra* note 259-64 and accompanying text for the EEOC's formulation for determining whether a challenged test has an impermissible disparate impact.

174. For example, the Executive Summary contains the racial/ethnic breakdown for "eventual bar passage" but does not mention the numbers for first-time passage. *LSAC Study*, *supra* note 43, at viii-ix.

175. As reported in the Executive Summary:

> [t]he eventual pass[] rates for racial and ethnic groups were: American Indian, 82.2 percent (89 of 107); Asian American, 91.9 percent (887 of 961); black, 77.6 percent (1082 of 1168); Mexican American, 86.4 percent (352 of 398); Puerto Rican, 79.7 percent (102 of 128); Hispanic, 89.0 percent (463 of 520); white, 96.7 percent (13,664 of 19,285); and other, 91.5 percent (292 of 319).

LSAC Study, *supra* note 43, at viii. Furthermore, "[a]mong those examinees of color who eventually passed, between 94 and 97 percent passed after one or two attempts [i.e., on the second or third tries] and 99 percent passed by the third [post initial] attempt." *Id.* at viii.

176. Many employers will not hire law graduates until they have been admitted to the bar, or may hire them only at a contingent, lower salary, pending admission. The consequences are dire, especially since the unsuccessful taker must also find a way to take or retake a bar prep course, and set aside adequate time for study before her next attempt—time which could otherwise be spent earning money or dealing with family or other personal concerns. *See* Glen, *supra* note 4 at 1704-05 (discussing CUNY graduates' stories). Law school loans, which now hover, on average, at around $84,400, also come due, requiring substantial payments that may be impossible to meet without a lawyer's salary. *See* Equal Justice Works, *Law School Costs, Law Student Debt and Attorney Salaries: Putting it all in Context*, *available at* http://www.equaljusticeworks.org/choose/loansurvey5.php (last visited May 10, 2003) (copy on file with author).

177. This assumes that second takers will take the bar examination the next time it is offered—in New York. The second administration after the July bar takes place in February. Unfortunately, the LSAC study does not describe or divide multiple takers by the time, as opposed to the number, of attempts, so it is impossible to ascertain the average delay experienced.

she is successful in *any* jurisdiction,[178] not necessarily the jurisdiction in which she made her prior unsuccessful attempt(s).[179] Admission to the bar is preferable to non-admission, but obtaining the privilege in a jurisdiction other than one's home presents difficult choices and a level of cost not imposed on those who pass the bar when they first attempt it. Understandably, the LSAC study makes no attempt to measure the extent of this cost on "eventual passers."

Finally, and as commentators have noted with some alarm,[180] for African-Americans at least, a substantial number of those who fail in their first attempt never make a second attempt.[181] Nearly 11% of all black applicants who failed the bar examination once never attempted it again,[182] thus ensuring that a significant number of black students who successfully

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178. Klein & Bolus, *supra* note 157, at 10 ("[T]he eventual rates in the LSAC study are not the kinds of rates that are traditionally reported for bar exams. For example, an applicant who fails in one state but passes in another is counted as a 'pass' in the LSAC study.")

179. This reflects the well known, albeit unedifying truth, that some jurisdictions with high bar pass rates consistently attract takers who may fare less well or expect that they will do so—than in jurisdictions in which they live, or hope to practice.

180. The list of those "alarmed" by the "persistence gap" includes prominent figures within the bar examiner community such as Arthuro M. Monocal, III, *see Performance Testing*, *infra* note 279 (Monocal has chaired the NCBE and the California Committee of Bar Examiners), as well as those generally critical of the bar examiner establishment. *But see* Erica Moeser, *President's Page*, B. EXAMINER, Feb. 2001, at 4, 5 ("neither of us believed that the persistence gap as described was supported by the published data") (speaking of herself and NCBE Deputy Director of Testing Dr. Mary Sandifer).

181. *LSAC Study*, *supra* note 43, at 56. This compares with two percent of white and Asian-American examinees and five percent of Hispanic examinees. *LSAC Study*, *supra* note 43, at 56. As the author of the LSAC study has pointed out, "black examinees . . . [who] failed the first attempt at the bar and never attempted it again . . . represent nearly half of those in the failed category." Linda F. Wightman, *Through a Different Lens: A Reply to Stephen Thernstrom*, 15 CONST. COMMENT. 45, 55 (1998) (hereinafter *Through a Different Lens*).

182. *LSAC Study*, *supra* note 43, at 56. Renard Strickland has claimed that this statistic is "misleading," since it compares those not retaking the exam with the total number of examinees for that group, rather than with the total number of examinees in that group also failed the first time. Renard Strickland, *The Persistence Facts*, AALS NEWSLETTERS, Nov. 2000 at 5. Using this formulation, the difference between African-Americans, 26%, and whites, 24%, is much less. I believe that the original formulation of the "persistence gap" is more useful, and more disturbing.

completed law school will never enter the profession.[183] This "persistence gap"[184] is one of the reasons that the number of non-majority graduates in the profession has not increased in any significant way over the past decade, even though the number of non-majority students matriculating in law schools has.

VII. More Perverse Effects

a) *Discouraging Non-Majority Applicants*

There is another way in which the bar examination may perversely affect diversification of the bar. Anecdotal evidence suggests that non-majority college graduates who are aware of the disparate impact of bar examination performance on law school graduates of their racial and/or ethnic cohort may often eschew legal education in favor of other professional schools which do not have such daunting post-graduation test barriers.[185] That is to say, excellent non-majority students who

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183. As one commentator has noted, "[t]oo many good lawyers are being lost and too many people who might not otherwise be served are having their legal needs go unmet because of it." Heady, *supra* note 162, at 27. Leo Romero, who chaired the LSAC at the time the study was released, writes of the "'persistence gap,' [w]e can conclude . . . that it represents a significant loss to the profession." Leo Romero, *Two Findings that Have Immediate Impact*, B. EXAMINER, Nov. 1998, at 13, 14.

184. While there is no clear explanation of the reasons for the persistence gap, a letter to the Minnesota Bar Examiners from the Deans of all ABA accredited law schools in that state provides a possible explanation. They wrote,

> delaying admission imposes substantial costs—the costs of retaking the Bar, the costs of preparing for the Bar, and the opportunity costs associated with lost or deferred employment until the second Bar is completed—which adversely affects those without substantial economic resources. This may cause some individuals likely to succeed on a second attempt to drop out of the process.

Letter from E. Thomas Sullivan, Harry J. Haynsworth, Erwin Butterfass & David T. Link, to State Board of Bar Examiners, May 9, 2000 (on file with author).

185. The number of non-majority students, particularly African American students, accepted to and attending ABA-accredited law schools has plateaued, or even declined, since the early nineties at the height of affirmative action efforts. *Dream Deferred*, *supra* note 21, at 36-39, although bar pass rate was clearly not the only causal factor. *See supra* note 39. The percentage of African-Americans obtaining law degrees in 1999, 6.7%, declined from 7.26% in 1997. LAW SCHOOL ADMISSION COUNCIL, MINORITY DATABOOK 38 tbl.VI-8, 39 tbl.VI-9 (2002). *See, e.g.*, James Podgers, *Progress Hits a Wall*, A.B.A. J., Sept. 2000, at 94; The Commission on Racial and Ethnic Diversity in the Profession, *Miles to Go 2000, Progress of Minorities in the Legal Profession*, 2000 A.B.A. COMMISSION ON RACIAL AND ETHNIC

might well be fine lawyers and bring access to justice to underserved communities,[186] are dissuaded from even applying to law school[187] because of their belief that the likelihood of ultimate success, i.e., admission to the practice of law, often long after graduation,[188] is only slightly better than three out of four.[189] This belief cannot help but encourage or persuade them to look elsewhere for their subsequent education and occupational choices.[190] The Law School Admissions Council's statistics on LSAT takers seem to bear this out, with flat, if not declining, numbers, at least through 2001, for African-Americans, especially African-American *men*.[191] And, of course, there is a well-founded concern that statistics reflecting the lower bar pass rate of non-majority students will affect the admissions policies of law schools seeking to improve their standing[192] and will otherwise "temp[er] [their] enthusiasm for diversity,"[193] also de-

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DIVERSITY IN THE PROFESSION, report summary at http://www.abanet.org/minorities/publications/milestogo.html (last visited Aug. 18, 2003).

166 *See* Lempert et al., *supra* note 155.

167 "To the extent that qualified minority youth are discouraged from seeking a legal career because of an unfounded belief that the bar examination will ultimately prevent their entry to the legal profession, a great disservice is done to the legal profession, the minority community and all Americans." Ramsey *supra* note 165, at 25.

168 *See supra* notes 174-75.

169 *Id.*

170 The power of a test to effect the occupant pool is one that has been demonstrated at the undergraduate level. When Bates College did away with reliance on the SAT, a predictor similar to the LSAT which in turn partially predicts the bar exam, its pool of applicants dramatically increased. A comparison of Bates students who voluntarily submitted SAT scores and those who chose not to do so showed a difference of some 160 points on the exam, but no discernable effect on academic performance or graduation rates after admission. Hugh B. Price, *Fortifying the Case for Diversity and Affirmative Action*, CHRONICLE OF HIGHER EDUC., May 22, 1998, at B4. Hundreds of colleges have followed suit and "applicant pools and enrolled classes have become more diverse without any loss in academic quality" according to Cambridge, Mass.-based Fair Test. Alfie Kohn, *Two Cheers for the End of the SAT*, CHRONICLE OF HIGHER EDUC., Mar. 9, 2001, at B12 (quoting Cambridge, Mass.-based Fair Test).

171 Law School Admission Council, Statistics on ABA Applicants for the Period 1991-1992 to 2000-2001 (on file with author). "The peak for black students was 9,969 in 1993-94 . . . [and then] declined until the 1998-99 applicant year, when the actual number of black applicants increased to 6,276 from 6,216 in 1997-98." MINORITY DATABOOK *supra* note 186, at 23.

172 *See, e.g.*, Rothmayr, *supra* note 124, at 769 ("[A] law school may put its [US News] rank and ability to recruit at big risk if it admits a significant number of non-standard students . . .").

173 Haddon, *supra* note 72, at 721.

creasing the number of non-majority law students and lawyers.[194]

b) *Effects on Non-Majority Students' Educational Experience*

A final, intangible but negative effect is the possible experience of non-majority students' expectation of failure. To the extent this expectation exists, it is almost certainly exacerbated by knowledge of the lower first-time bar pass rate of graduates of similar race and/or ethnicity. This notion tracks Claude Steele's important and provocative work on the impact of what he calls "stereotype threat"—which may negatively affect test takers because of their gender (his initial work),[195] race or language.

This phenomenon adversely affects the performance of traditionally strong, academically oriented students on high-stakes tests. According to Steele, "stereotype threat" arises in testing situations in which such students "must deal with the possibility of being judged or treated stereotypically, or of doing something that would conform to the stereotype," either to others or to themselves.[196] Once a stereotype becomes relevant and the test is seen as hinging on one of the qualities that are related to the stereotype, students for whom the stereotype has been triggered perform significantly less well than those who do not fall within the same group. As Wegner notes, writing about Steele's work, "[t]he phenomenon does not depend upon individuals' past experiences," or the existence of widespread stig-

194. *Cf.* Kane, *supra* note 74, at 21 (warning that pressures from *U.S. News and World Report* rankings which include LSAT scores will negatively affect minority admissions).

195. Steele originally tested his hypothesis on male and female students taking a difficult mathematics test. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 619 (1997). The work was then expanded to utilize the same hypothesis for non-majority takers. Claude M. Steele & J. Aaronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 401, 402-04 (Christopher Jencks & Meredith Phillips eds., 1998); Claude M. Steele, *Expert Report in Grutz v. Bollinger*, 5 MICH. J. RACE & L. 439 (1999) [hereinafter *Expert Report*]; Claude M. Steele, *Black Students Live Down to Expectations*, N.Y. TIMES, Aug. 31, 1995, at A25.

196. Steele & Aaronson, *supra* note 195, at 401. For methodological reasons, Steele has primarily studied high-achieving students, but there is no reason to believe that "stereotype fear" does not affect middle-tier students to at least the same extent.

matization in society, "but appears to be situationally triggered."[197]

Thus, where there is a stereotype that African-Americans or other non-majority students cannot pass the bar exam,[198] the very existence of that stereotype, despite the fact that it is not true, will negatively affect the bar exam performance of otherwise fully competent non-majority students. The risk of stereotype threat is highest on high-stakes tests with substantial time pressure—an accurate description of most law school exams, and even more true of the bar exam. The bar exam is the ultimate (as well as the last) timed, high-stakes exam for prospective lawyers. It is not unreasonable to posit that widely-reported studies which show that non-Hispanic whites are substantially more likely to pass the bar exam the first time[199] creates precisely that stereotype about all African-Americans. The false stereotype—that because you are African-American you cannot pass the bar exam—in turn, negatively affects the ability of African American applicants to answer questions on the bar exam,[200] artificially depressing their scores, potentially below the pass/fail cutoff. The false stereotype of incompetence may create a vicious cycle for non-majority applicants in which assessment of competence becomes problematic. Sadly, the existence of the stereotype may also decrease the learning experiences of non-majority students throughout the course of their law school education.[201]

VIII. Why This Bar Exam?

In summary, the bar examination, as currently configured, acts as a powerful barrier to the profession, albeit a temporary

197. Wegner, *supra* note 15.

198. The fact is, of course, that most non-majority students who persist in taking the bar, like their white counterparts, do pass the bar, although not by the same percentage on the first take. *LSAC Study*, *supra* note 43, at 56 tbl.19.

199. *See, e.g.*, Klein & Bolus, *supra* note 157.

200. For an explanation of how this occurs, see discussion *infra* notes 367-61 and accompanying text.

201. *See, e.g.*, Handy, *supra* note 162, at 25; Wegner, *supra* note 15. Steele notes that the stereotype threat "may impair the test performance of school-identified African-Americans students in two ways." Steele & Aaronson, *supra* note 195, at 402. The first is test performance. He describes the second as follows: "If stereotype threat persists as a chronic feature of the school performance domain, it may force the affected students to disidentify with that domain." *Id.* (citations omitted).

one for the vast majority of law graduates.[202] Although some applicants may suffer many takings, and literally wait years before they are admitted, almost everyone will eventually become a lawyer. Whether the wait results in increased competence[203] is, however, certainly open to question.[204] The bar exam clearly has a disparate impact on non-majority law graduates, which deprives the profession of diversity,[205] and yet it is clearly no guarantee of minimum competence to practice law unsupervised. It does not begin to test the range of skills and competencies the profession has identified as necessary to suc-

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202. According to the LSAC study, approximately 95% of all examinees eventually pass some jurisdiction's bar exam. *LSAC Study*, *supra* note 43, at 32 tbl 10. The 5% does not include those who fail on the first administration but do not persist, *see* discussion *infra* at notes 181-85, so the pass rate is, effectively, even higher. Given this, the question is why all those law graduates who eventually do pass the exam must wait for periods between several months (grading and admission for first-time passers) to several years (for multiple takers) before they can practice law.

203. Stephen Klein surmises (incorrectly, I believe) that "even in jurisdictions with very high standards for passing the bar exam, over 80% of the minority applicants ultimately pass. It may take them several tries, but they ultimately succeed, most likely as a result of further studying, preparation and other factors." Klein & Bolus, *supra* note 157, at 15 (citation omitted). This notion that "more study" is required to increase bar pass rate for non-majority takers is echoed in the Report of the New York State Bar Examiners, proposing an increase in the passing score. *Report and Recommendation*, *supra* note 18, at 18 ("The Board is convinced that candidates who pass the exam on their second or third attempt are, at that point, better prepared to enter the profession."). One wonders, as a number of law deans have expressed, whether this "additional study" is of the law and skills which applicants will need to practice law or if, more likely, it is simply of test taking skills which they will not.

204. For those who pass after the tenth or eleventh try, where it seems to me highly unlikely that they have learned more law, rather than forgetting a larger percentage of that which they learned during law school, I have assumed that it is more a matter of drawing the lucky No. 2 pencil. Here again, I do not mean to suggest that late passes will be poor lawyers, but only that they are demonstrably less good test takers.

205. The President of NCBE has consistently taken the position that the lack of diversity in the profession is not traceable to, nor the responsibility of, the bar exam, but rather "myriad decision and action points along the way that contribute to the paucity of minority candidates who enter and complete law school" including "insufficient resolve on the part of law schools to intervene in the educational failings of students while they are enrolled in law school . . . ." Erica Moeser, *President's Page*, B. EXAMINER, Nov. 2000, at 5. *See also* Erica Moeser *President's Page*, B. EXAMINER, Feb. 2000, at 4 ("In law, looking only to the bar examination segment of the [profession's] continuum for solutions overlooks the source issues that demand society's attention."). For a conflicting view, with impressive statistical documentation, see *Doors Deferred*, *supra* note 21, at 32-34.

cessfully practice law.[206] Its focus on "legal analysis," as traditionally taught through the Langdellian case method,[207] provides a disincentive to law schools to offer more costly and more relevant skills training,[208] and its existence perpetuates the lack of confidence, to which it may inadvertently contribute, that legal education cannot be trusted to graduate competent professionals.[209]

Why then, should there be a bar exam at all? Proponents interested in professionalism must do better than relying on the fact that the large majority of lawyers[210] suffered through the same rite of passage,[211] that the profession justifies its self regu-

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206. Rogers, *supra* note 51, at 565

> Influential studies agree that the examination is primarily an achievement test designed to assess specific accomplishments in a student's legal education, not a predictor of future performance. Even the most ardent proponents of state bar examinations do not contend that persons who succeed on the examination will be competent to practice law.

Id. (citations omitted).

207. *See* Munneke, *supra* note 127, at 124.

208. *See* discussion *supra* Part IV.

209. *See* discussion *supra* notes 141-50 and accompanying text.

210. This excludes lawyers admitted in states which had (or, in the case of Wisconsin, still have) the diploma privilege, *see* Moran, *supra* note 8, as well as those who were admitted with veteran's exemptions, *see infra* note 518-15 and accompanying text

211. The bar exam is often referred to as a "rite of passage," *see, e.g.*, Hansen, *supra* note 11, at 1215 nn.129 & 132 (criticizing justification of the bar as a rite of passage as simply—and erroneously—an appeal to tradition which says nothing about the rite itself). This may, however, be a serious misnomer, as Edna Wells Handy points out

> The bar exam has often been compared to that of a "rite of passage." This is an unfortunate comparison because the legal profession does not provide the structural supports typically attending a true rite. There is no pairing of an initiate with an elder or coach. There is no guided preparation period. Nor is there an investment by the entire legal community in the successful outcome of the "passage." What some people really mean when they say the bar is a rite of passage is, "I got mine. Now, you get yours!" Accordingly, I reject the "rite of passage" model of bar exam preparation. I believe the exam to be more like a ritual—a very specific, highly sophisticated, elaborate ritual, full of technical minutia carefully conceived to test a student's resolve. That resolve must be evident from the beginning of the study period and must be strong enough to take a student through the final day of the exam. The more students learn about the process, the less mystery and mistake there will be in treating the ritual with the utmost seriousness, respect and hard work. The key is hard work. There is a direct correlation between the quality and quantity of work done and the chances of success on the bar exam. The

lation by a licensing process,[212] and that it has been difficult to devise a better way, given the constraints of time and money under which bar examiners labor. Or to attempt a slightly more proactive formulation, why should the bar exam be limited to its present, multiply unsatisfactory form?[213]

I argue that it is possible to create a different, more valid, non-discriminatory test of a law graduate's minimum competence to practice law based on professional evaluation of a graduate's actual performance of the MacCrate skills. This proposal is founded analytically in Title VII's requirements of "job-relatedness," and historically in the context of the 1980 experiment that has led to today's Multistate Practice Test (MPT). A brief description of the proposal, with tentative answers to many of the questions it raises, follows discussions of the failed project of litigation against the existing bar (from which I take an analytical framework for assessing the proposal), and the efforts, ultimately unsuccessful, to create a more experiential, performance-based bar examination.[214]

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harder, longer and smarter a student works, the better the chances of passing on the first try.

Handy, *Why Students Fail*, 1997 NAT'L B.A. MAG. 17 [hereinafter *Why Students Fail*].

212. *See, e.g.* Michael J. Thomas, *The American Lawyer's Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 255, 264 (1999/2000) ("Once someone has suffered the 'punishment of the hurdle' several times, self-interest will naturally militate against arguing for reform of the system.").

213. There is a similar argument in the analogous area of law school admissions. *See Equality in Law School Admissions*, *supra* note 72. Instead of abstractly defining "merit" on the basis of scores on pencil and paper tests, law schools (whose "merit"-based admissions disparately impact non-majority students) should be required to do a "criteria audit" which identifies the characteristics necessary for success given the law school's mission. Schools should then admit those applicants who can demonstrate that they possess the requisite characteristics and skills. In other words, the job related criteria of employment law should be utilized to create real equality in access to legal education.

214. Those who are interested only in the proposal can turn to its explication at Part XI, *infra* or Glen, *supra* note 4. The Title VII discussion and MPT history, however, create important legal and political justifications.

IX. Attempts to Change or Abolish the Bar Exam

a) *Litigation*

Litigation directed at the bar exam's disparate impact on non-majority law graduates has been unsuccessful[215] for two main reasons. First, wherever licensing examinations are involved (particularly where those examinations have been or, alternatively required of, applied to, and passed by the very decision makers to whom the challenge is posed),[216] equal protection challenges have fared poorly.[217] Since, according to the courts, practicing law is not a fundamental right,[218] rational basis review applies.[219] Under that test, the challenged licensure examination is entitled to a presumption of validity,[220] which has proven difficult and, in the case of challenges to the bar examination, thus far impossible to overcome.[221] Where bar ad-

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215. *See* the extensive discussions in Rogers, *supra* note 51, Hunt, *supra* note 152, and Vaughns, *supra* note 37.

216. Hunt points out the generational composition of courts which ruled on the challenges brought against the bar exam in the 1970's. He wrote,

> [M]ost of the state officials and judges who reviewed the actions of the various bar examiners grew up during a time when minorities were virtually nonexistent in our nation's law schools. As a result, few, if any, of them had any exposure to minority students or professors in their law school classes. It is not unreasonable to suggest, as the dissent in *Tyler v. Vickery*, 517 F.2d 1089, 1106 (5th Cir. 1975), noted, that some of these judges and officials probably still harbored presumptions of racial inferiority about blacks, in general, and aspiring black lawyers, in particular – presumptions that colored their judgment when they considered the plaintiffs' claims of discrimination in bar examinations.

Hunt, *supra* note 152, at 757.

217. This has been equally true when the challenges were brought in state, rather than federal court. *See, e.g.*, Petition of Pacheco, 514 P.2d 1297 (N.M. 1973); Application of Peterson, 458 P.2d 703 (Alaska 1969).

218. *See, e.g.*, Lowrie v. Goldenhersh, 716 F.2d 401, 412 (7th Cir. 1983).

219. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089, 1093-03 (5th Cir. 1975) (rejecting plaintiff's request for strict scrutiny review and placing a heavy burden on those who challenge licensure exams); Scariano v. Justices of the Supreme Court of Ind., 38 F.3d 920, 924 (7th Cir. 1994).

220. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 351 (1979).

221. *See, e.g.*, Delgado v. McTighe, 522 F. Supp. 886 (E.D. Pa. 1981). The factual claim in *Delgado* was somewhat different – and arguably stronger – than in the Southern cases where minority applicants faced poorly on the bar exam. The Pennsylvania Bar Examiners raised the passing score for the bar exam (see discussion of the recent initiatives to extend this practice, *supra* notes 16-25) while in possession of an expert's report that to do so would have "a 'profound effect' on the percentage of blacks and whites who passed the bar examination." *Delgado*, 522 F.

missions are concerned, courts believe that states have a legitimate desire to regulate the profession[222] and accordingly they "treat state efforts to preserve professional integrity with deference."[223] Even more detrimental to a successful constitutional attack is the notion that

> [r]ationality does not require that a rule be the least restrictive means of achieving a permissible end. The general wisdom of [a state's] approach is not a matter for . . . scrutiny. A given bar admission rule need not be the most effective means of regulating bar admission . . . . Nor is it relevant that some unfairness results from the application of the rule.[224]

Although no fundamental right is implicated, the racial disparity that demonstrably occurs might suggest a higher standard of review, but that argument has been foreclosed by the Supreme Court's decision in *Washington v. Davis*.[225] Thus, even when plaintiffs have been able to demonstrate that African-Americans are disproportionately unsuccessful on a state's bar examination, courts have continued to insist on the rational basis test.[226] Attempts to impart the standards of Title VII,[227] which protects against disparate impact as well as discrimina-

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Supp. at 895. The court, however, found no discriminatory intent or purpose. As to the plaintiff's second argument, based on expert testimony, *id.* at 896-97, that the bar exam was not rationally related to the goal of insuring minimum competence, the court simply reasserted the rational relationship test and found, based on *Tyler* and its progeny, that the essay and multiple-choice exam was permissible. *Id.* at 897. *See* Hunt, *supra* note 152, at 751-53.

222. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 361-62 (1977). For the state's interest in character and fitness, *see, e.g.*, *In re* Griffiths, 413 U.S. 717, 722-23 (1973).

223. *Scarfone*, 38 F.3d at 924 (citing Schumacher v. Nix, 965 F.2d 1262, 1266 (3d Cir. 1992)).

224. *Id.* at 925 (citations omitted).

225. Washington v. Davis, 426 U.S. 229 (1976) (holding that, in order to make out an equal protection violation, there must be proof of discriminatory racial purpose, rejecting the use of disparate impact theory in constitutional cases).

226. *See, e.g.*, Tyler v. Vickery, 517 F.2d. 1089, 1101 (5th Cir. 1975).

227. 42 U.S.C. § 2000 (1964).

tory intent, into equal protection analysis[228] have been entirely unsuccessful[229] as have challenges under Title VII itself.[230]

The Title VII challenges have failed for two different reasons. First, courts have been unwilling to conceptualize bar examiners as employers, labor organizations or employment agencies,[231] thus excluding them from coverage under the Civil Rights Act.[232] The Tenth Amendment has also proven a barrier.[233] In the single case where a District Court held that the

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228. Unable to prove discriminatory intent, and with the constraints of *Washington v. Davis*, litigants challenging the disparate impact of the bar examination argued that "the bar examination should not be viewed within the framework of the traditional equal protection analysis, but that the bar examination should be considered in light of the Title VII testing guidelines promulgated by the EEOC." Vaughns, *supra* note 37, at 447-48 n.95. If Title VII standards applied in the constitutional analysis, however, at least one court reviewing a challenge to the South Carolina bar exam would have found the bar exam unconstitutional. Richardson v. McFadden, 540 F.2d 744, 746-47 (4th Cir. 1976), *on reh'g*, 563 F.2d 1130, *cert. denied*, 435 U.S. 968 (1978) ("[W]e believe the record is inadequate to demonstrate either 'criterion' ('predictive'), 'content,' or 'construct' validity under professionally acceptable methods. Thus, if we were to determine that Title VII standards were applicable, it would be necessary to reverse and declare the South Carolina Bar Examination constitutionally invalid.").

229. *Tyler*, 517 F.2d at 1096, 1098-99. *See* Jefferson v. Hackney, 406 U.S. 535, 548-59 (1972) (citing James v. Valtierra, 402 U.S. 137 (1971)).

230. *See, e.g.*, Parrish v. Bd. of Comm'rs of the Ala. State Bar, 533 F.2d 942, 949 (5th Cir. 1976) (holding that there is no basis for distinguishing *Tyler* on the Title VII question).

231. 42 U.S.C. § 2000e(2) (2000). *See also* 42 U.S.C. § 2000(b)-(d) (defining "employer," "employment agency" and "labor organization" respectively).

232. In an analogous area, courts have refused to apply Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d)-(d)(6) (1994) to the NCAA which imposes eligibility requirements on member institutions, despite the fact that those requirements have a clearly disparate impact on non-majority student athletes. *See* Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999), *rev'g* 37 F. Supp. 2d 687 (E.D. Pa. 1999). For a discussion of the disparate racial impact, *see, e.g.*, Kenneth L. Shropshire, *Color-blind Propositions: Race, the SAT & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 142 (1997) and the District Court opinion in *Cureton*. For a discussion of unsuccessful challenges to eligibility requirements, *see* Nathan Hunt, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. TOL. L. REV. 273, 282-86 (2000). The Circuit Court in *Cureton* held, alternatively, that the NCAA is not subject to Title VI because it is neither an "indirect recipient" of federal financial assistance, nor a "controlling authority" over institutions which themselves receive federal assistance. *Recent Cases, Title VI—Third Circuit Upholds Viability of Standardized Test Scores as a Component of Freshman Athletic Eligibility Requirements*—Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999), 114 HARV. L. REV. 947, 949-51 (2001).

233. An alternative formulation of this argument is the conclusion courts have drawn from Tenth Amendment analysis that "Title VII does not apply to li-

Board of Bar Examiners was an "employer" because it acted for the state in licensing professionals,[234] the Court nevertheless denied plaintiff's Title VII claim on the grounds that principles of federalism prevented the extension of Title VII test validation standards[235] to professional licensure examinations.[236]

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censure testing." Dinan Pullin, *Key Questions in Implementing Teacher Testing and Licensing*, 30 J.L. Rev. Educ. 383, 397 (citation omitted).

234. Woodward v. Va. Bd. of Bar Exam'rs, 420 F. Supp. 211, 214 (E.D. Va. 1976). Rogers makes a strong, and to my mind, compelling argument that the District Court opinion in *Woodward* was correct, Rogers, *supra* note 51, at 577-580. His argument is premised on the thorough analysis of the purpose and reach of Title VII in Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) (extending Title VII coverage beyond a direct employment relationship), which at least remains (in the D.C. Circuit) good law. A more recent case, Morrison v. Am. Bd. of Psychiatry and Neurology, 909 F. Supp. 582 (N.D. Ill. 1996), summarizes areas in which "the Sibley approach" has been successfully employed to extend Title VII beyond a direct employment relationship. There is currently a split in the circuits, with three circuits (the Second, Sixth and Ninth) taking an expansive view of the coverage of Title VII as extending beyond a Title VII plaintiff's "direct" employer, and three circuits (the Third, Fifth and Seventh) taking the contrary, narrow view. Ass'n of Mexican Am. Educators v. California, 231 F.3d 572, 602 n.4 (9th Cir. 2000) (en banc) (Kleinfeld, J., dissenting) ("We have now created a circuit split on a national issue of great importance.").

235. These standards do, however, apply to non-licensure tests under Title VII and analogously, under Title IX. In 1999, the Office of Civil Rights of the U.S. Department of Education, the agency which determines accrediting organizations for professional schools, including law schools, published a report which appears to adopt the *Griggs* test for high stakes testing. Daniel Subotnick, *Goodbye to the L.S.A.T.: Hello to Equity by Lottery? Evaluating Grutter's Plan for Ending Race Consciousness*, 43 How. L.J. 141, 143 (2000) (citing U.S. DEP'T OF EDUCATION, OFFICE OF CIVIL RIGHTS, NONDISCRIMINATION IN HIGH STAKES TESTING (1999)). The report includes this definition:

> [T]he use of any educational test which has a significant disparate impact on members of any particular race, national origin or sex is discriminatory, and is violation of Title VI and/or Title IX, respectively, unless it is educationally necessary and there is no practical alternative form of assessment which would meet the educational institution's educational needs and would have less of a disparate impact.

Id. at 143 n.13.

When the report leaked, *id.* at 143 & n.14, it provoked concern in the testing establishment, particularly at the College Board, which administers the SAT. *See also* Mueller, *supra* note 32, at 202, 247-48 nn.4-11. Although I know of no lawsuits brought on the basis of the Report, and suspect that newer faces at the Department of Education may not wholly embrace it, the migration of the *Griggs* test to the realm of high stakes testing suggests the validity of the approach utilized here.

236. *Woodward*, 420 F. Supp. at 214. *See also* EEOC v. Sup. Ct. of N.M., 19 FAIR EMPL. PROC. CAS. (BNA) 448, 449-50 (1977) (while recognizing bar examiners were employers for purposes of Title VII, found little support for a judicial construction of Title VII which would allow it to expand into an area where the federal

These decisions seem to be based on erroneous premises,[237] to be disingenuous[238] or just plain wrong. Nevertheless, litigation has clearly not proved a profitable path for compelling change.

The legal arguments employed, however, especially those utilizing Title VII, provide a compelling analysis which incorporates the two major concerns about the existing bar exam—the lack of connection between the bar exam and the actual skills of lawyering (or "lawyer competence"), and its disparate impact on non-majority graduates. That analysis suggests a solution to these concerns. Although courts have held the analysis constitutionally and statutorily (as yet) inapplicable, the seminal Ti-

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judicial power has been traditionally restricted"). The question of whether Title VII is applicable to state licensing agencies acting pursuant to the state's police powers has also been answered in the negative in non-bar cases, *see, e.g.*, Haddock v. Bd. of Dental Exam'rs of Ca., 777 F.2d 462 (9th Cir. 1985); Nat'l Org. for Women v. Waterfront Comm'n, 468 F. Supp. 317 (S.D.N.Y. 1979). *But see* Puntolillo v. N.H. Racing Comm'n, 375 F. Supp. 1069 (D.N.H. 1974), motion to dismiss decided on different grounds, 399 F. Supp. 231, 235 (D.N.H. 1975) (Title VII held to apply to NHRC). For an excellent argument for the applicability of Title VII, see Rogers, *supra* note 51, at 570-83, as well as his discussion that Title VII actually preempts state licensing schemes which run afoul of its prescriptions. *Id.* at 621-23.

237. The cases which refuse to apply Title VII to state licensing cases because of deference to the state's police power, *e.g.*, *Woodward*, 420 F. Supp. at 214; *EEOC*, 19 FAIR EMPL. PRAC. CAS. at 449-50, assume that the purpose of the bar exam is to protect the public. Many commentators argue that its real purpose is anti-competitive, that is, to limit entry into the profession so as to maintain high salaries and/or profits for those who are admitted, *see, e.g.*, *supra* text accompanying notes 117-23. Alternatively, as I have argued here, *supra* notes 126-41, and as others have also noted, the claim that the bar exam protects the public is invalid because the bar exam does not effectively test the skills necessary for competently lawyering, *see, e.g.*, Howarth, *supra* note 11, at 930; Hunt, *supra* note 162, at 760-69 (refuting the "Myth of the Bar Exam as a Test of Minimum Competence"), and so does not require deference to a state's police power.

238. That is, the insistence on an excessively literal reading of Title VII undermines that statute's purpose of ensuring equality of opportunity in employment, by prohibiting discriminatory practices that affect employees or potential employees. In contrast, the decision in *Ass'n. of Mexican Am. Educators v. California*, is promising in its *ex hoc* holding (three judges dissenting on the issue) that the California Education Department, which designed and administered the California Basic Education Skills Test (CBEST), a pre-requisite for teaching in California public schools, was covered by Title VII even though it was not a direct employer of persons taking the test, Ass'n. of Mexican Am. Educators v. California, 231 F.3d 572, 584 (9th Cir. 2000), and the majority opinion's assertion that "[t]here is no overarching 'licensing' exception to Title VII." *Id.* at 583.

tle VII testing case, *Griggs v. Duke Power*[239] provides analytic grounding for the proposed PSABE.

X. The Argument From *Griggs v. Duke Power*

Griggs held that tests which are not "a reasonable measure of job performance" or which do not "have a manifest relationship to the employment in question,"[240] constitute an impermissible employment practice when they have a disparate impact on racial minorities. The *Griggs* concept of "job-relatedness" was more fully explicated by reference to, and reliance on, its use of Equal Employment Opportunity Commission (EEOC) guidelines and interpretations in *Albemarle Paper Co. v. Moody*.[241]

The *Griggs/Albemarle* analysis, incorporated into Title VII by 1991 resturation legislation,[242] requires three steps, which can be applied usefully to the bar exam.

a) *Disparate Impact*

In the first step, the plaintiffs must demonstrate by "persuasive statistical evidence" that the challenged employment practice has a disparate impact on a protected group. Protected

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239. 401 U.S. 424, 432, 436 (1971). Although *Griggs* was implicitly overruled by Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (where the Court replaced *Griggs*' strict requirement of an affirmative defense of business necessity with the less stringent "legitimate business purpose," and redistributed burdens of proof and production to leave the burden of persuasion with the plaintiff even after a showing of disparate impact), Congress effectively reversed the Supreme Court and reinstated the *Griggs* test by enacting the Civil Rights Act of 1991, Pub. L. 102-166, §§ 104-105, 105 Stat. 1074 (1991). The 1991 legislation "re-establish[ed] the three step order and allocation of proof articulated in *Griggs* and its progeny." MELVIN B. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION § 2-37 (2001), and, by its legislative history, made clear "that the terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power* and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Antonio*." *Id.* § 2-46 (citing 137 Cong. Rec. § 15276 (daily ed. Oct. 25, 1991) (Interpretive Memorandum). For a full discussion of the legislative history, see *id.* § 2-5.

240. *Griggs*, 401 U.S. at 432.

241. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). "[It was not until *Albemarle* that the Court explained how a defendant proved [the] job-relatedness" required by *Griggs*. ROSSEIN, *supra* note 239, § 2-49.

242. *See* Civil Rights Act §§ 104-105. For a thorough discussion of the intent and impact of the 1991 legislation on the first prong of the *Griggs* test, see ROSSEIN, *supra* note 239, § 2-5.

groups under Title VII include racial and ethnic minorities. Although bar examiners in most states have failed or refused to keep statistics on bar passage based on race,[243] those statistics which do exist, primarily from California,[244] but also now from the LSAC,[245] demonstrate that non-majority students, particularly African-Americans and Hispanics are repeatedly and consistently less successful on first-time bar passage than majority graduates.[246]

The evidence which exists for racial disparity and bar pass rates clearly establishes disparate impact, as presently defined,[247] thus meeting the first prong of the *Griggs* test and

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243. Studies of the bar exam have consistently called on bar examiners to collect such information and make it available. *See* ABCNY *Bar Report*, *supra* note 9, at 11. Hari Swaminathan Rogers & H. Jane Rogers, *An Examination of Racial & Ethnic Bias in the Florida Bar Examination*, Final Report submitted to the Racial & Ethnic Bias Study Commission of the Florida Supreme Court 30 (1991), JCM Report, *supra* note 158. Prior to publication of the LSAC study, Professor Katherine Vaughns noted, "little comprehensive and accurate data about bar passage rates among racial and ethnic groups exists nationwide." Vaughns, *supra* note 37, at 426 n.5 (collecting earlier calls for collection of data). Cecil Hunt offers a comprehensive discussion of the absence of data. Hunt, *supra* note 152, at 726-33.

244. For example, Howarth notes the results of the July 1986 exam where, of first-time applicants who attended ABA-approved law schools in California, "92% of Whites passed, compared with 51.1% of Blacks, 64.4% of Hispanics, 74.6% of Asians, and 71% of other minorities. The disparities were similar for first-time takers from out-of-state ABA-approved law schools . . ." Howarth, *supra* note 11, at 931 & nn.24-26. A 1987 article lists the few jurisdictions which then kept statistics by race and ethnicity. Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299, 325-41 (1987).

245. The LSAC numbers were self-reported by law schools and, therefore, are not comprehensive, but they give a generally good picture. Individual states may have made records in one or more years; these are collected in Hunt, *supra* note 152, at 726-29 & n.9.

246. *Id.* at 15.

247. The court in Tyler v. Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975), found that the facts proffered by the plaintiffs met the first prong of the *Griggs* test. EEOC regulations create a presumption of disparate impact when the number of successful non-majority applicants is less than 80% of the successful majority applicants. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2002). Applying this test to any of the individual state pass rates which have been collected, *see supra* note 244 and accompanying text, offered into evidence in cases like *Tyler*, or the more national rates shown in the LSAC study, *supra* note 43, actionable disparate impact is always demonstrable. For example, using the LSAC data, the first-time pass rate for majority Caucasian students is 91.97%. *See supra* note 169 and accompanying text, 80% is 73.54%, but the actual pass rate for African-Americans, 61.10%, is substantially below that figure. Mexican Americans, 75.80%, and Hispanics, 74.81%, just avoid the 80% rule, while Pu-

shifting the burden to the defendant/employer (for purposes of this argument, the bar examiners) to demonstrate that the test is job-related. As the Supreme Court wrote in *Griggs*,

> Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance . . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[248]

Economic status is not a protected class,[249] nor is it incorporated into Title VII jurisprudence. However, if we want to consider—and ameliorate—the ways in which the bar exam disadvantages those who have traditionally been excluded from the profession, it is important to include the disproportionate impact it has on students with limited financial means.[250] That such impact exists can partly be inferred by analogy to the LSAT which, like other standardized tests which predict race and class,[251] also correlates to bar passage.[252] It is also highly

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erto Ricans, 69.53%, fall below it. For a general discussion of the statistical proof necessary under *Griggs* and the 1991 legislation, see Rosenblum, *supra* note 239.

248. Griggs v. Duke Power, 401 U.S. 424, 436 (1971).

249. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("poverty, standing alone, is not a suspect classification").

250. Comparing examinees who passed with those who failed, the LSAC Bar Study found a significant correlation with socioeconomic status (SES) for Hispanics and Asian-Americans, but not for blacks or whites. The percentage of first-time passers was lower for Hispanics and Asian-Americans in the Lower-Middle SES category, and the percentage who never passed was also highest for those in the Lower-Middle category. *LSAC Study*, *supra* note 43, at 57-58 & tbls 20 & 21. I am not convinced that these data, and the categories employed are sufficiently nuanced to take into account some of the specific financial and quasi-financial problems applicants may face. *See* discussion *infra* notes 652-57.

251. Two researchers who have looked at large data bases have found that LSAT scores correlate with SES, Wightman, *supra* note 154, at 452-95 (reviewing the SES profile of UCLA applicants by race/ethnicity, SES and other variables). One commentator suggests that these studies "may *underestimate* the magnitude of the relationship between SES and race by not adequately taking into account the one SES variable upon which Blacks are most disadvantaged vis-à-vis Whites' accumulated family wealth." William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 184 (2000) [hereinafter *Rise of the Testocracy*]. Similarly, the SAT correlates more closely to parental income than it does to freshman grades. *See* JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT 126 (1988); ALLAN NAIRN ET AL., THE REIGN OF ETS 203 (1980). *See, e.g.*, Claude M.

likely that students who cannot afford bar prep courses[253] and/or the recommended 10 weeks of uninterrupted bar preparation study do less well than more affluent students.[254] If what is known about the impact of income/poverty on LSAT performance can be shown, by good research, to correlate to bar performance, application of the *Griggs* test should lend persuasive weight to the argument for a PSABE.[255]

b) *Job-Relatedness*

In *Albemarle Paper*[256] the Court adopted the Uniform Guidelines on Employee Selection Procedures issued by the EEOC[257] as the standard by which the *Griggs* test of "manifest relationships to the employment in question"[258] must be met. The EEOC Guidelines provide, in pertinent part, that any test or selection procedure which has a disparate impact on members of a protected group[259] is deemed discriminatory and therefore presumptively violative of Title VII—unless the test or procedure has been validated by[260] criterion-related validity studies,[261] content validity studies,[262] or construct validity stud-

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Steele, *Understanding the Performance Gap*, in Who's Qualified?, *supra* note 32, at 60 [hereinafter *Understanding the Performance Gap*].

252. *See, e.g.*, Moran, *supra* note 8, at 651.

253. *See* Stephen Steinberg, *Mending Affirmative Action*, in Who's Qualified?, *supra* note 32, at 37-38 ("Standardized tests favor privileged groups who, aside from the advantages that derive from better schooling, have the resources to pay for expensive prep courses."); *Rise of the Testocracy*, *supra* note 251, at 194 ("[L]ower] graduation and bar passage numbers for people of color . . . may be partly attributable to non-academic factors associated with the financial burdens of legal education.").

254. In thinking about possible research projects which might move us toward an alternative to the bar exam or an alternative bar exam, this is surely an area which could be studied with some scholarly rigor. *See* discussion *infra* Part XIV(a).

255. *See* discussion *infra* Part XII(b) on why the PSABE should not disadvantage students of limited means.

256. Griggs v. Duke Power, 401 U.S. 424, 436 (1971).

257. 29 C.F.R. §§ 1607.1-1607.18 (2001).

258. *Griggs*, 410 U.S. at 432. The "manifest relation" language was reiterated in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

259. The groups pursuant to Title VII, are race, sex and ethnicity. 29 C.F.R. § 1607.3A.

260. In the following three footnotes, I reproduce Cecil Hunt's edited and editorialized version of the relevant definitions of criterion-related, content and construct validation. Hunt, *supra* note 152, at 765-66.

261. Criterion-Related Validation.

ies,[260] in accordance with the technical standards of the Guidelines.[264]

The existing bar examination would be hard pressed to meet the *Albemarle* test. As to criterion-related validity, in the only case where a court reached the issue (although ultimately deciding that Title VII did not apply), it found insufficient evi-

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Criterion-related validation is established when there is a positive correlation between comparative success on the test and comparative success on some measure of job performance. The degree of this relationship is expressed by a correlation coefficient, which ranges from—1.0 [i.e.,] the better one does on the test, the worse one does on the job] to +1.0 [total] identity of relative test scores and relative job performance.].

BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 114 (2d ed. 1983). "The most commonly used criterion measure is supervisory rating of job performance which is acceptable if done in a professional manner." *Id.* at 128. *See generally* 29 C.F.R. §§ 1607.14B-1607.15B.

262. Content Validation.

Tests having content validation must test a representative sampling of specified job functions or the underlying skills necessary to perform those functions. Once the job content has been identified, the primary considerations are the test makers' competence and thoroughness in test preparation and the representativeness of the test itself in terms of the job content to be evaluated.

See SCHLEI & GROSSMAN, *supra* note 261, at 130. *See generally* 29 C.F.R. §§ 1607.14C-1607.14C. *see also* Guardians Ass'n of N.Y. City v. Civil Serv. Comm'n, 630 F.2d 79, 87 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

263. Construct Validation. "Construct validation is established when there is a significant relationship between the test and the identification of some trait, such as 'intelligence' or 'leadership,' which is required in the performance of the job." "The issue in construct cases is usually whether the constructs themselves are related in the performance of the job." SCHLEI & GROSSMAN, *supra* note 261, at 150. "Construct validity is difficult, if not impossible, to prove in most cases and requires a presentation of empirical data . . . ." *Id.* at 154. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-35 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); *Guardians Ass'n of N.Y. City*, 630 F.2d at 91-94. 29 C.F.R. §§ 1607.14D-1607.15D. *See also* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & RICHARD F. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 274-76 (2d ed. 1988).

264. These standards, found at 29 C.F.R. § 1607, while not legally binding are "entitled to great deference" *Albemarle*, 422 U.S. at 431. "Failure to comply with the Guidelines, although not automatically fatal to an employment test 'diminishes the probative value of [a] defendant's' validation study." Ass'n of Mexican Am. Educators v. California, 231 F.3d 572, 585 n.8 (9th Cir. 2000) (citation omitted). Note, however, the claim that "[i]n recent years the view that validity can be divided into three types has fallen out of favor. Validity is regarded as a unitary concept." John C. Lenel, *Test Validation: What is It and How Should it be Done?* B. EXAMINER, Aug. 1991, at 5, 6. *See* discussion of Lenel's work, *infra* text accompanying notes 374-43.

dence that the bar exam was job-related within the meaning of *Griggs* and *Albemarle*.[265] This is, in large part, because success on the bar examination has never been correlated with "success" as a lawyer;[266] the correlations which do exist, but which are insufficient under the EEOC Guidelines, are to law school performance[267]—i.e. what happens *before* the exam, not after it. One might more reasonably demand proof that a bar examination be an adequate measure of job relatedness through content validation,[268] i.e., correlating the skills tested with those necessary to perform the function of a practicing lawyer.

Here, unlike the problems of defining "success" presented by criterion-related validation, there is some general agreement about "the underlying skills necessary to perform [the] functions [of a lawyer]"[269] as enumerated in the MacCrate Report.[270] Of the ten enumerated skills, at best, the existing bar exam tests legal analysis and written communication,[271] and, to a lesser extent, problem solving.[272] Bar examiners have eschewed

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265. Richardson v. McFadden, 540 F.2d 744, 746-47 (4th Cir. 1976). *But see Ass'n of Mexican Am. Educators*, 231 F.3d at 593 (holding that the District Court had not erred in finding the CBEST appropriately validated under Title VII).

266. That is, there is no criterion-related validation. *See, e.g.*, John P. O'Hara & Stephen P. Klein, *Is the Bar Examination an Adequate Measure of Lawyer Competence?*, B. EXAMINER, Aug. 1991, at 26, 29 ("No studies have attempted to correlate MBE scores with 'success as a lawyer' because of the difficulty of obtaining agreement as to a valid measure of success."). In fact, many would argue that the number of competent and unethical lawyers in practice has long suggested the possibility of a negative correlation coefficient. *See, e.g.*, Edward F. Hall, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1216 (1971) ("There are many grossly incompetent lawyers practicing law today who have passed a bar examination that failed to eliminate them and [prevented] them from practicing on an unsuspecting public."). The legal profession is not alone in this failure to usefully define success. As Sturm and Guinier note, "[t]he question of how to define successful performance of both institutions and particular actors within them is a critical step in developing fair and valid selection criteria and processes. Yet, it is one that is in its infancy in most institutional settings." Sturm & Guinier, *supra* note 22, at 1005. *But see* Kidder, *supra* note 160.

267. *See, e.g.*, *LSAC Study*, *supra* note 43, at 55.

268. *See supra* note 262 and accompanying text; *see also infra* Part XII(d)(1).

269. 29 C.F.R. § 1607.12(B)(1).

270. MacCrate Report, *supra* note 1.

271. *See supra* notes 130-34 and accompanying text.

272. *See supra* notes 135-38 and accompanying text. To the extent that the Multistate Performance Test (MPT) has been adopted (now, in New York, replacing one essay question from the old test), in order "to measure an important ability that is related to, but not fully measured by, essay examinations on the MBE," Jane Peterson Smith, *The July 1999 Performance Test Research Project*, B. EXAM.

testing the other MacCrate skills on the understandable grounds of time and cost.[273] To the extent that the bar exam is justified as certifying minimal competence to practice law unsupervised,[274] a strong argument can be made that, because it fails to test the skills recognized as necessary for such minimal competence,[275] the bar examination fails the second prong of *Griggs* and so violates Title VII.[276]

c) *An Alternative Employment Practice*

Even assuming, *arguendo*, that the bar examination *satisfies* the second prong of the *Griggs* test, it is still possible to obtain a remedy under Title VII if the plaintiff presents evidence to satisfy *Griggs*' third prong. There the question is whether there is an alternative employment practice available that does not have a similar disparate effect and that would also serve the employer's needs.[277] This question has, thus far un-

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NBE, May 1995, at 36, 41. It may, in a highly limited and artificially controlled environment, provide some basis for assessing the problem solving skill. Bar examiners claim that the performance test is "designed to examine four fundamental skills lawyers are expected to demonstrate, regardless of the area of law in which the skills arise. legal analysis, fact analysis, problem solving and communication." Jane Peterson Smith, *MPT Update*, B. EXAMINER, Aug. 1995, at 28, 28 [hereinafter *MPT Update*]. While there is some limited fact *analysis* contained in the MPT, the skill described by the MacCrate Report, "factual investigation," is much more complex, including, *inter alia*, determining the need for and planning the investigation, devising a coherent and effective investigative strategy, planning and conducting effective interviews, analyzing documents and deciding whether to conclude the process of fact gathering. MacCrate Report, *supra* note 1, at 163-72.

273. *See, e.g.*, *MPT Update*, *supra* note 272.

274. Fisher, *supra* note 3.

275. While the MacCrate Report explains that a new member of the profession need not necessarily "become acquainted with the full roster of skills and values while they are in law school or even before they are admitted to the bar," it emphasizes that knowledge of those skills and values is essential for every lawyer that is practicing law unsupervised. MacCrate Report, *supra* note 1, at 125.

276. This argument is based on the premise that, to be job-related, a test should be fairly representative of the skills required to perform the job, not just one skill or one part of the job. *But see* Guardians Ass'n of N.Y. City v. Civil Serv. Comm'n, 630 F.2d 79, 98-99 (2d Cir. 1980); Alba v. L.A. Unified Sch. Dist., 189 Cal. Rptr. 879, 902 (Ct. App. 1983) ("We cannot conclude that the test was inherently unfair because it did not include each and every subject area that the examinees had been advised pursuant to the published examination description.").

277. *See* Griggs v. Duke Power, 401 U.S. 424, 432 (1971). It was the plaintiffs' failure to produce any evidence on this third prong of *Griggs* which resulted in their losing their Title VII claim in Ass'n of Mexican Am. Educators v. California, 231 F.3d 572 (9th Cir. 2000).

successfully, engaged the attention of bar examiners and others concerned with creating and administering a fair, non-discriminatory and content-validated bar examination.[278]

XI. The 1980 California Bar Experiment

To date, there has been one major attempt to alter the bar exam in ways which would satisfy the *Griggs* criteria. That attempt was a major research project in California by the California Committee of Bar Examiners (CCBE) in 1980 that resulted in the modern MPT. The project, not unlike this proposal for a PSARE, attempted "to determine whether it is feasible to measure a broader range of lawyering skills in a bar examination and whether alternative testing instruments would narrow the differences in testing rates between minority and majority candidates."[279]

a) *Description.*

In 1979, acting on those concerns, the CCBE convened a group of national experts in legal education, including clinicians, as well as psychometricians and other testing professionals. According to Armando M. Menocal, then Chair of the CCBE, the law school clinicians "believed that clinical testing

278. See discussion of the experimentation which led to the present Multistate Practice Test (MPT) *infra* Part XI. Given the many criticisms of standardized pen and paper tests like the SAT and the bar exam, one educational psychologist asks, "why standardized tests remain so robust, particularly in this country," and answers his rhetorical question, in part, by noting "the lack of an alternative way of thinking about assessment and the paucity of alternative instruments or methods." Howard Gardner, *Vygotsky to the Rescue!*, in WHO'S QUALIFIED?, *supra* note 32, at 49, 53.

279. Jane Peterson Smith, *The July 1993 Performance Test Research Project*, B. EXAMINER, Aug. 1995, at 36 (describing efforts by the NCBE to create a performance test based on the 1980 California Experiment); Collocutors, *Performance Testing: A Valuable New Dimension or a Waste of Time and Money*, B. EXAMINER, Nov. 1983, at 12, 14-15 (panel presented at the ABA Annual Meeting, Aug. 1983, Douglas D. Roche, Moderator, Armando M. Menocal, III, Jane Peterson Smith, Albert Sacks, Panelists) [hereinafter *Performance Testing*] ("The 1980 experiment was the product of many pressures and aspirations, not always were those pressures and aspirations related or consonant." The two main concerns, however were "the recognition that the bar exam measured only some of the important skills required for someone to be certified as a minimally competent lawyer . . . [and the] recognition that there [was] a large gap in the pass/fail rates between minority and non-minority applicants on the bar exam.").

was possible," although they had not developed tests appropriate for the experiment, or even tests which they used in their own programs.[280] Over the following year, funded, in part, by the National Conference of Bar Examiners (NCBE), more than 150 people worked to develop,[281] and then to administer and grade the experimental session which the Bar Examiners planned.

There were three parts to the experiment that was administered during what was called the "Special Session." The first was a 90-minute test using videotapes designed to measure trial practice skills.[282] Applicants were given information about a case, then shown a brief segment of the arbitration or trial of that case. Questions, such as whether an objection was valid, appeared on the screen, and applicants were given five or ten minutes to write answers before the next segment appeared. The second, the Research Test, gave applicants a task—like writing a client letter, or preparing a cross examination—based on a "closed file" of materials including a library of legal authorities.[283]

The final experiment, the Assessment Center, was the most "clinical" of the experiment, and is the precursor of the PSABE. Five hundred volunteers were selected to participate in a simulated performance test where actors played the roles of judges, clients and witnesses. Applicants in role as counsel for plaintiff or defendant were asked to demonstrate various lawyering skills that were videotaped and later evaluated.[284]

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280. *Performance Testing*, *supra* note 279, at 14.

281. The general design of the test was to "include] a definition of the specific skills that were to be tested and the criteria for evaluating the performance of each skill." *Id.* at 15-16. The work done on design might prove quite useful in modeling the evaluation portion of the PSABE, *see infra* text accompanying notes 415-25 and accompanying text.

282. *Performance Testing*, *supra* note 279, at 16.

283. *Id.*

284. *See, e.g.*, Philip Carrizosa, *Test Can Measure Lawyering Skills, Study Concludes: Bar Exam Experiment*, L.A. DAILY J., July 28, 1982, at 1 (describing a major study of the 1980 experiment and the experiment itself); Jane Peterson Smith, *supra* note 279, at 17, 18 (describing the 1980 experiment and subsequent iterations in California).

The results, in most respects, were impressive,[285] if largely unreplicable.[286] Although, unfortunately, the experiment did not appreciably narrow the gap between minority and majority applicant scores,[287] the CCBE concluded that it more closely approximated the actual practice of law for which it certified applicants. Accordingly, they determined to add a practice component to the California bar examination beginning in 1983.[288]

b) *Evolution of the MPT*

In the end, not surprisingly, the bar examiners adopted only the written portion of the experiment.[289] In this iteration, applicants were given files containing various documents and a

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285. Armando Menocal noted

> [T]he first thing we learned was that it could be done. It is feasible to test clinical skills. Even the problems that are associated with the testing of oral skills such as alleged subjectivity and lack of uniformity could be overcome and produce a reliable test. In short, a reliable, scorable test of clinical performance could be constructed and graded, its results were as reliable in terms of the uniformity of grading presently achieved with the essay examinations.

Performance Testing, *supra* note 279, at 16. The latter is a reference to the fact that those applicants who took the experimental bar examination also took the existing bar examination, permitting comparison and correlation of grades.

286. Jane Peterson Smith noted,

> The California Committee determined that the new test model *did* more closely approximate the actual practice of attorneys – [but] there [were] limitations on what California concluded it could do: it was not feasible to take 12,000 candidates a year through a two-week Assessment Center and the time and costs associated with videotaping oral presentations made that form of testing impractical.

Jane Peterson Smith, *supra* note 279, at 18.

287. Although the experiment did not substantially close the gap "between Anglo bar passage rates and [those] of Asians, Blacks and Hispanics," *Performance Testing*, *supra* note 279, at 17, the bar examiners believed that the performance test would "change the composition of those people who [would] pass." *Id.* There were, however, strong correlations between scores on the experimental test and the MBE and traditional essay portions of the bar examination. Jane Peterson Smith, *supra* note 279. For the reasons which I believe ought – or should – cause a different, non-discriminatory result on a PSABE, *see infra* Part XIII(j).

288. Jane Peterson Smith, *supra* note 279, at 36. The Alaska Bar Examiners added a performance test component in 1982. Jarvis, *supra* note 5, at 36.

289. Bar examiners concluded that it would be "financially impossible to duplicate the . . . experimental exam for the 5,000 to 8,000 examinees each spring and summer." Carrizosa, *supra* note 284. Armando Menocal explained, "[w]e concluded that the [substantially modified written] performance test could serve as a

limited "library" with statutes, cases and Restatement sections from a fictional jurisdiction. For each of the files, they were asked to perform some lawyering task, like drafting a legal memorandum or preparing a cross examination plan for a witness. In the first administration of the California performance test, applicants spent a full day of the three day bar examination on the task—three and a half hours for each file.[290] Although it was intended as a substantial improvement on the existing bar exam,[291] observers noted that it was limited by its written format[292] and that, in many ways, it primarily tested a single performance skill, legal analysis,[293] already tested on the existing bar exam.

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proxy, albeit a rough proxy, for the two-day oral and written clinical exam." *Performance Testing*, *supra* note 279, at 17.

290. *Performance Testing*, *supra* note 279, at 17. The other two days were spent on the traditional tasks of existing bar examinations, a one-day MBE and one-day essay exam. *Id.*

291. Those who planned and created the 1980 experiment also expected that the inclusion of performance testing would have a significant impact on law schools. *Id.* at 20.

> If performance of lawyer-like activities is a significant test because it is a significant part of a lawyer's career, it may also be true that performance is a significant component of legal education. The appearance of performance testing on bar exams will make study of performance [clinical] skills in law school an authentic part of professional preparation. Adding the performance test in California acknowledges and authenticates the study and teaching of practical skills.

Id.

292. Harvard Dean Albert Sacks noted:

> I am somewhat . . . bothered by the fact that there seem to be constraints to do everything in writing. I understand the reasons, but at the experimental stage, I would prefer to see more experiments with oral testing. There are some things I don't think you can do . . . with nearly the same effectiveness as in an oral examination. I think it is a challenge to the people who make up the tests as to whether they will succeed in testing certain important skills if they limit themselves to written tests.

Id. at 21.

293. Dean Sacks referred to the performance skill as "case analysis," describing one of the limitations of the modified, written performance test as lacking the skill of "fact-gathering," a skill included, to some degree, in the 1980 experiment. *Performance Testing*, *supra* note 279, at 21. He characterized the more idealized, still unrealized true "performance" test as "a way of the future" "intended to include not just legal analysis but the ability to collect and raise facts, interviewing, negotiating, counseling and drafting – and not just drafting in the formal sense but writing more generally plus a number of trial skills . . . ." *Id.* at 21.

The National Conference of Bar Examiners ("NCBE") began studying this form of performance testing in California in the 1980's, and in 1990 proposed a substantially shorter version.[294] In 1992, state bar examiners requested an even more truncated version,[295] resulting in the NCBE's July, 1993 Performance Test Research Project.[296] The original seven-hour, two-file, four-task test was now reduced to a 90-minute written exam[297] which, according to the NCBE, tests four MacCrate skills: legal analysis, fact analysis, problem solving and communication.[298] State bar examiners have embraced the MPT as a way of fully examining competence by testing the MacCrate skills. As the Director of the Georgia Office of Bar Examiners wrote, "If a part of our public protection function is to assure competence, then we should be testing applicants to see if they possess these [MacCrate] skills and can apply them."[299]

In fact, as it currently exists, the MPT only slightly expands upon what is already tested in the existing bar exam.[300] For example, as already discussed, MacCrate communication is

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294. Applicants performed two sequential tasks in one three hour period. Jane Peterson Smith, *supra* note 279, at 37.

295. Bar examiners asked whether the three-hour exam could be split into two 90 minute questions, so that they could have the option of administering one or both questions. *Id.*

296. *MPT Update*, *supra* note 272, at 28. The project and its research findings are set forth in Jane Peterson Smith, *supra* note 279, at 37-41. *See also* Stephen P. Klein, *Relationships Among MBE, Essay and July 1993 Performance Test Scores* (1994), report prepared for NCBE. Klein found that there was a reasonably high correlation between the performance exam and the MBE and state essay questions, with some variations among the states where the test was administered, Alaska, California, Colorado, Georgia and Virginia. *Id.*

297. To be fair, two separate 90-minute questions, involving different tasks, are offered, but states have the option (exercised, for example, by New York) of utilizing only one. *MPT Update*, *supra* note 272, at 28.

298. *Id.* For an excellent critique of the limitations of the MPT "file," see Kozdesh, *supra* note 91, at 314 ("One of the unique aspects of the MPT is its comparative narrowness . . . [i]t uses a few cases, a statute perhaps, and maybe a procedural rule . . . the candidate must suspend all generalized knowledge that she might have about the area of law to be tested.").

299. Hulett H. Askew, *Why Georgia Adopted Performance Testing*, B. EXAMINER, Feb. 1996, at 30, 30.

300. Curcio, *supra* note 14, at 379 ("[The MPT is just another way of testing the same skills tested by other portions of the [bar] exam."). The NCBE's own study confirmed that the MPT mainly tests skills tested elsewhere on the exam. *Id.* at 379 n.65 (citing Marcia A. Koechenmeister, *A Performance Test of Lawyering Skills: A Test of Content Validity*, B. EXAMINER, May 1995, at 23, 27).

a complex skill, incorporating both written and oral communication.[301] Given the amount of time necessary to read the file, digest the materials contained in it, and formulate a "solution" to the problem presented, there is very little time[302] for the writing component, and the applicant's answer can hardly be expected to adequately demonstrate (or the bar grader to effectively assess) the nuances of the MacCrate skill.[303] Bar examiners claim that the MPT also tests fact analysis.[304] Again, however, the *actual* skill described in the MacCrate Report is not "fact analysis" but "factual investigation."[305] The latter includes numerous nuanced aspects for which no plausible claim of inclusion in the MPT can be made.

The efforts leading up to the MPT, and particularly the 1980 experiment, were, unquestionably, a genuine innovation.

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301. *See supra* text accompanying notes 130-34. For example, the "general prerequisites for effective written or oral communication" include:

> [a]ccurately perceiving and interpreting the communications of others (whether those be written, oral or non-verbal communications); reading, listening and observing receptively, and responding appropriately; and attending to emotional or interpersonal factors that may be affecting communications.

MacCrate Report, *supra* note 1, at 174.

302. Even at the earlier stage of a three or three and a half hour performance question, the Director of Testing for the California Committee of Bar Examiners had expressed concerns about the "constraint of time." *Performance Testing*, *supra* note 279, at 18.

303. *See supra* notes 130-34. Of the numerous specialized kinds of legal writing included in the MacCrate skills, few are tested on the MPT, and if there is only one MPT question, only one, probably writing a memoranda of law or a client letter will be tested. There is no reason to believe nor has it been shown, that the single limited writing skill tested is appropriately representative of all the writing skills which might be tested. *See, e.g.*, *Performance Testing*, *supra* note 279 (Armando Menocal III commenting, "I hope that these tests become more and more clinical in the sense of getting away from just having the applicants write a memorandum on the law and instead have applicants draft legal documents such as affidavits, interrogatories or discovery plans.").

304. *MPT Update*, *supra* note 272, at 28.

305. MacCrate Report, *supra* note 1

> To effectively plan, direct and (where applicable) participate in the process of factual investigation, a lawyer should be familiar with the skills, concepts and processes involved in determining whether factual investigation is needed, planning an investigation, implementing an investigative strategy, organizing information in an accessible form, deciding whether to conclude the investigation, and evaluating the information that has been gathered.

Id. at 160. Each of these skills is broken down into numerous sub-skills, virtually none of which are engaged in the MPT.

From its inception, the MPT experiment almost certainly involved more realistic evaluation of performance of lawyering skills over simulated but more extensive domains of practice.[306] Unfortunately, after its evolution, the performance test now looks more like the essay portion of the traditional bar exam, and tests roughly the same skills,[307] albeit, in a different, more "realistic" looking and cost-effective[308] package. However generously one views the MPT, it only marginally improves upon the skills-testing limitations of the traditional bar exam.[309] The promise of California's ambitious 1980 experiment remains, for understandable reasons of limited resources,[310] unfulfilled, and there is presently no examination which could satisfy the third prong of the *Griggs* test.

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306. *See* discussion of evaluation of minimum competence, *infra* note 396 and accompanying text.

307. *See supra* note 300. The essay section already purports to test legal reasoning and analysis and, to the extent that it requires written answers in full sentences, at least minimally tests written communication skills. Curcio, *supra* note 14, at 378 ("[B]ecause the MPT requires the applicant to digest a lot of information in a short amount of time and then produce a written product with no time for editing, it is questionable whether it really measures skills different than those measured by the essay portion of the exam.")

308. The expense of the Assessment Center experiment understandably made it impractical for wider administration, while the diminished case file questions offered on the MPT are scorable in roughly the same way and at the same cost as traditional bar essay questions. But, as Sturm and Guinier note, although "[s]tandardized tests can be administered to huge numbers of applicants at relatively low cost . . . [the] view of 'cost-effectiveness' focuses on short-term expenses of selection [and] . . . fails to take into account the costs to institutions of using selection criteria that do not predict successful performers." Sturm & Guinier, *supra* note 22, at 990.

309. A law professor who teaches preparation for the MPT suggests that, because of the extensive material which must be read and digested, it is actually more about time management than other lawyering skills. Interview with Suzanne Darrow-Kleinhaus (Apr. 24, 2002). *See also* Curcio, *supra* note 14, at 377-78 ("[T]he artificial timeframe means that someone who could actually solve the problem in practice if they had time to think about the problem . . . [to] research the issue and organize their thoughts by writing and rewriting their answer may never get that chance . . .").

310. There is no practical way, within the existing structures of any state's bar examination, to perform the extensive testing and evaluation involved in the 1980 experiment for the more than 40,000 applicants who take the bar exam each year. This is precisely why a paradigm shift in the structure—or at least some portion of it—is necessary. Only by greatly increasing the resources for evaluation to include court personnel or others, well trained and supervised, can the more individualized evaluation of a greater domain of skills become possible.

My proposal for a PSABE and a pilot project to test it is offered in the spirit of, and, I hope, as heir to the visionary work of the California Bar Examiners in 1979 and 1980 in their attempt to better test lawyering skills and their less than successful attempt to eliminate the unacceptable disparity in bar pass rates between majority and non-majority applicants.

XII. A Proposal To Meet The *Griggs* Test

The proposal, which I have detailed elsewhere,[311] has been designed to meet the third prong of the *Griggs* test and, hopefully, to accomplish that which was intended by the 1980 California experiment. As a genuine performance test,[312] it would require applicants who elect it to spend sufficient time[313] doing varied work, in a public service setting,[314] that would permit them to be professionally evaluated[315] on their competence in each of the MacCrate skills.[316]

Though firmly grounded in the law and analysis of Title VII's examination of job-relatedness, the PSABE would constitute a small, but real, paradigm shift in the way we certify entrance into the profession. From a timed paper and pencil test, to an evaluation, over time, of an individual's actual capacity to do the job of a lawyer is a sea change, but one for which a com-

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311. Glen, *supra* note 4.

312. This latter idea, obviously critical for legitimizing the PSABE, came from Lee Shulman, the President of the Carnegie Foundation, while he was part of a site team visiting CUNY for Carnegie's multi-year, five profession study of the transmission of professional values. *See* Wegner, *supra* note 15. It was Lee, a psychologist by training, who introduced me to the concept of "portfolios of competencies." For a discussion of portfolios of competencies, see, *e.g.*, D. Wolf, *Portfolio Assessment: Sampling Student Work*, 46 EDUC. LEADERSHIP 35 (1989).

313. My original proposal was for three hundred fifty hours, or ten weeks. *See infra* note 347. The Bar Committee Report proposes three months. *See* BAR COMMITTEE REPORT, *supra* note 5, at 6. Either should be more than ample time for evaluating an applicant's performance.

314. My proposal, like that of the Bar Committee, places the PSABE in the court system, *see infra* Part XIII(a), but other settings might be equally appropriate.

315. Court personnel—experienced lawyers and judges—would be trained to conduct the evaluations by law school clinical teachers, who would also engage in evaluations and "shadow" evaluations during a pilot project. *See infra* Part XIII(c).

316. *See* Glen, *supra* note 4 at 1725-26; *infra* Part XIII(c).

pelling analogy already exists in legal education.[317] This is the transition from "grading on" to law review to the now common, and sometimes dominant mode of "writing or publishing on."[318] In determining who has the skill and capacity to write for and edit a law journal devoted to legal scholarship, legal education began with a quantitative proxy for necessary skills—first-year law school grades[319]—and has now moved—partly based on diversity concerns about the earlier system—to a performance-based evaluation of candidates' actual writing skills.[320]

Whether or not law reviews have improved as a result of this change in assessing applicants, they certainly have not suffered, nor has whatever confidence they previously engendered decreased or disappeared. Certainly they are more diverse, both by gender and race. Once frequent criticisms of law review boards as elite and homogeneous have been muted or disappeared. The law review analogy, chronicling the transition from a quantitatively measurable, "objective" proxy, to a more experiential, job-related evaluation which also increases diversity, strongly supports a similar change in the way law graduates gain entrance into the profession.

While the core concept is simple, implementation, not to mention the political will which will be necessary to make it happen, is far more complicated. In what follows, I ask—and propose some tentative answers to—a number of questions

317. I owe this insight to Diane Yu.

318. See, e.g., Rosenkranz, *supra* note 101 (describing the history of law reviews and debunking the assumption of "merit" in selection and service); Fidler, *Law Review Operations and Management*, 34 J. Legal Educ. 21, 52-59 (1983) (survey of selection processes).

319. The problems inherent in the use of grades to measure or predict ability for legal scholarship mirror those in the use of the quantitative bar exam to (allegedly) predict competence as a lawyer. Rosenkranz, *supra* note 101, at 893 ("[T]he capacity to spot and discuss issues quickly and superficially is a far cry from the meticulousness and thoroughness that law review writing and editing demand."). That is, like the bar exam, "grading on" may be "actually perverse."

320. In 1978, less than 10% of law review members "wrote on;" by 1990, that number increased to 40%. Robert E. Riggs, *The Law Review Experience: The Participant View*, 31 J. Legal Educ. 646, 660-61 (1981); and today, the majority of journals permit "writing on." Michael J. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 Akron L. Rev. 15, 47-48 (1996). For a discussion of why "publishing on" more directly measures the necessary skills other than a writing competition (which fails to adequately test *legal* "research skills, analytical ability, style and originality," Rosenkranz, *supra* note 101, at 898), see Rosenkranz, *supra* note 101, at 894-99.

about a PSABE. Some are obvious, often implicit in the very concept, while other more sophisticated and nuanced questions have arisen in the many conversations I have had over the past three years.

Finally, I briefly discuss some of the efforts which might be necessary or helpful in moving the PSABE forward. The first of these is research, which could be followed, like the California experiment, by a well-designed pilot project. Such a pilot would allow us to test, evaluate and fine-tune a PSABE before considering whether to add it permanently to the process by which we certify the minimum competence to practice law which is the pre-requisite to entry into the profession. I conclude by setting out the special case for a PSABE in New York, based on findings and recommendations of an evaluation of the bar exam commissioned by its Court of Appeals more than a decade ago.

XIII. Questions and Answers About Implementation of the PSABE

a) *In What Institution Might the PSABE be Performed?*

1. *Legitimacy, Capacity and Geography*

Any PSABE would need to be legitimated by the institution in which the public service was performed, in light of that institution's own institutional capacity,[321] and also in the public mind. The PSABE would also require that the institution offer geographic capacity; that is, it would need to be available everywhere across the state so as to be equally accessible to graduates, regardless of where they lived or attended law school.

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321. Besides having the capacity to observe, train and evaluate, the institution should itself, as far as possible in this society, be free of bias and self-conscious about issues of discrimination both overt and covert. In this respect, state court systems would seem promising venues because of their decades long commitment to uncovering and eliminating bias, primarily through the gender and race bias studies in which they have engaged. The majority of states and several federal circuits have commissioned reports on diversity in their respective legal systems and established diversity task forces to address the issues of gender, racial, and ethnic discrimination. *See, e.g.*, Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity*, 32 IND. L. REV. 1167 (1999) (listing state race and gender bias task forces), and its impact on fairness in the courts. *See, e.g.*, Patricia L. Gatling & Majorie Heidseick, *The Effects of Diversity in the Office*, PROSECUTOR, May June 2001, at 26.

An obvious institution which fits these criteria is a state's judicial system. The courts are located in every county, and have, for the majority of the citizenry in most states, a high level of legitimacy. In most states, it is the judiciary, generally acting through the state's highest court, which hires and supervises bar examiners. The court system is, therefore, already ultimately responsible for the bar examination.[322] Because the court system delegates responsibility for certifying competence to practice law to bar examiners,[323] it is also surely capable of utilizing other trained employees within the system where evaluating performance, rather than creating and scoring a paper and pencil exam, would be the criterion for admission.

In suggesting the court system, I do not mean to privilege litigation or litigation skills over what most lawyers, who never see the inside of a courtroom, actually do in their practice. To the contrary, skills utilized by transactional lawyers and counselors—like negotiation, counseling and practice management—can be employed and evaluated in the court setting, while the existing bar privileges the litigation model, testing, for example, criminal procedure and evidence.

2. *Motivation*

The court system is also (using New York as an example) desperately in need of volunteers to perform pro bono services on its behalf. The Chief Judge of New York, Judith Kaye, has instituted a number of "access to justice" initiatives, all of which require resources which the legislature has either failed to provide or provided only at minimal levels.[324] Traditional pro bono

322. Rules for admission are promulgated by the highest state court in every state, with additional authority in the legislature in a minority of the states. COMPREHENSIVE GUIDE, *supra* note 13, at 8 Chart 1.

323. Most bar examiners, that is, members of the governing body on admission (in New York, the New York State Board of Law Examiners) are chosen by the state's highest court and serve, for pay, part-time, in addition to whatever other legal position they may hold, usually in the private bar. They may, in turn, hire and supervise "graders," who are also private lawyers, but who become employees of the judicial system in their official capacity. *See* N.Y. JUD. LAW § 461 (McKinney 2003).

324. *See, e.g.*, Judith S. Kaye, *Speech at the Access to Justice Conference*, 29 FORDHAM URB. L.J. 1061, 1062-63 (2002). The idea for the court system as the home of the PSABE arose from a luncheon held by Chief Justice Kaye and Chief Administrative Judge Jonathan Lippman with the Deans of all New York area law

efforts have not been effective in meeting the court system's "access to justice" needs; the PSABE could provide thousands of person hours of enthusiastic and highly-motivated assistance in this critical endeavor.

Assuming, for a moment, that a program could be designed for 350 or 400 hours of service, there remains the question of cost to the court system. Training court employees as evaluators requires a substantial investment by the system; supervision and assessment would take time from other duties which employees would perform in the absence of the PSABE applicants. Planning and evaluation of the process would create additional costs.[325] How could these costs be justified, given the enormous demands already made on a vastly overburdened system?

It is possible that, despite the cost, the court system would enjoy a net benefit from the work that applicants would accomplish during their period of service.[326] It is, however, more likely that any marginal gain might be insufficient to encourage a court system to make the necessary commitment of time and resources. But if the system were assured that additional help would be forthcoming from persons it had already certified as competent (and, therefore, presumably useful), courts' motivation for participation might greatly increase.

To create such motivation, I propose a 150-hour court-attached pro bono commitment over the two to three years follow-

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schools. In describing her many excellent initiatives, Judge Kaye implored the deans to encourage faculty and students to volunteer in these initiatives, ranging from the "self representation" offices where pro se litigants are assisted in various tasks, to alternative dispute resolution provisions which many courts have instituted.

325. These costs would be minimized in a pilot project in which two or three courts, at most, would be involved. *See* Bar Committee Report, *supra* note 5, calling for a pilot in the New York City Civil Court in the first year, and adding one upstate court in the second. In addition, there is at least a good chance that a foundation or other funder might provide resources to defray some of these costs to the court. *See infra* Part XIII(I) and accompanying text. Imagining the alternative on a statewide basis is, however, a far more daunting proposition.

326. Although there would need to be a set time (whether in hours, days or weeks) during which actual observation and evaluation would take place, applicants would also, throughout their placement, assist in the court's work. In my experience on the bench, law student interns were, at best, a break-even proposition. The situation of applicants, already law graduates, should improve their usefulness

ing an applicant's admission by the PSABE. The aspirational pro bono target for all lawyers is 50 hours per year,[327] so requiring that amount of service for a two-year period would not be overly onerous for the applicant.[328] On the other hand, the availability of thousands of well-trained volunteer attorney hours[329] might make a substantial difference to the courts. Increased staffing resulting from a PSABE pro bono commitment could enable court initiatives which would otherwise be purely aspirational within existing resource constraints. As an added bonus, this commitment to pro bono service in the years immediately following graduation could imbue PSABE applicants with an ongoing dedication to one of the core MacCrate values,[330] the betterment of the profession.

3. *Cultural Competence*

There is an important area of lawyer competence, although not extensively discussed in the MacCrate Report, which the courts are particularly well-situated to teach and evaluate. This competency, which my colleague, Sue Bryant, and her Yale Law School collaborator, Jean Koh Peters, call "cross-cultural lawyering"[331] is increasingly critical to good practice in this new

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327. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

328. At two hours a week, or a day a month, most applicants should be able to fulfill this pro bono responsibility consistent with their other professional and personal responsibilities. This is made more attractive, or feasible, by the fact that courts, more and more, operate beyond a 9-5 weekday schedule. In New York, for example, Small Claims Court (with opportunities for volunteer mediators) sits in the evening; the court system, sensitive to the problems of self-represented litigants, is actively seeking to operate offices to serve them outside regular office hours. See, e.g., NYC CONSUMER AFFAIRS: GUIDE TO SMALL CLAIMS COURT, *available at* http://www.nyc.gov/html/dca/html/smallcl.html (last visited Apr. 22, 2003).

329. If a pilot project involved as few as 100 applicants for each of two years, the courts would gain 20,000 hours.

330. "Striving to improve the profession," includes the court system. *See* MacCrate Report, *supra* note 1, at 117-19. *See, e.g.*, Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999) [hereinafter *Cultures of Commitment*].

331. This is the term used in materials which they jointly developed as part of CUNY Immigrant Initiatives, a project which, *inter alia*, created "modules" on immigration law considerations and immigrant perspectives for non-immigration law teachers in basic substantive areas like contracts, criminal law, family law, and labor law, as well as in clinical teaching. Their materials are available from Immigrant Initiatives at CUNY School of Law. A more scholarly account of the project

century. The demographics of the United States suggest that ever-increasing numbers of Americans will be immigrants, or the children of immigrants.[332] These immigrants, who have particular legal constraints and opportunities, as well as differing cultural and historic experiences within the legal system, comprise a large portion of the client base of those who will be graduating from law school in the next decade. Similarly, as American society becomes increasingly diverse,[333] lawyers will need to understand the cultural differences between clients, adversaries and judges[334] who are of different races and ethnicities. One of the most powerful arguments for diversity[335] and, by extension, for affirmative action[336] in law schools is precisely

and subject matter is contained in Susan Bryant, *The Five Habits: Building Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

332. Data from the 2000 Census indicates that more than 10% of the US population (some 28,400,000 people) were born abroad. Lisa Lollock, *The Foreign Born Population in the United States: March 2000, Current Population Reports*, P20-534, U.S. Census Bureau, Washington, D.C. (Jan. 2001). The 1990 Census reported that the foreign-born population was 19,800,000 or 7.9% of the nation's people. Immigration and Naturalization Service Triennial Comprehensive Report on Immigration, Executive Summary, *available at* http://www.ins.usdoj.gov/graphics/aboutins/repsstudies/addition.html (last modified Nov. 4, 2002). Thus the foreign-born population increased over 43% in ten years. Add to these statistics the fact that "age-specific fertility rates tend to be higher for foreign-born than for native-born women," it is clear that "[i]nternational migration is furthering the nation's ethnic and racial diversity while enlarging its foreign-born population." Jennifer D. Williams, *U.S. Population: A Factsheet*. Report of Congressional Research Service (June 12, 1995).

333. California is the first state to have "tipped" from a majority to a minority of non-Hispanic whites. *See* Todd S. Purdum, *Non-Hispanic Whites a Minority, California Census Figures Show*, N.Y. TIMES, Mar. 30, 2001, at A1. If current trends continue, it is estimated that by 2050, a bare majority, 53% of the population, will be non-Hispanic white. In 1995, non-Hispanic whites accounted for almost three of every four Americans. Daphne Spain, *America's Diversity: On the Edge of Two Centuries*, 1 PRB REPORTS ON AMERICA 11 (May 1999).

334. These are in addition to witnesses, jurors, agency officials and court personnel, to name just a few other participants in the legal system.

335. *See, e.g.*, David Dominguez, *Beyond Zero Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. LEGAL EDUC. 177 (1994); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995).

336. This, of course, is the underlying premise of Bakke v. Bd. of Regents of the Univ. of Cal., 438 U.S. 265 (1978) (opinion of Powell, J., outlining the constitutionality of race-based admissions policies to promote the educational goal of diversity). Much of the evidence adduced by the student intervenors in the University of Michigan Law School affirmative action trial demonstrated the value of law school diversity both in creating a marketplace of views and opinions and in equip-

to equip graduates for the multicultural world in which they will practice. While this is generally not yet a "skill" explicitly taught in law school, I suspect that if the MacCrate Commission were writing today, it would be more prominently discussed and incorporated in the MacCrate skills and values.[337]

Courts are wonderful places to observe diversity in action; they are integrated, by race, class, ethnicity and immigrant status, as perhaps no other institution in American society.[338] Litigants, jurors, and to an increasing degree, judges and court employees personify the multiculturalism that characterizes America today. Courts utilize interpretation in its formal sense[339] as well as informally and more figuratively.[340] As such, they provide an ideal opportunity for applicants to learn,[341] apply and reflect on cross-cultural lawyering skills which will well

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ping law students to function effectively outside their individual and/or racial backgrounds. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

337. Sensitivity to cultural differences is explicitly included in the MacCrate skills of Communication and Counseling: "View[ing] situations, problems, and issues from the perspective of the recipient of the communication, while taking into account the possibility that one's ability to adopt the perspective of another person may be impeded by . . . [a]n insufficient understanding of the other person's culture . . . ." MacCrate Report, *supra* note 1, at 173. Gathering "[i]nformation about the client's perspective on the decision to be made . . . including . . . [t]he extent to which [and the ways in which] the client's perspective, perceptions, or judgment may differ from those of the lawyer because of . . . cultural differences." *Id.* at 178-79.

338. For the importance of diversity in the judicial system, see Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1165, 1166 ("Given the role that courts play in our polychromatic society . . . it is an important independent value that there be a significant number of judges and advocates identifiably connected to those of like color whose rights and liabilities must be determined in those courts.").

339. Many courts in most states now have interpreters in one or more languages on staff, and maintain lists of interpreters in other languages to utilize on an "as needed" basis for litigants and witnesses in actual trials.

340. Interpreters may not only translate the words of non-English speakers in court proceedings, they may also assist them in understanding the justice system and its processes. In this respect, they function as "cultural interpreters." Virginia Benmaman, *Legal Interpreting: An Emerging Profession*, 75 MOD. LANG. J. 445, 446 (1992) ("The interpreter must command a "high level [of] cross cultural awareness and sophisticated skills, including the ability to manipulate dialect and geographic variation, different educational levels and registers, specialized vocabulary, and a wide range of untranslatable words and expressions").

341. A segment on cross-cultural lawyering skills might be profitably incorporated in the post-graduate introductory course. Applicants will also, of necessity, learn by doing, which is why it is also important to have some structured and facilitated reflection on their experiences.

serve them and their clients—in addition to the larger society—when they enter practice.[342] The PSABE would present a unique opportunity for applicants to observe and develop cultural competence.

Courts are not, however, the only possible venues for the PSABE. Many government law offices, District Attorneys' offices, Legal Aid, Legal Services and Public Defenders' offices already have excellent training programs and high-quality supervision. Their work generally requires proficiency in most of the MacCrate skills,[343] albeit in some instances focused in criminal law and procedure, rather than civil procedure and substantive civil law.[344] Such offices are often held in high esteem in the communities in which they are located; almost certainly most could also profitably utilize additional person power. Law firms and corporate counsel could also be utilized, although, in order to maintain a public service/public interest focus, the work done by applicants might have to be confined to more traditional pro bono tasks. While these latter settings would create a host of additional problems,[345] they might also provide appropriate placements for evaluation of applicants' competence in the MacCrate skills.

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342. *See, e.g.*, THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS (James R. Silkenat & Jeffrey M. Aresty eds., 2000) (describing the need for lawyers to be sensitive to cross-cultural issues when practicing outside the U.S.).

343. Familiarity with alternative dispute resolution procedures would probably not be available in many of the offices involved in the criminal justice system; if that skill were deemed sufficiently important, the placement might be supplemented by a shorter period of work in, for instance, a court-affiliated dispute resolution organization.

344. The disadvantage here, if it is important that the PSABE test the MacCrate skills in the context of the substantive law currently tested on the bar exam, is that fewer substantive areas would be implicated. On the other hand, the existing bar, somewhat problematically, tests criminal procedure rather than civil procedure. *See* Glen, *supra* note 4, at 1726-27. Arguably, the ability to utilize any fairly complex body of law, regardless of subject matter area, is the skill new lawyers need more than memorization of black letter law—often immediately forgotten—for the bar exam.

345. These would almost certainly include, *inter alia*, consistency of tasks and evaluation, uniformity of supervisory training and public confidence. Similar problems arising from diverse, non-centralized placements arise in systems of tutelage or apprenticeship like the credentialing system employed in Canadian provinces. *See, e.g.*, Curcio, *supra* note 14, at 398-401.

b) *How Would the PSABE Avoid Replication of the Disadvantages of the Existing Bar?*

One concern is that the PSABE not replicate the discrimination inherent in the present bar exam. That is to say, it should not be more expensive, take substantially more time, or otherwise exacerbate the differences between those who are already likely to do well on the bar and those who do not. The question is how to make the PSABE economically feasible so as not to disadvantage those already disadvantaged by class and financial capacity.[346] Setting a reasonable time requirement for participants' placement in the court system (or elsewhere) provides an answer.

Consider a requirement of three hundred fifty hours of public service in the court system for the PSABE. This divides nicely into ten weeks of seven-hour-a-day, five-day weeks, or about the same number of weeks that applicants taking the existing bar exam would devote to study and preparation. Three hundred fifty hours is a substantial period of time, that would likely satisfy the public. As an analogy, three hundred fifty hours of law school instruction constitutes 37.5%, or more than

346 I have not here discussed the potential of a fourth year after law school for a clerkship or tutelage as is the case on the continent, and, in substance, in Canada, *see* Hansen, *supra* note 11, at 1234-35 (arguing for a mandatory post graduate clerkship), although some of my colleagues in legal education have suggested that three years of law school is too long. *See, e.g.*, Sexton, *supra* note 25. This latter proposal has filled the President of the NCBE with dismay. *See* Erica Moeser, *President's Page*, B. Examiner, May 2000, at 4, 5. ("At a time when boards of bar examiners often seem to be lamenting inadequacies in the level of basic skills and the knowledge of basic legal principles of new law school graduates, it is almost unfathomable that progress would be marked by sailing those graduates out of law school any earlier."). Certainly extending law preparation by another year exponentially increases the difficulty for those for whom law school is already a serious financial challenge. And, unless there were someone to pay for such a fourth year, it would increase even more the astronomical debt limits which those who can afford to take such debt on find themselves burdened with at the end of their legal education and upon their admission to the bar. *See* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. Rev. 829 (1995). The case of the UK, Canada and even more so of Japan are also cautionary. There the number of law graduates far exceeds the number of tutelages available, so discrimination, whether based on pure "merit" (however that might be defined) or otherwise prevails, surely not an appropriate model for an alternative which seeks to decrease discrimination and increase diversity in the bar. *See* Bache, *supra* note 47, at 33.

1/3. of a law student's ABA-required education.[347] Saving the cost of a bar preparation course also makes it more likely that applicants of limited financial means could afford to devote ten weeks to unpaid work.[348]

It should be noted, however, that the proposal of three hundred fifty hours, like the proposal that the court system be the supervising and accrediting entity, is only an opening bid.[349] Either a greater or lesser number of hours might be appropriate. It is also possible that the placement might not need to be continuous—i.e., that it could be done in "shifts" that corresponded to an applicant's rotation. Thus, an applicant might spend three or four weeks assisting a judge in research, writing, conferencing and settling cases, and return later for a month in the self-representation part, assisting pro se litigants. She then return for yet a third placement working in alternative dispute resolution. A pilot project would help to determine whether "splitting" the applicant's service would be feasible for the court and for performance evaluation. These possibilities are offered as additional ways in which to ensure that the PSABE would not disadvantage those disadvantaged by the existing bar.

c) *How Would the PSABE Test More MacCrate Skills?*

Even with the addition of the MPT, the existing bar exam tests only a small proportion of the MacCrate skills—primarily legal analysis and, to a much lesser degree, problem solving and written communication.[350] The PSABE, on the other hand is de-

347. The ABA requires a minimum of 58,000 minutes (or 966 2/3 hours) of instruction for graduation. STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 304(b) (2001). Three hundred fifty hours is thus slightly more than thirteen of the credit hours required for graduation, albeit in a far more concentrated form. Standard 304(a) requires 130 days of regularly scheduled classes per academic year (although few students, especially upper division students, will have classes all five days of the week). Utilizing this standard, the PSABE would require 1/8 or 12.82% (50 days of 390). At 500 hours, the percentages would be 53.5 for hours, and 15.38 for days.

348. Although difficult, it would be possible for an applicant to work (at night, or on weekends) while taking the PSABE.

349. For example, the Bar Committees call for three months, or twelve weeks, which would total four hundred twenty five hours. BAR COMMITTEE REPORT, *supra* note 5, at 19.

350. *See* discussion *supra* notes 300-05. At present, most of the professional responsibility or ethical issues with which the MacCrate Report is so justifiably concerned are tested in the MPRE. The performance test piloted in California per-

signed to test virtually all of those skills—adding to those already tested: oral and other forms of written communication, counseling, fact-gathering, familiarity with litigation and alternative dispute resolution, and time management. All these skills would, of course, be utilized in the context of several bodies of substantive and procedural law, depending on the particular court.[351] To the extent that the existing bar tests "knowledge" of a number of primarily substantive areas of law, the breadth of the "domain knowledge" required in the PSABE should be reassuring.

A court-based PSABE provides a tailor-made opportunity for applicants to perform,[352] and be evaluated on all these skills.[353] Assigned to work with a judge, an applicant would utilize legal analysis and reasoning, problem solving, legal research and written communication skills while drafting opinions or bench memos. She could demonstrate oral skills in presenting that work to the judge, while also practicing negotiation in inevitable and ongoing settlement conferences. Assigned

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mitted inclusion of ethical issues in some context, but the 90-minute MPT question which many states have adopted hardly permits in-depth examination of an applicant's ability to "recognize and resolve ethical dilemmas." MacCrate Report, *supra* note 1, at 203. For a critique of the MPRE, the MCQ which currently "tests" professional responsibility, see Curcio, *supra* note 14, at 380.

351. I have proposed that the pilot take place in the Civil Court of the City of New York because it is a court I know well, and because it provides rich opportunities for performance and evaluation. Glen, *supra* note 4, at 1724-25. In the Civil Court, for example, applicants would encounter and employ contract, tort, property, administrative and business associations law, utilize the rules of evidence and a great variety of provisions in the New York Civil Procedures Law & Regulations (CPLR). In addition, issues of, *inter alia*, agency, tax and family law might also be encountered. The New York State Supreme Court—or any state's trial court of general jurisdiction—would provide equal, if not more, varied opportunities.

352. The literature describing court-based internships suggests that they provide excellent opportunities for learning and enhancing legal research and writing, legal analysis, advocacy skills, negotiation, mediation and workplace skills including time management and professional values. *See* Stacy Caplow, *From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 NEB. L. REV. 672, 679-87 (1996) (describing how court placements can provide equally excellent opportunities for evaluation of these and other MacCrate skills).

353. Careful design will be necessary to plan an appropriate rotation which will simultaneously give the applicant opportunities to employ the skills, permit trained observation and evaluation, and actually assist the court (create "value-added") in the performance of its responsibilities.

to a Pro Se or Self Representation Office, the applicant would engage in fact investigation, including interviewing litigants and examining documents. She would also have the opportunity to counsel pro se litigants. Spending weeks in a court would surely familiarize the applicant with the litigation process; similarly, in courts with mandatory mediation and/or arbitration, the applicant could both observe and participate in alternative dispute resolution procedures.[354] Given the court's workload and the applicant's own assignments and responsibility, organization and management of legal work would be a significant part of the applicant's experience—and the supervisor's ability to assess. Finally, as I can attest from fifteen years of experience, ethical issues arise frequently, requiring recognition and resolution before the court can proceed.

d) *Would the PSABE Constitute a "Valid" Test of the MacCrate Skills?*

One of the first objections heard in conversations about the PSABE is that, because it is somehow "subjective" in contrast to the "objectivity" of the existing bar exam, it would not constitute a valid test of minimum competence to practice law. There are many ways to talk about and/or define test validity.[355] In

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354 In the Civil Court of the City of New York, for example, all civil cases under $10,000 in value are subject to mandatory arbitration. The N.Y. Code title 22, section 28.2 provides for mandatory arbitration of claims up to $10,000 for each cause of action in New York Civil Court and up to $6,000 in the rest of the State for cases commenced in the Supreme Court, County Court, District Court, or a City Court where the Chief Administrator has so ordered. N.Y. COMP. CODES R. & REGS. tit. 22, § 28.15 (2000). The law does not apply to cases filed in Small Claims parts. In New York Civil Court, the mandatory arbitration program operates only in New York County. Interview with Fern Fisher-Brandveen, Presiding Judge of the N.Y. City Civil Court, in New York, N.Y. (July 21, 2002). In the small claims division of that court, claims are heard either by a judge or by volunteer (which, if appropriately trained, see Glen, *supra* note 4, at 1726 nn.115-116, could include PSABE applicant) arbitrators.

355 *See* Arthur L. Coleman, *Excellence and Equity in Education, High Standards for High-Stakes Testing*, 6 VA. J. SOC. POL'Y & L. 51, 104-05 (1998) ("The term validity is generally understood to refer to the accuracy of conclusions drawn from test results and to actions taken on the basis of those conclusions: 'In . . . essence, test validation is an empirical evaluation of test meaning and use. It is both a scientific and a rhetorical process, requiring both evidence and argument.'") (citations omitted); Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1191, 1194-95 (2002) (Although "the scientific concept of test 'validity' has

what follows, I use the work of psychometricians and other testing professionals who have been engaged in the discussion about performance testing, particularly as it relates to, or goes beyond, the MPT, and has been relied on for assistance in construction and justification of the bar examination.

The starting point for licensure examinations is the premise that "competence could be measured directly only if we could observe a[n] [applicant's] performance over the full range of encounters [defining the scope of practice] and evaluate that performance unambiguously. Since this is impossible, competence can never be measured directly."[354]
Given this absolute limitation,[355] all performance testing[356] requires the tester to "look at samples of behavior taken under controlled conditions and then draw conclusions about [an applicant's] ability to perform in the complete domain of practice.

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become confused and the subject of much disagreement . . . 'validity' generally refers to a test's accuracy—that is, its ability to predict accurately future performance (as in the case of the SAT) or its ability to measure accurately the knowledge and skill level that the test purports to measure (as in the case of educational assessments)") (citations omitted).

> The most widely accepted professional standards that are relied on in developing testing instruments are the *Standards for Educational and Psychological Testing* . . . of the . . . American Educational Research Association (AERA), the American Psychological Association (APA) and the National Council on Measurement in Education, which include three criteria against which test use is evaluated.

AM. EDUC. RESEARCH ASS'N ET AL., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999) [hereinafter JOINT STANDARDS]. Professor Jennifer Mueller summarizes the three criteria, validity, reliability and fairness, as follows:

> A valid test measures what it claims to measure and, where used for predictive . . . purposes, predicts what it claims to predict . . . The second [criterion] is reliability . . . the same test taker, taking the test multiple times, should get roughly the same score . . . [Fairness means that a test should measure the same skill or knowledge for all students who take the test. The test should not systematically over predict or under predict the results of members of any particular group.

Mueller, *supra* note 32, at 211.

356. Rachel Slaughter et al., *Bar Examinations: Performance or Multiple Choice*, B. EXAMINER, Aug. 1994, at 4.

357. Although the court-based PSABE provides the possibility of observing and evaluating virtually *all* of the MacCrate skills, it cannot permit their observation and evaluation in the entire "domain of possible encounters defining the scope of [legal] practice." M.T. Kane, *An Argument-based Approach to Validation*, ACT Research Report Series 90-13 (American College Testing) (1990).

358. Professional licensure is only one subset of the larger category of performance testing.

The soundness of these conclusions or inferences depends on three key dimensions of the measurement procedure: evaluation, generalization and extrapolation."[359]

1. *Evaluation, Generalization and Extrapolation*

Evaluation determines whether the observed performance is excellent, adequate, poor or unsatisfactory.[360] Generalization questions whether we can infer from the performance(s) observed that the applicant would perform similarly on other similar tests. Extrapolation asks whether we can infer from the applicant's test performance that she will perform similarly in the actual practice of law.[361] Assessment measures differ as to the strength of the inferences which can be made in each of these categories. A psychometrician's table, drawn from the model of a leading testing expert,[362] compares and contrasts evaluation, generalization and extrapolation in three assessment methods: direct observation of practice, so-called "performance testing" based on simulations, and "objective tests."[363]

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359. Slaughter et al., *supra* note 356, at 7-8

360. Obviously, one could provide greater nuances—as does, for example, the letter grade system used by most educational institutions (A+ to D-), but there is very little validity in fine distinctions. *See, e.g.*, Abiel Wong, *"Boosting" Opportunity?: Deconstructing Elite Norms in Law School Admissions*, 6 GEO. J. ON POVERTY L. & POL'Y 199 (1999). For purposes of the PSABE, however, these four (or even the cruder satisfactory and unsatisfactory) seem sufficient if the ultimate goal is to predict minimum competence. In the same way that the existing bar exam permits above average performance on one essay question to balance below average, or even failing performance, on another, skills evaluation should permit for some compensatory scoring, and implicitly, influence. This argues for the use of a four-tier evaluation of each distinct skill. An excellent score in one area should balance a poor, but not unsatisfactory, evaluation in another. Consistent excellence might also appropriately offset an unsatisfactory evaluation in a single area, especially since more MacCrate skills would be evaluated, at present (and certainly in the past, prior to any performance testing), of course, we admit applicants without any knowledge of their mastery of these skills.

361. Slaughter et al., *supra* note 356, at 8, Kuechenmeister, *supra* note 77, at 26-27.

362. Kane, *supra* note 357.

363. Slaughter et al., *supra* note 356, at 9

Table 1 (adapted from Kane, 1992)
Characteristics of Three Methods for Assessing Professional Competence

Assessment Method	Evaluation (Scoring)	Generalization (Reliability)	Extrapolation (Prediction)
1. Direct observation of performance in actual practice	Experts may disagree on the relative merits of different courses of action Levels of agreement Among experienced raters are typically poor. Subjectivity and bias are only partially controlled by using checklists and training raters carefully Overall Inference +	Samples of performance are generally small and unrepresentative Variability from one observation to the next tends to be fairly large. Inferences to the larger domain may not be accurate. Overall Inference: +	Professional competence as directly assessed Ability is evaluated in complex, realistic situations. Observation may influence performance. Observations are inconvenient and expensive Overall Inference: +++
2. Simulations ("Performance tests" of various types)	Specific and detailed scoring criteria can be developed and raters can be trained to use these criteria Client problem and context can be standardized to a high degree The optimal solution for the problem may be unclear-the more realistic the problem, the less likely experts will agree in rating performance Overall Inference -+	Observations will have high variability from one case to the next A larger and more representative sample of performance can be evaluated compared to direct observation of performance A larger number of simulations are needed for adequate generalization to the domain of practice Overall Inference ++	Even for high fidelity simulations, the inference from a score to a conclusion about competence in practice is based on assumptions. Empirical evidence supporting the relationship to practice is not strong. Items appear more like real-life tasks than multiple-choice questions Overall Inference ++
3. Objective Tests	Tests can be graded objectively Experts agree on the scoring key Tests generally focus on factual questions or straight-forward applications of well-established principles or procedures. Questions involving judgments about complex issues that will meet stringent criteria for objectivity can be constructed but are harder to develop than straightforward knowledge-based questions. Overall Inference +++	Inferences from performances on a sample of objective items are highly dependable Examinees can respond to several hundred items in a few hours resulting in very precise estimates of knowledge Sample a wide domain of knowledge. Overall Inference: +++	Written objective tests provide direct measures of certain learning skills (knowledge and skills related to performance in practice) but, at best provide only indirect indications of performance in a real practice situation The cognitive skills tested by written objective tests are generally considered necessary, although probably not sufficient, for effective performance Empirical studies on the relationship between test performance and performance in actual practice are generally not feasible. Overall Inference +

Accepting, *arguendo*, all the premises of the chart,[364] "objective tests," like the current bar examination, are notably weak in what would seem to be the most important dimension,[365] the ability to predict future performance.[366] Conversely, the highest level of inference about the critical component of extrapolation occurs where there is direct observation of actual practice. If one were to assign numerical values to the plusses in the table, the comparative scores would be

objective tests	?[367]
simulation	6
direct observation	5

These "scores," which are used to prove the point that the existing "package" of bar exam options (MBE, essays [state-constructed or MEE] and performance test [MPT]) give the most complete information regarding inferences of professional competence,[368] are of questionable value if one changes the assumptions in the table.

If "direct observation" was replaced by a carefully constructed PSABE, score of that factor should equal or surpass that of both objective tests and simulation. Note particularly the low score given for generalization based on the proposition

364 Obviously, I disagree with many, including the assertion that "written objective tests provide direct measures of certain learning skills," or that they "sample a wide domain of knowledge," as opposed to rote memorization.

365. If the purpose of the bar exam is to predict minimum competence to practice law unsupervised, *see* Fisher, *supra* note 3, then the inability to make that prediction with some degree of confidence would appear to constitute a fatal flaw.

366 As Slaughter writes, "In moving from direct observations of performance to objective tests . . . we lose strength in our assumptions about how accurately those scores are likely to predict performance on similar tasks [and] in practice." Slaughter et al., *supra* note 356, at 8. I "[sic]" the statement because one clearly does not perform the same tasks required on any bar exam in practice. In an oft-cited article, Susan Sturm and Lani Guinier argue against "one-size-fits-all" standardized tests, not only because of their impact on diversity in the workforce, but also because they are of limited utility in predicting performance in the job for which they are used. Sturm & Guinier, *supra* note 22, at 970.

367 Inability to test "judgments about complex issues" should reduce the evaluation score for objective tests to 2; similarly, the incorrect assumption that "a wide domain of knowledge" is being tested should also reduce the generalization score to 2. If this were the case, objective tests would score no higher than direction observation, and lower than simulation.

368. Slaughter et al., *supra* note 356, at 8; Kuehnemeister, *supra* note 77, at 36.

that samples of performance are generally small and unrepresentative. Observation, by trained evaluators, over a 10-week (or more) period would surely entitle the direct observation method to a score of three, rather than one.[369] This is particularly true since any "disadvantage" of inference to the larger domain[370] would disappear if the observation was of virtually *all* the larger domain. Thus, even if evaluation remains problematic,[371] the PSABE's direct observation would provide the same level of confidence ostensibly offered by the existing bar examination. With more skepticism about claims made for the objective test method,[372] direct observation would emerge as clearly superior. That is, the comparative scores would now look more like this:

	Evaluation	Generalization	Extrapolation
Objective Tests	+++	++[+]	+
Simulations	++	++	++
Direct Observation/PSABE	+[+]	+++	+++

360. Kuechenmeister notes that "many of the disadvantages of performance testing can be overcome if time and expense are not a problem." Slaughter et al., *supra* note 356, at 12. The PSABE deals with time by expanding the observations over many weeks, and with expense by utilizing existing resources (court personnel and the court domain) in a way which actually increases, rather than depletes, those resources (by providing assistance during the PSABE itself, and through subsequent pro bono service obligations).

370. "Domain" here is used with regard to other questions which might be asked on another administration of the test, in the case of objective tests, or other choices as to the applicants' other skills which might be observed. As Kuechenmeister points out with regard to objective tests, "It is not feasible to assess the full domain of content and skills on any one administration because of time constraints and examinee endurance." Kuechenmeister, *supra* note 77, at 66. This is why generalization is so important in time limited tests, like the present bar examination, and why it should be substantially *less* important for observations over a lengthy period of time. "Domain," especially on the MBE, also includes the range of subjects, if not lawyering skills, that are tested. As I suggest, an equally large, if not larger, domain of law is present in, and would necessarily be utilized by applicants in the PSABE. See discussion *infra* notes 483-87 and accompanying text.

371. I do not believe this is necessarily the case.

372. *See, e.g.*, Rudler, *supra* note 251, at 169 (arguing that the regression model of test bias, used to validate the LSAT and the SAT, is flawed in that it may "actually mask bias by relying on a criterion (law school grades) that also may be contaminated by bias against women, people of color, and a host of other outsider groups").

Objective tests (the current bar exam) and the PSABE would now have the same "validity" score of seven. If I am correct, either that the current bar exam deserves less than three for generalization, or that, by developing uniform instruments for evaluation, and instituting a set of checks and balances, the evaluation score for the PSABE would rise to two, the PSABE would garner a superior score.

If "[t]he goal is to design a process that will provide the most useful information [in assessing an applicant's competence to practice law] given a jurisdiction's limited resources,"[373] the PSABE should certainly be given a try.

2. *Validation and Reliability: The "Argument-Based Approach"*

Another way of assessing any test used to license for a particular occupation or profession is suggested by Julia Lenel, formerly the Director of Law Programs at the American College Testing Programs, Inc. (ACT) who was responsible for developing the MBE and MEE.[374] Her analysis provides a useful way of predicting the validity of a PSABE, as compared to the accepted validation of the existing bar examination.

Dr. Lenel notes that,

> the two most important attributes of a test are its reliability and its validity. Validity refers to the appropriateness or soundness of test-score interpretations while reliability refers to the accuracy or precision of test scores. In assessing the validity of a test, one asks, "Are the interpretations or inferences made on the basis of this test score appropriate? Does the test actually measure what it is intended to measure?" In assessing reliability, one asks, "Is this test score an accurate measure of the ability the test is intended to measure?" If a test is not valid, the reliability of the test scores is irrelevant.[375] If the test scores do not measure what they are supposed to measure, it does not matter how accurate they are. For this reason, the validity of a test is its most critical attribute.[376]

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373. Kuechenmeister, *supra* note 77, at 27.

374. Lenel, *supra* note 264, at 14.

375. This is a statement of the principle which I use to criticize the validity of the existing bar exam, see *supra* Part IV(a).

376. Lenel, *supra* note 264, at 5

Lenel reviews evolving concepts of validation,[377] describing the result as, "a change in belief about the kinds of evidence that must be gathered to support the validity of a test,"[378] and then employs the work of M.T. Kane[379] and his "argument-based" approach to validation. She applies this approach to the existing bar examination as follows: validation must examine the assumptions and inferences inherent in the interpretation of the test. Given its purpose of protecting the public,[380] the "interpretative argument" for the bar exam is

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377. She notes that views about what constitute test evaluation have evolved from dividing validity into three different types, criterion related validity, content validity, and construct validity, as provided in AM. PSYCH. ASS'N , ET. AL., STANDARDS FOR EDUCATIONAL TESTING (1974) to validity as a unitary concept, or, to put it another way, all types of validity as forms of construct evaluation. *Id.* at 8. She writes:

> According to this viewpoint, every examination is a measure of some hypothetical construct. Even if the construct is not part of a well-articulated theory, the interpretation of test scores involves a structure of assumptions and inferences that can be tested. Validation, then, is the process of evaluating these assumptions and inferences.

Lenel, *supra* note 264, at 5. This is the procedure I have used in applying the Kane scoring typology to a PSABE. *See supra* text accompanying notes 360-73. It also collapses the usual three types of validation which are set forth in the much earlier EEOC Guidelines, see *supra* notes 261-63 and accompanying text, though without, as discussed here, changing the result in validating the PSABE or, for that matter, the existing bar exam. For a discussion of the concept of "validity," as fluid and ever-changing, see Coleman, *supra* note 355, at 104. Coleman was Deputy Assistant Secretary for Civil Rights in the Clinton Department of Education.

378. Lenel, *supra* note 264, at 8 ("When an individual is asked to validate an examination, a major problem he or she will face is deciding which kinds of validity evidence should be collected."). Lenel notes that for licensure exams, evidence of predictive validity is the most important, but creates difficulties because of the problem of "identifying an appropriate performance or criterion measure." *Id.* at 6. In other words, how do we know or how can we identify and "nail" what constitutes competence in lawyering? This has hitherto for been the largest single problem for bar examiners. I suggest, and by their creation and/or acceptance of the MPT they would appear to agree, that the MacCrate Report provides us conceptually with the necessary criteria insofar as it describes the fundamental skills necessary for competent practice. The difficulty which remains for bar examiners is to persuasively argue that the MPT effectively (validly?) tests those skills.

379. Kane, *supra* note 357. Note that "argument" about the validity of assessment is part of validity's rhetorical content. Coleman, *supra* note 355.

380. Licensure examinations are intended to protect the public, as demonstrated by the 1997 definition of the U.S. Department of Health, Education & Welfare (now, relevantly the U.S. Department of Education) of licensure as "a process by which an agency of government grants permission to an individual to engage in a given occupation upon the finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety and welfare

> [A] conclusion based on two premises: (1) Because there are critical abilities (i.e., skills or knowledge) that are necessary for the safe and effective practice of law, individuals who lack these abilities will not perform effectively; and (2) individuals who receive low scores (i.e., scores below the passing score) on a bar examination, lack these critical abilities to a substantial degree.[381]

Investigating Premise (1), the validator must identify "the skills or knowledge that should be included in the domain of critical activities."[382] This is commonly done by reliance on the judgments of a panel of experts.[383] The alternative method involves a job or task analysis identified by Lenel as "the method of choice for . . . . licensure examinations."[384] Exploring the possibility of constructing a good job analysis for the existing bar examination, Lenel points out difficulties based on the varying practice situations available to entry level lawyers.[385] Given licensure's obligation to secure protection of the public,[386] it is disturbing that, as she notes, "it is possible that some skills or abilities that are critical to competent practice are *acquired on the job rather than prior to being admitted to the bar*."[387] Thus,

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will be reasonably well-protected." U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PUBLIC HEALTH SERVICES, CREDENTIALING HEALTH MAN[SIC]POWER, DHEW Publication No. (05) 77-50057 (1977). That said, state governments regulate those occupations practiced within their jurisdictions deemed to require licensure and oversight in order to protect public health, safety, and economic well being; there is no federal level licensure that supersedes the states. Some professions have national qualifying examinations that are recognized in most states as part of the licensing process, but there is little reciprocity regarding recognition of qualifications or licenses since requirements vary state to state.

381. *Id.*

382. *Id.*

383. Bar examiners do this, to some extent, in determining the subject matter to be tested, both on the MBE and on the essay portion of bar exams. *See, e.g.*, Howarth, *supra* note 11. They do much the same when they ask "What does a competent practitioner need to know about a particular subject which is being tested?" *See* Dubin, *supra* note 60.

384. Lenel, *supra* note 264, at 9 (citing JOINT STANDARDS, *supra* note 355, at 64).

385. This difficulty is related to the notion of a "unitary profession." *See supra* notes 67-78 and accompanying text.

386. Lenel, *supra* note 264, at 10. The implication that one cannot or does not have the full range of skills necessary for minimally competent law practice directly undercuts the justification for licensure.

387. *Id.* (emphasis added). Lenel states that, "[i]t is not reasonable to require candidates to demonstrate skills that they have not yet had an opportunity to acquire." *Id.* Perhaps this is not reasonable for those applicants whose law school

while relevant to a job analysis, those skills and abilities are not, somehow, "appropriate content for a bar examination."[388]

We currently have a high level of confidence in identification of the "critical skills or knowledge," as a result of the opinions of experts[389] who, in essence, performed a "job analysis" of the profession[390] for the MacCrate Report. For the PSABE, Premise (1) would reasonably appear to be established, while for the traditional bar exam, there would be less evidence, and/or evidence to the contrary.

As for Premise (2), Lenel describes the "normal procedure" for testing the "*problematic assumption*"[391] that the contents of bar examinations are relevant to law practice as using the information obtained through analysis of Premise (1) "to define the domain of critical abilities and to develop a table of specifications for the examination."[392]

For the existing bar exam, this can be done, at best, only partially, because of the same time, space, and examinee endur-

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education has failed to provide them with opportunities to acquire critical skills. But is it reasonable to claim you are protecting the public, when you know that applicants you are licensing lack essential skills? To this, Lenel states parenthetically, "This also raises the question whether such skills should be acquired prior to licensing, but that is a topic for another paper." *Id.* The profession, if not the academy, has resoundingly answered that question in the MacCrate Report. Much of the argument for a PSABE is to encourage law schools to teach the skills we know are critical, as well as to require applicants to demonstrate competence in those skills before they are admitted to practice. And secondary to its purpose of providing opportunity for evaluation, the PSABE itself incorporates a fair amount of "on the job training." *See infra* Part XIII(k)(2).

388. Lenel, *supra* note 264, at 10.

389. The MacCrate Commission was made up of leading experts from the realms of practice, legal education and the judiciary. I know of no one who has seriously criticized the composition of the Commission or the expertise and experience of its members.

390. In formulating the ten "fundamental lawyering skills" and four "fundamental values of the profession," the Commission sought comments not only from those practicing law, but also those who work with lawyers. The tentative draft resulting from this first round formulation was circulated nationally to the profession in 1991. MacCrate Report, *supra* note 1, at xii. It is hard to imagine a more thorough, comprehensive process of job analysis for a diverse profession.

391. For the existing bar exam, Lenel considers one of the imbedded assumptions in this Premise, that bar examination scores are a measure of the critical abilities, *problematic* because "the contents of bar examinations are often attacked for having limited relevance to the practice of law." Lenel, *supra* note 264, at 10.

392. *Id.*

ance limitations previously noted.[393] Having identified the "domain" as that described in the MacCrate Report, the PSABE's extended observation would obviate these limitations. More significantly, in Lenel's construct, "the format of a test may not be amenable to assessing certain [critical] abilities."[394] Here again, the (projected) evidence about the PSABE is more likely to support the necessary inference of an inclusive domain.[395]

Lenel also notes that the second embedded assumption—that the passing score marks the cut-off between incompetence and minimum competence—is problematic. It is, however, critical. As she writes:

> If a test validator cannot make a plausible and persuasive argument (preferably based on empirical studies) that individuals who score below the passing score generally are not competent to practice law and those who score above the passing score are at least minimally competent, then the test cannot be considered valid.[396]

As to the existing bar examination where the cut-off appears both arbitrary and protectionist,[397] this seems an under-

393. "There is a limit to the number of questions that can be included on a [written] test . . ." *Id.* In contrast, the PSABE permits innumerable observations of the full domain of skills, as well as the contextualized use of substantive law in testing the knowledge of which is, by this definition, severely curtailed on a paper and pencil test.

394. *Id.* The example she uses is oral communications skills, but she could have chosen a number of other MacCrate skills, including negotiation, client counseling, alternative dispute resolution, or even legal research (to the extent that it involves the real life practice situation of a relatively unbounded universe of potential source material, unlike the tightly closed universe of the MPT), none of which can be assessed on the existing bar exam.

395. This is because virtually all of the MacCrate skills could be observed and evaluated in the PSABE. *See supra* note 316 and accompanying text and *infra* Part XIII.d.i.

396. Lenel, *supra* note 264, at 11.

397. The argument that the bar examination is more about limiting competition than ensuring competence has often—and with some basis—been made. *See, e.g.*, Rogers, *supra* note 51, at 584-87; *supra* text accompanying notes 116-20. The difference in passing scores among jurisdictions also suggests at least some degree of arbitrariness. *See, e.g.*, Kurdish, *supra* note 91, at 308 nn.26-27 (Georgia requires a minimum score of 115 on the MBE, with a combined score of 270 on the MBE and essay portions; in Minnesota, an MBE score of 145 is sufficient to pass the bar. Connecticut has a combined score requirement with no required minimum on either portion. Pennsylvania now requires a minimum scaled score of 130 on the MBE and 135, with a minimum combined score of 270 (citations omitted)). On the connection between raising the cut-off point, see *Dream Deferred*, *supra* note 21.

statement, especially in light of the movement to increase passing scores and thus lower bar pass rates.[398] The PSABE might not be better, although intuitively it seems that it would,[399] but it certainly could not be worse.[400]

Having arguably collected evidence which would allow one to substantiate the two stated premises,[401] the argument-based method continues by requiring the validator to test competing hypotheses—that is, whether the test is measuring other, irrelevant factors.[402] These might include assertions, *inter alia*, that the existing bar exam actually tests only memorization; that scores are a function of who grades the exam rather than the examinee's knowledge; that it tests general intelligence—or test-taking skills—instead of competence to practice law; that it is biased against women or minorities, etc. Testing these alternative hypotheses requires studies specifically designed to

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398. *See supra* text accompanying notes 16-20; Merritt et al., *supra* note 20. If the arguments *for* engaging in this score raising are actually premised in the belief that previous scores were too low to ensure competence (although there has been absolutely no evidence propounded either for or against that proposition), then the bar examiners are admitting that many practicing attorneys lacked minimum competence, although they were certified as possessing it at the time they took and passed the bar exam. For obvious reasons (including the lack of any evidence), they cannot make this claim, without the claim, it is difficult to justify raising the passing score, especially when to do so will almost certainly have a disparate impact on non-majority takers. *See Dream Deferred*, *supra* note 21, at 32-36.

399. Evaluators would assess competence (excellent, adequate, poor, unsatisfactory) on identified tasks which when aggregated, would more closely approximate a line between minimal competence and incompetence, than numerical scores assigned to questions and scaled against other takers' answers and scores. Judgments would still need to be made—for example, if numerical values were assigned to each of the categories, i.e., 4 to 1, and averaged across the evaluation of each skill, we would need to decide whether an average of adequate (3) was necessary (as opposed to something between average and poor) and/or whether, even if the numerical average met our numerical cutoff (3, 2.5, 2), an applicant would "pass" with an evaluation of incompetent on one or more of the skills observed.

400. This assumes competent and reasonably consistent evaluators. *See* discussion *infra* Part XIII(e).

401. Lenel seems, although with some qualification, to believe that this can be done on the cutoff issue for the existing bar exam. Lenel, *supra* note 254, at 11. If this criteria of validity were honestly applied, we would have to conclude (in the absence of any empirical studies correlating bar pass scores to "competence" in practice, however that might be defined) that the bar exam is invalid as a licensure test. The point here, however, is to demonstrate that by criteria so loosely applied as to avoid the dilemma by current bar examiners (and the NCBE), the PSABE would, at worst, be equally valid.

402. *Id.* at 12.

study each one individually.[403] The validator can only form the "validity argument"—or a persuasive claim that the test is what it purports to be, and does what it purports to do (and is required by general principles of licensure, and the due process clause)[404]—after such studies have been successfully completed.

The "competing hypotheses" about the existing bar exam have neither been adequately tested,[405] nor, where tested, been convincingly dispelled.[406] We could—and should—also formulate competing hypotheses for the PSABE. For example: the role of evaluation bias; that it proves competence only in the controlled setting of the court system, rather than in unsupervised practice, etc. As competing hypotheses arise, they should, like those for the existing bar, be subjected to the best studies which can be designed and executed. Surely the public deserves no less from those whose competence is certified by bar examiners. There is, however, little reason to believe that the competing hypotheses would prove any stronger for the PSABE than for the existing bar exam; if they did, the PSABE could and should be discontinued.

Even after the validity argument can be made—thus far, I suggest, it can be done at least as persuasively for the PSABE—the social consequences of the test must be considered. That is, the evaluation moves from the technical to the political.[407]

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403. *Id.* Lenel cautions, however, that because "Bar examinations are the target of considerable criticism, [i]t may not be reasonable to expect validators to investigate every [competing hypothesis]." *Id.*

404. For a finding that a test was "unfair" in constitutional terms, because it did not test what had been taught, see Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981).

405. Evidence that bar passage is somewhat correlated to LSAT scores hardly proves that success on the former—as well as the latter—is not a function of test-taking skills, as opposed to legal competence. Certainly, that claim has never been made for the LSAT by LSAC. And, of course, "the LSAT has never been (nor was it ever intended to be) validated as a predictor of actual performance as a lawyer." Kidder, *supra* note 150, at 197 (citing Wightman, *supra* note 154, at 29-31).

406. If anything, the LSAC Bar Passage Study confirms rather than disproves allegations of disparate impact on non-majority applicants. *See LSAC Study*, *supra* note 43.

407. As Lenel describes, using unproven but widely-accepted allegations of racial bias as a "hypothetical," "a test that is technically sound may still be judged unfair and possibly invalid." Lenel, *supra* note 264, at 12. Social consequences, especially as they may include differing results for different sub-groups of takers

Drawing on the work of leaders in the measurement field, Lenel writes:

> It is no longer enough to show that a test is technically sound and measures what it is supposed to measure. The social impact of testing must also be evaluated. The test user must ask, "What are the consequences of testing?"[408] What unintended consequences is the test having?[409] Are these consequences acceptable?[410] Is the test still serving its function?[411]

Creating and testing a PSABE, rather than working toward the unlikely possibility of abolishing and/or replacing the existing exam should be especially attractive. An alternative which corrects for the inadequacies of the existing bar exam[412] by deploying new resources and testing more lawyering skills could relieve some of the pressure on the current system and those who believe it should be maintained "as is." Especially where applicant perception[413] and other unintended consequences are involved,[414] a PSABE could dispel skepticism and/

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is part of the third requirement for "validity" in the Joint Standards, *supra* note 355. *See also* Coleman, *supra* note 355, at 106.

408. To this, one answer, propounded by the MacCrate Report, is that law schools are not encouraged, much less compelled, to teach the full range of lawyering skills.

409. For example, if there were a widespread perception that non-majority takers have only a 50% chance of passing the first time, has that perception caused non-minority applications to law school to fall disproportionately (thus decreasing the diversity of an already disproportionately white bar)? *See* discussion *infra* Part XII(g). Or, alternatively (and less controversially), does the bar examination's reliance on testing doctrine rather than lawyering skills result in decreased commitment by law schools to teaching those skills as part of their curriculum?

410. For example, can we continue with a bar exam which has the consequence (to whatever extent it is "responsible") of a bar which does not reflect the diversity of the society which the law governs and regulates?

411. Lenel, *supra* note 264, at 13. For example, given the widespread dissatisfaction with and distrust of lawyers and the legal system, can we assume the bar exam is adequately protecting the public?

412. This refers particularly to those involving time and expense constraints over which well-intentioned bar examiners have no control.

413. Testing professionals agree that, when validating an examination, examiners should believe the test to be a fair measure of "critical knowledge or skills." *See, e.g.*, *Performance Testing*, *supra* note 279 at 36 (describing the process by which applicants were questioned on their perception of the "fairness" of the 1980 California experiment).

414. "Researchers increasingly suggest that both the intended *and* unintended effects of a test should be studied and validated." Mueller, *supra* note 32, at 211.

or hostility and encourage results deemed critical by the profession. Giving an applicant the opportunity to choose how her lawyering skills would be tested might increase both her chances of passing and her confidence in the fairness of the process.

In summary, using either or both models employed to justify the current system, the PSABE should prove at least an equally "valid" and acceptable testing mechanism.

e) *Who Would Evaluate PSABE Takers, How Would They be Trained and How Would we Avoid Bias?*

1. *Identity*

In the long term, a PSABE's on-the-job evaluations should be done by court employees– experienced lawyers[415] and judges—who have been appropriately trained.[416] Those employees must also be given periodic opportunities for reflection with their colleagues and trainers, other testing professionals and/or members of the "bar examination establishment."[417] In the shorter term—i.e., for a pilot project—skilled law school clinical teachers would be critical in training and assisting selected court personnel. This combination could produce opportunities for fine-tuning subsequent training, improving the evaluation process, especially for first-time court employees, increasing the ability to generalize across observations, and providing feedback, which is a critical part of learning.[418]

415 It is important to remember that the existing bar exam is graded by practicing lawyers who are selected and trained by the bar examiners. The Bar Committees' Proposal would require all "site supervisors" to have at least five years of experience. BAR COMMITTEES REPORT, *supra* note 5, at 13.

416 *See infra* text accompanying notes 419-38. Training, and requiring duties in addition to those in their existing job descriptions would require consultation work, and cooperation from, their relevant unions. *See* discussion *infra* at notes 679-80 and accompanying text.

417 By this I mean the institutions, groups and individuals who are involved in the bar examination process – the state supreme court or court of appeals which controls admission to the bar, the bar examiners of the particular state, the NCBE, state and other important bar associations, psychometricians and testing professionals relied upon by bar examiners and perhaps also the bar review industry.

418 *See generally* Goode, *supra* note 146, for a discussion of the importance of feedback in a clinical setting.

2. *Training*

Law school clinicians will be critical in designing and administering training for court employee evaluators. In 1979, the California Bar Examiners called upon the relatively undeveloped expertise of clinicians in constructing the test and evaluating the performance of applicants.[419] More than twenty years later, clinicians have developed a sophisticated pedagogy and extensive literature of evaluation.[420] While much of this is focused on evaluation as part of a learning, rather than a sorting or weeding process, clinicians, like other law school teachers, are required to assess · and thus sort—their students in the process of awarding letter grades. Clinical teachers have developed assessment methodologies,[421] and have utilized them in training others to do so, most commonly in the context of externships where practitioners who supervise law students participate in the evaluation and grading process.[422]

More can be learned from the experience of the 1980 California experiment. Bar examiners—themselves almost all prac-

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419. *See Performance Testing*, *supra* note 279, at 14, for Armando Menocal's description of the limitations of clinical expertise at that time.

420. *See, e.g.*, Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349, 355-56 (1996). "The principles of competent skills performance . . . do not remove all subjectivity from . . . evaluation—nor do the criteria for effective answers to traditional doctrinal essay questions—but they do rest on careful analytical breakdowns of the component parts needed to achieve effective performance." *Id.*, Amy L. Ziegler, *Developing a System of Evaluating in Clinical Legal Teaching*, 42 J. LEGAL EDUC. 505 (1992); Roy T. Stuckey, *Apprenticeships and Clinical Education: The Only Real Performance Tests?*, B. EXAMINER, Aug. 1986, at 4, 7.

421. For example, I asked one CUNY clinical teacher how she would assess competency in the MacCrate skill of interviewing (part of fact development). She described reviewing an "interview plan" prepared by a student prior to the interview itself (looking at, e.g., the student's understanding of the case, possession of a "theory of the case" which might be enhanced or altered by the results of the interview, etc.), observing the interview for, e.g., skill in eliciting relevant facts, and then comparing (in consultation with the student) the results of the interview with the interview plan. (Interview with Janet Calvo, CUNY Professor (Apr. 2001)). "Evaluating an instance of lawyering performance, especially an oral performance, usually requires different methods of analytical assessment than would be used in evaluating a written essay answer, but this is a difference of degree and not of kind." Grosberg, *supra* note 420, at 356.

422. There is, by now, a fairly extensive literature on externships, *see* J.P. Ogilvy, *Introduction to the Symposium on Developments in Legal Externship Pedagogy*, 5 CLINICAL L. REV. 337 (1999), and symposium articles summarizing pedagogical goals, program design, field supervision and evaluation.

titioners--were taught to evaluate the performance of the 500 participants who were videotaped performing various lawyering tasks in the "Assessment Center" portion of the experiment.[424] Those who evaluated the overall experiment found that the resulting performance assessments were as reliable as assessments made in grading the traditional bar exam.[424] A PSABE would differ in the increased and more varied domain of practice observed. There is, however, no reason to believe that the training and evaluation methods employed in 1980 would not be a useful source for training court employees to assess PSABE applicants.[425]

More recent practices developed to grade, where more subjective measurements of legal knowledge and skills are involved, can be helpful in designing training for court employee evaluators. These include the methods utilized by bar examiners to avoid bias and increase uniformity of scoring MPT questions and essays.[426] Experience from other countries may also provide guidance. In the Canadian credentialing process (which varies slightly from province to province), law graduates are required to successfully complete a six-week to six-month teaching term as well as a six to twelve month period of articling (clerkship).[427] The teaching term faculty may be required to grade projects which are completed by applicants during their hands-on, skills-based training.[428] Students are also tested during the term to determine whether they are mini-

423. See discussion *supra* Part XI.B.3.

424. *See supra* note 285.

425. For example, the BAR COMMITTEE REPORT suggests, "formulation of appropriate evaluation criteria . . . and formats for an on-the-job assessment . . . be developed cooperatively by . . . court personnel and . . . outside consultants . . . Live or videotaped demonstrations will be prepared which model appropriate feedback techniques and serve as a baseline for evaluation." BAR COMMITTEE REPORT, *supra* note 5, at 13-14.

426. MPT graders are given a uniform scoring instrument, "Drafters Point Sheet and Grading Guidelines," which describes the factual and legal points encompassed in the lawyering task to be performed by the applicant. Following administration of the MPT, graders may participate in a national grading workshop. *See* Smith, *supra* note 84, at 46. Similarly, there are techniques for increasing reliability by essay graders. *See* John C. Land, *The Essay Examination: Part III: Grading the Essay Examination*, B. EXAMINER, Aug. 1990, at 14, 16.

427. Curcio, *supra* note 14, at 398-401 (describing the Canadian model).

428. *Id.* at 399.

mally competent in specific lawyering skills.[429] The experience of attorney supervisors in the teaching term in assessing lawyering skills should be examined and, where successful, incorporated.

Finally, there is an enormous literature on job assessment[430] outside the licensure context[431] which could be drawn upon in constructing a valid evaluation model and training for a PSARE.[432] Significantly, the EEOC's Uniform Guidelines on Employee Selection Procedures (adopted by the Supreme Court in *Albemarle* and incorporated into Title VII as establishing the kinds of validation which legitimate employment tests)[433] note that, for criterion-related validation, "[t]he most commonly used criterion measure is supervisory rating of job performance which is acceptable if done in a professional manner."[434] Such performance-based assessment has already been widely and successfully employed.

The provocative work of Susan Sturm and Lani Guinier suggests that the process of developing "dynamic and interactive" models of assessment which are "integrated into the day-to-day functioning of the organization" could also enhance opportunity and diversity in ways different from, and politically

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429. *Id.* at 400.

430. *See* Kenneth Pearlman, *Twenty-First Century Measures for Twenty First Century Work*, in TRANSITIONS IN WORK AND LEARNING: IMPLICATIONS FOR ASSESSMENT (Ed. on Testing and Assessment & Nat'l Research Council eds. 1997); PERSONNEL SELECTION IN ORGANIZATIONS (Neal Schmitt et al. eds. 1997); F. L. Baker et al., *Policy and Validity Prospects for Performance Based Assessments*, 48 AM. PSYCHOLOGIST 1210 (1993); K. WARNER W. WILLINGHAM ET AL., PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES (1990); LINDA DARLING-HAMMOND ET AL., A LICENSE TO TEACH: BUILDING A PROFESSION FOR 21ST CENTURY SCHOOLS (1995).

431. Lawyers themselves have developed models and techniques, for example, for assessing the skills of law students they have hired. *See, e.g.*, Alice Alexander & Jeffrey Smith, *Law Student Supervision: An Organized System*, LEGAL EXPO., May-June 1989, at 38; Henry Rose, *Lawyers as Teachers, The Art of Supervision*, LAW PRAC. MGMT., May-June 1995, at 28.

432. A new LSAC-funded study conducted by Professors Marjorie M. Shultz and Sheldon Zedeck of the University of California at Berkeley is in the early stages of using empirical studies to define the skills necessary to succeed as a lawyer, to be followed by development of job-based predictive instruments by Professor Zedeck, an authority on job-relatedness and Title VII. Marjorie M. Shultz & Sheldon Zedeck, Presentation at the AALS Annual Meeting, *Where are we Headed? Improving the Competence of Law Schools* (Jan. 5, 2003).

433. *See supra* notes 256-64 and accompanying text.

434. SCALES & GROSSMAN, *supra* note 261.

more appealing than traditionally understood affirmative action programs.[435] Their work conceptualizes new methods of evaluation, which move "from prediction to performance." Incorporating "[r]ecent developments in the assessment area, such as portfolio-based[436] and authentic assessment,"[437] Sturm and Guinier ask questions[438] and provide a valuable context in which evaluation training can be developed.

3. *Avoiding Bias*

The kind of on-the-job performance evaluation and assessment utilized in a PSABE raises a potential for bias which always exists in more subjective evaluations.[439] There are no simple answers, but my personal experience in the court system gives me some measure of confidence that where those who are trained to do the evaluations are themselves of diverse race and gender, and operate within an inclusionary structure, their evaluations can be fair and unbiased.[440] Nonetheless, the evaluation process must be designed explicitly to minimize or com-

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435. Sturm & Guinier, *supra* note 22, at 1012-13.

436. For a discussion of professional portfolio-based evaluation in the educational context, see Hamilton et al., *supra* note 430, at 81-84; *see also* Ruth Mitchell, Testing for Learning: How New Approaches to Evaluation Can Improve American Schools 20-21 (1992).

437. Sturm & Guinier, *supra* note 22, at 1013.

438. Among the "challenges" they pose are "how to integrate the assessment process into the activities of the organization," a question which goes directly to the issue of designing a real-life, real-time, court-based performance evaluation, and to the develop "mechanisms of evaluation that are accountable to concerns of both performance and inclusion." Sturm & Guinier, *supra* note 22, at 1010-11. The latter raises the potential problem of bias in a more subjective assessment scheme.

439. *See* Vaughns, *supra* note 17, at 425; Steinberg, *supra* note 253, at 39-40. "[S]tudies have consistently found that performance appraisal ratings of women and people of color are prone to bias." Steinberg, *supra* note 253, at 39-40. *See generally* Virginia A. O'Leary & Ronald D. Hansen, *Performance Evaluation: A Social-Psychological Perspective in* Performance Measurement and Theory 197 (Frank Landy et al. eds., 1983).

440. Studies of teamwork in multiracial settings (of which the court system is surely one) suggest that the ability to work as co-equals in interdependent and cooperative teams can reduce bias. *See, e.g.*, Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 Small Group Res. 224, 226 (1994).

pletely avoid bias and should include a system of checks and balances.[441]

Uniformity of evaluation criteria is critical to anticipating and avoiding bias.[442] Research shows that hiring and promotion outcomes are better for women and minorities—i.e., less biased—when procedures are formalized rather than entirely informal and thus vulnerable to abuse.[443] This strongly suggests that the evaluation process for a PSABE needs to be both accountable and transparent. Criteria need to be agreed upon and consistently and explicitly applied. As Sturm and Guinier suggest:

> The challenge posed . . . is to develop systems of accountable decision making that minimize the expression of bias and structure judgment around identified . . . norms. For each assessment, [evaluators] would articulate criteria of successful performance, document activities and tasks relevant to the judgment, assess [applicants] in relation to those criteria, and offer sufficient information about the candidates' performance to enable others to exercise independent judgment.[444]

Those who planned and implemented the 1980 California experiment had concerns about bias which, through use of criteria like those suggested by Sturm and Guinier, proved largely unfounded. Once again, there is much of value to be derived from their work.

The other end of the spectrum from negative bias is the possibility, which also may arise in law school grading,[445] that supervisors and evaluators might develop friendships with, or a

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441. The BAR COMMITTEE REPORT would accomplish this by use of a variety of evaluation devices, "graded" by different people, including evaluation on a simulated task, and a written test, like the MPT, but without its time constraints. *See* BAR COMMITTEE REPORT, *supra* note 5, at 10-16. While the elaborate system of checks and balances the Committees propose might be feasible—and extremely useful—for a pilot, expansion to a large universe of applicants could result in the same problems generated by the 1950 Assessment Center experiment.

442. This is one of the recommendations contained in the BAR COMMITTEE REPORT, *supra* note 5, at 16.

443. *See* Paul Osterman, *Too Formal?*, *in* WHO'S QUALIFIED? *supra* note 32, at 72.

444. Sturm & Guinier, *supra* note 22, at 1014.

445. Concern for unconscious bias—favorable as well as possibly discriminatory—is one of the reasons most law schools require written examinations (as opposed to papers, where students and teachers may have repeated interaction, or clinical work, in which anonymity is impossible) to be blind graded.

sense of responsibility for applicants that could result in overly favorable assessments. Unlike discriminatory bias or prejudice *against* an applicant, the potential danger of an overly-favorable assessment lies in the undeserved pass or, in testing terms, a false positive. In the PSABE, such bias could result in "passing" applicants who were not minimally competent. (Presumably, this did not occur in the 1980 California experiment, since graders had neither supervisory responsibility over, nor personal contact with applicants whose videotaped performance they were evaluating).[446] This raises two separate questions.

First, is there a way to avoid or protect against pro-applicant supervisor bias[447] such that there can be as much confidence in the results of the PSABE as in those of the existing bar exam?[448] Here, we should examine and draw upon the consider-

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446. Certainly videotaping would permit a range of assessments by a number of evaluators, obviating the potential for this kind of bias. Unfortunately, it would run into the same cost barriers which caused the California bar examiners to eschew videotaped tests after the 1980 experiment. More limited use of videotaping, as part of the pilot could, however, help ascertain the existence and extent of such positive bias so that appropriate corrective measures could be devised.

447. Although I use the term "supervisor" here, the danger of positive bias is most likely to arise when "supervision" crosses over into "mentoring." *See* Michael Meltsner et al., *The Bike Tour Leader's Dilemma: Talking about Supervision*, 13 VT. L. REV. 399, 423 (1989). A mentor "imparts knowledge, aimed at a more generally applicable and less result-oriented form of learning, rather than the transmission of skill that flows from task supervision. Mentoring partakes of identification . . . . The mentor expects and plans for the success of the mentee." *Id.* at 423. While there are real benefits possible in a mentoring relationship, see *infra* Part XIII(C)(2), part of training court employees to supervise and assess applicants' performance is teaching them to *recognize* and distinguish between the roles of supervisor and mentor.

448. Attempts have been made to test the hypothesis of racial or gender bias on the part of bar exam graders. *See, e.g.*, Klein & Bolus, *supra* note 157. While the purpose of these studies has been primarily to detect unconscious cultural bias (since the graders know neither the race nor the gender of the women or minorities), it also necessarily includes a *favorable* bias towards those who write or reason like the graders. While the studies have shown that graders of different genders and races generally award similar scores to questions, regardless of the race and/or gender of the applicant, the issue of bias, especially toward an invisible, but shared cultural norm cannot be entirely ruled out. The persistent and seemingly fixed disparate impact of the bar exam on non-majority applicants suggests not only that qualified applicants may be being excluded but, at least inferentially, there might also be positive bias toward some majority takers who are otherwise "unqualified."

able work done and the best practices which have emerged from workplace and educational assessment and evaluation.[449]

In a pilot project, utilizing both law school clinicians and court employees, the former could provide assessments unrelated to and unaffected by any supervisory role. Those assessments could be used to test hypotheses of positive or negative bias by supervisors,[450] and to standardize the final, determinative evaluations of minimal competency. Multiple assessments of individual applicants, utilizing articulated standards, coupled with time for reflection and comparison of views, would go a long way to ensure fairness and absence of bias.[451] Such assessments could also inform training and procedures if the pilot were expanded. There is no simple answer to the possibility of supervisor bias, but experience and careful "evaluation of the evaluation" will surely be critical in a pilot project, and in any subsequent decision about whether to continue or expand a PSABE.

The second question is less about practice than values. As with every test which purports to weed the incompetent from

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449. Sturm and Guinier have responded to similar concerns and criticisms about subjectivity in their emphasis on workplace evaluation over pencil and paper tests. *See* Susan Sturm & Lani Guinier, *Reply, or* WHO'S QUALIFIED? *supra* note 32, at 100.

> [That concern that moving beyond dominant reliance on tests necessarily leads back to the systems of informed, subjective, and biased decision making that tests were in part developed to prevent] is well founded, but in our view, unduly static and reactive. The approach to selection need not simply reflect a choice between these polar alternatives. We are urging interactive experimentation within institutions to permit more accountable and transparent decision making.

Id. at 100.

450. Trained professionals, such as experienced clinical teachers, would assess each applicant's minimal competence on the same tasks evaluated by supervisors. Any substantial variations would suggest a methodologically sound base for determining the likelihood of identification bias (substantially more passes or discriminatory bias (fewer passes for one gender or ethnicity). A constant assessment by one evaluator, paired with assessments from multiple supervisors would even out the assessment process and result in greater uniformity—and fairness—of result. This is similar to a technique presently utilized in grading the existing bar exam.

451. The BAR COMMITTEE REPORT calls for the "design of a system of evaluation that not only minimizes bias and is fair, but one that is subject of the kinds of checks and balances provided by the use of multiple evaluation devices." BAR COMMITTEE REPORT, *supra* note 5, at 15.

the competent, there is a danger of error—both false positives and false negatives[452]—requiring thoughtful consideration of the costs of each. That is, it is necessary to be clear about the limits of our tolerance for both underinclusive (excluding the competent) and overinclusive (including the incompetent) results. As to the former, as already discussed, the existing bar exam may be significantly underinclusive, especially for non-majority takers who have or might otherwise demonstrate their competence.[453] The consequence of underinclusion is the continuation of a bar which fails to represent the diversity of the society it serves, and results in a corresponding lack of access to justice for non-majority communities.[454] At the same time, the persistence of lawyer disciplinary actions, malpractice cases and client dissatisfaction suggest some degree of over-inclusiveness which both society and the profession have continued to tolerate.

The question is what degree of over-inclusiveness we are willing to tolerate from a PSABE. Here the findings of the LSAC Bar Study are instructive. They establish, as observers would guess, that eventually almost every applicant who persists will pass a bar exam[455] and be admitted to practice. Only five percent of takers who persist[456] never pass the existing bar

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452. Different statistical models used by psychometricians treat selection outcomes and selection errors differently, depending on whether false positives or false negatives are perceived as a worse outcome. *See* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. Colo. L. Rev. 1065, 1087 (1997).

453. For anecdotal support for this proposition, see discussion *infra* notes 543-54 and accompanying text, describing two professionally successful CUNY grads who failed the bar twice.

454. *See, e.g.*, Lempert et al., *supra* note 155, at 438-39 (describing the "statistically significant tendency of [Michigan] alumni to disproportionally serve persons of their own race or ethnicity" which, as "an aspect of . . . Michigan's commitment to train more minority lawyers," has "increased the numbers of its graduates providing services to African American and Latino individuals and organizations and to low- and middle-income individuals").

455. *See LSAC Study*, *supra* note 43, at viii. However, it may not be in the jurisdiction where the applicant first applied.

456. As previously discussed, a substantial number of African Americans who failed the bar on their first taking never attempted the bar exam again. *See supra* note 181 and accompanying text. It is impossible to determine whether, with persistence, they would have been "eventual passers," but anecdotal evidence suggests that many would. *See* discussion *infra* notes 550-61.

exam.[457] If we believe that a licensure test with an overall eventual pass rate of 95% is adequately protecting the public,[458] either the degree of over-inclusion in the existing bar examination regime is acceptable, or legal education is doing a sufficiently good job that almost all graduates of ABA-accredited law schools are appropriately admitted to the bar.[459] If the latter is true[460]—and, as a legal educator I would hope that it is—then we should be able to tolerate any over-inclusion which might result from the PSABE with equal comfort.[461] If the former is the case, we should be able to tolerate a similar margin of

457. *LSAC Study*, *supra* note 43, at 31 tbl.9. The actual percentage is 6.2.

458. I am certainly not suggesting that the bar passage rate be decreased by arbitrarily increasing passing scores. *See supra* text accompanying notes 16-25. I think, however, that this figure says something about the boundaries of our tolerance for error in admission of less than minimally competent practitioners.

459. Note that I characterize this as "appropriately admitted" rather than minimally competent to practice law unsupervised. It is problematic that admission via the existing bar guarantees the latter while the very purpose of design of the PSABE is to do so in a different and more efficacious way.

460. Hansen argues that arguments like these he attributes to Dean Griswold, that law schools are too easy in and for students are, if they were ever true, now simply outdated. *See* Hansen, *supra* note 11, at 1216. He notes that the bar exam is not a student's only serious hurdle to beginning a law career, but rather, that

> [T]here are many hurdles students must pass over before being admitted to practice. They include the LSAT, [competitive] acceptance to law school . . . law school assignments and examinations, and in many law schools [now in all ABA-accredited law schools, *see* ABA STANDARDS, *supra* note 36, Standard 302(a)(2)] a substantial writing requirement. These are all serious hurdles . . . .

Hansen, *supra* note 11, at 1216 (citing Griswold, *supra* note 39, at 82-83).

461. This is, of course, is also an argument for the proposition that we do not need any bar exam at all. *See* Hansen, *supra* note 11, at 1235; MacCrate Report, *supra* note 1, at 277-84. Unlike the existing bar, the PSABE would confer additional benefits – potentially increased public confidence, much needed assistance to the courts, and the potential for furthering the MacCrate value of providing pro bono assistance.

error for the PSABE,[462] especially in light of its other anticipated benefits to legal education[463] and the profession.[464]

f) *What Prerequisites Should There be for PSABE Takers?*

In addition to designing an evaluation process and method for training evaluators, a number of other practical issues need to be addressed prior to any pilot project of a PSABE. One issue is, broadly speaking, the question of preparation. This, in turn, has two aspects: preparation during law school and post-law school preparation for the work applicants would be required to do during the PSABE.

1. *Preparation in Law School*

If we seriously mean the PSABE to be a real, alternative bar exam, it must test skills and knowledge learned during the course of an applicant's legal education. Many of the MacCrate skills that the PSABE would test are already present in the curricula of every law school; others are not. For example, the traditional curriculum includes legal analysis and reasoning, legal research, and at least some degree of problem solving.[465] ABA accreditation standards ensure that all law students are taught professional responsibility,[466] so, at the very least, students should be knowledgeable about applicable rules and pro-

462. There is, of course, no way to determine the precise degree of over-inclusion in the existing bar regime, nor would there be any way to ascertain it for a PSABE. Without agreement on what constitutes competent practice (this is somewhat different from identifying the skills required for competent practice), the tools to measure it and to correlate it to bar passage in either regime, over-inclusion or the degree of "false positives" can never be known with certainty. The ongoing Berkeley Study may, however, provide some assistance. *See* Shultz & Zedeck, *supra* note 432.

463. If, for example, a PSABE and increased student demand resulted in law schools offering more experiential and skills-based courses, lawyers who took those courses and passed the existing bar might be more competent to practice upon admission. That is, the PSABE might well have a positive influence on at least some number of those who chose *not* to take it, that positive effect might balance out any negative effect from possible PSABE over-inclusion.

464. This assumes that the PSABE would not replicate the disparate impact which the existing bar exam has on non-majority applicants, thus potentially increasing diversity in the profession. *See supra* Part V.

465. All these skills are required by ABA accreditation standards, *see* ABA STANDARDS, *supra* note 36, Standard 302(a)(1), and are (with the exception of legal research) tested on the existing bar exam.

466. ABA STANDARDS, *supra* note 36, Standard 302(b).

cedures.[467] The standards also require instruction in legal writing, and at least one upper class writing opportunity for every student.[468] Written communication is, therefore, already part of every law school curriculum,[469] although the full range of writing skills may or may not be either explicitly or implicitly taught.[470] Oral communication skills are also taught[471] —or

467. Most law schools fulfill the ABA requirement through a mandatory course which covers the ABA Code of Professional Responsibility, the ALI Model Rules of Professional Conduct, and relevant state professional responsibility rules, regulations and disciplinary procedures. This primary technical compliance has been criticized. *See, e.g.*, Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 732-34 (1994). A much smaller number of law schools, including CUNY, have heeded these concerns and designed methods for teaching professional responsibility "pervasively," throughout the curriculum. *See, e.g.*, Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method (1994). It is this latter mode of instruction which seems more likely to equip students with the MacCrate skill of "recognizing and resolving ethical dilemmas." MacCrate Report, *supra* note 1, at 138-40. The skill includes both knowledge of the various ethics, standards and ways by which they are enforced, *and* the complex ways in which such dilemmas arise and the processes by which a lawyer should attempt to resolve them.

468. ABA Standards, *supra* note 36, Standard 302(a)(2). Writing has, however, often been treated as a by-product of the traditional curriculum or, to the extent that it is explicitly "taught" as a stepchild, an endeavour of substantially lower prestige—and financial investment by many law schools. *See, e.g.*, Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 Duq. L. Rev. 329, 353 (2001); Jenny B. Davis, *Writing Wrongs*, A.B.A. J., Aug. 2001, at 24. The ABA's expansion of 302(a) to include an upper division writing opportunity has, in part, been a response to the articulated concerns of firms and other employers of lawyers which have contributed to a greater awareness of the need for clearer and more focused writing.

469. The essay portion of the existing bar exam tests at least a portion of legal writing, but hardly the full range of skills included in the MacCrate definition of written communication. *See supra* notes 120-33 and accompanying text.

470. In addition to breaking down effective communication into general prerequisites for presentation, specialized requirements in legal context (like how to choose and utilize facts), and requirements for legal citation form, the MacCrate skill notes substantive and technical requirements for specialized kinds of legal writing like drafting executory and litigation documents, and legislative drafting. *See supra* note 130. Depending on the law school—and law teacher—courses like wills and trusts may or may not have more experiential drafting component, while courses in trial advocacy might include drafting litigation documents as might live-client clinics, which might also offer transactional drafting. An elective in legislation might touch some of the skills of that specialized form of legal writing.

471. These skills might be taught, for example, in courses in Appellate Advocacy or Trial Practice.

practiced and critiqued[472] —in virtually all law schools, and some form of moot court activity, whether a formal, graded part of the curriculum or a student-organized voluntary activity, is offered. And, in many ways, the experience of law school, with its multiple and conflicting time demands, provides an opportunity to learn and practice time management skills.[473]

With the exception of legal research, oral communication, and specialized legal writing, the existing bar exam purports to test these skills, at least to some degree, and presupposes that they have been acquired during the applicant's legal education. The PSABE would not, therefore, require additional instruction in any of these skills.

The additional MacCrate skills, factual investigation, counseling, negotiation, litigation and alternative dispute resolution procedures,[474] may or may not be part of a law school's curricular offerings, and may be taught individually (i.e., courses in negotiation, counseling, or mediation) or more holistically, traditionally through live client or simulated clinics,[475] or supervised externships.[476] If the PSABE is to test such lawyering skills, applicants who elect it should be required to have studied and learned some, if not all, of these additional lawyering skills during the course of their legal education. Because law schools

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472 The Socratic method, still a primary tool of legal instruction, requires students to engage—perhaps less reflectively—in many of the MacCrate communications skills. *But see* Lani Guinier, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1, 3, 4 (1994) (criticizing the Socratic method for its negative and "silencing" effect on women).

473 Clinicians and other experientially based teachers would argue that this process can be learned and should be taught. *See, e.g.*, Munneke, *supra* note 127, at 169.

474 Most, if not all, law students gain some familiarity with litigation procedures through the study of civil and/or criminal procedure, evidence, and by the general use of the case method. Some of the more sophisticated aspects of the MacCrate skill of understanding and familiarity, like "the lawyer's ethical obligation to screen the merits of the case before instituting litigation," "strategic assessment of what motions to file," and "the skills of preparing and conducting witness examinations," require more advanced and explicit instruction. *See* MacCrate Report, *supra* note 1, at 191-94.

475. *See, e.g.*, Grosberg, *supra* note 420, at 349; Barry et al., *supra* note 145, at 16.

476. *See* Ogilvy, *supra* note 422; Meltsner et al., *supra* note 447; Caplow, *supra* note 352, at 874.

vary so widely in clinical experiences offered to students,[477] the prerequisites for taking the PSABE would almost certainly differ by school, with a baseline to be set,[478] in advance,[479] by the existing bar examiners or other appropriate persons.[480]

For example, a live-client clinic might provide instruction and reflection in factual investigation, counseling, negotiation and litigation, as well as legal analysis, research and communications skills. Most clinics also include exposure to, and reflection on, ethical issues which arise in the course of representation. The remaining MacCrate skill, alternative dispute resolution, might be learned in a mediation course. Together, a clinic and mediation could cover the skills which generally are not taught as part of the basic, more traditional bar-focused curriculum.

Two immediate potential benefits of the PSABE and this sort of prerequisite are readily apparent. First, student demand would give law schools the incentive to offer a variety of

477. Some clinics are based entirely on simulations, while others involve supervised live-client representation. Clinical experiences may be offered in one semester, for as few as three credits, or across the third year, for as many as sixteen credits. The subject matter will vary enormously, as, for example, at CUNY, from domestic abuse, to criminal defense, to immigrants' and refugees' rights. The focus may be entirely on litigation, solely transactional, like tax assistance clinics, or somewhere in between (as, for example, in CUNY's elder law clinic). Some schools also offer "practice courses" which, while not strictly "clinical," provide instruction in the same skills. *See, e.g.*, Ralph M. Cagle, *Teaching Practice Skills in Law School: The University of Wisconsin Experience*, B. EXAMINER, Feb. 1998, at 6; Gresberg, *supra* note 420, at 361.

478. The base might require some minimum number of clinical credits, plus a showing that all the MacCrate skills were taught in the totality of courses taken by the applicant, or depending upon the kind of clinic, supplementation from a laundry list of courses like Negotiation, Alternative Dispute Resolution, etc. The BAR COMMITTEE REPORT calls for eight credits of clinic and/or simulation and skills courses plus New York Practice. *See* BAR COMMITTEE REPORT, *supra* note 5, at 6, 7. I propose twelve credits.

479. Students would need to know, usually by the end of their first year, which courses they had to take from among the more advanced, and usually more heavily elective, courses offered in the second and third years.

480. If the PSABE was embraced by a state's bar examiners, they, in consultation with legal educators, could define the base or "floor" of courses and credits an applicant would be required to have taken successfully. If the PSABE was first offered as a pilot program growing out of a task force recommendation, a task force and/or its consultants might design a set of requirements that would be subject to subsequent fine-tuning. If the PSABE pilot was offered only to graduates of the state's own schools, the initial task would be far easier in comparing course content for those schools, as opposed to all 185 ABA-accredited schools.

course and clinical experiences which teach all the MacCrate skills.[461] Second, there could be increased public confidence (as well as that of the bar itself) that law schools had fully and appropriately educated those graduates who opted for the PSABE,[462] as well as confidence in the guarantee of minimal professional competence for those certified by the PSABE process.

Finally, there is the issue of substantive knowledge, acquired through courses defined by subject matter, and tested selectively (but, the bar examiners assure us, validly) on the MBE, to a lesser extent (in coverage, if not depth) on the essay portion, whether MEE or state-specific, and also, to an even lesser degree on the MPT (where a "file" of reference materials is provided). Although substantive legal knowledge is not the primary focus of the PSABE, the PSABE could be constructed so that most, if not all,[463] of the "big six" tested on the MBE (Constitutional Law, Contracts, Criminal Law, Evidence, Real Property and Torts) as well as the additional subjects tested on the MEE (Business Organizations, Commercial Transaction, Family Law, Wills/Estates/Trusts, Conflicts of Law & Federal Civil Procedure [or, in the case of state constructed essays, state procedures, criminal and civil]) would be part of the substantive domain experienced and employed by applicants during their court-based public service. Since there is room for reasoned disagreement about the subjects presently tested (for example, many more practitioners interact with administrative agencies than with criminal courts), the substantive coverage of the PSABE would be more a matter of design than of formal replication. It should, however, satisfy those who believe that a bar exam should require applicants to demonstrate familiarity with (if not memorization of) *major* bodies of law as well as, and perhaps more important, the ability to utilize that law in solving real legal problems.

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461. *See, e.g.*, Barry et al., *supra* note 145, at 19 n.150, *infra* text accompanying notes 587-89.

462. By analogy, the public and the bar presumably have confidence in Wisconsin law graduates, based on their successful completion of a required curriculum that results in the diploma privilege. *See* Muran, *supra* note 6.

463. This would depend, for example, on whether the applicant's PSABE took place in a court with civil rather than criminal jurisdiction, or vice versa.

2. *Post-Graduate Preparation*

Appropriate prerequisites are also needed to assure the court system that applicants already possess minimum competence in skills necessary to perform the functions assigned to them, although that alone would not necessarily be sufficient preparation for meaningful work in the courts. Familiarity with, and some expertise in, the particular subject matter handled by the court in which an applicant is placed are critical to an applicant's "hitting the ground running," as is knowledge of particular court processes and procedural rules. This suggests the need for a post-law school, pre-PSABE course of three to five days, which could be developed and taught jointly by academics and court personnel.

For example, in New York City applicants placed in the Civil Court[484] which has, *inter alia*, jurisdiction over residential and commercial landlord tenant disputes,[485] would need to know relevant landlord/tenant law,[486] as well as the rules and procedures unique to the Civil Court.[487] A comprehensive tour of the court[488] and observations with appropriate time for, and facilitation of reflection,[489] could round out the introductory

484. For a more extensive discussion of the Civil Court, and why it would provide an excellent setting for the PSABE, see Glen, *supra* note 4, at 1724-26.

485. N.Y. City Civ. Ct. Act § 204 (2001).

486. First or second year required property courses may include some reference to this body of law, but it is highly unlikely that graduates would have sufficient specialized knowledge, unless their law school offered a landlord/tenant or housing law course or clinic.

487. As a court of limited jurisdiction, the Civil Court has its own statutory procedures, in addition to general rules of New York practice which are also applicable. Demonstrating the capacity to work with a particular set of rules and practices should generate confidence that a successful applicant could learn and utilize other procedural and regulatory frameworks in the course of their practices.

488. The value of such a tour, including various clerks' offices, with explanations of their functions, should not be underestimated. Many law school graduates literally have never set foot in a court, much less been introduced to how to file papers or retrieve information, or even how to find the library. If a law school graduate is going to be involved in litigation at all, minimal competence suggests knowing one's way around at least one courthouse in the jurisdiction in which one is admitted.

489. This is important not only to give applicants a sense of the "style" of the court, its judges and its personnel, but also of its limitations. In a place like the Housing Parts of the New York City Civil Court, the problems faced by tenants—and, to a lesser extent, by landlords—may be solvable only with the assistance of public agencies or through public benefits, like emergency rent payments. The

course. Satisfactory completion of such a course would prepare an applicant to be a useful participant in the PSABE. It would also give the court system confidence that the applicant had sufficient knowledge and skill to provide competent assistance in the variety of settings through which she would be rotated.

g) *How and When Would Takers Be Selected for a Pilot?*

If the PSABE was administered as a pilot program, with limited placements available, how would applicants be selected? Since a pilot seems both practically[490] and politically[491] necessary, only a limited number of applicants would have the opportunity to participate.[492] The most likely means of selection would be a lottery, perhaps with a certain number or percentage of places open for each accredited law school in the state.[493]

Civil Court's affirmative obligation to be involved in the "enforcement of state and local laws for the establishment and maintenance of housing standards," N.Y. CITY CIV. CT. ACT § 110 (2001), may depend on enforcement and/or inspection by appropriate city agencies. While not specifically enumerated in the MacCrate Report, understanding institutional competence is an important lawyering skill.

490. Whatever "plan" is devised for service and evaluation in a particular court, it will almost certainly require at least modest changes once operative. Running two or three administrations with a limited group of applicants in two or three courts will allow the court system to become comfortable with the process before it is asked to accommodate large numbers at more sites. It will also permit study and fine-tuning before any decision is made to adopt the PSABE as part of the state's bar examination process. *See infra* Part XI.Vi.c.

491. I can imagine no possibility that a PSABE would be adopted without testing—nor should it be. This is the way other new components of the bar exam have entered general use. *See supra* Part XII.c) (discussing the MPT). The same process should be employed here.

492. Unlike prior experiments, where applicants taking the existing bar exam also volunteered to take the new version, it seems unlikely that PSABE applicants could reasonably be asked also to take the MBE and essay portion of the bar exam. The amount of bar review study necessary for the latter (usually around ten weeks), coupled with the ten to twelve weeks of the PSABE itself, would be a prohibitive investment of time for virtually all law graduates, especially those already disadvantaged by economic status or family or other responsibilities. I recognize the traditional preference for this double-blind approach (although as it has been employed in, for example, the MPT, it risks the conflation of self-selection) but I believe it would be unnecessary for the PSABE. If the bar exam's critics are even partially correct about the existing bar exam's defects, which the PSABE is designed to remedy, "success" on one should not necessarily predict "success" on the other. The issue of public confidence may be raised and used as an argument against the PSABE, but I believe a carefully constructed and monitored pilot should suffice, especially if it is fully explained.

493. It would appear practical—and justified—to limit the pilot to law schools in the state in which the PSABE was administered. Those designing and monitor-

This leads to a second issue, relevant not only to any pilot,[494] but to the PSABE itself, if adopted: the timeframe in which applicants would need to elect the PSABE instead of the existing bar exam. Substantial lead time would be necessary because the course of study pursued by an applicant in her second and third years might differ significantly, depending on the option chosen.[495] The most reasonable time for students to make these choices would, therefore, be at the beginning of their second year.[496] For the first administration of a pilot program, this would give ample time for fine-tuning the PSABE, training evaluators, readying the site or sites, etc. An earlier election would thrust a choice on students with insufficient experience to realistically assess their post-graduate career plans and opportunities, or to adequately assess their own strengths and weaknesses.[497] Any later selection would raise serious timing issues for accumulating the requisite skills credits.

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ing the pilot would have sufficient familiarity with those schools and their curricular offerings to construct or approve reasonable prerequisites. Publicity about the PSABE and application process could be better controlled and made more consistent in a limited number of schools with geographical proximity to bar examiners or members of a task force creating the pilot.

494. The issue would be more complicated—and potentially costly—for applicants in the pilot. With a limited number of spaces available through a lottery system, the election and selection would have to be made early enough to allow the applicant to make the necessary changes in her upper level course selection depending on whether or not she was selected for the PSABE. There will also almost certainly be some number of applicants who change their minds. For those selected for the pilot, withdrawal should be allowed without penalty.

495. This is true not only because the PSABE would have prerequisites, *see supra* text accompanying notes 474-80, but also because students taking the traditional bar will generally take a heavier concentration of courses in subjects tested on it, *see supra* text accompanying notes 52-55. Given the finite number of credit hours available after the first year, and required second and/or third year courses, knowing *which* bar they will be taking will almost certainly affect some or many of the course choices students will make.

496. This would give them three more semesters to take courses necessary to meet the prerequisites for the PSABE, since the choice of third semester courses is usually made towards the end of the first year.

497. Students could, in consultation with faculty and/or skills teachers, assess whether they were excellent or mediocre standardized test takers and/or what their interests and talents were in areas like counseling, mediation, etc. The point is not that students who would not be competent lawyers could elect an "easier" bar examination. Rather, it is that those who would be excellent lawyers but who may have difficulty on standardized written tests should be allowed to have their lawyering skills tested, instead of being disqualified because of limited competence

h) *How Would the PSABE Be "Graded" and What Happens if a Taker Fails?*

As already suggested, many decisions will have to be made about how the PSABE is graded,[498] including whether an applicant must demonstrate minimum competence on each of the MacCrate skills tested, or whether excellence in some should compensate for deficiencies in one or more others.[499] However this is resolved, there is also a question about the consequences of "failure."[500] Should an unsuccessful applicant be permitted to take the existing bar exam if she chooses?[501] Or might she be permitted to retake the PSABE, or the portion or portions of it that she failed?[502] If the latter, when should the retake be of-

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in a skill (timed, high-stakes test-taking) which has never been proven essential to competent lawyering.

498. *See supra* note 399.

499. In most states, the existing bar exam allows for higher scores on one portion to balance lower scores on another. This "blending" of scores is not, however, universal, as many states require some minimum score on each section. *See supra* note 397. On the essay portion, however, I know of no state where a "failing" grade on a single essay—or two—automatically results in a failing grade on the entire bar exam. That is, insufficient knowledge on a domestic relations question does not necessarily doom to failure an applicant who demonstrates mastery in business associations and other subjects tested on a particular administration.

500. There is also, implicit in all of this, a challenge to the existing practice in which some percentage of bar takers must fail. Although, for the sake of "correlation," we could pass only the same percentage of PSABE takers as takers of the existing bar exam, this would totally undermine the whole premise of the PSABE. If every PSABE taker demonstrated minimal competence to practice law unsupervised, I would argue that every PSABE taker should pass. If and/or how such a result might affect the public or the profession's view of the PSABE or the existing bar is a question for another day.

501. If this process were adopted, it could give us some very interesting comparative data from which we could generate meaningful questions. How might we feel about an applicant who could not demonstrate, through observed practice, minimum competence in some or all of the MacCrate skills, but who subsequently passed the paper and pencil test that is the existing bar? Would this suggest that the applicant had improved, or, rather, that the PSABE was a "better" or more rigorous test? Would we have the same confidence in the applicant's competence that we might have had in the absence of the PSABE? If the applicant also failed the existing bar exam, would we understand that result to mean that both tests were successfully "weeding" for incompetence? In addition to questions raised by allowing unsuccessful PSABE applicants to substitute the existing bar exam, it would also be necessary to decide whether or not they could make unlimited attempts at either or both tests.

502. There is an analogy in architectural licensing where the "exam" has many parts, generally taken at different times. Once an applicant has achieved a passing grade on a particular section, she is not required to repeat it, but may

fered,[503] or might the applicant be allowed to continue her PSABE until she was successful?[504] Because of the PSABE's combined teaching and evaluation functions, I would argue for the latter,[505] although reasonable people could surely differ in their opinions on this.[506]

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retake the sections on which she has been unsuccessful until she "passes." *See generally* Licensing of Architects in The United States of America, National Council of Architectural Registration Boards, *available at* http://caus5.arch.vt.edu/programs/Masters/EESA-NCARB.pdf (last visited Aug. 20, 2003). Given that the potential consequences of substandard work by an incompetent architect are potentially at least as grave as those of an incompetent lawyer, there is no reason to believe that serial re-testing of lawyers, like architects, would not adequately protect the public.

503. The PSABE might be offered several times a year, at the same time as the existing bar exam, or, more flexibly, throughout the year, including the possibility of non-sequential segments (i.e., two weeks of research and writing and oral communication which the applicant could complete at a different time than two weeks of fact investigation and counseling). This would depend on the capacity of the court system, and of the particular courts in which applicants were placed. Applicants might prefer a single ten or twelve week period directly following graduation, making them more immediately available for full-time legal employment, while courts might prefer to space applicants' service over a longer period, perhaps even continuously throughout the year. This is, it would seem, one of the very practical issues which could best be decided in the concrete rather than the theoretical. If, however, unsuccessful applicants had to wait to retake part or all of the PSABE, there might be a real educational benefit. Instead of the generalized, test-taking focused bar-prep retake courses to which unsuccessful applicants now flock, we might see the emergence of mini-courses in individual skills like negotiation or mediation which would actually improve the initially unsuccessful PSABE taker's skills in a way which would make her not only a successful re-taker, but a better lawyer.

504. For example, if an applicant would have passed but for deficiencies in mediation, would she be permitted to do another round, or rounds in that area until her performance was deemed minimally competent? This idea has an analogy in some law school grading practices whose goal is "mastery" rather than sorting.

505. If the ultimate goal is to ensure competent lawyers, rather than simply to disqualify applicants who have not yet achieved competence, the teaching and learning aspects of the PSABE should be fully utilized. These include repeated instruction coupled with a second and even third evaluation, until the applicant really gets it right. This is the model of evaluation employed in most clinical teaching. *See* Grosberg, *supra* note 120.

506. The BAR COMMITTEE REPORT proposes a quantitative score, to be derived from each of the assessment devices used (in addition to on-the-job assessments of various skills, the Report calls for a simulated skills evaluation, the MPRE, and a written test instrument). The weights to be given to each section would be determined by those designing the pilot. There would be a passing score, and those who failed would only have the option of taking the existing bar exam, although, "subject to the limitation of a three month period [of PSABE placement] an appli-

Here, as in other experiments, the actual creation of a pilot PSABE can only occur through a process which will necessarily involve many very smart, well meaning and experienced people deciding the answers to these and other questions.

i) *How Could the PSABE Avoid Creating a Two-Tier System of Certification?*

Another concern which must be addressed is whether, in creating the PSABE, we might inadvertently structure a two-tier system which could negatively impact those who chose it over the existing bar exam. That is, either employers, or the public, or both might consider the PSABE as less rigorous, less legitimate, or less likely to ensure competence in lawyers who were admitted as a result of passing it. Although there is no definitive way to answer this concern prior to testing a PSABE, there are several reasonably compelling arguments that should assuage undue concern.

1. *The Argument from History*

First, we already have examples of lawyers who have been admitted to the bar without taking any bar exam. The most obvious example is those who have utilized the diploma privilege in states which permit or, in the past, have permitted it.[507] Although Wisconsin is the only state which currently has a diploma privilege for graduates of its two in-state law schools, those states which have abandoned the privilege in recent decades, Mississippi, Montana, South Dakota and West Virginia[508] provide the more interesting example. In each of those states, there are now cohorts of lawyers who are graduates of the same law schools[509] who did, and who did not, take the bar

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cant [might be able] to repeat a task for which a failing score was [initially] received." BAR COMMITTEE REPORT, *supra* note 5, at 18.

507. For a history of the diploma privilege in all the states and U.S. territories, see George N. Stevens, *Appendix to the Diploma Privilege: Bar Examination or Open Admission*, 46 B. EXAMINER 16 (1977).

508. As of 1980, these four states, in addition to Wisconsin, had a diploma privilege. *See* Hansen, *supra* note 11, at 1192-93 n.7.

509. This fact is why the Wisconsin experience may not be as compelling an analogy. The diploma privilege has been in place for seventy years for graduates of Marquette, and since the beginning of the bar exam for graduates of the University of Wisconsin. *See* Moran, *supra* note 8, at 646-48. The graduates of the University of Wisconsin and Marquette Law Schools have achieved rates of such

exam. There are no studies[510] testing whether consumers or employers in Mississippi or West Virginia have any preference for lawyers from one cohort over the other[511] or any views about either cohort's relative competence. I suspect, however, that they do not, if they are even aware that there is a distinction in the basis for admission. Similarly, lawyers admitted in Wisconsin, pursuant to the diploma privilege can be admitted on motion in New York without taking the New York, or any other, bar exam.[512]

There is another equally interesting example. For many years, in New York[513] and, no doubt, in other states, veterans were exempt from taking the bar exam if they graduated from law school within a certain period of their service.[514] This exemption, which in New York, lasted through the Vietnam War, also provides two matching cohorts, although the passage of time suggests that fewer and fewer members of both cohorts are still practicing. It is interesting that neither I, nor anyone I

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prominence in public and legal life that one might argue it is the recognized and respected law schools from which they graduated which ensures public and employer confidence. Following this hypothesis, it is understandable that potential members of the Wisconsin bar from out of state schools would need to prove themselves as well as demonstrate knowledge of Wisconsin law (which in-state graduates would already be presumed to have) on a written bar examination.

510. Thus, therefore, is a possibility for the research agenda I discuss later. See discussion *infra* Part XIV.A.1.

511. Over time, of course, the diploma privilege lawyers will be older and older—and more experienced—in comparison to those who have passed the bar exam. This is a variable which could cut either way, but would need to be separated out from the issue of the basis for admission.

512. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.10 (McKinney 1996) (permitting admission on motion of attorneys admitted in jurisdictions which have reciprocity with New York, in addition to other practice qualifications).

513. I owe this insight to Justice Alfred Lerner, who also brought to my attention one of the most prominent attorneys who benefited from the veteran's exemption, the Chief Judge of the U.S. Court of International Trade, Nicholas Tsoucalas. Other notable lawyers who never took a bar exam include Bernard S. Meyer, a former judge of the New York Court of Appeals, Robert McKay, a former Dean of New York University Law School and Melvin Wulf, former Legal Director of the American Civil Liberties Union (Meeting of the Committee on Legal Education and Admissions to the Bar of the New York State Bar Association, New York Law School, Oct. 30, 2000).

514. *See* Rule III for the Admission of Attorneys and Counselors at Law, 1945 N.Y. Laws 2169; Civil Practice Annual of New York 9-10 (Gloria C. Markinson & Gerald Kaplan eds., 1969). Finding the documentation for this now expired privilege was no mean task, and I owe a debt of thanks to Ricardo Pla for uncovering it for me.

have spoken with about this, had any idea that there was such privilege, or that there were lawyers practicing in New York who had neither diploma privilege nor bar passage as the basis of their admission to the profession.[515] Despite the respect and gratitude which members of the public feel toward those who have served their country in the military, it would be hard to assert that service as an infantryman or Navy gunner was such assurance of minimum competency to practice law that it could be substituted for some testing or certification process. That is, unlike the diploma privilege—or the PSABE—there can be no plausible claim that the alternate basis for admission "weeds" applicants by knowledge and skills. It does not, however, appear that anyone—either members of the public, or employers—was troubled by the distinction.[516] One possible conclusion from both the diploma privilege and veterans exemption cases is that, basically, no one knows the difference.[517]

2. *The Importance of Description*

The second point is the importance of the way in which the PSABE is presented and described. The danger, of course, is that without adequate "buy-in" from all stakeholders, the PSABE might incorrectly be seen as a bad variation on affirmative action, already discredited by many, and experienced as providing more special opportunities for "less qualified" minorities.[518] If, as I have argued, the PSABE is actually a *better* test

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515. This is understandable for my younger colleagues, but I graduated from law school only a decade after the Korean War and while the Vietnam War was still in progress, as did many of those to whom I related this information. As both a trial and appellate judge, I undoubtedly had veterans' exemption lawyers practicing before me, but that fact never came to my attention.

516. Comparing the cohorts of veterans' exemption and bar exam takers is another research project which could prove fruitful, as is a comparison of attitudes about each cohort, if such a research project could be designed and executed.

517. Resumes include, and most employment questionnaires for lawyers ask for the date and jurisdiction of *admission*, not the basis upon which admission was obtained.

518. Obviously, I do not believe this characterization, either of affirmative action, or of the PSABE, but sadly it is possible, given the backlash against affirmative action which we have experienced in the last several years. *But see, e.g.*, Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001) (rebutting this argument and challenging the manner in which traditional standards of merit perpetuate race and class privilege).

of minimum competence to practice law (because it permits assessment of all the MacCrate skills) or if it can be persuasively claimed that the PSABE is similar to the test that bar examiners would choose to employ if both adequate time and funding were available,[619] then there should be no reason to discount the abilities of those who gain admission by its successful completion. Although one motive for creating an alternative is increasing the diversity of the bar, it is important not to racialize the PSABE,[620] nor to confine any pilot to non-majority students or students only from non-elite schools.[621] Focusing on the real-life, real-time opportunity to evaluate skills the profession has identified as essential should persuade employers and the public alike—or at least anyone who is paying attention—that those who pass the PSABE are at least as competent, if not more competent, than those who pass the traditional pencil and paper test.[622]

3 *Effect on Employers*

As a practical matter, it would be valuable to survey a wide variety of potential employers to ascertain whether the PSABE would have any effect on their hiring decisions. If potentially negative effects surface, an appropriate education campaign can be designed and tested. It would be equally important for a pilot program to obtain prior commitment from the employers of choice for those who selected the PSABE that they would treat admission based on the PSABE the same as admission pre-

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619. Here the analogy to the 1980 California experiment is useful. *See supra* Part XI.

620. As Claude Steele writes:

> It is important that people realize th[e] shift [away from a paper and pencil model of evaluation] is not an evasive one, motivated to avoid holding minority students to the same standard as everyone else. It is a shift that recognizes real limitations in a testing system, limitations, tied to race, that if not avoided can cause unjustified discrimination . . . .

Understanding the Performance Gap, *supra* note 351, at 60.

621. I do not suggest that any pilot project would do so deliberately, but rather that care must be taken to ensure the broadest representation of participants.

622. There is another interesting analogy—and possible study—in the case of multiple takers. Anecdotally, at least, no one ever asks her lawyer how many times she took the bar exam before passing nor, except perhaps for the most elite employers, does the number of attempts matter once a lawyer has been admitted

mised on the existing bar exam. While there would probably be no way to obtain such commitment from every potential employer of every pilot PSABE applicant, agreement from the major players—the large firms,[523] Legal Aid and Legal Services offices,[524] District Attorneys' offices and judicial clerkships[525]—would go a long way to reassure those who might elect to participate in a pilot project. There is also a substantial possibility that employers would actually prefer prospective employees who took the PSABE because of the experience and additional practical training it would afford.[526] Finally, the law review

523. Unlike other employers, the large firms often make offers as early as the end of a student's second summer. They commit to employment without any certainty that the student will pass the bar and be admitted on a first try. Given this and the highly competitive nature of large firm hiring, it seems highly unlikely that such firms would be concerned with the basis on which their new associates were admitted. This is partially confirmed by the response of a partner in a large firm called by a reporter who publicly broke the story of the PSABE and the Bar Committees' Joint Report. "I'm not sure [which way an applicant was admitted] would make any difference to us, said Robert J. Kafin, chief operating partner of Proskauer, Rose LLP. We don't care a lot about what bar examiners do." Thomas Adcock, *Pilot Proposal Would Make Public Service Count on Bar Exam; City and State Bar Committees to Endorse in Rare Joint Report*, N.Y. L.J., June 28, 2002, at 16.

524. Unlike large firms, Legal Aid and Legal Services offices do not generally hire on a set timetable, but rather as vacancies or new positions arise. Thus, they would be in no position to give assurances to individual PSABE applicants, but they could, and could reasonably be expected to, make such a commitment for any new hire. The assistance which many of these offices give to multiple takers, *see* examples cited *infra* notes 543-54, suggests strongly that it is the fact of admission, not its basis which is their real concern. Legal Aid and District Attorneys' offices are also different from other employers because pursuant to a Practice Order graduates may practice immediately on employment, and may continue to practice through a first bar exam failure and until they have been notified of the second. N.Y. Jud. Law §§ 478, 484 (McKinney 2003).

525. Like large firms, many federal judges make commitments to their future clerks in the second year of law school, so there is little reason to believe that the PSABE would be a concern. This is especially likely since most clerkships are only a year in duration. This suggests that admission is less important for judges hiring clerks than for other employers. If, as I propose, the court system is the institution in which the PSABE occurs, it is reasonable to believe that state court judges would welcome, rather than discriminate against, clerkship applicants who already had experience and some certified competence in the court system.

526. Employers are often skeptical about the value of the existing bar exam. *See, e.g.*, *supra* note 522. In discussions about the proposal at the NYSBA Committee on Legal Education and Admissions to the Bar, at least one member opined that the problem, should the PSABE be adopted, would be an insufficient number of placements, since virtually all employers would encourage graduates to elect an

analogy[527] strongly suggests that it is the fact of, not the means of, admission which is ultimately important to employees and others.

j) *Why Might Non-Majority Students Perform Better?*

Since much of the impetus for this essay and the idea of a PSABE[528] is to relieve non-majority bar applicants of the disadvantages of the existing bar regime, it is important to know, or at least to have a founded belief that the PSABE would avoid the disparate impact of the current examination. A favorite defense of the existing bar exam is that nothing else makes—or could make—a difference, so why not keep doing what has always been done, and done "successfully?"[529] If there is a problem, as some argue, then it is with non-majority students,[530] legal education[531] or the educational system generally[532] or with

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examination from which they could also gain practical experience and refine skills (personal communication, NYSBA Committee meeting, New York, NY, Apr. 2002).

527 *See supra* text accompanying notes 317-20.

528 The need to test what lawyers actually need to know, and the skills that are required for competent practice, as well as to encourage law schools to teach those skills is a separate and, I believe, entirely sufficient basis for change. The California experience, *see supra* Part XI, though not entirely successful as a true performance exam, proves this point.

529. Bar examiners have used the LSAC study, particularly its findings on eventual pass rates, *see supra* text accompanying notes 174-79, to minimize the disparity between majority and non-majority pass rates. *See, e.g.*, Ann Fisher, *Reflection on the LSAC National Longitudinal Bar Passage Study*, B. EXAMINER, Nov. 1998, at 6

> The completed study was released in June 1998 into an environment that has become hostile to affirmative action programs. The bar passage study now provides empirical evidence that minority candidates have a high success rate at law school and on the bar examination. The study replaces pessimistic, anecdotal information about minority bar pass[] rates.

Id. See also Laura Taylor Swain, *Thoughts on the LSAC Bar Passage Study—Good News and Good News*, B. EXAMINER, Nov. 1998, at 16 (stating the "good news" of the LSAC study is that "it shows clearly that the disparity in pass[] rates is not due to some mysterious, inexplicable, and irrational bias built into examinations").

530 *See, e.g.*, Klein & Bolus, *supra* note 157 ("disproving" a number of hypotheses which would place responsibility for the disparate impact on the bar exam, and instead blaming non-majority students for their "failure" because of their less adequate educational preparation).

531 Erica Moeser, President of NCBE, repeatedly makes this assertion. *See e.g.*, Erica Moeser, *President's Page*, B. EXAMINER, Nov. 2000, at 4, 5; Erica Moeser, *President's Page*, B. EXAMINER, May 2001, at 4. Moeser also attributes many of the

society.[533] It is to these factors that we should turn our efforts. If it is not possible to suggest a plausible basis for believing the PSABE would "do better," there may be less reason to test the concept. In the absence of data that can only be generated by a pilot project,[534] I offer two strong "hunches," a third less developed, and the beginnings of an analytic argument, which is the subject of fuller exegesis by others.[535]

1. *Observations from Experience*

My first hunch is anecdotal. It is based on my own and my CUNY colleagues' observations of non-majority students who have performed superbly in law school and subsequently in practice, but who, surprisingly, did not pass the bar on first—and sometimes second—takings. CUNY, like only two other ABA-accredited law schools, requires an extensive clinical expe-

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criticisms of the existing bar to what she sees as "sour grapes" from law schools with poor bar pass rates.

> While a number of law schools seek bar passage information and use it for retrospective evaluation and prospective action, some law schools have adopted less meritorious strategies. One such strategy is to attack the bar exam itself. . . . When law schools deal with grim bar examination results, it is easy to 'shoot the messenger' by criticizing the test.

Id. Although conceding that there is much more that law schools could and should do to train competent lawyers, legal education's failures, to the extent they exist, should not detract from honest, engaged and principled criticism of the existing bar exam.

532. *See, e.g.*, Vaughns, *supra* note 37, at 457. "[C]hildren of color continue to receive unequal education in this country . . . the lack of academic preparedness—a suggested reason for poor performance in law school and on bar exams—results from a disparity in educational attainment among racial and ethnic group members." *Id.* (citation omitted). Vaughns also constructively criticizes legal education for its failure to provide appropriate and effective intervention for educationally disadvantaged students. *Id.* at 458.

533. This includes the so-called "pipeline" argument. *See, e.g.*, Erica Moeser, *President's Page*, B. EXAMINER, Feb. 2000, at 4; Erica Moeser, *President's Page*, B. EXAMINER, Nov. 2000, at 4, 5. While the goal of increasing diversity in the profession requires a hard look at . . . and major efforts to improve . . . the path for non-majority students through the entire educational system and into law school, the need for this work should not let the bar exam entirely "off the hook" for its possible impact on the pipeline. *See supra* notes 185-94.

534. It is possible to imagine—and to design—a research project which might give more empirically-based assurance. *See infra* Part XIV(a).

535. The publication of the Carnegie Foundation study of which Judith Wegner is principal investigator and author should go far to stimulate discussion and debate in this area, *see* Wegner, *supra* note 15, as should the LSAC-sponsored study of what constitutes success as a lawyer, *see* Shultz & Zedeck, *supra* note 432.

rience for every third-year student. Students are supervised in live-client representation for one or two semesters, for twelve to sixteen credits. The clinic curriculum is planned and executed so that students perform—and are evaluated on—virtually all of the MacCrate skills.[536] Although the goal of clinical experience is mastery, rather than sorting,[537] trained clinicians are nevertheless required to assess performance and assign letter grades for the semester's work. These grades, together with nuanced evaluations,[538] represent the level of skill a student has attained in professional competencies.

In the past, a number of our best non-majority clinic students—who have also gone on to be excellent practitioners—have failed the bar on first taking, despite the fact that faculty evaluation has provided a high level of confidence that they possess, at the very least, minimum competence to practice law unsupervised. Their ability, as demonstrated by excellent evaluation, has equaled and often surpassed majority students who have done well in clinic, and who have passed the bar on first taking. The CUNY experience shows that when non-majority students are given real lawyering tasks, employing a variety of skills at a relatively high level, affecting the lives of real human beings, they perform as well and often better than their majority counterparts.[539] This is true even though they know

536. In a typical client representation, students are required to interview the client, research relevant law, investigate facts, apply the law (at a minimum, to create a "theory of the case"), test the proposed course of legal action against other possibilities, present the argument orally, counsel the client orally, and generally compose one or more legal documents, such as motions, pleadings and/or memoranda of law.

537. Students who are not initially successful at one or more skills are given feedback and the opportunity to improve, rather than simply given a lower grade that serves to distinguish them from their classmates. Mastery is a goal required by the role the third-year clinical experience plays in assisting law students' transition from school to practice, and is part of the professional responsibility of providing competent representation. *See* MacCrate Report, *supra* note 1, at 207-12.

538. Clinical teachers write separate evaluations for each student on each of six competences. Personal Communication with Susan Bryant, Director of CUNY Clinical Program (Dec. 27, 2002).

539. *See* Waters & Boyes-Watson, *supra* note 32, at 17.

> Assessment through opportunity to perform often works better than testing for performance. Various studies have shown that 'experts' often fail on 'formal' measures of their calculating or reasoning capacities, but can be shown to exhibit precisely those same skills in the course of their ordinary work. Those who assess individuals in situations that more closely resemble ac-

that they will be evaluated or assessed in their work.[540] These non-majority students' experience with the bar suggests that it is something about the test, rather than their ability, which keeps them from success on their first attempt.

This hypothesis is not based solely on the evaluations of a particularly gifted group of clinical teachers.[541] Their conclusions about student competence—or excellence—have been verified by the employers for whom those students work after graduation, but before eventual bar passage[542] as demonstrated by the following two examples:

Several years ago, CUNY had an extremely talented[543] African American student[544] who, in her first year, won a prestigious and competitive Earl Warren Scholarship from the NAACP Legal Defense and Education Fund (LDEF) where she interned her first summer. The lawyers at LDEF, well-known for their rigor, uniformly praised her performance working on complicated legal issues under heavy time pressure. In the student's

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tual working conditions make better predictions about those individuals' ultimate performance.

Id.

540. This fact is potentially important, especially insofar as there is some reason to believe that it is the *first* of evaluation or assessment—best documented as "test anxiety"—which contributes to the existing disparity in bar pass rates.

541. CUNY has been a leader in clinical education since its inception, is consistently ranked in the top ten clinical programs nationally by peer evaluation, and has, among clinical faculty, two former presidents of the National Clinical Law Association.

542. Significantly in New York, graduates employed by District Attorneys' Offices and Legal Aid under the student practice rule, N.Y. Jud. Law §§ 478, 484 (McKinney 2002), may continue to practice in court after an initial bar failure, and until a second failure has been reported or May after their graduation, whichever occurs sooner. One Deputy District Attorney who has been involved in training young Assistants in the Kings County District Attorney's Office speculates that minority graduates may take the July and/or February examinations even if they are insufficiently prepared, in order to accept an offer from her office, and to "take a shot" that they will be successful. Sometimes, despite their excellent performance as Assistants, they are not. (Personal Communication from Carol Morse, Deputy District Attorney, Kings County District Attorney's Office (Apr. 8, 2002)).

543. Like many CUNY students she came to the Law School with an advanced degree—an M.S.W. from Columbia—and after a career in public service, including several years as a social worker at the Legal Aid Society Juvenile Rights Division.

544. All information about both students discussed here, whose names are withheld to maintain their privacy, has been checked directly with the students and verified with records kept at the Law School. Telephone Interview with Anonymous Students, (Jan. 2002) (on file with author).

second summer, she worked at a major New York City law firm where she was so successful that she was offered full-time employment following graduation. In her third year of law school, the student took the 12-credit Equality Concentration where her faculty and supervisors' evaluations were again highly favorable. Based on semester-long observations, they uniformly predicted that she would be an excellent lawyer. This graduate has now been at her "white shoe" firm for slightly more than three years. She has performed almost flawlessly, with consistently excellent evaluations from her firm supervisors. Unfortunately, she failed the bar on her first two takes, finally passing on the third. She described her bar experience as humiliating and pointless, in part, because she sees the exam as having so little relationship to the work she is actually doing as a highly-paid and responsible large firm associate.[545]

There was another gifted African American student[546] who also excelled at law school during all three years of law school. In her third year, she took the Housing Concentration[547] where she was supervised by a legendary (in part, for his extraordinarily high standards) legal services attorney who gave her the highest evaluations. On graduation, she won a competitive two-year IOLA fellowship with which she did domestic violence work in a New York City Legal Services office. This graduate, forewarned of the possibility of failure, took both the Connecticut and New York bars, although she had no intention of practicing anywhere but New York. She notes, savoring the irony in retrospect, that she passed the Connecticut bar on the first try[548] and was sworn in on November 1, four weeks before learning that she had failed in New York. Although she was already

545. This graduate was fortunate because her employer had no strict rules like those, for example, of Legal Aid and District Attorneys' Offices—requiring termination after a second failure. *See supra* note 542. It is a testament to her excellent performance that the firm was willing to continue her employment through a third and ultimately successful take. Most graduates are not so fortunate.

546. This student came to CUNY at the age of 30, after a successful career as an executive assistant, and with an LSAT score above the 70th percentile.

547. Concentrations are highly supervised external placements, designed on a clinical, not an externship, model, and carrying 12 credits.

548. As a particularly telling fact, although Connecticut requires a scaled MBE score of 133, and New York requires a scaled MBE score of 133, she passed in Connecticut and failed in New York. *See Report and Recommendation*, *supra* note 18, at 2, 9.

practicing law, with superior evaluations. she was "totally traumatized" by her failure. Reluctant to make a second attempt the following February, she was persuaded by family and friends, but again she failed. This time, however, she was not humiliated, but extremely angry. As she said, "There I was, representing people, doing a really good job, and they tell me I'm not qualified to practice law." Because her work was excellent, her office kept her on, strongly encouraged her to make a third attempt, paid for a Bar Re-Take Course,[549] and gave her a month's leave to study for the next administration where she was, finally, "successful." This graduate was, by all accounts, an excellent lawyer who was performing well in a competitive situation.[550] Bar passage in another state allowed her to appear *pro hace vice*, and to keep her job[551] during two retakes. Under other circumstances, she says she would probably have "given up"—and so been forever lost to the profession. Her story illustrates the costs, both actual[552] and potential, of "eventual passage" and the concurrent potential for the "persistence gap."[553]

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549. The graduate's finances did not permit her to take the course before her second bar attempt. She credits the course—and her union's work to make it available—as one of the prime reasons for her ultimate success on the New York bar. The parallels here to another of our graduates, *see supra* note 543, are striking, demonstrating the financial barriers which can frustrate successful retakes (as well as, she points out, exacerbating the "persistence gap," which caused a number of her friends to give up after failing on the first attempt).

550. The IOLA grant gives a legal services office a "free" lawyer for two years, but does not create a new position, so the IOLA fellow must prove herself as exceptionally competent in order to land one of the few, and highly-coveted, legal services jobs, which might be available at the end of her grant.

551. In this respect, her situation was unlike another less fortunate graduate, a single parent with no family support, who was unable to afford the bar prep course for his first two attempts. Although he was performing well in his job, the Legal Aid Society had no choice but, regretfully, to let him go after the second failure. He worked in construction for a year, finally, at our urging, borrowing from everyone he knew to pay for the course and take off a month to study. The "happy ending" is that he finally passed, the sad part of the story is that his clients and potential clients were deprived of an excellent lawyer for more than a year—not because, as he says, he knew more law the third time, but because he could afford to master the test-taking skills necessary for success.

552. In telling me the details of her story, some of which I had not known, the graduate stressed the huge sacrifices her family made because of her two retakes, and the cost to her own and her family's life.

553. *See supra* text accompanying notes 180-84. "Disidentification relieves the pain of stereotype threat by breaking identification with the part of life where the pain occurs, which necessarily includes a loss of motivation to succeed in that part of life." *Understanding the Performance Gap*, *supra* note 251, at 64.

It is also testament to the absurdity of conflicting judgments by the bar examiners in neighboring states about this graduate's otherwise well-demonstrated "minimum competence to practice law."[554]

The point of these not atypical stories is more than how disturbing it is that these excellent lawyers have had such difficulty passing the New York Bar. It is also, significantly for this argument, that they have excelled in supervised practice, utilizing all the MacCrate lawyering skills, in the course of actually working as lawyers. Their stories strongly suggest that when graduates are observed and evaluated, over time, in a real-life practice setting, the issues which interfere with successful first-time bar passage are diminished or absent.[555] This is the first reason that gives cause for optimism that the PSABE will not have a disparate impact on non-majority bar applicants.

2. *The Significance of Claude Steele's Work*

The second hunch relates directly to my understanding of Claude Steele's work. His carefully constructed studies[556] demonstrate clearly and repeatedly that where tests are presented as a measure of *ability*, Black students perform worse than Whites;[557] where participants are not told that the test measures ability, Blacks and Whites perform the same;[558] and where ability is not specified but participants are "race-primed" by specifically asking them questions about their race, Black students again are less successful.[559] Steele has done similar experiments in which other groups demonstrate "stereotype fear" when tested in areas where the groups to which they be-

554. It is not only the different "judgments," but the different scores which, individually or as a total, constitute bar passage.

555. This tracks a similar observation "that some people who may perform well in an educational or work environment perform poorly under the unique circumstances of most testing conditions." Sturm & Guinier, *supra* note 22, at 976. *See also infra* note 563.

556. Although I refer here to his work on stereotype threat affecting African American students, Steele has convincingly done the same kinds of studies with the same results using gender rather than race. *See, e.g.*, *A Threat in the Air*, *supra* note 195, at 619.

557. Steele & Aronson, *supra* note 195, at 409. The terms and capitalizations "Black" and "White" are Steele's and Aronson's.

558. *Id.* at 414–19.

559. *Id.* at 419.

long are thought of as lacking ability. The most prominent example, and the domain in which Steele began his work, is gender and math. When told they were being tested for gender differences in a difficult math exam, women substantially under-performed compared to otherwise similarly situated men. When they were given to understand that the test had already been normed for gender, women performed equally to men.[560] Where math is involved, gender is not the only determinant. When white men are tested against Asian-American men, whom they are told "do better" in math, they also consistently under-perform.[561] This demonstrates that *any* group can potentially suffer—and have their scores on high stakes tests artificially diminished—depending on the context. Stereotype fear is *not* a theory about non-majority test takers, but about test takers from any group which has been stereotyped about its ability in a particular area.

Steele's studies indicate that something negative is surely going on. Identifying that "something" is critical to constructing a different way to "weed" would avoid the distorted and discriminatory results[562] which Steele's experiments consistently demonstrate. Carefully examining the data from a number of tightly constructed studies, Steele posits some hypotheses about the mechanism by which stereotype threat diminishes performance. All of the tests he employed were both difficult[563] and administered under strict time constraints. Steele notes:

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560. *A Threat in the Air*, *supra* note 195, at 613-14.

561. *Expert Report*, *supra* note 195, at 448.

562. They may be described as discriminatory because groups are divided (unintentionally in Steele's experiments, unintentionally in real life) by their race-based response to racial stereotype, rather than by their actual abilities or capacities to perform on the test. In this respect, I am wholly in the camp of those who label such outcomes "discriminatory," *see* Braceras, *supra* note 355, at 1171, notwithstanding the lack of any *intent* to discriminate (summarizing arguments that because "standardized exams fail to measure accurately the actual skill level or knowledge base of minority test takers vis-à-vis their white counterparts—the exams themselves discriminate"). Braceras, *supra* note 355, at 1171.

563. Steele asks whether there would be a difference for well-prepared African American students on tests which they perceived as "easy." Steele & Aronson, *supra* note 195, at 424. As virtually no law graduates approach the existing bar exam with this view, Steele's surmise that there might be some ambiguity of results on "easy" tests should not concern us here. But, of course, if measurement of ability on a test *perceived* as "easy" did not trigger stereotype threat, the challenge would be to create conditions fostering such confidence. If non-majority students

> Stereotype threat seems to exert its influence by reducing efficiency. Participants who experience stereotype threat spend more time doing fewer items less accurately. This reduction in efficiency of mental processing is probably the result of dividing their attention, alternating between trying to answer the items and trying to assess the significance of their frustration.[564]

If this is the mechanism—or even one of the mechanisms—by which performance is diminished, an obvious solution suggests itself: give test takers a lot more time. There is already some modest evidence that substantially increasing the time permitted for taking a law school exam can decrease the disparate affect on non-majority takers which occurs when it is offered in a more traditional, three-hour period.[565] It seems unlikely that bar examiners would willingly do this across the board,[566] although it would be an extremely interesting experi-

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performed consistently well in a clinical setting over a semester or more, and then were asked, over a period of time, to do legal tasks which seemed no more complex or difficult, we could hypothesize that this might diminish or eradicate stereotype threat which would otherwise undermine their performance.

564. Steele & Aronson, *supra* note 195, at 423. Steele also hypothesizes that "[s]tereotype threat may also increase test anxiety for blacks"—this is another psychological mechanism which interferes with test takers' ability to do the work of which they are clearly and demonstrably capable. *Id.*

565. Audio tape: Stanford Law School Professor Pamela Karlan, Presentation at panel, *Learning Theory and Student Evaluation: Throw out those Blue Books?* AALS Annual Meeting (Jan. 4, 2003) (on file with author) (informal study comparing differing results for non-majority students on a three-hour, in-class, open-book exam, with results on a similar exam in which students were given eight hours, "to have lunch, take a walk, or think more about the questions"). Although it did not consider the racial/ethnic background of applicants, a 1981 study by psychometrician Stephen Klein demonstrated that when more time is allowed for the MBE and essay portions of the bar exam, mean scores rise quite dramatically. *See* discussion *infra* note 709.

566. The history of litigation by applicants who request increased time as an accommodation to their disabilities suggest that bar examiners are unlikely to abandon what seems to be their belief in the importance of time pressure in assessing ability. *See, e.g.*, the seemingly endless history of one applicant's attempt to obtain additional time as an accommodation to her disability, Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997) (judgment for plaintiff), *reconsideration denied by* 2 F. Supp. 2d 388 (S.D.N.Y. 1997), *aff'd in part, vacated in part by* 156 F.3d 321 (2d Cir. 1998), *cert. granted, vacated by* 527 U.S. 1031 (1999), *remanded to* 226 F.3d 69 (2d Cir. 2000), *remanded to* No. 93 Civ. 4956, 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001). Interestingly, the District Court, Sotomayor, J., sitting by designation for trial, eschewed the Board's reliance on objective psychometric exam scores in determining the plaintiff's disability.

ment,[567] and one worthy of support.[568] Here, however, the possible implications for the PSABE are apparent, even in the absence of empirical study. Watching/evaluating people perform the "real" tasks that lawyers do—interviewing a client or pro se litigant, conducting a mediation, doing research, writing a bench memo or making an oral presentation of one's legal conclusions over periods of weeks is very different from "testing" those same people in two minute—or even fifty, sixty or ninety minute[569]—slots.

No one denies that lawyers work under pressure, but, at least to some extent, they can exercise some degree of control by allocating their time in ways that other workers cannot. An assembly line worker must complete a certain number of (generally repetitive) tasks within a prescribed shift. A lawyer is usually able, even with court or other deadlines, to give a problem more time—albeit often at the expense of family, social life or sleep—than originally intended, if that is what it takes to do it right. Would we not approve of a PSABE taker who chose to spend her weekend polishing a legal memo, or preparing an interview plan, even though she was only required to spend 35 hours a week in the PSABE? Wouldn't we prefer lawyers who know what is needed, and who accept the responsibility of finding or making the time to do it as well as possible? I hope the answers to these questions are affirmative. If they are, then the

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567. Suppose, for example, that we allowed applicants two whole days, rather than one, for the MBE, or that we simply told them they had as much time as they needed? Do we have any basis for confidence that the general ability to practice law unsupervised is dependent on "quickness," or would we instead imagine that thoughtfulness and care might be more important qualities, especially for neophyte lawyers?

568. The BAR COMMITTEE REPORT proposes a written component similar to the MPT, but without its time constraints. *See* BAR COMMITTEE REPORT, *supra* note 5, at 16.

569. Two minutes is slightly more than the time allocated for each question on the MBE. *See supra* note 13. In New York, for the first day, which tests New York law, applicants are advised to spend 1.5 minutes per multiple choice question, and forty minutes for each of three essays administered in the morning session. In the afternoon session, the recommended time is forty-five minutes for each of two essays, and ninety minutes for an MPT question. State of New York Unified Court System, New York State Board of Law Examiners, *Multi-State Performance Test (MPT)*, *available at* http://www.nybarexam.org/MPT.htm (last modified Mar. 12, 2003). One wonders at the calibration necessary to design morning essay questions that are 66.6% as time consuming as those offered in the afternoon.

PSABE would look to results, giving participants "enough" time to accomplish those results, but would also offer the ability (which lawyers have in practice) to take—if they are willing to "make"—more time as necessary. If I read Steele correctly, the expansiveness of the PSABE might well avoid triggering stereotype threat, thus permitting non-majority takers to more accurately demonstrate their abilities.[570]

3. *Support from Social Psychology*

There is a theory in social psychology which describes a phenomenon most people have experienced, although they may not have named it. Denominated "locus of control,"[571] the theory posits that individuals perform differently depending on whether the necessity of performance is internally or externally generated. Thus, if I "choose" to do something, I am more likely to overcome frustration in accomplishing the task, to persevere, and to complete it successfully. If, on the other hand, the task is imposed on me from outside, particularly if I am otherwise resistant, I am more likely to become frustrated quickly, and to give up on the task, or give it less than my best effort.

Locus of control theory resonates with Steele's work, and suggests an alternative reason for believing that a PSABE could make a difference to non-majority takers—including non-majority takers who, instead of electing the PSABE, choose the existing bar. My hypothesis is that the choice itself—for whatever reasons an applicant might decide[572]—can make a difference in the way a non-majority applicant performs on the exam. Rather than a feared, externally-imposed, single method of admission, the existing bar exam would be one of two options. The ability to choose which option might, itself, lead to an appli-

570. Having been taught, and already been favorably assessed on these skills in law school clinics should also improve the likelihood that performance on the PSABE will more accurately approximate applicants' actual capacity to practice law.

571. *See, e.g.*, ELLEN J. LANGER, THE PSYCHOLOGY OF CONTROL (1983) (describing the positive benefits of a sense of control in a given problem-solving situation as contrasted with a decrease in success when limitations or belief about lack of control are present). I thank Gail Mellow and Kay Deaux for this insight.

572. An applicant might want to concentrate on a series of specialized subject matter electives rather than taking the number of credits in skills courses required as a prerequisite, or might be uncertain about her ability to meet the subsequent pro bono obligation in the court system after successfully passing the PSABE.

cant's performing in a manner more directly and accurately related to her actual ability.[573]

In the end, there are substantial reasons to believe that a PSABE, which incorporates the EEOC's requirement of job relatedness by utilizing a true performance test, rather than distant and discriminatory proxies,[574] will prove to negate the disparate impact of the existing bar exam. Being evaluated—and "weeded," rather than "sorted" —in the context of actual, albeit supervised lawyering holds promise that the PSABE could eliminate the disparate impact which non-majority bar applicants have consistently experienced to their—and the profession's—detriment.[575]

These are my "hunches" about why the PSABE might avoid the disparate impact of the existing bar exam while, at the same time, better assess the lawyering skills necessary for minimum competence to practice law unsupervised. Like the hopes and untested hypotheses of the concerned bar examiners who created the 1980 California experiment, I believe they should impel us to action, limited and tentative as a pilot project might be. The cost of losing and/or unfairly delaying competent non-majority law graduates from entrance into the profession is alone sufficiently great to justify trying an alternative when there is some basis for believing that it might be better.[576]

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573. This is another area for research which could bolster the argument for a PSABE, or improve its design and execution. *See infra* Part XIV(a).

574. *Griggs* is a perfect case in point. Instead of testing prospective employees in the skills of employment, the employer, relied on a standardized test, not clearly related to the relevant skills and duties, as a proxy. Because the test was not closely tailored to the job for which it was "weeding," and because it had a demonstrably disparate impact, it was held to be a prohibited employment practice under Title VII. *See* Griggs v. Duke Power, 401 U.S. 424, 433 (1971).

575. Steele notes that while his research has focused on school admissions and performance, the "findings can be applied to the workplace as well." *Understanding the Performance Gap*, *supra* note 251, at 61.

576. There is some parallel between the two-day long assessment exercise utilized in the 1960 performance experiment, and the observation and evaluation which would be encompassed in a PSABE. However, because that experiment was divided into time-limited segments, it necessarily replicated at least some of the time pressures which may operate to diminish performance where stereotype threat is present. This is, I believe, a plausible explanation for why it did not reduce the disparate impact on non-majority takers. The more expansive time permitted by a PSABE—not just the number of weeks, but the optional, personal time which characterizes professionals—suggests that any lack of "efficiency" generated by knowledge that ability was being tested could be overcome. And, in contradic-

Given all of the reasons stated above for considering a test that has a much greater relationship to the job of being a lawyer, the burden should surely shift to those who defend the status quo.[577]

4. *Larger Questions About Testing*

A more ambitious and expansive analysis of the existing regime of high stakes testing could move us away from, or at least reposition, the issue posed here. Rather than asking whether a test can be designed so as not to affect non-majority students disproportionately, we could instead question whether there is something deeply flawed about what and how we are testing. It is not necessary to pursue this analysis in order to accomplish the more modest goal of a "better," less-discriminatory means for determining minimum competence to practice law, or to provide minimal protection for consumers of legal services. Nonetheless, discussion of whether non-majority students would or should do better, or at least as well as their white counterparts, on a PSABE begins to place this issue[578] in sharp relief, and raises a number of "bigger" questions.

If instead of testing for what we actually need to know—about someone's ability to do a job, or to succeed in an educational setting—we utilize proxies which are largely unexamined, and validated[579] only by reference to other tests[580] which

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tion to the 1980 experiment, anecdotal evidence from high performing graduates suggests that being evaluated on "real" work might also make a positive difference for non-minority applicants.

577. In *Griggs*, Title VII analysis demonstrating an alternative mode of assessment which has no disparate impact and serves the employer's (here, the public's) needs ends the argument. *See Griggs*, 401 U.S. at 431.

578. The larger analysis on which my understanding is premised is derived, in part, from Sturm and Guinier's statement that "because of the importance in a democracy of ensuring opportunities to perform, we can start by shifting the model of selection from prediction to performance." Sturm & Guinier, *supra* note 22, at 19.

579. *See* Olivas, *supra* note 452, at 1091:

> An explanation of [the use of] correlation coefficients [in test validation] is likely to stress the robustness of the mathematical relationships, rather than the underlying social construction, societal values, or intrinsic political assumptions of the statistical study itself. That societal values inhere in statistical equations often surprises observers who may have come to believe that such equations are value-free or apolitical.

Id. at 1091.

utilize similarly unexamined proxies,[581] isn't there a risk (or worse) of disparate results which will continue to reproduce the power and status relationships of the status quo? Isn't there a danger that proxies for competence will embed and obscure a history of past discrimination?[582] When we use inaccurate proxies for an ability, skill, or competence, instead of testing that ability, skill or competence itself, we are often backed into the uncomfortable corner of asking for special treatment to compensate for the disparate effects produced by the proxies, instead of insisting on a different, real test of ability, skill or competence.

In many ways, these questions lie at the heart of what is called the affirmative action debate. In actuality, however, both the questions and the debate itself need to be reframed. If "merit,"[583] as we test and measure it, is not demonstrably em-

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580. LSAT scores are predictive of first-year law school grades, *see supra* note 45, but, according to Wegner, what is taught in law school, especially in the first year, is not necessarily what is tested, and, therefore, graded. *See* Wegner, *supra* note 15. Law school grades correlate to bar pass rates, *see LSAC Study*, *supra* note 43, at 77, and bar pass rates are correlated to LSAT scores, *see* Howarth, *supra* note 11, at 927 n.5; Hunt, *supra* note 152, at 766-67. This entirely self-referential mobius loop (which almost certainly also includes the presently hotly-contested SAT's, *see, e.g.*, *infra* note 569) meets the psychometric requirement for generalization—i.e., whether we can infer from one test performance that the applicant will perform similarly on another test iteration, *see infra* note 646, but has not, at any level, been demonstrated to correlate with the skills and values necessary for the competent unsupervised practice of law, *see, e.g.*, Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Steven v. Pounder & Hammond*, 25 Law & Soc. Pol'y 507, 512 (2000) (commenting on the Lempert et al. study, "The gap [they] discovered is intriguing. The numerical criteria for admission [to law school] are largely irrelevant to career success"); Russell, *supra* note 580, at 512.

581. *See, e.g.*, Rothmayr, *supra* note 124, at 732; Dariu Rothmayr, *Deconstructing the Difference Between Bias and Merit*, 65 Cal. L. Rev. 1449, 1491-92 (1997).

582. Rothmayr, *supra* note 124, at 734. Utilizing antitrust analysis, Rothmayr argues:

> [W]e might usefully understand white dominance of legal education and employment to be the product of a locked-in culturally specific network standard that favors whites. Anti-competitive conduct by whites during the segregation era created an overwhelming initial advantage, if not an outright monopoly, in early market competition. This monopoly, which lasted well over a century, may have produced a de facto standard [exemplified by the LSAT] that favors white cultural performances and disproportionately excludes people of color.

Id.

583. Rothmayr, *supra* note 124, at 734. The term meritocracy was coined by British sociologist Michael Young in The Rise of The Meritocracy 1870-2033

nected to the opportunities it screens for, why not redefine merit instead of fighting increasingly losing battles for programs which only partially correct for the fundamental error?[584] This question grounds Sturm and Guinier's challenge that we "confirm" equality by moving from prediction to performance,[585] and is inherent in Judith Wegner's painstaking examination of law school teaching and testing.[586] It is, in many ways, the same question raised by the current debate about the almost exclusive use of the SAT to determine admission to higher edu-

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1958) who "argued that a meritocracy is a set of rules put in place by those with power that leaves existing distributions of privilege intact, while convincing both the winners and the losers that they deserve their lot in life." *Id.* at 1870-2039 (paraphrased in Lani Guinier, *Confirmative Action*, 25 Law & Soc. Inquiry 565, 573 (2000) (hereinafter *Confirmative Action*)). For similar radical critiques of merit, including standardized tests as measures of merit, *see, e.g.*, Lawrence, *supra* note 518, at 945; Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 Wash. & Lee L. Rev. 995, 1018 (1996); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 Geo. L.J. 1711, 1719, 1740-45 (1995).

584. *See, e.g. Equality in Law School Admission*, *supra* note 72, at 1455-62. The author argues that affirmative action—which I otherwise support and defend—grew out of the realization that the old "equality-of-opportunity" paradigm was, by itself, inadequate to achieve the goal of greater representation of women and people of color in public institutions of all kinds. In education, as standardized tests were increasingly used to define "merit," and minority students faced "neutral" barriers to admission,

> civil rights activists focused on advocating for affirmative action programs rather than challenge the validity of the tests as fair and accurate means of measuring the skills and talents necessary for success in a college or university and beyond. Affirmative action programs "evolved as a low-cost patch solution to the enormous problem of improving the lot of [minorities]."

Equality in Law School Admission, *supra* note 72, at 1455-56. The author would instead focus on a critical inquiry into "whether the definition of merit used to determine which opportunities are made available is fair or legitimate." *Equality in Law School Admission*, *supra* note 72, at 1457 (utilizing a contextualized redefinition of merit analogous to bona fide occupational qualification in the Title VII context). Until then, however, more traditional affirmative action is critical to remedy past racism and/or to promote diversity.

585. *See* Sturm & Guinier, *supra* note 22, at 956, 957:

> It is time to discuss how conventional assessment and predictive criteria do not function fairly, democratically, or even meritocratically . . . We need to show that the current one-size-fits-all ranking system of predicting "merit" is no longer justified or productive for anyone . . . It is underinclusive of those who can actually do the job. It is deeply problematic as a predictor of job performance. Across the board, it does violence to fundamental principles of equity and "functional merit."

Sturm & Guinier, *supra* note 22, at 956, 957.

586. *See supra* text accompanying notes 93-105.

cation.[587] Instead of compensating for a fundamentally-flawed testing regime, why not change the way we test?

Within the context of this argument, the question that began this section could become irrelevant. Just as there is no demonstrable basis for believing that non-majority law graduates are any less competent lawyers than their majority counterparts,[588] there should be no reason to expect that they would do any less well on a true, performance-based test of competence for beginning law practice. Predictive proxies can obscure locked-in discrimination. Honest observation and evaluation of real work—what a PSABE might offer—should not.

k) *What Other Benefits Might be Expected from a PSABE?*

1. *Positive Effects on Legal Education*

Utilizing the *Griggs* analysis, this essay has argued primarily that a PSABE would be a better test of minimum competency to practice law unsupervised than the existing bar exam, and that it might not have the same disparate impact on non-majority takers, as the existing bar exam. Other potential benefits have been mentioned in passing—for example, that the institution of a PSABE would positively affect reform in legal education such that "law schools will embrace their responsibility to educate students for the practice of law and . . . marshal

587. *See, e.g.*, DEREK BOK & WILLIAM G. BOWEN, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 168-10 (1998) (Despite opposition to the exclusive use of SAT's and GPA's, accepting the general predictive power of the SAT, but limiting its importance as a sole measure for potential success.); Ian Kim, Book Note: *College Admission and Affirmative Action—Consequences and Alternatives*, 4 MICH. J. RACE & L. 145, 152 (1998). The social construction, rather than assumed "pure objectivity" of the SAT was first brought to wide public attention by NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999).

588. David Chambers' work suggests, instead, that non-majority lawyer graduates of the University of Michigan are, by criteria he uses, as "successful," if not more "successful," than their white counterparts. In the area of social contributions, or public service, there is also a negative correlation with the high admission scores attained typically by white students. *See* Lempert et al., *supra* note 155, at 465-69. Guinier notes of their study, "[t]he cumulative effect of [their] findings is to challenge the conventional faith in [a] test-driven admissions policy . . . It tells us that affirmative action critics' much-touted reliance on *objective measures of merit* have little to recommend them over the life span of a lawyer." *Confirmation Action*, *supra* note 583, at 468-69.

their resources toward that goal."[589] That is, where exhortations from the profession, legal educators and law students have failed to produce significant change,[590] a bar examination which actually tests lawyering skills might result in greater success because of law schools' concern with bar pass rates.[591]

2. *Additional Training and Feedback*

An experientially-based test like the PSABE offers additional advantages. Although it is not intended as a post graduate "clerkship" or "tutelage,"[592] the time spent doing supervised work[593] would, in addition to providing the basis for skills assessment, create a real learning opportunity.[594] Supervision, as clinical law teachers know, is a powerful tool in learning,[595] especially when it incorporates feedback from the supervisor.[596]

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589. Stuckey, *supra* note 10, at 650. In his 1996 article, Stuckey opined that "[t]he MacCrate Report and recent changes in ABA accreditation standards" would at least "assure that law schools will *consider* these possibilities," but saw the main "impediment to reform . . . (was) the effect of the bar examination on the curriculum." Stuckey, *supra* note 10, at 650. His hope that there were "sufficient catalysts" for reform has proven unfounded, but the institution of a PSABE might provide just that additional impetus for law schools to more seriously respond to the challenge of the MacCrate Report.

590. *See, e.g.*, Rodney J. Uphoff et al., *Preparing the New Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 383 (1997) (surveying new graduates on their preparedness to practice law); Stuckey, *supra* note 10, at 659.

591. *See supra* note 146 and accompanying text.

592. It is important to reiterate that, for reasons I have previously described, *see* Glen, *supra* note 4, at 1701-02 n.15, the PSABE is not an abbreviated version of the clerkship system employed in Canada or the U.K. *See* Hansen, *supra* note 21 (proposing a variation on the Canadian model); *see also* Curcio, *supra* note 14, at 398 (considering the value of same) for reasons I have previously described. While grounded in practice, the PSABE is intended to provide a setting which permits real-life, real-time performance evaluation, rather than primarily as a teaching vehicle, followed by yet another test.

593. For an excellent model of employee supervision, see Alexander & Smith, *supra* note 431.

594. An applicant's placement would not only present opportunities to improve or polish existing skills, but would also permit the applicant to learn a whole variety of valuable lessons, including working in a diverse environment, understanding the limits of the law's power and the need, often, to engage with other institutions, etc. *See supra* Part XII(B).

595. For an excellent discussion of the many aspects of supervision, and particularly its capacity to foster learning, see Meltsner et al., *supra* note 447.

596. *See* Meltsner et al., *supra* note 447:

> [Performance] evaluation, which serves as a summing up, is a familiar attribute of our educational system in the form of grades and particularly char-

Good feedback can help the applicant obtain relevant, detailed, immediate information on how she is doing—and can assist in helping her adjust her behavior and performance so as to be more successful at the tasks in which she is engaged. Since any decisive assessment in the weeding process would come at the end of a supervisor's interaction with the applicant,[597] the use of good feedback during the supervision could and should improve the applicant's lawyering skills, with corresponding benefits for her future clients.[598]

Put another way, if we believe that excellent clinical training, of the sort envisioned by the MacCrate Report, is necessary to obtain essential lawyering skills, the quasi-clinical[599] experience of the PSABE, following and building upon prior experiential and/or clinical instruction,[600] creates a substantial[601]

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interizes legal education with its reliance on final examinations as an index of performance. In work life in general, and supervision in particular, such evaluations are far less important to learning than is feedback . . . Without feedback, we cannot effectively evaluate and change behavior to bring it closer to our goals.

Id. at 439. In the context of a PSABE, then, there is potential for moving closer to the "goal" of competent practice because of the potential for feedback, as opposed to a purely evaluative "final exam" which is the existing bar examination.

597. For example, using the example of placement in the New York Civil Court, *see supra* note 354, an applicant working the Self-Representation Pro Se office would engage in a number of instances of interviewing, fact-gathering and counseling during her rotation. A well-trained supervisor could help her assess and hone those skills during the course of supervision, prior to the supervisor's final assessment of whether the applicant was "minimally competent" in those skills.

598. *See* Uphoff et al., *supra* note 590. In a survey of recent graduates hired as new public defenders, finding that those who had had a "quality clinical experience" were better prepared to represent their clients "because they . . . had a significant taste of actual practice in a structured setting under the tutelage of an experienced lawyer . . . who provided them the opportunity to discuss and to reflect about the positive and negative aspects of that experience." Uphoff et al., *supra* note 590, at 403.

599. Obviously, supervisors in the PSABE will not, nor should they, be solely concerned with the pedagogical success of the experience. With training, however, they should, like supervisors in externships, be able to assume a teaching role in addition to assessment and getting their own work done.

600. *See supra* notes 474-79 (discussing the pre-requisites for a PSABE, including clinical experience).

601. Law school clinics range from 2 to 16 credits, with students expected to spend approximately three hours per credit per week. Although weeks spent in the PSABE proposed here would be slightly less than a semester of law school, the hours devoted to it would exceed all but the most intensive and demanding law school clinics.

opportunity for enhancing minimum competence. In this respect, the PSABE could also answer Sturm and Guinier's call for a dynamic, interactive model which derives assessment from performance, while simultaneously promoting learning[602]. It would also benefit employers of graduates who chose a PSABE over the existing bar exam, from which little is learned, and less retained.

3. *Fostering Pro Bono and the MacCrate Values*

Pro bono is another area where the PSABE can benefit both participants and the profession. For the former, the public service work which applicants perform, like other non-bar exam-related pro bono, has the capacity to provide young attorneys with "valuable training, trial experience, and professional contacts"[603] while developing capacities to communicate with diverse audiences and building problem-solving skills and expanding their perspectives.[604] Similarly, their work assisting litigants "of limited means [can] provid[e] exposure to the urgency of unmet needs and the law's capacity to cope with social problems."[605] As to the latter, performing public service is "a way for the bar to improve the public standing of lawyers as a group."[606]

More important, pro bono provides a valuable contribution to the justice system, and to society as a whole. As a decade-old New York judicial report has noted:

> Much of . . . what lawyers do is about providing *justice*, [which is] nearer to the heart of our way of life . . than services provided by

602. *See* Sturm & Guinier, *supra* note 22, at 1010. "We are proposing a shift in the model of [assessment] from prediction to performance. This model builds on the insight that the opportunity to participate creates the capacity to perform . . ." *Id.*

603. *Cultures of Commitment*, *supra* note 330, at 2420; *see also*, Donald W. Hoagland, *Community Service Makes Better Lawyers*, in THE LAW FIRM AND THE PUBLIC GOOD (Robert A. Katzmann ed., 1995).

604. Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201, 1213 (2000) [hereinafter Rhode Essay].

605. *Id.*

606. *Cultures of Commitment*, *supra* note 330, at 2420; Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: A.B.A. Poll*, A.B.A. J., Sept. 1993, at 60-61 (demonstrating higher opinion of the legal profession when lawyers provide free service to disaster victims).

> other professionals. The legal profession serves as an indispensable guardian of our lives, liberties and governing principles . . . . Like no other professionals, lawyers are charged with the responsibility for systematic improvement of not only their own profession, but of the law and society itself.[607]

Despite the importance of pro bono service and its centrality to professional responsibility,[609] there remains an enormous "gap between professional ideals and professional practice"[609] with only a small percentage of lawyers contributing meaningful service.[610] In the face of many questions raised about reasons for this gap, attention has focused on the responsibility of legal education for instilling a sense of professional responsibility and a pro bono commitment that, it is hoped, will follow graduates into their practice years.[611] Although there is no definitive research on whether pro bono service in law school actually results in continued post-graduate pro bono work,[612] anecdotally, "[s]chools with pro bono requirements have found that between two-thirds and four-fifths of students report that their experience has increased the likelihood that they will engage in similar work as practicing attorneys."[613] In the same

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607. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1990), *reprinted in* 19 FORDHAM L. REV. 755, 782 (1991).

608. "Every lawyer . . . has a responsibility to provide legal services to those unable to pay and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer." MacCrate Report, *supra* note 1, at 140. Note that one of the MacCrate values includes, "[C]ontributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services are Provided to Those who Cannot Afford to Pay for Them." MacCrate Report, *supra* note 1, at 140.

609. *Cultures of Commitment*, *supra* note 330, at 2415.

610. Rhode *Essay*, *supra* note 604, at 1201.

611. For an excellent description and summary of this effort, see ASSOCIATION OF AMERICAN LAW SCHOOLS COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES, LEARNING TO SERVE: A SUMMARY OF THE FINDINGS AND RECOMMENDATIONS OF THE AALS COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES (1998), *available at* http://www.aals.org/probono/report2.html.

612. *See, e.g.*, Kristin Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, N.Y. ST. BAR. J., May-June 1998, at 20-21 (arguing for the need for good research on whether law school pro bono experience carries over into practice).

613. Rhode *Essay*, *supra* note 604, at 1212; Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563, 1567 (2000) (reporting that "volunteer activity, especially contact with clients and lawyers, powerfully sustains commitment.").

way that law school pro bono programs aim to create "a culture of commitment to public service,"[614] the PSABE could instill an appreciation of the value of service, and the satisfaction of helping the disadvantaged.[615] The additional post-PSABE pro bono commitment proposed here could reinforce the benefits of the PSABE[616] as well as help successful applicants learn to create time and space for pro bono in their practices.[617] The continued public service commitment which successful PSABE takers would carry into the first years of their professional lives could also serve as a compelling example for their colleagues and other newly-admitted lawyers.

The PSABE would also allow us consciously to combine, in a concrete and powerful way, the MacCrate skills and values. Those values are: provision of competent representation, promotion of justice, fairness and morality, improvement of the profession, and professional self-development.[618] All are implicit in the public service work a PSABE applicant would perform; designers of a pilot project would do well to make them explicit.[619] The MacCrate Report itself is clear about the indivisibility of "skills" and "values,"[620] noting that "[t]he process of preparing to represent clients competently is a matter both of accepting cer-

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614. *Cultures of Commitment*, *supra* note 330, at 2442-43.

615. Rhode *Essay*, *supra* note 604, at 1210. "Providing face to face exposure to the human costs of social problems could prove . . . important [to increase post-graduate participation]." *Id.* Such exposure would be assured if the PSABE were located in a court like the New York City Civil Court that, in its Housing Part, processes evictions for tens of thousands of poor and unrepresented New Yorkers.

616. *Id.* (i.e., the experience that pro bono is "important in giving meaning and purpose to their professional lives").

617. It is a reasonable hypothesis that young lawyers who make time for pro bono during the first two or three years of practice, as a result of their post-PSABE commitment, will be better equipped and more likely to continue to make time after the formal commitment has ended.

618. MacCrate Report, *supra* note 1, at 213-21.

619. This could be accomplished both in a pre-service prep course and by training supervisors and providing opportunities for reflection, during the PSABE itself.

620. The feat of somewhat artificial division and ordering was seen as necessary "to promote clarity in examining the components of each one," recognizing "a basic difference in the kinds of discourse best suited to express skills, on the one hand and values on the other, particularly in a prescriptive format. Legal skills are illuminated by dissection and precise elaboration. Values are better explicated in broad formulations nuanced by discussion." MacCrate Report, *supra* note 1, at 136.

tain professional values and of acquiring the skills necessary to promote those values."[621] Done well, the PSABE could illuminate and model the importance of connections, not only for PSABE applicants, but for legal education and the profession as a whole.

Finally, serious attention to constructing and evaluating a PSABE will, in its necessary emphasis on the elements of "competence" and "success as a lawyer,"[622] require us to re-join and re-invigorate that important conversation about lawyering and the profession of which the MacCrate Report is only the most recent iteration.

4. *Potential Benefits for the Courts*

There are also potential benefits for the courts in which the PSABE would be conducted, as well as for the court system generally. Organizational transformation, or even modest improvement, necessarily begins with reflective practice. In the hectic environment of most courts[623] there is little time for, or encouragement of, reflection. There is always more work to do than time in which to do it. For judges and other court attorneys involved in the PSABE, supervision and evaluation of applicants provide a rare opportunity and incentive to think deeply about what they—and the institution in which they work—are doing.[624]

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621 *Id.* at 137.

622. The reference here is to measuring for the "job" in the job-related requirement of *Griggs*. *See* Griggs v. Duke Power, 401 U.S. 424, 435-36 (1971).

623. Describing the New York City Civil Court, perhaps the busiest in the state system, the Office of Court Administration notes: "The combination of massive caseloads, litigants largely unfamiliar with the legal process and limited judicial resources has resulted in an environment that more closely resembles a hospital emergency room than a court." THE HOUS. PART OF THE N.Y. CITY CIVIL COURT, NEW YORK STATE UNIFIED COURT SYSTEM *at* http://www.courts.state.ny.us/hctprg.htm (last visited Sept. 12, 2002).

624. I owe this insight about the potential for, and potential benefit of, reflection to Susan Sturm. In my experience on the bench, the process of supervising student interns inevitably brought a fresh perspective and altered my own perceptions of the work I was engaged in, both in substance (including the effect it had on the parties, public perception, and the law) and process. Most of my judicial colleagues, as well as their court attorneys, reported a similar effect.

Training provided by clinicians[625] would also facilitate and reinforce reflective practice. It is difficult to foretell what consequences might result from such reflection on the part of judges and court personnel,[626] but it is reasonable to believe that the results would be positive including, perhaps, improved morale.

Second, the court system needs more members of the profession to understand and advocate for it. There has long been a disconnect between legal education and the courts.[627] Bringing clinicians and other legal educators into the courts to plan and execute a pilot program and to work collegially with judges and other court personnel would expose a new and important group of stakeholders to the courts' many problems—and many possibilities. Once the connection was made, participants from legal education might well remain engaged in issues of court reform and the courts' justice initiatives. They might also take back to their classrooms and their colleagues a more realistic and nuanced picture of the court system than can be gleaned from casebooks and most law review articles.[628]

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625. The BAR COMMITTEE REPORT proposes day-long orientation and training sessions for what it calls "Placement Supervisors," prior to the beginning of each placement period. The curriculum for the sessions would be developed by a Statewide Administrator in consultation with clinical law professors or professional legal trainers, and would "provide for the opportunity for supervisors to work together in small groups to design assignments, practice giving feedback and use the standard evaluation instruments. Live or videotaped demonstrations . . . [would] model appropriate feedback techniques and serve as a baseline for evaluation." BAR COMMITTEE REPORT, *supra* note 5, at 13-14. Supervisors would receive feedback during the orientation and at monthly meetings with clinicians during the pilot placement. *Id.*

626. The effect of training and subsequent responsibility for supervision and evaluation could be usefully studied as one of the research agenda flowing from a pilot project.

627. As one effort to create closer cooperation, the New York State Institute on Professionalism, initiated by Chief Judge Judith Kaye, held its first convocation on legal education, and included a panel on Legal Education and the Courts. *See* THE NEW YORK STATE JUDICIAL INST. ON PROFESSIONALISM IN THE LAW, CONVOCATION ON THE FACE OF THE PROFESSION, PANEL II SOCIALIZATION OF LAW STUDENTS INTO THE PROFESSION 61 (Nov. 13, 2000), *available at* http://www.courts.state.ny.us/ip/NYSProfJournal_p3.pdf (last visited Oct. 4, 2003).

628. An increased, contextualized knowledge of and attention to the operation with the court system would also, correspondingly, be of benefit to legal education

I) *Who Will Pay for the PSABE?*

Hidden, but hardly opaque, is the question of cost. Who will finance a PSABE pilot, including, perhaps most importantly, its subsequent evaluation, which ought to extend over a considerable time?[629] History suggests some possibilities, especially insofar as the PSABE is intended, to some degree, to affect change in law schools. One of the great stories in legal education is the extraordinary transformation brought about by the Ford Foundation's enormous and consistent commitment to creating and nurturing law school clinical programs.[630] That commitment, initially premised in encouraging law schools to provide legal services for poor people, has substantially altered legal education.[631]

Many opportunities remain to make constructive change in areas supported by the profession, such as the skills training recommended in the MacCrate Report, and, in the case of the call for diversifying the profession, the larger society as well. Many foundations continue their concern and commitment to these and related social justice goals,[632] as well as to the

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629. If, for example, we want to look at disciplinary actions, complaints and malpractice or other measures of incompetence or success it would be necessary to follow lawyers' careers for a number of years after admission.

630. In the early years of modern clinical education, 1959-65, Ford provided small grants totaling $500,000 to a number of law schools, with an additional grant of $950,000 to the Council on Education in Professional Responsibility (CEPR) later renamed the Council on Legal Education for Professional Responsibility (CLEPR). From 1968-78, Ford funded CLEPR (which, in turn, awarded grants to law schools) in the amount of $11 million. Barry et al., *supra* note 145, at 18-19, *see generally* RICHARD MAGAT, THE FORD FOUNDATION AT WORK: PHILANTHROPIC CHOICES, METHODS AND STYLES (1979). When Ford support came to an end in 1978, the Department of Education continued and expanded funding clinical legal education, appropriating approximately $87 million from 1978-97. Barry et al., *supra* note 145, at 18-19.

631. *See* Barry et al., *supra* note 145, at 19-20.

> If the nearly $15 million from the Ford Foundation was instrumental in jump-starting clinical legal education in most of the law schools in the United States during the first 20 years of the second wave of clinical education, then the $87 million from the Title IX program over the last 20 years of the second wave of clinical education was responsible for developing these budding clinical programs into integral parts of the curriculum at almost every law school in the United States.

Id.

632. For example, the Rockefeller Foundation's recent publication, "Louder Than Words," demonstrates its ongoing commitment to utilizing the law and law-

broader goals of education[633] and professionalism.[634] There is reason for optimism that the foundation community, with its long and generous involvement with legal education and professionalism, could be engaged in an experiment that proposes to increase skills training in law school, increase the diversity of the bar,[635] provide substantial pro bono legal services to public and/or public interest institutions,[636] carefully examine the tenets of traditional high stakes testing,[637] and offer the possibility of supplements or alternatives.[638]

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yers to achieve racial justice. *See* Patricia D. Hart, Louder Than Words, Lawyers, Communities and the Struggle for Justice: A Report to the Rockefeller Foundation (2001), *available at* http://www.rockfound.org/Documents/431/louderthanwords.pdf. The Open Society Institute has provided substantial funding to support public interest law, through Equal Justice Works (formerly NAPIL, the National Association for Public Interest Law) fellowships and the Law School Consortium Project/Community Legal Resource Network which ties law schools to their graduates in small and solo community based practices with justice missions. Open Soc'y Inst., Programs on Law & Society, *at* http://www.soros.org (last visited Aug. 21, 2003).

633. The Carnegie Foundation's multi-year study on professional education, including legal education, is a major undertaking which can be expected to have substantial impact on all five of the professions studies. *See* Wegner, *supra* note 15.

634. For example, the Keck Foundation has been a major funder on issues of professionalism and professional responsibility.

635. The PSABE seeks to accomplish this by creating a non-discriminatory alternative to the present bar with its negative disparate impact on non-majority students, thus increasing diversity, but also making legal education—without a daunting and often disabling barrier at its end—more attractive to non-majority students.

636. The need for pro bono services is clearly not being met by the large firms, *see* Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. Times, Aug. 17, 2000 at 1, nor is it ever likely to be. As public institutions, like the courts, also seek pro bono assistance, the situation will only grow worse. By tapping a new resource, bar applicants, including their post admission commitment, the PSABE increases pro bono services with minimal institutional cost.

637. The increasing criticism of our testing culture, *see supra* note 104 and accompanying text, and the growing appreciation that there is a serious disjunction between learning and testing, *see, e.g.*, Wegner, *supra* note 15, underscores the need to think more expansively about what we are actually doing, including sorting and weeding, when we test. The Ford and Mott Foundations have funded the work of Susan Sturm and Lani Guinier in exploring the correlation between standardized testing and racial discrimination. *See* Subotnick, *supra* note 235, at 142-43 & nn.7-8.

638. The choice law school graduates would be given as a result of a PSABE could make the entire licensing system appear fairer, thus boosting public confidence. In New Mexico, for example, where the Supreme Court implemented various "procedures designed to professionalize the admissions process and assure

The 1980 California experiment, claimed as foremother of the PSABE, is another relevant example. The experiment grew out of research and proposals funded by the NCBE and the state's own bar examiners.[639] It is possible that a similar coalition could be formed to provide the drive behind a new approach like the PSABE

Finally, the announcement by LSAC of the creation of a research fund of $10 million[640] creates a possible source of funding LSAC has long been deeply committed to diversity, and in the past has committed substantial resources, including funds for the LSAC Bar Study.[641] One of the avowed purposes of the new research fund is to educate law schools about the appropriate uses of the LSAT.[642] While the LSAC Bar Study and other studies have demonstrated correlations between LSAT scores, law school performance (measured by grades) and bar passage,[643] there has been no way to separate out, or account for, basic lawyering competence. A PSABE pilot would necessarily generate questions about what we mean by minimal competence to practice law, and how we measure it.[644] As such, it could provide an important new lens for examination of the LSAT and its legitimate uses.[645]

XIV. Strategies For Creating a PSABE

As we have seen above, the PSABE is a feasible alternative practice to the existing bar exam, which would meet employers'/bar examiners' needs. From an analysis premised in Title VII

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fairness to all candidates," "'upgrading' . . . the bar examination process had a positive effect [and added] to the enhanced perception of fairness and integrity . . . ." Vaughns, *supra* note 37, at 450 & n.109

639. *See* Carrizosa, *supra* note 284

640. Rick Haggerty, *LSAC Commits $10 Million to Help Schools Examine Admission Policies*, THE LEGAL INTELLIGENCER, Jan. 31, 2001

641. *See supra* Part VI.

642. *See* Haggerty, *supra* note 640

643. *See LSAC Study*, *supra* note 43.

644. LSAC has already demonstrated its interest in the question of what constitutes success as a lawyer by funding a study currently underway at the University of California at Berkeley Law School. *See* Shultz & Zedeck, *supra* note 432.

645. I exclude here the use of LSAT scores in *U.S. News and World Report*, now perhaps the most powerful verifier of these scores. LSAC itself has always discouraged this "mis" use of its scores, and has cooperated with the AALS and law deans in their attempt to counter the effect of *U.S. News and World Report* in application decision making.

law, the existing bar examination is highly questionable in terms of its job relatedness and validation, and unquestioned in its discriminatory impact. From a practical, as opposed to a legal, standpoint then, the questions are: How do we get there from here? What strategies do we need to pursue to make a PSABE a reality?

a) *Research*

One strategy is to create a research agenda which will support the arguments for a PSABE, help structure a pilot, and create a design for meaningful evaluation. That strategy could begin with a question like: Why do we believe that lawyers who have taken the bar are better at practicing law than those who have not? If they are not, then, at least for graduates of ABA-accredited law schools, there is no justification for the bar at all. Fortunately, there are large cohorts of lawyers in both categories.[646] Identifying such lawyers would permit those with diploma privilege or veterans' exemptions to be compared with those who have entered the profession by the more traditional route of bar passage. This might resolve the otherwise untested premise that the bar exam somehow "weeds" out bad lawyers and ensures minimum competence to practice law. If those who never took the bar proved every bit as competent, the necessity for rethinking the bar examination regime would be obvious and, perhaps, even inescapable. If the results were more ambiguous, we might be impelled to deal more creatively with the ambiguity.

Comparison is a particularly interesting aspect of the research agenda, because the larger question is "comparison of what to what?" How do we begin to divide lawyers, for this purpose, into those who are competent and those who are not, so as to compare those who passed the bar exam the first time, with those who did not? There are at least two easily quantifiable events which would seem to relate to competence or, more accurately, lack of competence, in a modest way: disciplinary actions and malpractice cases.[647] The two cohorts of lawyers, bar takers

646. *See supra* notes 8 & 507-15 and accompanying text (discussing diploma privilege and veterans' exemption lawyers).

647. Obviously there is a need for subtlety and caution in using these indicators, as well as a special difficulty posed by confidentiality restraints in discipli-

and those who were otherwise admitted, could be compared on both of these scales; it would be surprising to see if there was a substantial difference between them.[648]

The larger question, which ought to engage those in legal education responsible for training the profession and those in the bar regime responsible for admitting them, is what values we believe lawyers bring to society and to their clients, and how we can measure them. Issues here could include peer evaluation and reputation, client satisfaction, and overall contribution to the effective resolution of disputes, public and private, within society. Some notion of contribution to increasing access to justice for all segments of the population[649] might also find its way into the measurement.[650] These are clearly not easy things to

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nary cases. Filing a complaint with a disciplinary authority may reflect as much on the individual who files—who may be motivated by many factors, including unhappiness with a fair but unfavorable outcome—as on the alleged incompetence of the respondent. Careful analysis of charges and results, extremely difficult to operationalize, would be required if disciplinary complaints were utilized as a stand-in for incompetence. This is because a "no finding" does not necessarily ensure that the respondent's practice was competent, but might instead reflect proof or procedural problems. Similarly, in the case of malpractice actions, improper motives would need to be sifted from actionable behavior, and results analyzed in a way more nuanced than simply whether the plaintiff prevailed. There is another reason for caution. In my experience on the bench, malpractice counterclaims were routinely interposed in actions to collect attorneys' fees for not always legitimate reasons. Although looking at disciplinary and malpractice actions would be a very crude tool, it may be one of the few available for making comparisons.

648. The New York Bar Examiners have eschewed the value of a comparison in measure of competence (or incompetence), based on these factors, but have offered no alternative ideas. *Report and Recommendation*, *supra* note 18, at 12-13. While I agree that malpractice and disciplinary complaints are a weak measure, they may be more important to the public, whose confidence is implicated, than to rigorous social scientists designing a study, or even to most lawyers. More significant, however, the tactic of throwing up one's arms and claiming "it can't be done" seems inappropriate when those eschewing responsibility are those who are erecting barriers to entry based on entirely untested (and, according to them, untestable) premises.

649. A study of Michigan Law School graduates defines success as a measure of the Law School's mission, including career satisfaction, financial earnings after graduation, and contribution to society. *See* Lempert et al., *supra* note 155, at 443. For an argument that this contribution to society should be an important consideration, see Curcio, *supra* note 14, at 380 nn.72-73.

650. It is no coincidence that my choices for describing the assessment of lawyer competence incorporate, to large part, though different formulation, the MacCrate "values" which Robert MacCrate himself has said are the most important part of this eponymous Report. Interview with Robert MacCrate, Chairperson of the American Bar Association Section of Legal Education and Admissions to the

quantify, but difficulty in doing so makes them no less important. Comparing cohorts of bar-examined and non-bar-examined lawyers might usefully employ those same techniques in measuring the value of the legal education which our law schools provide to their graduates.[651]

An additional research agenda might focus on a previously untested and unrefined argument against the existing bar exam. Based on existing evidence, it is basically uncontroverted that the bar exam has a disparate impact on non-majority takers, but there is virtually no corresponding data about economic status.[652] Although there is some anecdotal information, no one has thoroughly explored the effect of poverty—or relative poverty—on bar success. The LSAC Bar Study considered the SES of bar takers,[653] but not their more contextualized economic situations at the time of bar administration.[654] If we were to focus on actual economic position, a number of questions would emerge. For example, does it make a difference to bar passage rates that applicants have other obligations, including working for income, during the time they study for the bar? Does the ability to pay for review courses create a greater likelihood of success, as opposed to prospects for those who cannot afford

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Bar Task Force on Law Schools and the Profession: Narrowing the Gap, New York, N.Y. (Oct. 2, 2011).

651. Gunner notes of the Lempert et al. study that, "[i]t redefines what it means to be truly 'qualified' based on the work one does as a lawyer rather than as a law student. It identifies the need to connect our view of qualifications at the admission [to law school] stage with competence after graduation." *Confirmative Action*, *supra* note 583, at 572.

652. We do know, however, that test scores and comparable measures of "legal aptitude" "tend to correlate with parental income (i.e., with the applicant's socioeconomic status and wealth)." *Confirmative Action*, *supra* note 580, at 572 & n.23; Lawrence, *supra* note 518, at 945. SES correlates with LSAT scores and law school performance. *See Rise of the Testocracy*, *supra* note 251.

653. SES, as traditionally measured, does not accurately describe the economic situation of non-majority subjects because it only measures income, and not capital accumulation, where, for a variety of reasons, non-majority persons lag far behind majority whites. *See Rise of the Testocracy*, *supra* note 251, at 184.

654. The LSAC study looked at family income at the time students began law school, how much they worked during their undergraduate educations, and how much paid work they estimated they would need to do in law school, not their own level of debt, cost of living, or income at graduation. *See LSAC Study*, *supra* note 43, at 67-68.

such courses?[655] Does working an extra job or an extra shift to pay for the review course negatively impact the applicant's chances?[656] Regardless of the inability to make successful legal arguments based on the possibility that the bar exam discriminates against those of meager means, in order to begin to remedy economically-based disadvantages and to seek out solutions,[657] research to answer such questions is long overdue.

A different research agenda arises out of the hypothesis, based on Claude Steele's work, that non-majority students will not suffer the negative consequences of stereotype anxiety if they are evaluated in a real-life practice setting.[658] Even before a PSABE, we might identify a numerically significant cohort of non-majority graduates working for large employers like Legal Aid and District Attorneys' offices[659] where periodic evaluations are routinely made. Assuming permission and confidentiality, we could look at how graduates' evaluations correlated with bar passage. If there were significant disparity,[660] or if poor evaluations were distributed equally among those who passed and those who failed, it might be possible to make much stronger

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655. *See supra* note 551; Wong, *supra* note 360, at 231-32 (writing about the LSAT, noting that higher SES students can buy their way to higher scores, since it is about test-taking skills, which can be taught in expensive prep courses).

656. Professor Paula Lustbader conducted an informal unpublished study at the University of Seattle from which she concluded that graduates' financial and familial obligations impact negatively on their ability to pass the bar. *See* Curcio, *supra* note 14, at 391 & n.183.

657. At CUNY, we have often surmised that paying for the bar review course (we already offer the MBE preparation course for free) and supplying childcare and similar substitutes for our graduates' familial work and community responsibilities would be the most effective strategy for raising bar pass rates. Our own lack of resources has, however, made this hypothesis impossible to test.

658. *See* discussion *supra* Part X[B][3][2]; *Confirmative Action*, *supra* note 523, at 575. "[H]igh stakes testing does not reproduce the [debilitating] challenges within the [real life] environment in which minority lawyers function and do fine." *Id.* at 575.

659. This would require reporting from employers who have multiple graduates each year. In New York, both defenders' and prosecutors' offices hire substantial numbers of non-majority graduates who could be compared with each other. Both offices generally offer good supervision and evaluation of new hires. If, as seems unlikely, there are large firms that have substantial numbers of non-majority students, they would also provide a useful comparison. The key is to have the same evaluators doing similar evaluations for a meaningful group of new hires.

660. The more graduates with high evaluations who do not pass the bar, the greater the support for the hypothesis that it is exam-taking, not competence, that is being disproportionately measured for non-majority students.

assumptions about the examination's role in creating false negatives or false positives.[661]

It might be possible to do more sophisticated bar-related research which takes as its starting point the work Jay Rosner has done on the SAT exam.[662] His research demonstrates that SAT questions are pre-tested, including for race, and that the questions which ultimately appear on the SAT are dramatically—and disturbingly—weighted towards those on which whites perform better than non-majority students. While Rosner's primary interest is whether this same pattern holds true for the LSAT, making it, as he describes the SAT, a "race chosen" exam, we might want to ask the same questions about the bar, particularly the MBE, where questions are repeated from exam to exam. I know of no literature on exactly how bar exam questions are pre-tested[663] or whether there is racial data,[664] but insofar as Rosner's inquiry goes to the construction of the test, rather than seeking to find causal explanations for performance, this could be an important area of research.

There is also a variety of research which could be done in anticipation of a pilot. This might include surveys of employers to ascertain whether the means by which prospective employees

661. *See* discussion *supra* notes 452-54 and accompanying text.

662. Oral presentation, *High-Stakes Testing*, Society of American Law Teachers Conference: Teaching, Testing and the Politics of Legal Education in the 20th Century, (Oct. 21, 2000); *See also* William C. Kidder & Jay Rosner, *How the SAT "Creates Built-in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131 (2002); Jay Rosner, *Disparate Outcomes By Design: University Admissions Test*, 12 La Raza L.J. 377 (2001).

663. According to the NCBE:

> All items on the MBE are reviewed for potential bias. Men and women serve on each Drafting Committee, and members of ethnic minority groups assist in the preparation and review of items at both the Drafting Committee level and at the level of MBE Committee and State Board review. The National Conference of Bar Examiners is committed to diverse representation on all its Drafting and Policy Committees.

National Conference of Bar Examiners, Myths and Facts about the MBE, at http://www.ncbex.org/tests/mbe/myths.htm (last visited Nov. 16, 2003). This does not, however, directly address Rosner's issue.

664. Because the vast majority of states do not collect bar data by race, it is unlikely that the same circumstances described by Rosner exist for the bar exam; there would be no way to know the race of those who answered particular questions correctly or incorrectly. If and when such data is collected, it would be important to ascertain what, if any, racial differences individual questions might promote.

were admitted (i.e., by the PSABE, or the existing bar exam) would matter to them in hiring, retention or promotion. Law students could be surveyed to determine how many of them might elect a PSABE if it were offered. Consumers of legal services could be questioned as to whether they knew—or cared—how many times their lawyer had taken the bar, or whether they would have differing views of, or concerns about, competence depending on how a lawyer was admitted. Courts where a PSABE might be situated would have to be carefully studied to determine whether placement there would permit applicants to perform—and be evaluated on—the full range of MacCrate skills. There would need to be detailed and informed projections of how to expand the PSABE if the pilot were successful. The project of moving the PSABE forward requires the engagement of law teachers, social scientists and other allies in these and other inquiries which constitute a useful and, in some instances, necessary research agenda.

b) *An Alternative Minimum Test*

Because of the profession's historic confidence in the bar exam, some kind of written test might still, as a political matter, be necessary. One possibility, proposed by the Bar Committees' Report, is to require those electing an alternative experientially-based bar to take both the MPRE[665] and a written test similar to the MPT, but without the latter's time constraints.[666]

There is another possibility. This would require thinking about the kinds of things we want lawyers to actually "know," in the sense of having that information in their minds at all times. What, if anything, should all lawyers have to memorize? Obviously this cannot be the entire body of substantive law; there would be no room left for application or analysis. There

665. I have taken no position as to whether the MPRE, which is normally taken while applicants are still in law school, should continue to be required, although I do not believe that it actually tests professional responsibility, or the MacCrate skill of resolving, as opposed, in a very limited and non-contextualized way, to recognizing ethical dilemmas. See MacCrate Report, *supra* note 1, at 140.

666. Bar Committee Report, *supra* note 5, at 16. Lengthening the time for the written test is intended to decrease the operation of stereotype threat for non-majority takers, to the extent that it operates by decreasing efficiency. *See supra* notes 564-65 and accompanying text.

are, however, things that lawyers ought to know without looking them up, where failure to know, or to subsequently look it up can be disastrous. Among these, I would include common statutes of limitations, filing deadlines, and similar limitations in administrative proceedings, basic ethical rules and rules of professional responsibility. Just as we test such simple but important facts on exams for drivers' licenses (for example, how many car lengths should be between cars at given speeds, or how often you have to renew your license),[667] a similar short test might be appropriate. As a precondition, however, we would need to think and agree about what is really important to have on such a test, what must be memorized, and most important, whether it is necessary to be a competent and ethical lawyer.

c) *The Need for a Pilot Project*

My proposal is not intended to replace the traditional bar exam overnight, if at all. As I have noted throughout this article, the PSABE should initially be proposed as a pilot project. A pilot is important for a number of reasons. First, training, evaluating and credentialing a relatively small number of law graduates is easier than flooding the courts with unprepared helpers who would need supervision and evaluation from untrained court personnel. It is important that the project work, and a carefully designed small pilot has a far greater chance of success. One, two or three receptive courts, with receptive administrators and personnel could, with good training and preparation, generate results which would be sufficiently attractive to other courts to garner system-wide support.

It also seems likely that a small pilot would be more palatable to bar examiners and their constituencies. It is important to reiterate that the bar examiners are, and have been, operating in good faith, undoubtedly doing the best they can within the constraints of the time and money they are allocated. As bar examiners in New York have said, while it would be optimal to do real performance-based evaluation with videotaping, critique, open file questions, etc., this is simply impossible for the

667. NEW YORK STATE DEP'T OF MOTOR VEHICLES INTERNET OFFICE, Driver's Manual, chs. 1, 5, *available at* http://www.nydmv.state.ny.us/dmanual (last visited Nov. 16, 2003).

10,000 or more law graduates they must evaluate each year.[668] Limiting an initial pilot in New York to a few hundred students would not devalue or inappropriately challenge what bar examiners do, but would test an alternative not presently available on the mass scale on which they work. As a political matter, it is also more likely that an integrated bar, an Institute on Professionalism, or some other prestigious legal organization would support a pilot[669] which could be carefully evaluated than it is to effect wholesale change in the way in which lawyers have been admitted for most of the last century. And, as Sturm and Guinier point out, "[t]o be workable, strategies [like the PSABE] may need to be implemented on an experimental basis to gain insight into their actual effect, not just their predicted effect, and to fine-tune them over time."[670]

Finally, almost too obvious to mention, there are innumerable issues, both large and small, which would have to be identified, researched,[671] considered and decided in the course of actually designing a pilot and subsequently evaluating its results. It is not surprising that more than one hundred professionals from diverse disciplines worked to create and evaluate the 1980 California Experiment. Many areas of social science, testing and other expertise, all beyond my limited capacity, will be required. Only a well thought-out design can appropriately test the hypotheses behind the PSABE, and create a feasible model for replication and expansion. And, as with all ideas for change, the results will undoubtedly look far different from what was originally envisioned.

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668. Statements made at meeting of the NYSBA Committee on Legal Education and Admission to the Bar with members of the New York State Board of Law Examiners (Oct. 24, 2002).

669. This is precisely what the Committees on Legal Education and Admission to the Bar of the two major bar associations in New York have already done. See BAR COMMITTEE REPORT, *supra* note 5, at 1.

670. Sturm & Guinier, *supra* note 22, at 104.

671. As one small but illustrative example, suggested by Susan Sturm, in planning the supervisory and evaluative roles that judges might play in the PSABE it would be important to analyze job patterns to create incentives for participation and to maximize accountability.

d) *Allies*

Allies are critical in any strategy for significant change. Potential allies exist in a number of important institutional settings, including the organized bar, legal education, and the court system. Within the organized bar, and particularly critical state bar associations, support should come on at least one of two grounds. Many members of the practicing bar are concerned about the lack of lawyering skills possessed by graduates. This is a phenomenon which surfaces every twenty or so years in bar association reports and pleas that legal education, in its most recent form, "MacCrate" the curriculum. Bar leaders with these concerns should be major allies for testing an experientially based, professionally validated certification of lawyering skills prior to admission. In addition, the organized bar has spoken out strongly and repeatedly about its concerns for the necessity of increasing diversity. This oft-stated position should be used to support a pilot to test and/or ameliorate causes of the negative, disparate impact of the existing bar examination on non-majority students.

Legal education may, paradoxically, be a tougher nut to crack, but there are allies within academia. SALT and its members are an obvious base because of the commitment of the organization to examining and working creatively around issues of diversity and the bar examination. The interconnections between SALT and the AALS, and the demonstrated commitment of the AALS[672] to the same issues which should engage bar leaders suggest that AALS itself would be an enormously valuable ally in creating a pilot program. There may well be principled and/or self-protective resistance on the part of some traditional law school teachers, but the small number of participants in a pilot PSABE should allay their fears. Certainly a pilot will have little effect on their lives, scholarship and teaching responsibilities; an anticipatory assessment of how many students might elect a PSABE, if it were freely available, would probably do the

672. For example, AALS accreditation standards require member schools to demonstrate commitment to diversity in hiring and admissions. AALS is an active participant of the AALS/ABA/LSAC Joint Committee on Racial Diversity and has a large and active Section on Minority Groups.

same.[673] The art of compromise is not to be underestimated; this concession to skills teachers and other faculty who value lawyering skills is one which might be obtained by principled conversations among colleagues in legal education.

Foundations are also important allies, both for the critical funding they might supply and for the legitimacy a pilot associated with them would possess. Delivering the resources to do a pilot project makes it much more likely to happen. The prestige of a Carnegie, Ford or Rockefeller[674] Foundation's support should help convert the skeptical, and enhance professional and public acceptance. Foundations have also become increasingly skilled at evaluating the projects they fund and may have technical[675] as well as financial resources to ensure that a PSABE pilot will be thoroughly and properly evaluated.

Finally, the support of the court system is critical. Members of the highest state court, responsible for supervising the bar examiners in most states, need to be convinced of the value of a pilot without unduly threatening their long-term commitment to the existing bar exam. Studies and reports from court administration on diversity and the need for professional skills and values can provide fertile ground for persuasion.[676] In states with ambitious pro bono programs, the vision of trained and supervised free help to accomplish the many valuable programs which have been envisioned but provided with inadequate resources may be persuasive. In New York, for example, it is clear that the court system needs "bodies" to fulfill its ambitious plans and justice initiatives; calls for pro bono services from large law firms and law schools have not produced any-

673. A useful step, which does not necessarily rise to the level of research, might include an inquiry of students at several representative schools. While the benefits of additional training should attract many, and might also, in turn, result in encouragement by employers, the subsequent pro bono requirement might substantially decrease their numbers.

674. These three foundations listed in alphabetical order have particular public recognition, but there are many, many others, committed to similar goals and with histories of creative and path-breaking funding which would be equally valuable to engage.

675. Foundations may have researchers on staff, or may have a group of researchers with whom they have worked successfully who could plan and execute evaluation and follow-up on any pilot project.

676. *See* JCN Report, *supra* note 158. Many states have established Commissions on Taskforces on Gender and Racial Diversity.

where near sufficient help.[677] The need for, and ability to creatively and effectively use trained law graduates is something which can be argued, but which is best demonstrated and actualized by an effective pilot. This leads to the last group of prospective allies.

When we think of the courts, we must also, where applicable, include the unions to which court employees belong, and by whom they are represented. Union leaders—and rank and file members—must be persuaded that a potential wave of PSABE applicants descending on the courts will not threaten jobs[679] or impose unwanted, and unbargained-for obligations on existing court personnel.[678] Instead, training in supervision and evaluation that would be given selected court personnel should be presented thoughtfully as a model of skills enhancement. In addition, with the assistance of PSABE applicants, employees might experience at least some decrease in the time expended in their duties. In my experience, court personnel—and their unions—have genuine concern for the justice function of the judicial system, as well as the more traditional labor-management issue of increased status through training. With appropriate and respectful communication, the unions should prove allies, not adversaries, in the effort to some day establish a PSABE.[680]

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677 No state has yet adopted mandatory pro bono, and few even have mandatory reporting systems. Whether or not mandatory pro bono is a good thing, without it, and given the enormous number of needs which pro bono service can fulfill in any given jurisdiction, the courts are unlikely to benefit from the generosity and professionalism of members of the Bar in their personal decisions about where to spend non-billable hours.

678 Since PSABE applicants would largely be used to staff pro bono initiatives which would otherwise not exist, or be severely limited, and since their presence would be time limited, the PSABE should not be seen as creating a serious threat.

679 I owe this observation to Josh Prusansky.

680 In my experience, many court personnel, a substantial number of whom are persons of color, aspire to, and ultimately attend law school, often in part-time programs. The potential opportunity to establish their competence to practice law by performance in a system with which are already familiar and successful could provide an additional base for their support of a PSABE.

XV. The Special Case for New York

Thus far, this article has considered criticisms of the bar exam as it is administered everywhere in the United States, and has proposed an alternative bar exam which could be employed in any jurisdiction.[681] There is, however, a special argument for adoption of the PSABE in New York.

In 1992, responding in part to the critical Report by the Association of the Bar of the City of New York[682] and the Report of the New York State Judicial Commission on Minorities,[683] the New York Court of Appeals commissioned a study of the New York bar examination. The study, entitled an "Evaluation," was conducted by an "evaluation team"[684] of psychometricians and testing professionals. By intention, it was confined to the New York portion of the exam, was to be "thorough and wide-ranging," and was to be "entirely independent."[685] It covered a number of areas,[686] of which three, the sections on content validity, construct validity and race/ethnicity, and gender and bar examination performance are particularly relevant to the PSABE proposal. Its findings in each area fully support the

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681. The New York City Civil Court has been used as a model here and elsewhere in proposals for a PSABE. *See, e.g.*, Glen, *supra* note 4; BAR COMMITTEE REPORT, *supra* note 5. However, the model is intended to be transferable to other courts in other jurisdictions.

682. ABCNY *Bar Report*, *supra* note 9.

683. JCM Report, *supra* note 158

684. The team consisted of Professors Jason Millman, Cornell University, William A. Mehrens, Michigan State University, and Paul R. Sackett, University of Minnesota, each of whom had authored a number of books, scores of articles, been elected officers of professional organizations and edited one or more professional journals. Judge Richard Simons was liaison to the Court of Appeals. Millman study, *supra* note 7, app. I-1.

685. Millman study, *supra* note 7, at 2-1.

686. Other areas included accommodations for applicants with disabilities, test security, grading, test reliability, score reports, and appeals. One final subject, the passing score, is highly relevant to the ongoing debate about raising bar passing scores. *See supra* notes 16-26 and accompanying text. Significantly, the Evaluation (which, like the more recent Klein studies cited in support of a proposed score increase, utilized expert panels in a standard setting exercise) recommended "that the passing score of 660 be retained for the present. If the Bar Examination evolves to a noticeably different character, the Board might consider a standard-setting study that is more extensive than the one described here." Millman study, *supra* note 7, at 8-5. There has been no such "substantial change" in the character of the bar exam since 1993.

proposal to design and pilot a PSABE as does its conclusion and recommendations.

a) *Content Validity*[687]

This section posed several questions including, "What areas of law do experienced lawyers think should be tested, and with what emphasis? What, besides knowledge of law, appears to be tested on the examination? What other competencies should be tested?" The Court of Appeals appointed two panels of six lawyers each, one representing upstate and one the New York Metropolitan Area,[688] who evaluated the existing bar examination (New York essays and New York multiple choice questions) for substantive subject matter coverage and for skills tested. As to the latter, the team and the panels distinguished between skills necessary to be a *competent* lawyer, and those necessary to be a *successful* lawyer, determining that only the former were appropriate to the bar examination's stated purpose of protecting the public. Skills necessary for competent practice were defined as those whose absence would be apt to harm a client.

Recognizing also that "if only a limited number of skills can be tested, those that are pre-requisite to important skills deserve preference,"[689] the skills rated most important by panelists were, in this order: legal analysis and reasoning; legal research; factual investigation and analysis; problem solving and case planning; written communication; personal qualities of integrity, diligence, timeliness and sound ethical awareness; knowledge of ethical mandates, including when refusals are necessary because of lack of time, knowledge or ability, interpersonal tasks, such as interviewing, counseling and negotiat-

687. The Evaluation uses the categories of validation which are employed in EEOC Guidelines. *See supra* notes 259-64 and accompanying text. Content validation asks whether "a representative sampling of specified job functions or the underlying skills necessary to perform those functions" are being tested. *See* Rogers, *supra* note 51, at 625. As discussed below, the Evaluation identified those "skills" and found virtually none of them tested. Hence, under the technical meaning of the term, the bar exam should be said to lack much content validity.

688. The criteria for appointment was to "include[e] as broad a spectrum as possible of attorneys of varying ages, years of practice and areas of concentration who were employed in public and private practice and different size firms." Millman Study, *supra* note 7, at 3-11.

689. *Id.*

ing;[690] trial advocacy, oral communication and advocacy in the motion and appellate contexts; and law office management. The knowledge elements deemed important to competence were: knowledge of some core body of doctrinal and procedural law; and knowledge of basic concepts underlying the common law and constitutional and statutory interpretation. In their assessment of prerequisite skills, the panelists indicated that factual investigation, problem solving and case planning were prerequisites for interpersonal tasks, but trial advocacy and law office management were not, so the former were to be preferred over the latter.[691]

Limiting the knowledge and skills elements to the most important, both for protecting against harm and as prerequisites for other important skills, the panelists selected legal analysis and reasoning, legal research, factual investigation and analysis, problem solving and case planning, knowledge of ethical mandates, etc., and personal qualities of integrity, diligence, timeliness and sound ethical awareness and the two knowledge areas.[692] The Evaluation noted that while "a strong case can be made for assessing [these seven skills and knowledge bases]" the skill "referencing behavioral dispositions, cannot be well assessed in a traditional examination context."[693] As a result, it concluded that "the test format found on the present Bar Examination can be advantageously expanded" because "the test is far from a perfect sampling of all the important lawyering skills."[694]

What is significant—even stunning—about the Evaluation's treatment of, and recommendations about, content validity are how closely they parallel both criticisms of lacunae in the existing bar exam and the potential of the PSABE to test every skill, including the "behavioral dispositions"[695] found most im-

690. Note that two separate MacCrate skills, counseling and negotiation, are lumped together here with one aspect of a third MacCrate skill, fact investigation, i.e., interviewing. *See* MacCrate Report, *supra* note 1, at 138-39.

691. Milliman study, *supra* note 7, at 3-14.

692. *Id.*

693. *Id.*

694. *Id.* at 3-15.

695. These characteristics, which can only be poorly approximated on any written test, are precisely what supervisors would observe and could evaluate during a ten to twelve week placement.

portant to assessment of competence as a lawyer in order to protect the public. It is also apparent how much more nuanced they are than the skills allegedly tested on the existing bar exam (i.e., "fact analysis" vs. "factual investigation and analysis, problem solving and case planning").

If we are to take the extensive Evaluation commissioned by the Court of Appeals seriously, the PSABE precisely meets the recommendation or the "Concluding Comments" that "[i]n the longer term, we encourage experimentation to overcome the logistical, cost and testing-technology impediments to increased content validity."[696] The PSABE does just that.

b) *Construct Validity*[697]

This section posed questions such as "What does the Bar Examination measure? Is it a measure of overall knowledge and legal reasoning? Or is it a measure of rote memorization? Of skill dealing with multiple-choice item formats? Of ability to work quickly?"[698]

In examining the three components of the bar exam, the MBE, New York essays, and New York multiple-choice questions, the Evaluation found "a very strong relationship among the underlying characteristics as being measured by the test components."[699] That is, that all three components "are measuring a common underlying characteristic."[700] That characteristic is "generalized legal knowledge and legal reasoning" *not* any of the skills, or even necessarily the knowledge bases[701] found important for lawyer competence. Looking at one administration of the bar exam, and the various substantive areas tested, the Evaluation concluded that while some questions primarily tested memorization, and others tested more generalized

696. Mullinax study, *supra* note 7, at 3-15, 16.

697. Under EEOC Guidelines, *see supra* notes 259-64, construct validation looks to a relationship between what is tested and some trait like intelligence, needed to perform the job. "Construct validation is difficult, if not impossibly to prove and requires a presentation of substantial empirical data." Seitel & Grossman, *supra* note 261, at 154.

698. Mullinax Study, *supra* note 7, at 9-1.

699. *Id.* at 9-2.

700. *Id.*

701. It would be difficult to claim that any of the three components test "knowledge of basic concepts underlying the common law and constitutional and statutory interpretation." *Id.* at 14

"reasoning,"[702] memory and reasoning items tested the same thing.[703]

One psychometric conclusion that can be drawn from this is comforting: the test is valid because it is measuring what it says it is measuring,[704] and doing so consistently (reliably). The next necessary step is, however, missing; there is no "extensive empirical data" connecting that which is measured to the job of competent lawyering. A common sense look, like the work done by the content evaluation panels, strongly, if not dispositively, suggests that the "general legal reasoning" and memorization tested consistently and reliably by the bar examination is far from adequate to constitute competence, or to protect the public.[705]

The Evaluation's findings about "speededness" are even more important to concerns about the existing bar which could be remedied by the PSABE. The Evaluation first considered whether the exam was "speeded," i.e., requiring speed for success, and then whether such "speededness" was relevant to, or important for, competence as a lawyer. Applicants generally believe that they need more time, and that with more time they would perform better. Evidence obtained in California, cited in the Evaluation, bears out the truth of these beliefs, demonstrating that "doubling the time allowed for the MBE would produce a mean change equivalent to 30 New York common scale points."[706] Research on the essay portion in California produced

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702. Remember that on the MBE there is often no "right" answer, just an answer which is least wrong. This may be good test construction, but it is not necessarily the way in which lawyers need to know or to think. That is, there is a right answer and only one right answer to many legal problems, like the applicable statute of limitations. In many other, more complex situations, there are far more than four possible answers, see Bubis, *supra* note 87, and the competent lawyer must draw on a more complex skill set to analyze the situation and then chart a course of action. This observation supports the Evaluation's finding of the importance of the skill of "factual investigation analysis, problem solving and case planning" as it is necessarily employed in tandem with "legal analysis and reasoning." That is, the latter skill, by itself, is generally not enough to solve a client's problem, which is seldom, if ever, presented as a one or two paragraph, fact-fixed exercise.

703. Millman study, *supra* note 7, at 9-6.

704. *See, e.g.*, Mueller, *supra* note 32, at 211.

705. *See supra* Part III(d).

706. Millman study, *supra* note 7, at 9-6 & n.11 (citing STEPHEN KLEIN, THE EFFECT OF TIME LIMITS, ITEM SEQUENCE AND QUESTION FORMAT ON APPLICANT PERFORMANCE ON THE CALIFORNIA BAR EXAMINATION (1981)) (Report prepared for the

similar results.[707] While there is apparently no data on how an increase in time affects applicants by racial or ethnic categories, this finding also gives very substantial support to a hypothesis about increasing time based on Steele's work,[708] and argues for a less-speeded test—unless, that is, the "speededness" required by the test is also required for competence as a lawyer. Intuitively, this is false, and the panels utilized by the Evaluation came to this conclusion, summarizing their findings as "speed in reading fact patterns, selecting answers, and writing essay responses [is] not the kind of speed needed to be a competent lawyer."[709] A major characteristic which the bar exam tests, and for which there is good reason to believe disparate impact occurs,[710] is *not* necessary for competence and may, indeed, be contraindicated.[711]

c) *Race/Ethnicity, Gender and Bar Examination Performance*

This section of the Evaluation is important because it buttresses the findings of disparate impact reported nationally by the LSAC[712] and the New York State Judicial Commission on Minorities.[713] The Evaluation's study, albeit of only one administration of the bar exam, July 1992, is arguably more comprehensive than the latter, since it relied on questionnaires placed on all applicants' seats at the July administration asking about gender, race/ethnicity, and whether English was the applicant's

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Committee of Bar Examiners of the State of California and the National Conference of Bar Examiners).

707. Mullman study, *supra* note 7, at 5-18.

708. *See supra* Part VII(b).

709. Mullman study, *supra* note 7, at 9-8. In an earlier section, looking primarily at accommodations for people with disabilities, the Evaluation tied the issue of speededness to construct validation, writing:

> It is generally believed that the defense of what constructs should be measured on a licensure exam should be based on an analysis of the tasks on which an individual must be competent to not endanger the public. We are unaware of any *formal* documentation that speededness is an essential component of a minimally competent attorney.

Id. at 5-20 (original emphasis).

710. *See supra* Part VII(j)(1) (discussing "inefficiency" resulting from stereotype fear).

711. *See supra* Part XII(j)(3); Babbs, *supra* note 67, at 16.

712. *See LSAC Study*, *supra* note 43, at 80.

713. *See* JCM Report, *supra* note 158.

native language. Accordingly, unlike the JCM study, it included graduates from both in-state and out-of-state law schools.[714] The passing results, however, were painfully similar, and were reported as follow:

Asian Americans	53.0
Blacks	37.4
Hispanics	48.6
Whites	81.6

The results in the study commissioned by the Court of Appeals, and the *only* instance in which the bar examiners collected data thus confirm the disparate impact[715] of the New York bar exam on all non-majority groups.[716]

The Evaluation contains two other pieces of important information. First, as to gender, although performance on the essay portion of the bar exam was virtually identical, men performed a significant .26 standard deviation units better than women. Because the essay scores are scaled to the MBE scores, this can result in an artificially diminished score for women who overall had a slightly lower passing rate (73.1%) than men (75.7%).[717] The findings on applicants with a native language other than English are far more disturbing. The results of the data collected indicate that native English speakers score 35 points higher than ESL takers, "holding other questionnaire variables constant."[718] One highly likely explanation is the exam's emphasis on "speededness," which could reasonably be expected to disadvantage those for whom English is not their first language. But precisely because the communities from

714. 7490 applicants took the bar exam in July 1992; 7099 answered the race/ethnicity question, and 7133 answered the gender question, giving a very large, though admittedly incomplete, sample of the entire population. Millman study, *supra* note 7, at 10-2.

715. *See supra* note 247, defining presumptive disparate impact for Title VII purposes.

716. In other sections, the Evaluation utilizes statistical and psychometric techniques to demonstrate that "there is nothing in the analysis [of how different racial groups did on different portions of bar exam] to suggest that the Bar Examination is functioning in a different way for one group than for another." Millman study, *supra* note 7, at 10-7, except, of course, that whites are more than twice as likely to pass as blacks. The inability to find a reason for the disparity does not reduce the pressing need to do something about it.

717. Millman study, *supra* note 7, at 10-5.

718. *Id.* at 9-11, 12 & tbl 7.2.

which those applicants come are already severely underserved,[719] the exam's requirement of this non-essential skill works to disqualify those law graduates who would both increase the diversity of the profession and create increased access to justice for their communities of origin. The New York bar exam thus has a demonstrably "perverse effect," highly likely to be unrelated to minimum competence on two major values and aspirations of the profession, diversity and increasing access to justice.[720]

The comprehensive Evaluation commissioned by the New York Court of Appeals thus reiterates and supports the arguments made more generally for a PSABE. This is true especially insofar as it underscores the disparate impact of the exam on non-majority takers, and specifically calls for experimentation to overcome logistical, cost and testing-technology impediments—which the proposed pilot would do—to increase content validity, i.e., testing the skills necessary for competence, all of which could be evaluated by the PSABE.

The strong correspondence between findings and recommendations in the Evaluation and arguments for the PSABE should make the latter especially appealing for New York, and to the New York Court of Appeals which supervises and ultimately decides the bar admission process.

XVI. Conclusion

With its commitment to innovation and access to justice initiatives, New York is a promising state to pilot a PSABE. Because of my own personal experience, I have drawn on New York-based observations about the court system in sketching out what a PSABE might look like. The idea, however, has validity for virtually every jurisdiction, and another may be able to move more quickly. This article is intended to provide the framework for experimentation in planning and creating a performance-based alternative wherever the idea takes hold, as well as to provide some theoretical, analytical, historical and practical grounding for the experiment.

719. *See supra* note 155 and accompanying text.

720. *See supra* notes 155 & 414 and accompanying text.

There is a final note of caution, echoing some old and excellent advice: anything, a PSABE included, worth doing, is worth doing well. The work of design, implementation and evaluation is formidable, yet it is, as history teaches, well within the capabilities of legal education and the profession. History teaches another, equally important lesson. A profession which is committed to serving the public and improving the legal system must hold firmly to core values, like those enumerated in the MacCrate Report, and also seek always to improve the means by which those values are embodied. A century ago there was no written bar examination. The time has come for exploration of new ways to make the existing bar examination a better means of entry into the practice of law. Piloting the PSABE is an important step in that process.