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### Ringin Changes: Systems Thinking About Legal Licensing

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# **RINGING CHANGES: SYSTEMS THINKING ABOUT LEGAL LICENSING**

Joan W. Howarth\* & Judith Welch Wegner\*\*

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## INTRODUCTION

The bar examination is a significant topic of conversation among regulators, bar examiners, the courts, legal educators, law students, and practicing lawyers.<sup>1</sup> We seek to move beyond recent debates by proposing a new framework for conversations about the system of legal licensure, not merely the bar exam. In setting forth our framework, we build upon discussions from the Florida International University College of Law's Summit on the Future of Legal Education and Entry to the Profession.<sup>2</sup>

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<sup>1</sup> Notable recent debates have addressed such questions as the cut score to be used on the California Bar Examination. See THE STATE BAR OF CAL., FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES (2017) [hereinafter FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES], <https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf>; Letter from Cal. Supreme Court to Michael G. Colantuono, President, Bd. of Trs. & Leah Wilson, Exec. Dir. State Bar of Cal., (Oct. 18, 2017) [hereinafter Letter to Colantuono], <https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam> (discussing retaining existing cut score on California bar examination). Texas has also recently undertaken an extensive review of its approach to bar examinations. See TASK FORCE ON THE TEXAS BAR EXAMINATION, RECOMMENDATIONS AND REPORT, FINAL REPORT TO THE TEXAS SUPREME COURT (May 14, 2018), [http://www.txcourts.gov/media/1441612/final-task-force-report\\_051518.pdf](http://www.txcourts.gov/media/1441612/final-task-force-report_051518.pdf) (recommending adoption of the Uniform Bar Examination, among other matters).

National conversations in recent years have focused significantly on the National Conference of Bar Examiners' (NCBE's) development of the "Uniform Bar Examination" (UBE), now adopted in more than half of American licensing jurisdictions. Extensive information on the UBE is available on the NCBE website. See *Uniform Bar Examination, Further Reading*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/further-reading/> (last visited Sept. 12, 2018). For a recent compilation of essays relating to possible bar examination reforms, see *Symposium on Legal Education: A Meeting of the Minds*, 90 N.Y. ST. B.J. 8 (Deirdre L. Hay ed., 2018). Many of the current critiques echo those voiced over past decades. See, e.g., *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446 (2002) (critiquing traditional bar examinations on three principal grounds: failure to adequately measure professional competence to practice law, negative effects on law school curricular development and the law school admission process, and creation of significant barriers to achieving a more diverse bench and bar); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343 (2004) (recommending public service residency as alternative means of assessment); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 364–65 (2002) (urging reform to test additional skills required for law practice); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 930 (1997) (summarizing earlier criticisms of bar examinations).

<sup>2</sup> We appreciated the opportunity to participate in this Summit held in April 2018, as well as in the Research Seminar sponsored by AccessLex later that month. We dedicate this article to an extraordinary group of reformers who have been working intensively over recent years to improve legal education,

Why shift the conversation from “bar exam reform” to “legal licensure reform”? Debating how the current bar exam might be modestly reformed, without looking at the current system’s assumptions and implications, masks many consequences of the current system and the opportunities for improvement that a more expansive inquiry focused on the legal licensing system illuminates.

As a modest metaphor, consider a system that may be familiar to many readers, at least those who enjoy British mysteries,<sup>3</sup> watch British movies, or imbibe certain British television programs. Imagine, if you will, a scene in which bells ring out to celebrate a wedding in a church in England.<sup>4</sup> A joyous peel rings forth. What factors contribute to that performance? Undoubtedly, the space (typically a wonderful space in which bells are hung), the number of bells, how they are tuned, the skill of the ringers, and the sequence in which bells are rung. Skilled bell ringers may engage in “ringing changes,” that is, changing the order in which bells are rung, in a precise mathematical sequence.<sup>5</sup>

Consider, too, a different structure and different cadence: a bridge and soldiers marching in tight formation. What happens when soldiers or citizens march or walk across a bridge in lock-step? The resulting vibrations may make the bridge collapse, stopping all forward movement.<sup>6</sup> Even as more voices challenge bar exams, a uniform focus on the exams by themselves can limit attorney licensing progress just as effectively, although less dramatically, as a bridge that crumbles from marchers pounding one beat. Licensing reform, like ringing changes, is complex and systemic, not a solo or one-note endeavor. The following diagram illustrates this larger licensing system.

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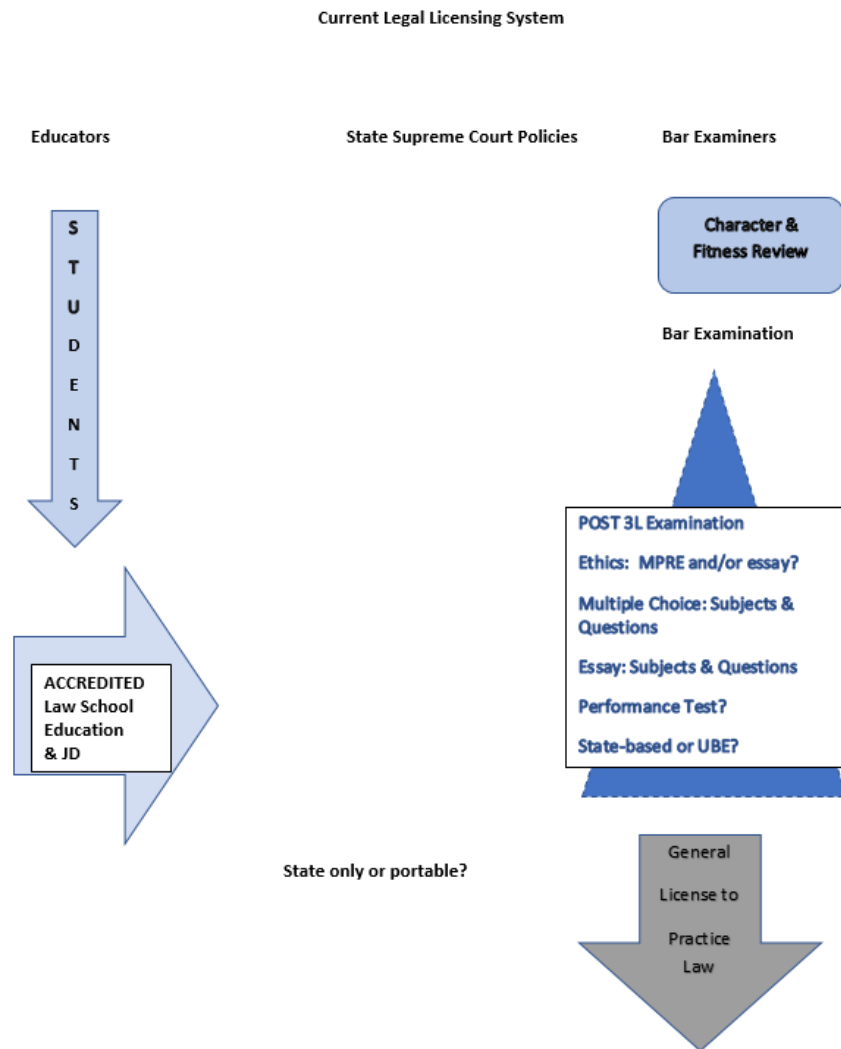
including the bar exam. Our heartfelt thanks go out to Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol Chomsky, Andrea Curcio, Alli Gerkman, Eileen Kaufman, Deborah Merritt, and Patricia Salkin for their commitment and inspiring work in this vineyard. We also thank Judith Gunderson, Kellie Early, and other leaders at the National Conference of Bar Examiners for their willingness to engage with us about these ideas.

<sup>3</sup> See DOROTHY SAYERS, *THE NINE TAILORS* (1934) (featuring Lord Peter Wimsey performing as part of a church bell ringing group).

<sup>4</sup> For example, consult CHURCH BELL RINGERS, *WEDDING BELLS (THE SOUND OF CHURCH BELLS RINGING FOR WEDDINGS & CELEBRATIONS)* (2013), <https://itunes.apple.com/gb/album/wedding-bells-sound-church-bells-ringing-for-weddings/666061610> (ringing a descending scale).

<sup>5</sup> See, e.g., Burkard Polster & Marty Ross, *Ring the Changes*, PLUS MAG. (Dec. 1, 2009), <https://plus.maths.org/content/ringing-changes>.

<sup>6</sup> See, e.g., Steven H. Strogatz et al., *Theoretical Mechanics: Crowd Synchrony on the Millennium Bridge*, 438 NATURE 43–44 (2005), <https://www.nature.com/articles/438043a> (discussing implications of civilians walking across the London Millennium Bridge and creating synchronized vibrations).



We can compare the complexities of attorney licensing to those of ringing changes:

**Structure** (akin to the tower in which bells are rung):

*Three-Year Requirement.* The general practice of allowing licensure only after three years of law school means that

nearly all students must take on at least three years of educational debt before they can gain a license to practice.<sup>7</sup>

*JD Degree and General License.* Requiring Juris Doctor degrees and general licenses means even accomplished students who have engaged for two years in specialized study and associated residency cannot qualify to provide legal services in areas in which there are significant access to justice deficits.

***Touch Points*** (akin to the number of bells and how they are tuned):

*The Bar Exam.* The bar exam is the principal touch point for licensure and often the only touch point that students and practitioners focus upon. Bar exams typically use essay and multiple choice questions to test applicants' ability to learn legal doctrine and apply it to new fact patterns. Performance tests, in which applicants are provided with a case file and required to produce a specific attorney work product, are increasingly used, too. Performance tests assess some additional competencies, such as case reading and understanding distinctions between advocacy and objective writing.

*Character and Fitness Review.* Such review must be conducted for all candidates in all jurisdictions. A separate multiple choice exam (currently the Multistate Professional Responsibility Exam) has been used since the Watergate era to evaluate bar candidates' knowledge of rules of professional responsibility. Assurance of professional

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<sup>7</sup> About nine states allow candidates to take the bar exam after completing law office study or correspondence. The National Conference of Bar Examiners maintains a compendium listing bar examination prerequisites. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 8-9 (Judith A. Gundersen & Claire J. Guback eds., 2018) [hereinafter NCBE & ABA COMPREHENSIVE GUIDE], <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> (last visited Jan. 16, 2019). Law office study is permitted in California, Maine, New York, Vermont, Virginia, Washington and West Virginia. Correspondence study is allowed in California, Minnesota, New Mexico, Oregon and Vermont. *Id.* Very few candidates appear to take this option and successfully pass the bar exam, however. See *Persons Taking and Passing the 2017 Bar Examination by Source of Legal Education*, THE BAR EXAMINER, Spring 2018, at 13 (2017 National Conference of Bar Examiners data showing that 54 individuals engaged in law office study and 16 passed (30% pass rate)).

identity formation should require more than knowledge of rules and a clear disciplinary record.

*State-Specific Supplemental Requirements.* A growing number of states, many of which are using the Uniform Bar Exam (UBE), have adopted new methods to encourage mastery of state law that is not directly tested on the bar exam.<sup>8</sup>

### ***Bell Ringers and Their Skills.***

*State Supreme Courts and Bar Examiners.* Formal authority over attorney licensing rests with state supreme courts and boards of bar examiners. State supreme courts typically either establish admissions policy or delegate it to bar examiners. Admissions policy includes bar exam format, exam cut scores, adoption of the UBE, and so on. State supreme courts may establish licensing strategies that do not require bar exams (Wisconsin and New Hampshire), and play an important role in developing admissions initiatives, for example by instituting additional requirements such as those relating to completion of pro bono work prior to licensure.<sup>9</sup> State supreme court justices facing budget pressures, access to justice crises, and other judicial administration problems sometimes prefer to delegate oversight of attorney licensing to bar examiners. In virtually every jurisdiction individual state bar examiners play a crucial role based on their knowledge, experience, and willingness to innovate.

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<sup>8</sup> For a review of different supplemental approaches to fostering education on state-specific law, see *UBE Jurisdiction-Specific Components: Seven Unique Approaches*, THE BAR EXAMINER, Sept. 2016, at 37. Options can include on-line courses with embedded questions, workshops or “bridge the gap” continuing legal education requirements for new lawyers. The efficacy and wisdom of such strategies continues to be debated. See Patricia Salkin & Lawrence Cunningham, *The Role of State Law in Legal Education and Attorney Licensing: How important is state law to practice? To what extent should law schools teach and test state law?*, NEW YORK L.J. (Jan. 7, 2019) <https://www.law.com/newyorklawjournal/2019/01/07/the-role-of-state-law-in-legal-education-and-attorney-licensing/>. For updated state-law supplemental requirements, see <http://www.ncbex.org/exams/ube/score-portability/local-components/> (last visited Mar. 20, 2019). Such approaches in effect employ a staged approach to gaining licensure, as advocated more fully in this Article.

<sup>9</sup> See *infra* notes 28–29 (discussing New York and California initiatives).



*The National Conference of Bar Examiners.* Especially because formal authority is dispersed among all the states, the loudest bell ringer in attorney licensing is the National Conference of Bar Examiners (NCBE). The NCBE has substantially improved legal licensing examinations over recent decades in three ways: (1) implementation of sophisticated scoring protocols; (2) creation of higher quality questions and exams; and (3) scoring assistance and ambitious educational programming for state bar examiners. NCBE staff have more expertise in test development than most states' bar examiners. That expertise includes the use of complex mechanisms to evaluate questions, expertise that is typically not available to state bar examiners. The NCBE also convenes subject experts from academia to assist in the development of subject-specific questions, a practice few jurisdictions follow.

Almost all U.S. jurisdictions now use bar exam components produced by the NCBE, whether the Multistate Bar Exam (MBE) (a 200 multiple choice question test currently adopted by all American jurisdictions other than Louisiana and Puerto Rico), Multistate Essay Examinations (MEE) (currently used by 37 states), or Multistate Performance Tests (MPT) (currently adopted by 43 states).<sup>10</sup>

The influence of the NCBE has recently become even bigger with the widespread adoption of the Uniform Bar Exam (UBE), now approved in thirty-four jurisdictions as a means of promoting portability of licensure and consistent quality of test components.<sup>11</sup> UBE jurisdictions use the

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<sup>10</sup> See NAT'L CONFERENCE OF BAR EXAM'RS., JURISDICTIONS ADMINISTERING THE MBE, <http://www.ncbex.org/exams/mbe/> (multi-state multiple choice examinations used by American jurisdictions other than Louisiana and Puerto Rico); NAT'L CONFERENCE OF BAR EXAM'RS, JURISDICTIONS ADMINISTERING THE MEE, <http://www.ncbex.org/exams/mee/> (multi-state essay examinations employed by American states other than California, Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, Michigan, Nevada, Ohio, Oklahoma, Pennsylvania, Virginia, Puerto Rico); NAT'L CONFERENCE OF BAR EXAM'RS, JURISDICTIONS ADMINISTERING THE MPT, <http://www.ncbex.org/exams/mpt/> (multi-state performance text employed by American states other than California, Florida, Kentucky, Louisiana, Michigan, Oklahoma, Pennsylvania, Virginia, Puerto Rico).

<sup>11</sup> As of January 2019, thirty-four jurisdictions have adopted the UBE. See NAT'L CONFERENCE OF BAR EXAM'RS, JURISDICTIONS THAT HAVE ADOPTED THE UBE," <http://www.ncbex.org/exams/ube/> (last visited Jan. 16, 2019) (states not yet adopting the UBE include the following: Arkansas, California, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Nevada, Oklahoma, Pennsylvania, South Dakota, Virginia, and Wisconsin). The NCBE has indicated that jurisdictions adopting the UBE will continue to decide such issues as who may sit for the bar exam, how many times applicants may retake the exam, how the MEE and MPT will be graded, what jurisdiction-

MBE, MEE, and MPT instead of any state-drafted components, and agree to weigh the components uniformly.<sup>12</sup> The UBE juggernaut means that more and more states employ NCBE multiple choice, essays, and performance tests. Nonetheless, states continue to use a wide range of cut scores to purportedly reflect “minimal competence to practice” even though the different cut scores are based on the same test, the MBE, the multiple choice component of the exam.<sup>13</sup>

*Legal Education.* Law schools and legal educators have formal authority for the education required to become licensed to practice law. Also, professional licensing test standards require that licensing tests be developed in part in response to what professional schools consider critical in their academic programs. Law schools and their faculties undoubtedly play a role in ringing changes or failing to, insofar as their adoption of curricula and selection of teaching personnel shape student learning and influence bar examiners.

*Bar Prep Industry.* Due in large part to the disconnect between legal educators’ goals and bar examination design and content, applicants may spend nearly \$4000 for a commercial bar preparation course after law school.<sup>14</sup> Those companies are also increasingly contracting with law schools to provide courses, bar support, and data analytics. The field is ripe for disruption, perhaps through provision of lower-cost bar review courses by a nonprofit entity.

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specific content might be required for a separate course or test, how passing scores should be set, and a variety of other matters.

<sup>12</sup> See NAT’L CONF. B. EXAM’RS, UBE SCORES, <http://www.ncbex.org/exams/ube/scores/> (UBE jurisdictions agree to weigh the MBE 50%, the MEE 30%, and the MPT 20%) (last visited Jan. 24, 2019).

<sup>13</sup> See generally Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PROF. 69 (2017) [hereinafter Howarth, *Uniform Cut Score*]; Joan W. Howarth, *New York Leads From the Middle: Crowdsourcing the Bar Exam Cut Score*, 90 N.Y. ST. B.J. 42 (2018).

<sup>14</sup> See Jack Crittenden, *Best Bar Reviews*, NAT’L JURIST 16, 17 (Winter 2019), <https://www.bluetoad.com/publication/frame.php>.

*Missing Pieces.*

*Implications for Diverse Populations including the Public and the Profession.* Numerous observers have cited bar exams as limiting the diversity of the legal profession.<sup>15</sup> While over the last decades the demographic diversity of enrolled law students has increased in some respects, the proportion of African-American and Hispanic students in particular has remained far lower than the proportion of African-American and Hispanic individuals in the general population.<sup>16</sup> The legal profession itself remains far less diverse than the current law school student population, other elite professions, and the public it is charged to serve.<sup>17</sup>

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<sup>15</sup> See, e.g., Alex M. Johnson, *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem and Affirmative Action is Not the Answer*, 24 STAN. L. & POL'Y REV. 379, 405 (2013) ("Almost all would agree that the individual state bar examinations act as a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys."); Glen, *supra* note 1, at 381–83 (discussing studies showing white applicants' bar passage rates were 30% higher than black applicants' bar passage rates); *id.* at 508–10 (discussing New York State Evaluation from 1992 showing similar pattern). Due to disparate impact concerns, American Bar Association entities focused on diversity have actively opposed efforts to ratchet up the bar pass rates required for law schools to retain ABA accreditation. See, e.g., ABA Diversity Entities' Response to Standard 316 (Jan. 11, 2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/feb19/3-aba-diversity-entities-response-to-standard-316.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/feb19/3-aba-diversity-entities-response-to-standard-316.pdf).

<sup>16</sup> For statistics on law students who entered their first year of law school in 2018, see AM. BAR ASS'N, *Various Statistics on ABA Approved Law Schools*, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) (2018 1L Enrollment by Gender, Race/Ethnicity) (last visited Jan. 28, 2019). The ABA reported that for the 2018 1L entering class, nationally law schools enrolled a total of 2388 Asians, 4811 Hispanics, 3035 blacks, and 23,582 whites. *Id.* The Law School Admissions Council reported that for the current application year (applicants seeking admission in fall 2019), there were 3903 Asian applicants, 3933 Hispanics, 3565 Blacks, and 21,259 whites. See LSAC, *U.S. Ethnicity, School Type, and Sex*, <https://report.lsac.org/VolumeSummaryOriginalFormat.aspx> (last visited Jan. 28, 2019). The 2010 Census reported the following information in terms of demographic trends in the United States: Asians (5.8%), Hispanics (18.1%), Blacks (13.4%), Whites (76.6%). See *QuickFacts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited Jan. 28, 2019).

<sup>17</sup> See Deborah Rhode, *Law is the least diverse profession in the nation. And lawyers are not doing enough to change that.*, WASH. POST (May 27, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.a7c13bbb777c](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.a7c13bbb777c). For further analysis, see Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 305–13 (2014) (providing data comparing diversity of legal profession with diversity of other prestigious professions). For updated data, see information collected by the American Bar Association, showing that in 2018, the legal profession was composed of 3% Asians, 5% Hispanics, 5% Blacks, and 85% whites. See AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY (2018) [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/National\\_Lawyer\\_Population\\_Demographics\\_2008-2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf).

Recent studies by the American Bar Association and the Legal Services Commission demonstrate that the “justice gap” disproportionately burdens the poor, who are in turn disproportionately people of color.<sup>18</sup> Large disparities also exist in criminal law.<sup>19</sup> The legal profession can better serve diverse communities when it is itself diverse.<sup>20</sup>

How does the bar exam bear on these concerns? Although few jurisdictions provide racial and ethnic passage rates, California does, and these data confirm ongoing disparities.<sup>21</sup> A significant study conducted by Dr. Linda Wightman for the Law School Admissions Council in 1991 found that candidates of color have historically had a lower initial passage rate on the bar exam, albeit that many pass the bar examination on a subsequent attempt.<sup>22</sup> Since 1991, costs of tuition and bar preparation have grown significantly.<sup>23</sup>

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<sup>18</sup> Studies by the Legal Services Corporation demonstrate that the justice gap disproportionately affects people of limited means. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS* (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (last visited Jan. 28, 2019). Federal Census data indicate that people of color are disproportionately poor. See *People and Families in Poverty: Selected Characteristics for 2016 and 2017*, Table 3, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/2018/demo/p60-263.html> (last visited Jan. 28, 2019) (for 2017 data regarding poverty levels, 10.0% of Asians were below poverty level, 18.3% of Hispanics, 21.2% of Blacks, and 10.7% of Whites (8.7% of Whites, non-Hispanics)). See also Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (discussing perceptions of access to justice).

<sup>19</sup> Prison populations are disproportionately composed of minorities. The federal Bureau of Prisons reports that 1.5% of inmates are Asian, 38.1% are Black, 2.2% are Native Americans, and 58.2% are white. See *Inmate Race*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) (last visited Jan. 28, 2019). In terms of ethnicity, 32.2% of federal prison inmates are Hispanic and the balance is non-Hispanic. See *Inmate Ethnicity*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_ethnicity.jsp](https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp) (last visited Jan. 28, 2019).

<sup>20</sup> For example, clients of color may have difficulty finding attorneys of color to whom they can relate. See Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Disparities in Representation for Employment Civil Rights Plaintiffs*, 15 LEGIS. & PUB. POL’Y 705, 723 (2012).

<sup>21</sup> California reports the demographic break down of bar passage by Asians (A), Hispanics (H), Blacks (B), and Whites (W), respectively. For the July 2008 California bar exam, pass rates were 56% (A), 49% (H), 34% (B), 69% (W). For the July 2012 California bar exam, pass rates were 51% (A), 42% (H), 28% (B), 52% (W). For the July 2016 California bar, pass rates were 38% (A), 34% (H), 21% (B), 52% (W). See ROGER BOLUS, *RECENT PERFORMANCE CHANGES ON THE CALIFORNIA BAR EXAMINATION (CBE): INSIGHTS FROM CBE ELECTRONIC DATABASES*, Table 6 (2017), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Final-Bar-Exam-Report.pdf?ver=2018-11-15-110106-057> (last visited Jan. 30, 2019).

<sup>22</sup> The full Wightman study for the LSAC is available at <https://www.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf>.

<sup>23</sup> AccessLex reports that for 2015–2016 law school tuition and fees ranged from \$28,700 (in state resident public law school) to \$40,950 (non-resident public law school) to \$47,333 (private law school).

Students from less privileged backgrounds have less substantial resources available to support them and may need to work while studying for the bar exam.<sup>24</sup> The burdens associated with a failure to pass the bar exam on the first attempt tend to fall particularly heavily on such students and may impede their ultimate licensure.

California has undertaken significant studies beginning in 2016 to determine whether its bar passage rates were too stringent, in part in response to concerns about the impediment the bar exam and pass rates present to diversifying the profession.<sup>25</sup> So far these studies confirm that significant racial disparities in pass rates persist and reveal that California's unusually high cut score amplifies racial disparities in bar pass rates when compared to, for example, New York's more moderate cut score.<sup>26</sup>

We do not expect bar examiners to correct the lifelong educational inequities that lead to these disparate results, but increased attention to aspects of test scoring that unnecessarily exacerbate these disparities, like extreme cut scores, is paramount. Also, these disparities provide further

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See SANDY BAUM & PATRICIA STEELE, *THE PRICE OF GRADUATE AND PROFESSIONAL SCHOOL: HOW MUCH STUDENTS PAY* 5 (2017), <https://www.accesslex.org/the-price-of-graduate-and-professional-school> (last visited Jan. 28, 2019). To compare earlier tuition and fees, see AM. BAR ASS'N, *LAW SCHOOL TUITION 1985-2012*, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/law\\_school\\_tuition.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/law_school_tuition.authcheckdam.pdf) (last visited Jan. 28, 2019).

<sup>24</sup> In important research, the Association of American Law Schools has recently undertaken research on "Before the JD" to explore factors that influence potential students' decisions to apply to law school. See ASS'N OF AM. LAW SCHS., *HIGHLIGHTS FROM BEFORE THE J.D.: UNDERGRADUATE VIEWS OF LAW SCHOOL* 2 (2018), <https://www.aals.org/wp-content/uploads/2018/09/BJDReportsHighlights.pdf> (finding that only 1/5 of students considering law school are first-generation college graduates, and half have at least one parent with an advanced degree) (last visited Jan. 29, 2018). A family member or relative was seen as the most important source of information about law school by 60% of students. *Id.* at 4. Thus, first generation college students (many of whom come from minority or socio-economically disadvantaged backgrounds) may find it hard to even consider law school. Drawing on federal data, AccessLex has reported that for 2015–16, only 33% of the parents of law students lack a college degree or additional advanced degree. See ACCESSLEX INSTITUTE, *LEGAL EDUCATION DATA DECK* 10 (2018), <https://www.accesslex.org/legal-education-data-deck> (last visited Jan. 29, 2019). Compared with other professional, masters, and doctoral degrees, only medicine had a lower percentage of parents with college or advanced degrees. *Id.*

<sup>25</sup> California has undertaken a series of significant studies of the state bar examination. See THE STATE BAR OF CAL., *CALIFORNIA BAR EXAMINATION STUDIES FACT SHEET* (2018), <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Studies-Fact-Sheet> (last visited Jan. 29, 2019) (providing links to studies relating to recent performance on the California bar exam, standard-setting study, content-validity study, and job-analysis study).

<sup>26</sup> See BOLUS, *supra* note 21.

urgency to the need to assure that bar examinations are demonstrably grounded in careful job analysis and other research to establish that the exams in fact assess minimal competence to practice law as required for validity.<sup>27</sup> The California studies conclude that such evidence is currently lacking.<sup>28</sup>

*Professional Skills.* As currently designed, most legal licensing systems do a very limited job in evaluating skills required to serve the public competently. Even the addition of the important competencies assessed in current performance tests leaves many other critical lawyering competencies unevaluated in licensing and not required to be learned in law schools. A growing number of states have required bar applicants to document pro bono service,<sup>29</sup> but such service generally does not include assessment of either professional skills or professional identity. Deeper assessment of candidates' professional skills and professional identity is possible.

*In-Depth Expertise in Areas of Intended Practice.* Existing bar examinations do not provide students with an option to be tested in depth on areas in which they have taken multiple courses and may intend to practice. Current bar examinations tend to require mechanical application of artificially stable facts to artificially stable law. The doctrinal knowledge required extends to small points across a wide spectrum of traditional subjects. Specialization in a chosen field could justify both depth of doctrinal knowledge and more sophisticated, less mechanical analysis.

The NCBE has not yet grappled with the need for a typology of questions that would help to distinguish students who can engage in sophisticated analysis from those who have more

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<sup>27</sup> For explanation of the importance of validity in licensing tests, see *infra* text accompanying notes 69–72.

<sup>28</sup> “[C]omprehensive and up-to-date attorney practice analysis is needed for a thorough re-look at the bar exam.” THE STATE BAR OF CAL., FACT SHEET: CALIFORNIA ATTORNEY PRACTICE ANALYSIS, [http://www.calbar.ca.gov/Portals/0/documents/Practice\\_Analysis\\_Fact\\_Sheet.pdf](http://www.calbar.ca.gov/Portals/0/documents/Practice_Analysis_Fact_Sheet.pdf) (last visited Jan. 30, 2019).

<sup>29</sup> See, e.g., NEW YORK RULES OF THE COURT OF APPEALS FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW § 520.16, <https://nycourts.gov/ctapps/520rules10.htm#B16> (requiring 50 hours of pro bono for admission to bar); DEL. RULES OF COURT, SUP. CT. RULES, RULE 52 (West 2019) (requiring five-month fulltime clerkship in Delaware prior to admission).

shallow, memorized knowledge. They have also been reluctant to modify the scope of subject-matter coverage in light of pervasive changes in law school curricula over recent decades, or to grapple with options for testing additional skills. Significant questions persist about whether current testing frameworks reflect problems with “speededness”<sup>30</sup> or adversely affect students of color as a result of “stereotype threat.”<sup>31</sup>

*Rational Cut Scores.* Whether or not they have adopted the UBE, states continue to use a wide range of passing standards (or “cut scores”) on the MBE, the multiple choice portion of the test, to purportedly reflect “minimal competence to practice law.” These differing MBE cut scores are the main reason that passing a bar exam differs in difficulty from state-to-state and are hard to justify on grounds other than traditions of local control. Other professions have moved to a uniform cut score on their licensing exams.<sup>32</sup>

*Communication Between Bell-Ringers.* Finally, bar examiners and law school faculty, including doctrinal, clinical, academic support, and legal writing professors, remain disconnected from each other. Although bar examiners have long employed selected faculty as subject-matter experts in reviewing bar questions, significant gaps remain between the understandings of what is actually needed in practice and what is actually taught in law schools, particularly given increasingly rapid changes in both practice and legal education.

***Sequenced Bell Ringing.*** We are inspired by listening to the many ways in which bell ringers engage in “ringing changes.”<sup>33</sup> One of our fundamental claims is that we are ill-served by the assumption that the best way to assess

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<sup>30</sup> For a discussion of speededness, see *infra* text accompanying notes 89–90.

<sup>31</sup> For a discussion of stereotype threat, see *infra* text accompanying note 91.

<sup>32</sup> See generally Howarth, *Uniform Cut Score*, *supra* note 13; Howarth, *New York Leads From the Middle*, *supra* note 13.

<sup>33</sup> For resources on “ringing changes,” see Polster & Ross, *supra* note 5 (discussing mathematical dimensions of change ringing); *Change Ringing? What’s That?*, NORTH AM. GUILD CHANGE RINGERS, <https://www.nagcr.org/pamphlet.html> (last visited Sept. 13, 2018) (describing change ringing as a “team sport”).

competence for legal practice is through a single bar examination given at the end of the third year of law school.

This Article explores these and related questions. Part I examines core assumptions associated with licensing systems as well as associated ambiguities. In particular, it acknowledges multiple understandings about what “competence” is and differing assumptions about how to evaluate or measure it. Part I thus sets forth important predicates for our argument that only a multi-faceted licensing system can do what is needed in assuring minimal competence, and that not all forms of competence are best measured by traditional licensing examinations.

Part II raises the possibility of creating a post-first-year examination designed to assess critical thinking in the context of the first-year curriculum. It also considers ways in which an early performance test focused on legal writing and research skills could prove beneficial in preparing students for legal practice and for more in-depth evaluation of practice skills at the end of the JD degree. Such a test could be a voluntary educational assessment or a licensing requirement.

Part III considers the benefits of requiring the equivalent of a semester’s “residency” experience that includes a clinic or externship in which students would gain substantial experience representing actual clients. This Part explores the rationale for such a requirement and canvasses the increasing interest among state supreme courts in imposing such a requirement, far beyond what American Bar Association accreditors currently mandate.

Part IV addresses the possibility of a limited licensing option for students who have completed two years of law school with targeted instruction and residency experience. A limited license to practice in areas of high need could help to address access to justice concerns. This Part argues that a limited licensure option for students who have completed a well-structured, two-year program of law school education should allay concerns among lawyers whose doubts about preparation of paraprofessionals have caused resistance to strategies to use limited licenses to address significant access to justice concerns.

Part V explores how a newly reshaped bar examination and licensure system might work at the end of the third year of law school. It identifies new approaches to coverage, new assessment frameworks, and other factors that might make a post-JD bar licensing framework more likely to address concerns about minimal competence. These ideas are timely, especially in an era in which the Uniform Bar Examination has moved away from assessing candidates’ understanding of and experience with jurisdiction-specific law.

In summary, this Article offers new systems thinking about legal licensure. Our approach is polyphonic (suggesting that legal licensure needs to consciously embrace assessment of diverse aspects of preparation and



performance), yet practical (suggesting that changes might be incorporated into existing licensing systems). It invites bar examiners, courts, legal educators, practitioners, and students to step back and rethink how we might best assure that beginning practitioners have the skills needed to serve the public. It invites further conversation about the ways that change might improve access to justice and the quality of legal representation, while also reducing student debt and the disengagement experienced by too many upper level students.

## I. LICENSURE AND COMPETENCE: SOME INITIAL QUANDARIES

A core, longstanding tenet of professional licensure is the need to protect members of the public from those with advanced expertise should the experts in question fail to protect the health, safety, and welfare of those they are supposed to serve.<sup>34</sup> Regulations of doctors and of lawyers have served as prototypes for licensing systems because of the significant ways in which professionals in these fields could cause grave injury to their clientele should those professionals lack the preparation or the necessary ethical commitments, particularly since clients typically lack the expertise to evaluate the specialized and arcane knowledge held by professionals such as these.<sup>35</sup> In a strange way, the availability of volumes of self-help information on the internet make this dilemma an even more challenging one since patients and clients may have more facts and opinions at their fingertips while assuming that they actually understand more than they in fact do.<sup>36</sup>

The cornerstone of licensure has accordingly been “competence,” albeit that notion has not been easily or clearly defined.<sup>37</sup> Moreover, efforts to evaluate or precisely measure “minimal competence” of entry-level lawyers have proved vexing. Licensing examinations are central to this discussion and associated statistical and psychometric concepts are not always well understood.<sup>38</sup> This Part examines these two issues (defining and measuring minimal competence) separately. It suggests that both issues need to be

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<sup>34</sup> See Richard M. Luecht, *Professional Certification and Licensure Examinations*, in THE HANDBOOK OF COGNITION AND ASSESSMENT: FRAMEWORKS, METHODOLOGIES, AND APPLICATIONS 447 (Andre A. Rupp & Jacqueline P. Leighton eds., 2017) [hereinafter Luecht, *Licensure Examinations*].

<sup>35</sup> See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 438 n.26 (2001) (citing sources explaining importance of using licensing protocols to address information asymmetry).

<sup>36</sup> For a discussion of the Dunning-Kruger effect, see *infra* note 274 (discussing research that shows that those with limited understanding and expertise are consistently more likely to overestimate their expertise).

<sup>37</sup> See Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. L. REV. 675, 684–90 (2016) [hereinafter Wegner, *Competence*].

<sup>38</sup> For discussion of related concepts, see *infra* Part I.B.

engaged in order to develop appropriate professional licensing systems but notes that adequately addressing such challenges requires legal educators and licensing authorities to explore unstated assumptions long held dear.

#### A. “Competence” and Its Meaning(s)

One of us has written earlier at some length about the meaning of “competence” in the context of legal ethics, legal education, accreditation, and licensure.<sup>39</sup> Competence has had a long-standing role at the heart of legal ethics standards,<sup>40</sup> so it is not surprising that it should be a cornerstone of accreditation and licensing requirements. Yet scholars of the professions, legal scholars, accreditors, practitioners, and legal licensing authorities have struggled to develop well-grounded understandings of what “competence” entails and what “minimal competence” for entry-level lawyers might mean.

##### 1. Scholars of the Professions

Lee Shulman and Howard Gardner, for example, developed a framework tying the work of “professionals” (writ large) with the preparation that is or should be received by novices in professional school.<sup>41</sup> More specifically, they asserted that professionals need to be able to navigate the following challenges, and novice professionals should be prepared to do the same:<sup>42</sup>

- Employ fundamental knowledge and skills derived from an academic base;
- Make decisions under conditions of uncertainty;
- Engage in complex practice;
- Learn from experience;
- Create and participate in responsible professional communities; and
- Have the ability and willingness to provide public service.

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<sup>39</sup> See Wegner, *Competence*, *supra* note 37 (discussing these aspects of competence in detail); see also Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems”*, 61 RUTGERS L. REV. 867 (2009) [hereinafter Wegner, *Wicked Problems*].

<sup>40</sup> See Wegner, *Competence*, *supra* note 37, at 684–90.

<sup>41</sup> See Lee S. Shulman, *Theory, Practice, and the Education of Professionals*, 98 ELEM’Y SCH. J. 511, 516 (1998) [hereinafter Shulman, *Education of Professionals*] (introducing the six commonplaces within professional education); Howard Gardner & Lee S. Shulman, *The Professions in America Today: Crucial but Fragile*, 134 DAEDALUS 13, 14 (2005) [hereinafter Gardner & Shulman, *Professions Today*].

<sup>42</sup> Gardner & Shulman, *Professions Today*, *supra* note 41, at 14.

## 2. Legal Scholars

A number of leading scholars have engaged with the question of competence by seeking empirical data on entry-level lawyers' experiences in practice and the judgments of those who supervise them.

Important research by Professor Bryant Garth and Joanne Martin relied upon empirical insights drawn from junior and supervising lawyers in the extended Chicago area in order to differentiate the competences expected in different areas of practice.<sup>43</sup> In particular, they found that 25 years ago, junior lawyers in Chicago firms rated the following skills as particularly important: oral communication, written communication, instilling others' confidence in you, ability in legal analysis and legal reasoning, drafting legal documents, ability to diagnose and plan solutions for legal problems, knowledge of substantive law, organization and management of legal work, and negotiation.<sup>44</sup> Small-firm Chicago junior lawyers and those in Springfield, Illinois and neighboring Missouri had similar judgments but added other priorities (including fact gathering, sensitivity to ethical concerns, knowledge of procedural law, and conducting litigation).<sup>45</sup>

UC-Berkeley Professors Marjorie Shultz and Sheldon Zedeck undertook empirical studies to determine what knowledge, skills, and values junior lawyers were expected by supervisors and clients to possess.<sup>46</sup> In an effort to expand the factors considered as part of admissions decisions, they developed clusters of skill-sets that are necessary to be effective in legal practice, including the following:

- Intellectual and cognitive: analysis and reasoning, creativity and innovation, problem-solving, practical judgment;
- Research and information-gathering: researching the law, fact-gathering, questioning/interviewing;
- Communication: influencing and advocating, writing, speaking, listening
- Conflict-resolution: negotiation skills, ability to see the world through the eyes of others;

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<sup>43</sup> See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

<sup>44</sup> *Id.* at 475.

<sup>45</sup> *Id.* at 477.

<sup>46</sup> See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620 (2011); MARJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (2008) [hereinafter SHULTZ & ZEDECK, SUCCESSFUL LAWYERING], <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

- Character: passion and engagement, diligence, integrity and honesty, stress management, community involvement and service, self-development;
- Working with others: developing relationships within the legal profession, evaluation/development/mentoring;
- Planning and organizing: strategic planning, organizing one's own work, organizing and managing others;
- Client and business relationships: networking and business development, providing advice and counsel, and building relationships with clients.<sup>47</sup>

More recently, Professor Neil Hamilton and colleagues have intensively examined the development of professional identity as students transition from law school into the profession. He has summarized numerous empirical studies relating to expectations regarding competence as follows:

*Very important/critically important competencies:* integrity/honesty/trustworthiness; good judgment/common sense/problem solving; analytical skills: identify legal issues from facts, apply the law, and draw conclusions; initiative/ambition/drive/strong work ethic; effective written/oral communication skills; dedication to client service/responsiveness to client; commitment to firm/department/office and its goals and values; initiates and maintains strong work and team relationships;

*Important to very important competencies:* project management, including high quality, efficiency, and timeliness; legal competency/expertise/knowledge of the law; ability to work independently; commitment to professional development toward excellence; strategic/creative thinking; research skills; inspires confidence; seeks feedback/responsive to feedback; stress/crisis management; leadership; negotiation skills.<sup>48</sup>

Researchers such as Alli Gerkman with the Institute for the Advancement of the American Legal System (IAALS) based at the University of Denver have also engaged in very significant studies of

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<sup>47</sup> SHULTZ & ZEDECK, *SUCCESSFUL LAWYERING*, *supra* note 46, at 26–27.

<sup>48</sup> See Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, 83 THE BAR EXAMINER 6, 10 (Sept. 2014) (evaluating survey data from junior and senior lawyers in Minnesota, interviews, job analysis studies by the National Conference of Bar Examiners, and other studies).

employer expectations about minimal competence and skills of entry-level attorneys.<sup>49</sup> In particular, IAALS researchers found that the following are particularly important factors in the short-term for entry-level attorneys:

- *Communications*: listen attentively, respond promptly to communications, speak in a manner that meets legal and professional standards.
- *Emotional and interpersonal intelligence*: treat others with courtesy and respect, regulate emotions and exhibit self-control, exhibit tact and diplomacy, understand and conform to appropriate appearance and behavior in a range of situations.
- *Legal thinking and application*: effectively research the law, identify relevant facts, legal issues, and informational gaps and discrepancies; gather facts through interviews, document file review/searches, other methods; effectively use techniques of legal reasoning and argument; critically evaluate arguments; maintain core knowledge of substantive and procedural law in core area.
- *Litigation practice*: draft motions, pleadings, briefs; request and produce written discovery; interview clients and witnesses.
- *Passion and ambition*: set goals and plan to meet them.
- *Professional development*: take individual responsibility for actions and results; understand when to engage supervisor or seek advice in problem solving; seek and be responsive to feedback; adapt work habits to meet demands and expectations; work autonomously.
- *Professionalism*: keep information confidential; arrive on time for meetings, appointments, hearings; adhere to proper timekeeping and/or billing practices; handle dissatisfaction appropriately.
- *Stress and crisis management*: react calmly and steadily in challenging or critical situations; cope with stress in a healthy manner; make decisions and deliver results under pressure.
- *Technology and innovation*: learn and use relevant technology effectively.

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<sup>49</sup> See ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT (2016), <https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient>.

- *Working with others*: work cooperatively and collaboratively as part of a team; express disagreement thoughtfully and respectfully; maintain positive professional relationships; recognize client or stakeholder needs, objectives, priorities, constraints, and expectations.
- *Workload management*: prioritize and manage multiple tasks; maintain high quality work product; see a case or project through from start to timely finish.<sup>50</sup>

### 3. Legal Accreditors

The American Bar Association's Council of Legal Education and Admission to the Bar has adopted important changes in its Standards governing accreditation that place more emphasis on competence. In particular, over the last five years the Council has moved from an emphasis on input measures to "output measures."<sup>51</sup>

The ABA Accreditation Standards now focus on lawyer competence in the following respects:

*Standard 302. Learning Outcomes*: A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- Knowledge and understanding of substantive and procedural law;
- Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
- Exercise of proper professional and ethical responsibilities to clients and the legal system; and

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<sup>50</sup> *Id.* at 30–34.

<sup>51</sup> For a discussion of evolving accreditation measures, see Judith Welch Wegner, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don't Know, and What We Should Do Next*, 67 J. LEGAL EDUC. 412 (2018) [hereinafter Wegner, *Assessment*]; Judith Welch Wegner, *The Accreditation Context and the Law School Mission* [hereinafter Wegner, *Accreditation*], in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 3 (Deborah Maranville et al. eds., 2015) [hereinafter Maranville et al., BUILDING]. For further background on the ABA's efforts to engage with outcome-based accreditation, see AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, REPORT OF THE OUTCOME MEASURES COMM. 54–62 (2008), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2008\\_outcome\\_measures\\_committee\\_final\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf).

- Other professional skills needed for competent and ethical participation as a member of the legal profession.<sup>52</sup>

*Standard 315.* Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods: The dean and faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of *competency* in the learning outcomes and to make appropriate changes to improve the curriculum.<sup>53</sup>

#### 4. Legal Practitioners

Two major initiatives of the American Bar Association illustrate the importance of minimal competence in the thinking of legal practitioners and other leaders of the profession.

A foremost example of efforts by legal practitioners to explore the meaning of minimal "competency" for entry-level attorneys is found in the famous "MacCrate Report," the report of a task force led by former ABA President Bob MacCrate that sought to identify the "skills and values" essential to members of the legal profession.<sup>54</sup> This study, reflecting the work of both practitioners and legal academics, identified an array of knowledge, skills, and values needed by legal practitioners.<sup>55</sup> Rather than trying to designate a level of "competence" that should be shown by entrants into the profession, the task force took the position that skills and values developed on a "continuum" across a lawyer's lifetime, beginning in law school and continuing throughout their careers.<sup>56</sup> This approach accordingly recognized

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<sup>52</sup> AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018-2019, at 15 (2018) [hereinafter ABA STANDARDS 2018-19].

<sup>53</sup> *Id.* at 23.

<sup>54</sup> See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report].

<sup>55</sup> *Id.* at 135–221. The skills listed in the MacCrate Report include the following: problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, familiarity with litigation and alternative dispute resolution methods, ability to organize and manage legal work, and ability to recognize and resolve ethical dilemmas. Values listed include the following: commitment to maintaining competence and representing clients competently; promoting justice, fairness, and morality; improving the profession and remedying bias; and continuing to develop professionally. *Id.* (discussing in detail each listed skill or value).

<sup>56</sup> *Id.* at 240–317 (discussing in detail the continuum of preparation beginning prior to law school, extending throughout law school and bar exam preparation, and extending throughout years in practice).

the importance of ongoing efforts to build, maintain, and increase competence, rather than expecting “competence” of some ill-defined sort to be present at the time of legal licensure.

A second example of efforts by the American Bar Association to grapple with the meaning of “competence” is found in the ongoing work of the “Commission on the Future of Legal Education,” created as an initiative of ABA President Hilarie Bass in 2017. The Commission has focused on an array of issues that animate the proposals presented here, including contemporary workplace needs, access to justice, and legal licensing reform. As part of its work, the Commission is pursuing two studies (both funded by AccessLex) that are exploring the meaning of minimum competence and state-level variations in the bar exam.<sup>57</sup>

## 5. Licensing Authorities

The standard approach to developing licensing examinations<sup>58</sup> typically entails a research initiative to determine what tasks are required of entry-level professionals (sometimes called a “job analysis”), then reverse-engineering licensing examinations to create assessments and specific questions that can provide a documented basis for an asserted nexus between the tasks identified in the job analysis and questions on licensing examinations.<sup>59</sup> The National Conference of Bar Examiners (NCBE) contracted for a job analysis that was conducted through survey research in 2012, but the results may have methodological limitations given a low response rate.<sup>60</sup> The NCBE has

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<sup>57</sup> See *Commission on the Future of Legal Education*, A.B.A., [https://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/futureoflegaleducation.html](https://www.americanbar.org/groups/leadership/office_of_the_president/futureoflegaleducation.html) (last visited Aug. 18, 2018); see also Patricia D. White, *Essential Questions: What to Ask About the Bar Exam*, 90 N.Y. ST. B.J. 34, 34 (Sept. 2018) (noting that the Commission has “found that our licensing system has been far less attuned to the needs of a changing profession”).

<sup>58</sup> See, e.g., Chad W. Buckendahl & Susan L. Davis-Becker, *Setting Passing Standards for Credentialing Programs* [hereinafter Buckendahl & Davis-Becker], in GREGORY J. CIZEK, *SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS* at 487 (2012) (providing graphical representation of stages in developing and checking possible high-stakes tests).

<sup>59</sup> For detailed information regarding the views of the National Conference of Bar Examiners, see their publication, *THE BAR EXAMINER*, <http://www.ncbex.org/publications/the-bar-examiner/> (last visited Sept. 13, 2018).

<sup>60</sup> See Steven Nettles & James Hellrung (AMP), Nat’l Conf. of Bar Exam’rs, *A Study of the Newly Licensed Lawyer* (2012) (on file with the author) [hereinafter Nettles & Hellrung Study]. That research may have methodological limitations given a very low response rate. The study relied on distributing surveys to more than 20,000 new admittees whose email addresses were provided by the National Conference of Bar Examiners. Only 1,669 (8.4%) returned completed surveys. See *id.* For a discussion of this job analysis, see Susan Case, *The Testing Column, The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, 82 THE BAR EXAMINER 52 (Mar. 2013), [http://www.ncbex.org/assets/media\\_files/BarExaminer/articles/2013/820113testingcolumn.pdf](http://www.ncbex.org/assets/media_files/BarExaminer/articles/2013/820113testingcolumn.pdf).



recently appointed a task force on the future of bar examinations<sup>61</sup> that will undertake a further job analysis<sup>62</sup> and explore additional issues.<sup>63</sup> Similarly, at the direction of the California Supreme Court, the State Bar of California is undertaking a number of studies related to attorney competence,<sup>64</sup> including a job analysis study.<sup>65</sup>

## 6. Conclusions About the Meaning of “Competence”

This discussion establishes that no single understanding of minimal “competence” for entry-level practitioners is shared within the universe of legal educators, accreditors, practitioners, and licensing authorities. In the absence of any shared understanding about the meaning of minimal “competence” it is not surprising that proponents of the existing bar examination and critics of the existing system do not see eye-to-eye. Going forward, exploring shared understandings of these concepts will be important. In the meantime, some of the reluctance of bar examiners to consider such questions is rooted in their reliance on expert judgments of testing experts, psychometricians, and statisticians about how competence can be assessed. Proponents of change need to understand related principles regarding assessment of competence in order to engage effectively with those who control current practices about legal licensing.

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<sup>61</sup> For information on the National Conference of Bar Examiners “Task Force,” see *National Conference of Bar Examiners*, TESTING TASK FORCE, <https://www.testingtaskforce.org/> (last visited Dec. 26, 2018).

<sup>62</sup> See *Testing Task Force Selects ACS Ventures, LLC, and American Institutes for Research to Support Its Study*, TESTING TASK FORCE, <https://www.testingtaskforce.org/2018/09/05/task-force-selects-research-consulting-firms/> (last visited Sept. 13, 2018) (announcing newly selected consultants).

<sup>63</sup> The authors have submitted a range of questions regarding licensing reform to the NCBE for their consideration. Questions posed include whether they might consider new approaches including (a) evaluation of non-knowledge based competencies, (b) more or different performance tests, (c) refined and narrowed content coverage, (d) tying multiple choice questions to performance tests, (e) allowing candidates to select areas for in-depth testing, (f) permitting candidates to pass different components at different times, (g) using standardized clients, and (h) addressing potential “speededness.” Letter from Joan W. Howarth & Judith Welch Wegner to NCBE (on file with authors). These and other questions will be considered by the NCBE’s Testing Task Force referenced *supra* notes 61–62.

<sup>64</sup> For descriptions of these studies, see *Bar Exam Studies*, <http://www.calbar.ca.gov/Admissions/Examinations> (last visited Jan. 17, 2019) (describing studies and providing links to reports).

<sup>65</sup> See THE STATE BAR OF CAL., ATTORNEY PRACTICE ANALYSIS FOR THE CALIFORNIA BAR EXAM, [http://www.calbar.ca.gov/Portals/0/documents/Practice\\_Analysis\\_Fact\\_Sheet.pdf](http://www.calbar.ca.gov/Portals/0/documents/Practice_Analysis_Fact_Sheet.pdf) (last visited Jan. 17, 2019) (providing background on purpose of and need for study).

## B. Measuring Minimal Competence

Even if broad agreement on the meaning of minimal competence existed, would there be a shared understanding of how such competence should best be evaluated? This is an arena in which legal educators, like us, have strong opinions. But are we fluent enough with principles of high-stakes testing to reflect upon and assess our options? This section endeavors briefly to outline some key principles from the research literature regarding high-stakes testing for purposes of licensure.

### 1. Foundational Considerations

Many readers likely have limited familiarity with the complex field of educational measurement and testing theory.<sup>66</sup> As a point of departure, it is useful to become familiar with foundational principles such as those set out in the *Standards for Educational and Psychological Testing*, a sophisticated but accessible explanation developed by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education.<sup>67</sup> Three fundamental considerations ground experts' thinking about educational testing, including credentialing or licensure tests: validity, reliability, and fairness.<sup>68</sup>

#### a. "Validity"

Validity "refers to the degree to which evidence and theory support the interpretations of test scores for proposed uses of tests."<sup>69</sup> Validity thus addresses the extent to which a test measures what it purports to measure. For professional licensing examinations, "validation" accordingly involves (a) a determination of the knowledge, skills, and abilities necessary to perform

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<sup>66</sup> Important sources for those seeking to understand the technicalities of test development and analysis include NAT'L. COUNCIL ON MEASUREMENT IN EDUC. & AM. COUNCIL ON EDUC., *EDUCATIONAL MEASUREMENT* (Robert L. Brennan ed., 4th ed. 2006) [hereinafter *EDUC. MEAS.*]; *TESTING IN THE PROFESSIONS: CREDENTIALING POLICIES AND PRACTICE* (Susan Davis-Becker & Chad W. Buckendahl eds., 2017) [hereinafter *CREDENTIALING*]; *HANDBOOK OF TEST DEVELOPMENT* (Suzanne Lane et al. eds., 2d ed. 2016) [hereinafter *Lane et al., TEST DEVELOPMENT*]. See generally ROBERT L. JOHNSON, JAMES A. PENNY & BELITA GORDON, *ASSESSING PERFORMANCE: DESIGNING, SCORING, AND VALIDATING PERFORMANCE TASKS* (2009).

<sup>67</sup> See AM. EDUC. RES. ASS'N, AM. PSYCHOL. ASS'N, & NAT'L COUNCIL ON MEASUREMENT IN EDUC., *STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* (2014) [hereinafter *STANDARDS*, 2014].

<sup>68</sup> For a discussion of credentialing tests including tests for professional licensure, see *id.* at 174–78, 181–83.

<sup>69</sup> *STANDARDS*, 2014, *supra* note 67, at 11.

with minimum competence in the profession;<sup>70</sup> (b) judgments concerning how well the licensing test questions actually measure that level of knowledge, skills, and abilities;<sup>71</sup> and (c) relevant evidence to provide a sound scientific basis for proposed score interpretations for specific uses.<sup>72</sup>

Accepted standards specify that the “construct or constructs” used by high-stakes licensing tests “should be described clearly”<sup>73</sup> with an eye to the knowledge, skills, and abilities being assessed. Moreover, a rationale “should be presented for each intended interpretation of test scores for a given use, together with a summary of the evidence and theory bearing on the intended interpretation.”<sup>74</sup> Unfortunately, in the context of bar examinations, “practice analysis” studies have not been particularly rigorous or transparent.<sup>75</sup> “Constructs” for test coverage on current bar exams primarily refer to mechanical application of recollected doctrinal subject matter content to factual scenarios rather than to depth of understanding, more complex application, or performance abilities.<sup>76</sup> Evidence to connect testing paradigms with actual practice requirements is largely lacking.<sup>77</sup>

A number of common problems can affect the validity of licensing tests. Often these concerns are framed in terms of “content validity,” a notion that emphasizes that tests should measure what they are intended to measure.<sup>78</sup>

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<sup>70</sup> See Amanda L. Clauser & Mark Raymond, *Specifying the Content of Credentialing Examinations*, in CREDENTIALING, *supra* note 66, at 76 (discussing scholarship on practice analysis and explaining that practice analysis seeks to objectively document work-related behaviors, tends to rely on “bottom-up” information from workers about their daily activities, focuses on the present, describes typical performance, and results in a listing of discrete tasks and knowledge/skills/attitudes); Michael Kane, *Validation Strategies: Delineating and Validating Proposed Interpretations and Uses of Test Scores*, in Lane *et al.*, TEST DEVELOPMENT, *supra* note 66, at 64, 76–77 (suggesting assessment of “knowledge, skills, and judgment” is required for professional licensing).

<sup>71</sup> See STANDARDS, 2014, *supra* note 67, at 11.

<sup>72</sup> See *id.*

<sup>73</sup> *Id.* at 23, Standard 1.1.

<sup>74</sup> *Id.* at 23, Standard 1.2.

<sup>75</sup> See *supra* text accompanying notes 28 & 60.

<sup>76</sup> For information on subject matter coverage, see 2018 MBE Subject Matter Outline, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F201> (last visited Sept. 13, 2018).

<sup>77</sup> “The standard and most useful device for representing the construct of professional competence is a *job* or *practice analysis*.” THOMAS M. HALADYNA & MICHAEL C. RODRIGUEZ, DEVELOPING AND VALIDATING TEST ITEMS 283 (2013). Although the NCBE has undertaken research involving job task analysis (see *supra* text accompanying notes 61–63), other than the addition of civil procedure to the subjects covered by the MBE, little in the exam appears to have changed in response to this research. The NCBE continues to rely on law professors, rather than their job task analysis, to guide their efforts related to content coverage of questions.

<sup>78</sup> See Keith A. Markus & Chia-ying Lin, *Construct Validity*, in ENCYCLOPEDIA OF RESEARCH DESIGN (Neil J. Salkind ed., 2010).

One issue is “construct irrelevance.”<sup>79</sup> Another is construct underrepresentation.<sup>80</sup> In short, attention to test validity requires test-developers to assure that tests are closely targeted to the knowledge, skills, and abilities that lawyers need to possess in order to represent their clients competently.

*b. “Reliability”*

Reliability can be used both to refer to “correlation between scores on two equivalent forms of a test, assuming that taking one form has no effect on performance on the second” (sometimes referred to as “reliability coefficient”) and more generally to refer to the “consistency of scores across replications of a testing procedure” as to an individual test-taker (sometimes referred to as “reliability/precision”).<sup>81</sup> Reliability is necessary for comparability of test scores across February and July bar exam administrations, for example. Testing experts regard reliability as particularly important for high-stakes tests, where serious adverse effects can accrue if reliability is absent.<sup>82</sup>

*c. “Fairness”*

Fairness is described in the *Standards* as a “fundamental validity issue.”<sup>83</sup> Two key notions inform this principle: “accessibility” (“the notion that all test takers should have an unobstructed opportunity to demonstrate their standing on the construct(s) being measured”) and “universal design” (“an approach to test design that seeks to maximize accessibility for all intended examinees”).<sup>84</sup> The *Standards* take pains to emphasize that “fairness” for testing purposes “explicitly excludes one common view of fairness in public discourse: fairness as the equality of testing outcomes for

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<sup>79</sup> See W. Jake Thompson, *Construct Irrelevance*, in THE SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT AND EVALUATION (Bruce B. Frey ed., 2018) [hereinafter EDUCATIONAL RESEARCH] (“construct irrelevance” measures more than the construct of interest, giving as an example a situation in which a student with high math ability scores at a lower level because word problems are used and the student lacks reading and comprehension ability).

<sup>80</sup> See Yi-Hsin Chen, Isaac Y. Li & Walter Chason, *Construct Underrepresentation*, in THE SAGE ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, MEASUREMENT AND EVALUATION, *supra* note 79 (“Construct underrepresentation” arises “when a test does not adequately measure all aspects of a construct of interest”; “many multiple choice tests over-represent lower order skills and under-represent higher order skills”).

<sup>81</sup> STANDARDS, 2014, *supra* note 67, at 33.

<sup>82</sup> *Id.* at 33.

<sup>83</sup> *Id.* at 49.

<sup>84</sup> *Id.* at 49–50.

relevant test-taker subgroups.”<sup>85</sup> Significantly, the *Standards* emphasize the importance of eliminating “construct-irrelevant components in test scores” that pose particular difficulties or are differentially valued by particular individuals, for example those relating to language or verbosity.<sup>86</sup> The *Standards* also emphasize the implications of differentials in “opportunity to learn” depending on inequalities in school resources or quality of education received.”<sup>87</sup>

The *Standards* specify that “[s]tandardized tests” “should be designed to facilitate accessibility and minimize construct-irrelevant barriers for all test takers in the target population, as far as practicable,”<sup>88</sup> and give as an example the importance of avoiding inappropriate “test speededness.”<sup>89</sup> “Speededness” is generally understood as a testing dynamic through which some test-takers are not able to fully consider all test items within the time allotted.<sup>90</sup> “Stereotype threat,” a dynamic that places greater pressure on high-stakes test takers who allocate cognitive resources to proceed especially carefully and slowly in order to disprove salient adverse stereotypes, can have a particularly pernicious effect on test performance that assumes high-speed performance.<sup>91</sup>

<sup>85</sup> *Id.* at 54.

<sup>86</sup> *Id.* at 56.

<sup>87</sup> See STANDARDS, 2014, *supra* note 67, at 56–57.

<sup>88</sup> *Id.* at 57.

<sup>89</sup> *Id.* at 58. “Usually we want to test examinees’ knowledge and skills or ability rather than how fast they work.” Cathy L.W. Wendler & Michael E. Walker, *Practical Issues in Designing and Maintaining Multiple Test Forms*, in Lane et al., TEST DEVELOPMENT, *supra* note 66, at 433, 439; see also Wim J. van der Linden, *Setting Times Limits on Tests*, 35 J. APPLIED PSYCHOL. MEASUREMENT 183, 183 (2011) (providing description of “speededness” and emphasizing its relationship to fairness).

<sup>90</sup> For insightful discussions about the implication of “speededness” on high-stakes tests, see Ying Lu, *Validity Issues in Test Speededness*, 26 EDUC. MEAS.: ISSUES & PRAC. 29, 29 (2007) (defining “speededness” as a situation in which time limits do not allow a “substantial number[] of examinees to fully consider all test items”); see also Polina Harik et al., *A Comparison of Experimental and Observational Approaches to Assessing the Effects of Time Constraints in a Medical Licensing Examination*, 55 J. EDUC. MEAS. 308, 308 (2018) (providing analysis of speededness on Medical Licensure Examination, but concluding that evaluation of time impacts is imprecise). For studies of “speededness” in the context of legal education, see Ruth Colker, *Test Validity: Faster Is Not Necessarily Better*, 49 SETON HALL L. REV. (forthcoming 2019) (arguing that federal nondiscrimination law creates an imperative to avoid speededness in high stakes examinations); see also William D. Henderson, *The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 975–76 (2004).

<sup>91</sup> For discussion of stereotype threat in the context of legal education, see Timothy T. Clydesdale, *A Forked River Runs through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 L. & SOC. INQUIRY 711, 715–16 (2004). For broader analysis of stereotype threat, see Arthur L. Whaley, *Advances in Stereotype Threat Research on African Americans: Continuing Challenges to the Validity of Its Role in the Achievement Gap*, 21 SOC. PSYCHOL. EDUC. 111, 112–14 (2018) (reviewing implications of stereotype threat analysis for undergraduate students); see also Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPER. SOC. PSYCHOL. 379, 379

## 2. Advanced Concerns: Test Constructs, Testing Methods, and Cut Scores

### a. Test Constructs

Bar exams should test minimal competence to practice law.<sup>92</sup> Critics who argue that traditional bar exams do not do a good job of testing competence to practice law today are making a construct invalidity claim based on the disagreements about the meanings of competence, and the possible lack of evidence that the knowledge, skills, and abilities currently being tested are critical for minimal competence to practice law.<sup>93</sup>

Current bar examinations test “analysis” or “application” of doctrinal rules and exceptions relying on memorized “content knowledge.” Is that an appropriate “test construct” for an era in which the practice of law has changed and memorized knowledge is no longer the norm?

### b. Testing Methods

Depending on what a licensing test is endeavoring to measure, a variety of testing methods might be employed. Testing experts recognize the benefits of essay questions that require candidates not only to demonstrate relevant knowledge and analysis, but also to demonstrate communication skills in developing written work-product similar to that required in professional circumstances.<sup>94</sup> Growing attention has been given to a variety of methods of performance testing, simulations, and professional portfolios.<sup>95</sup> Current bar exams rely on essay and multiple choice questions and increasingly on performance tests that require candidates to produce written attorney work products based on case files.

The NCBE and some jurisdictions developing high-stakes licensing tests rely upon extensive consultation with subject-matter experts to develop and evaluate potential bar examination questions, in particular the Multistate Bar Examination (MBE) multiple choice questions that are central to bar

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(2002) (explaining the development of the notion of the “stereotype threat” and analyzing the results thereof); *see generally* CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010) (describing challenges faced by minorities in academic settings).

<sup>92</sup> *See, e.g.*, Judith A. Gunderson, *MEE and MPT Test Development: A Walk-Through from First Draft through Administration*, 84 THE BAR EXAMINER 29, 31 (June 2015) [hereinafter Gunderson, *Walk-Through*].

<sup>93</sup> For discussion of validity, *see* text accompanying *supra* notes 69–72.

<sup>94</sup> For a discussion of diverse testing methods, *see* HALADYNA & RODRIGUEZ, DEVELOPING AND VALIDATING TEST ITEMS, *supra* note 77, at 282–301.

<sup>95</sup> *See infra* notes 315–323 and accompanying text.

exam scoring in jurisdictions that use the UBE and those that do not.<sup>96</sup> The NCBE has committed themselves to a transparent distribution of subject area outlines of bar examination coverage to assure that law professors can take into account licensure examinations when crafting their syllabi.<sup>97</sup> Nonetheless, the NCBE has not adjusted its subject outlines to take into account changes in law school curricula that increasingly endeavor to encompass experiential learning and emerging areas of specialization that are not included in traditional bar examinations.<sup>98</sup> Moreover, to the extent that states vary widely in the subject areas they assess as part of their bar examinations, candidates seeking admission to practice do not face comparable conditions in preparing for licensure examinations.<sup>99</sup>

A review of multiple choice questions developed by subject-matter experts for the MBE raises important issues.<sup>100</sup> To what degree do questions in certain subjects test narrow information that is not truly central to practice but that is readily tested?<sup>101</sup> To what degree do multiple choice bar examination questions test memorized content knowledge, in contrast to higher order thinking skills? For example, experts on assessment of higher order thinking skills recognize that a variety of skills might be considered under this overall umbrella, including reasoning skills, argumentation skills, problem solving and critical thinking skills, and metacognition.<sup>102</sup>

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<sup>96</sup> The NCBE takes pride in its relationship with subject area experts (including both academics and practitioners) who assist in drafting exam questions and also review questions once they have been drafted. See Gunderson, *Walk-Through*, *supra* note 92, at 30–31.

<sup>97</sup> For subject area outlines, see *2018 MBE Subject Matter Outline*, NAT'L CONF. B EXAM'RS, <http://www.ncbex.org/pdfviewer/?file=%2Ffmsdocument%2F201> (last visited Dec. 17, 2018).

<sup>98</sup> The co-authors discussed related issues with senior staff of the National Conference during a visit to their office in July 2018, and learned that at least some senior staff believed that law schools should roll back curriculum reforms embracing experiential education to conform to past practices regarding more expansive doctrinal subject matter coverage.

<sup>99</sup> Some states have adopted extensive subject-matter coverage for their bar examinations. *E.g.*, RULES OF THE VIRGINIA BOARD OF BAR EXAMINERS § I(B) (VA. BD. BAR EXAM'RS 2018), <http://barexam.virginia.gov/pdf/VBBERules.pdf> (listing 21 subjects, four of which are Equity, Local Government Law, Taxation, and Virginia Civil and Criminal Procedure (including appellate practice)); see *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FLA. BD. B. EXAMINERS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748> (last visited Dec. 17, 2018) (identifying 16 subjects, including Florida Rules of Civil and Criminal Procedure; Criminal Law, Constitutional Criminal Procedure, and Juvenile Delinquency; and Family Law and Dependency).

<sup>100</sup> See Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS (ASSOC. AM. L. SCHS.), Spring 2017, at 12–13, [https://www.aals.org/wp-content/uploads/2017/05/AALSnews\\_spring17-v9.pdf](https://www.aals.org/wp-content/uploads/2017/05/AALSnews_spring17-v9.pdf) (critiquing evidence questions).

<sup>101</sup> *Id.*

<sup>102</sup> See Gregory Schraw et al., *An Overview of Thinking Skills* [hereinafter Schraw et al., *Overview*], in ASSESSMENT OF HIGHER ORDER THINKING SKILLS 22–23 (2011) [hereinafter HIGHER ORDER THINKING].

Those responsible for professional licensing examinations have often explained their preference for multiple choice examinations that facilitate psychometric analysis and provide an assessment of a wider range of subject matter content with more precision than might be possible with alternative testing methods.<sup>103</sup> Assessing performance of examinees on multiple choice examinations that focus on one “best answer” as opposed to other design options may put psychometricians and licensing authorities at rest, but such questions do not necessarily approximate in meaningful ways the actual nature of decision-making within the legal profession.

Questions could be asked other than “what is the best among four multiple choice options?” For example, questions could ask: “what evidence needs to be considered?” or “what are the two best competing theories?” or “what competing precedent needs to be evaluated?” These questions are much more sophisticated than those traditionally asked in multiple choice questions on the MBE. A good case can be made that we are asking too little of law students and bar applicants, insofar as bar examinations emphasize simplistic application of memorized doctrinal rules. Lawyers who we prepare to serve the public should be more sophisticated, and we should ask more of them than we do.

*c. Cut Scores*

Setting a bar exam’s passing standard, or cut score,<sup>104</sup> is a particularly fraught aspect of bar examiners’ responsibility to assess or measure competence. Setting a cut score is a peculiar mixture of psychometrics, tradition, and politics.<sup>105</sup> One of us has written about the vexing problems of setting cut scores, noting in particular the significant disparity among

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<sup>103</sup> For discussion of rationales for preferring multiple choice questions to other forms of assessment, see Brian E. Clauser, Melissa J. Margolis & Susan M. Case, *Testing for Licensure and Certification in the Professions* [hereinafter Clauser et al., *Testing for Licensure*] in EDUC. MEAS., *supra* note 66, at 701, 707 (discussing benefits of multiple choice questions including opportunity for broad content sampling, reproducible scores, and correlation with other types of questions; while also noting continuing work to improve the use of scenario-based items, reduce the likelihood of guessing, increasing the quality of simulations, and enhancing the quality of performance testing).

<sup>104</sup> The term “cut score” refers to the passing score on a given test. See Gregory J. Cizek, *An Introduction to Contemporary Standard Setting: Concepts, Characteristics, and Contexts*, in CIZEK, *supra* note 58, at 3-5. For primary sources relating to the 2017 debate about California bar examination cut scores, see *supra* note 1. California uses its own essays and performance tests but uses the Multistate Bar Exam (MBE) created by the NCBE.

<sup>105</sup> See Clauser et al., *Testing for Licensure*, *supra* note 103, at 720 (“Standards typically do not exist in nature, waiting to be found or estimated by scientific procedures. Establishing a standard is a policy decision and so it is, by definition, a political activity.”); see also Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 967–68 (2001) (considering possible rationales for past increases in bar exam cut scores and finding them unpersuasive).



Multistate Bar Exam (MBE) cut scores across the country, including in jurisdictions that have adopted the Uniform Bar Examination (UBE).<sup>106</sup> Most other professions that employ a national licensure examination component (such as the MBE) adopt a national cut score on that test that reflects a consensus view on minimal professional competence.<sup>107</sup> Law is unusual in deferring to individual jurisdictions to set differing cut scores when many jurisdictions employ the same test to determine minimum competency competency.<sup>108</sup> Legal licensing authorities also prefer not to acknowledge the extent that policy and politics underly cut score decisions, or the related risk that state licensing boards may be engaged in anticompetitive decisions that could be susceptible to antitrust challenges.<sup>109</sup> Nor have the National Conference or many state licensing authorities grappled with the realities that unnecessarily high cut scores exacerbate persistent disparate results for candidates of color.<sup>110</sup>

Given recent debates about the appropriateness of cut scores in California<sup>111</sup> and other jurisdictions, legal educators and policy-makers alike should understand the extent to which decisions on cut scores may reflect anticompetitive or exclusionary preferences as opposed to defensible judgments on minimum competence required to protect the public. A defensible cut score is an important aspect of the validity of any licensing

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<sup>106</sup> See Howarth, *Uniform Cut Score*, *supra* note 13, at 70; for a map depicting current UBE cut scores, see NAT'L CONF. B. 'EXAMINERS, *Minimum Passing UBE Score by Jurisdiction*, <http://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited Sept. 13, 2018).

<sup>107</sup> See Howarth, *Uniform Cut Score*, *supra* note 13, at 70.

<sup>108</sup> See *id.* at 74.

<sup>109</sup> For a consideration of possible antitrust considerations of occupational licensing, see Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1568 (2017) (discussing antitrust doctrine in the wake of *North Carolina Board of Dental Examiners v. FTC*); see also Bobbi Jo Boyd, *Embracing Our Public Purpose: A Value-Based Lawyer-Licensing Model*, 48 U. MEM. L. REV. 351, 430 (2017) (reviewing history of lawyer-licensing and calling for fair and transparent systems).

<sup>110</sup> Disparate bar passage rates for minority candidates, and evidence that higher cut scores exacerbated those disparities, was an issue in California's recent review of cut scores. See sources cited *supra* note 1. Earlier studies by education scholar and Law School Admissions Council researcher Linda Wightman concluded that students of color were typically able to pass the bar examination by their second try, but that study was completed more than 20 years ago. See 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 Admissions Decisions*, 72 N.Y.U. L. REV. 1, 38 (1997). For more recent observations, see Johnson, *supra* note 15, at 418–19 (arguing that the bar exam, not the LSAT, is the critical impediment to admission of more minority lawyers into the profession).

<sup>111</sup> See FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES, *supra* note 1; Letter to Colantuono, *supra* note 1; RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON THE TEXAS BAR EXAMINATION, *supra* note 1; *Uniform Bar Examination, Further Reading*, *supra* note 1; *Symposium on Legal Education: A Meeting of the Minds*, *supra* note 1, at 8; see, e.g., *Society of American Law Teachers Statement on the Bar Exam*, *supra* note 1, at 446; Curcio, *supra* note 1, at 364–65; Glen, *supra* note 1, at 343; Howarth, *supra* note 1, at 930.

test. State-by-state disparities suggest that cut scores are a vulnerable aspect of many jurisdictions' current practices for measuring competence.

### C. Conclusion

This Part has offered a framework through which legal educators and bar examiners can begin to grapple with challenges created by attorney licensing. Initially, it describes the variety of definitions of basic competency that might guide legal educators and licensing authorities. Notwithstanding the extensive research on attorney competence undertaken from diverse perspectives, bar exams and current licensing requirements do not reflect that research. Bar examiners are just beginning to conduct more meaningful job analysis and other research regarding professional competence. Thus, bar examiners have continued to employ outdated content-based constructs that give a premium to doctrinal-memorization. Legal educators should challenge such constructs, but only after engaging and understanding psychometric concerns.

## II. NATIONAL POST-1L TEST

Law schools should give their students a national, criterion-referenced<sup>112</sup> test after completion of the first year. This post-1L test could set a standard for "basic competence" or "preliminary competence" related to critical thinking abilities in core common law subjects following the first year of law school.

### A. Why a National Post-1L Test?

Law students are introduced in the first year to the basic critical thinking skills of legal reading, legal research, legal writing, and application of legal doctrine to new fact patterns.<sup>113</sup> Students are currently assessed on these skills, but they are typically graded on a curve that only compares their performance to that of other students in their own law school.<sup>114</sup> A national

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<sup>112</sup> "Criterion-referenced interpretations characterize an examinee on the basis of a test performance without reference to the performance of other individuals. In theory, the interpretation is determined by the absolute level of the examinee's score." Edward H. Haertel, *Reliability*, in EDUC. MEAS., *supra* note 66, at 65, 66–67.

<sup>113</sup> See generally WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 47–74 (2007) [hereinafter EDUCATING LAWYERS] (describing first year case dialogue as potentially transformative signature pedagogy).

<sup>114</sup> "Norm-referenced interpretations locate an individual examinee's score relative to the distribution of scores for some relevant comparison group." Haertel, *supra* note 112, at 66. For discussions

criterion-referenced test could tell law students not just how their exams compare to those of their classmates, but whether they have learned the competencies at the level that the profession expects them to have reached in their first year. Results would signal whether students are on a trajectory for success on a bar exam.

If required by law schools, this post-1L test could help law schools become more accountable for working with students who are at risk academically, and could help schools demonstrate their compliance with ABA accreditation standards related to admissions<sup>115</sup> and attrition.<sup>116</sup> The test would give law schools a metric to measure preparation for future bar exam success, timed to enable students and schools to tailor the education offered to particular students without having to wait for the post-graduation bar exam success or failure of that cohort. In an era when the ABA is pushing law schools to create cultures of academic assessment,<sup>117</sup> this educational assessment test would enable law schools to measure themselves against a national standard. That comparative data, in turn, could provide useful consumer information for students choosing which law school to attend.

Alternatively, students could voluntarily take such a test to determine relatively early in their law school career their command of critical thinking, doctrinal content basics, and fundamental performance skills. Criterion-referenced results at this early stage would give students time to adjust their approach to learning in law school, if needed. A national test taken at the end of the 1L year would provide meaningful results before students invest in three or four years of study and take on the debt<sup>118</sup> now associated with obtaining a J.D. degree.

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of the limitations of legal education's reliance on norm-referenced grading systems that use grading curves to compare students to each other, see Judith Welch Wegner, *Implications for Traditional Grading Practices*, in Maranville et al., *BUILDING*, *supra* note 51, at 422; Wegner, *Competence*, *supra* note 37, at 710–11.

<sup>115</sup> Standard 501(b) provides that “[a] law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.” ABA STANDARDS 2018-19, *supra* note 52 § 501(b) at 31.

<sup>116</sup> Interpretation 501-3 states, “[a] law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with [Standard 501(b)].” Interpretation 501-3, ABA STANDARDS 2018-19, *supra* note 52, at 32.

<sup>117</sup> See Wegner, *Assessment*, *supra* note 51.

<sup>118</sup> See, e.g., A.B.A., TASK FORCE ON THE FINANCING OF LEGAL EDUCATION 29 (2015), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2015\\_june\\_report\\_of\\_the\\_aba\\_task\\_force\\_on\\_the\\_financing\\_of\\_legal\\_education.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf). For a study of how current law school scholarship policies contribute to increased student debt among students from disadvantaged backgrounds, see Aaron Taylor, *Robin Hood, In Reverse: How Law School Scholarships Compound Inequality*, 47 J. L. & EDUC. 41 (2018).

## B. Post-1L Test Design

### 1. Content

Critical thinking includes key abilities to know, comprehend, apply, analyze, synthesize, and evaluate<sup>119</sup> plus metacognition, or the understanding of one's thinking processes and the ability to regulate them.<sup>120</sup> Metacognition is one of a number of higher order skills (also including reasoning, argumentation, problem solving/critical thinking) that lawyers need in order to understand what they don't know and what avenues they need to pursue in order to meet their obligations to clients without falling prey to blind-spots.<sup>121</sup> Many professors, especially those who teach in first year courses,<sup>122</sup> academic support,<sup>123</sup> legal writing,<sup>124</sup> or clinical education,<sup>125</sup> understand that metacognition and the ability to reflect are among the most important skills that students can develop both to achieve academic success and to meet their obligations to future clients. As Professor Preston and her co-authors suggest, "if the skill needed for practice is the ability to think, experiences in thinking (and review of how to think better next time) are essential."<sup>126</sup>

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<sup>119</sup> See BENJAMIN BLOOM ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK I: COGNITIVE DOMAIN (Benjamin Bloom et al. eds., 1956) [hereinafter BLOOM ET AL., TAXONOMY]. For a discussion in the legal context, see Ruth Jones, *Assessment and Legal Education: What is Assessment and What the \*# Does it Have to do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 98 (2013) [hereinafter Jones, *Assessment*].

<sup>120</sup> "[M]etacognition is the concept that individuals can monitor and regulate their own cognitive processes and thereby improve the quality and effectiveness of their thinking." Cheryl B. Preston et al., *Teaching "Thinking Like a Lawyer": Metacognition and Law Students*, 2014 BYU L. REV. 1053, 1057 (2014) [hereinafter Preston et al., *Metacognition*]; see David R. Krathwohl, *A Revision of Bloom's Taxonomy: An Overview*, 41 THEORY INTO PRAC. 212, 214 (2002) [hereinafter Krathwohl, *Revision*].

<sup>121</sup> Schraw et al., *Overview in HIGHER ORDER THINKING*, *supra* note 102, at 26–27 (defining metacognition as "thinking about and regulating one's thinking" and arguing that metacognition is comprised of three sub-components, declarative knowledge including knowledge of ourselves, procedural knowledge including knowledge of strategies, and conditional knowledge including insights about why and when to employ certain strategies).

<sup>122</sup> See Preston et al., *Metacognition*, *supra* note 120, at 1056, 1059 (suggesting a relationship between the Socratic Method and teaching metacognition).

<sup>123</sup> E.g., Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227 (2015) (discussing metacognition and self-regulated learning). See generally Louis N. Schulze, Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise its Bar Passage Rates in an Era of Decline*, 68 J. LEGAL EDUC. (forthcoming 2019).

<sup>124</sup> E.g., Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149 (2012) [hereinafter Niedwiecki, *Metacognitive Skills*].

<sup>125</sup> E.g., John M. A. DiPippa & Martha M. Peters, *The Lawyering Process: An Example of Metacognition at Its Best*, 10 CLINICAL L. REV. 311 (2003).

<sup>126</sup> Preston et al., *Metacognition*, *supra* note 120, at 1090.

The evidence that learning metacognition skills improves academic performance<sup>127</sup> suggests that focus on metacognition early in law school also supports legal educators' responsibility to help build a more inclusive and diverse profession. The era of reduced funding for public education has increased disparities in educational preparation, leaving too many low- and middle-income students and people of color with deficient K-12 educational preparation that can continue to haunt them as they move to college, law school, and beyond.<sup>128</sup>

The essential competencies to be learned in the first year of law school include fundamental skills in legal reading,<sup>129</sup> legal reasoning,<sup>130</sup> legal writing,<sup>131</sup> legal research,<sup>132</sup> knowledge and understanding of legal doctrine,<sup>133</sup> application of legal doctrine to new fact patterns, and, increasingly, metacognition.<sup>134</sup> Scholars in the academic support arena are

<sup>127</sup> *Id.* at 1057–62.

<sup>128</sup> See Sean Reardon et al., *The Geography of Racial/Ethnic Test Score Gaps* (Stan. Ctr. for Educ. Pol'y Analysis, Working Paper No. 16-10, 2018), <http://cepa.stanford.edu/sites/default/files/wp16-10-v201803.pdf> (discussing review of approximately 200 million standardized math and reading tests administered to public school students from 2009–2013, analyzing student achievement gaps, and concluding that economic, demographic, segregation, and school characteristics explain 44–72% of geographic variation in achievement gaps, with the strongest correlates reflecting racial/ethnic differences in parental income, local average parental education levels, and patterns of racial/ethnic segregation).

<sup>129</sup> See, e.g., Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407, 409 (1987); Ruth Anne Robbins, et al., *Analysis, Research, and Communication in Skills-Focused Courses* [hereinafter Robbins et al., *Analysis*], in Maranville et al., BUILDING, *supra* note 51, at 111, 113, (citing Leah M. Christensen, *Show Me, Don't Tell Me! Teaching Case Analysis by "Thinking Aloud"*, 15 PERSP.: TEACHING LEGAL RES. & WRITING 142 (2007)).

<sup>130</sup> See, e.g., LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 55-63 (4th ed. 2015) (identifying key types of legal reasoning as rule-based, analogical, policy-based, principle-based, custom-based, inferential, and narrative); Robbins et al., *Analysis*, *supra* note 129, at 114–16 (providing a taxonomy of legal reasoning as induction, deduction, analogical reasoning, policy-based reasoning, narrative reasoning, and inferential reasoning).

<sup>131</sup> See, e.g., MARY BETH BEAZLEY & MONTE SMITH, LEGAL WRITING FOR LEGAL READERS (2014); TERRILL POLLMAN ET AL., EXAMPLES & EXPLANATIONS FOR LEGAL WRITING (2d ed. 2014); ANNE ENQUIST, ET AL., JUST WRITING: GRAMMAR, PUNCTUATION AND STYLE FOR THE LEGAL WRITER (5th ed. 2017).

<sup>132</sup> See, e.g., Robbins et al., *Analysis*, *supra* note 129, at 119–20; MARK OSBECK, IMPECCABLE RESEARCH: A CONCISE GUIDE TO MASTERING LEGAL RESEARCH SKILLS (2d ed. 2015); TERRILL POLLMAN ET AL., EXAMPLES & EXPLANATIONS FOR LEGAL RESEARCH (2016).

<sup>133</sup> ABA Standard 302 requires law schools to establish learning outcomes that include competency in, among other things, “[k]nowledge and understanding of substantive and procedural law.” ABA STANDARDS 2018-19, *supra* note 52, at 15. For a compelling treatment of the fallacy of distinguishing between doctrinal and skills courses and faculty, see LINDA H. EDWARDS, THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION’S SELF-INFLICTED WOUND (2017) [hereinafter DOCTRINE-SKILLS DIVIDE].

<sup>134</sup> See, e.g., EDUCATING LAWYERS, *supra* note 113, at 47–86; see also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 207, 211–12 (2007) [hereinafter STUCKEY, BEST PRACTICES].

demonstrating that explicit interventions to help entering students develop metacognitive skills can make all the difference in their ultimate success on bar passage and in their careers.<sup>135</sup>

The post-1L test could use doctrine from two or three first year courses, perhaps Contracts, Torts, and Criminal Law, as the subject matter platform from which to test basic competence in legal analysis, meaning the ability to know, comprehend, and apply legal doctrine to new fact patterns. Contracts, Criminal Law, and Torts all provide classic common law doctrinal development. Contracts also incorporates Uniform Commercial Code analysis, and since many criminal law courses focus on the Model Penal Code criminal law questions might also be shaped to address statutory interpretation.<sup>136</sup>

The crucial competencies of legal reading, knowledge of legal doctrine, and application of legal doctrine to new fact patterns could be tested with multiple choice questions similar to Multistate Bar Exam (MBE) questions.<sup>137</sup> Performance tests using a more fact-intensive simulated law practice context would add legal writing and legal research to the competencies tested.<sup>138</sup> The richer context of a case file, library, and specific lawyerly tasks allows performance tests to assess critical thinking in a professional context beyond the more mechanical legal analysis required by typical bar exam multiple choice and essay questions.<sup>139</sup>

In light of the importance of knowing what one does not know and what one needs to do to learn it, arguably an exam intended to provide a formative assessment of critical student development at the end of the first year of law school should also endeavor to assess a basic level of metacognition. Formative assessment of metacognition being used in law school classes<sup>140</sup> could be adapted for this purpose.

A test using Torts, Contracts and Criminal Law as the subject sphere for MBE-type multiple choice questions, plus performance tests in those

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<sup>135</sup> See Bloom, *supra* note 123; Schulze, *supra* note 123.

<sup>136</sup> The current MBE subject matter outline includes Articles I and II of the Uniform Commercial Code within Contracts, but does not reference the Model Penal Code in the Criminal Law section. See NAT'L CONF. BAR EXAMINERS, 2018 MBE Subject Matter Outline, <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F201> (last visited Feb. 18, 2019).

<sup>137</sup> Current bar exam MBE questions test knowledge of legal doctrine and application of doctrine to new fact patterns. See Gundersen, *Walk-Through*, *supra* note 92, at 29.

<sup>138</sup> *Id.* (in addition to knowledge of legal doctrine and application of doctrine to new fact patterns, bar exam essay questions and performance tests also test legal writing, requiring "clear, concise, and well-organized composition.").

<sup>139</sup> See Kimberly A. Swygert & David M. Williamson, *Using Performance Tasks in Credentialing Tests*, in HANDBOOK OF TEST DEVELOPMENT 294, 299 (2d ed. 2016) [hereinafter Swygert & Williamson, *Using Performance Tasks*].

<sup>140</sup> See Niedwiecki, *Metacognitive Skills*, *supra* note 124, at 181–93.

subjects, plus some assessment of metacognition, would give students and law school useful information about whether examinees have achieved the level of competence to be likely to pass a bar exam. The value of the additional self-knowledge is sufficiently high to justify increasing law students' already elevated levels of stress<sup>141</sup> by adding yet another big test. On the other hand, the opportunity to re-take the test subsequently may help reduce students' stress level.

## 2. Scores

We propose that a student could receive one of three results on this test: “Competent,” “Indeterminate,” or “Competence Not Established.” A student who earned a score of “Competent” could be confident that he or she has demonstrated success at fundamental legal reasoning skills taught in the first year, and could shape course selection moving forward with that in mind.<sup>142</sup> Students who earn “Competent” could consider pursuing a limited license after two years of law school.<sup>143</sup>

We suggest a middle category of “Indeterminate” for several reasons. A test that is being used for educational assessment, not licensing, need not be limited to binary pass or fail results.<sup>144</sup> On any test the dividing line between pass and fail is necessarily imperfect, resulting in both false positives and false negatives.<sup>145</sup> Students who barely pass a pass-fail test may respond with unwarranted confidence, and students who barely fail could receive a message of exaggerated doom. Creating an intermediate category of “Indeterminate” recognizes these imperfections and provides a more nuanced result. The lack of precision at the pass-fail line is true for any high stakes

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<sup>141</sup> See, e.g., Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 262 (2004).

<sup>142</sup> Scores should not be provided to students who were judged “Competent,” just as bar exam scores today generally are not provided to students who pass. Post-1L test scores should be provided to those with “Indeterminate” or “Competence Not Established” results, broken down by subparts of the test.

<sup>143</sup> See *infra* text accompanying notes 247–265.

<sup>144</sup> Bar examiners address the problem of lack of precision at the passing standard of their pass-fail tests in a variety of ways, including extra review of essays that are close to the pass line, such as the phased grading by California bar examiners, or the availability of appeal procedures, as in Michigan. See The State Bar of Cal., *California Bar Exam Grading*, CAL. B., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Exam/Description-and-Grading-of-the-California-Bar-Exam> (last visited Feb. 18, 2019); MICHIGAN SUPREME COURT BOARD OF LAW EXAMINERS, RULES, STATUTES, AND POLICY STATEMENTS 1, 22 (2018), [http://courts.mi.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLE\\_Rules\\_Statutes\\_Policy\\_State\\_ments.pdf](http://courts.mi.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLE_Rules_Statutes_Policy_State_ments.pdf).

<sup>145</sup> “[T]he likelihood of misclassification will generally be relatively high for persons with scores close to the cut scores.” STANDARDS, 2014, *supra* note 67, at 97.

test, but it is especially true for a new test, which in its earliest iterations will lack a track record.

The possibility of the “Indeterminate” result also strengthens the message of a “Competence Not Established” rating. This result should serve as a wake-up call for law students who are struggling but might not have appreciated their deficiencies. Students who are not able to establish their basic competence—or come close—would have very useful information about their trajectory toward licensure at a time when they have invested only one year of opportunity costs and one year of law school tuition. Students who are seriously deficient on this post-1L test could reconsider their career options without having invested multiple years and incurred potentially overwhelming debt.<sup>146</sup>

### C. *Learning from Veterinary Medicine*

Veterinary education offers a similar, early stage, educational assessment test. The International Council for Veterinary Assessment (ICVA) administers the licensing exam for veterinarians, the North American Veterinary Licensing Examination (NAVLE).<sup>147</sup> ICVA also offers the Veterinary Educational Assessment (VEA), which is used voluntarily by many<sup>148</sup> veterinary schools but not required for licensure.<sup>149</sup> The VEA assesses “student knowledge in basic science or pre-clinical subjects” taught in the first two years “but not addressed directly on the NAVLE.”<sup>150</sup> The content of the VEA can be compared to the Step 1 licensing tests in medicine,

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<sup>146</sup> Law schools that offer masters degrees for successful completion of the first year of a J.D. program facilitate this exit strategy. See, e.g., LAW COLLEGE FACULTY HANDBOOK ON THE IMPLEMENTATION OF MICHIGAN STATE UNIVERSITY ACADEMIC POLICIES 33 (Aug. 30, 2017) (on file with authors) (providing for a Master of Jurisprudence (M.J.) degree for students who have successfully completed the 1L required curriculum); *Cleveland-Marshall First School to Offer Risk-Free J.D. With ‘Convertible’ Degree Option*, CLEVELAND-MARSHALL C.L., (Mar. 5, 2014, 3:03 PM), <https://www.law.csuohio.edu/newsevents/news/cleveland-marshall-first-school-offer-risk-free-jd-convertible-degree-option> (announcing that Cleveland-Marshall College of Law students who complete their first year in the J.D. program will be eligible to convert to a Master of Legal Studies (M.L.S.) with completion of one additional course).

<sup>147</sup> See generally INTERNATIONAL COUNCIL FOR VETERINARY ASSESSMENT, <https://www.icva.net/navle> (last visited Feb. 18, 2019) for a description of the NAVLE.

<sup>148</sup> Ten of the 36 accredited veterinary schools in North America administered the VEA last year. *Technical Report, ICVA Veterinary Educational Assessment, September 2016, January 2017, and May 2017 Test Administrations*, INT’L COUNCIL VETERINARY ASSESSMENT, [https://www.icva.net/image/cache/2016-2017\\_VEA\\_Technical\\_Report.pdf](https://www.icva.net/image/cache/2016-2017_VEA_Technical_Report.pdf). Almost half of the accredited veterinary schools are using the VEA or considering adding it. Telephone Interview with Dr. Heather Case, ICVA CEO (Aug. 3, 2018) (on file with authors).

<sup>149</sup> See generally VEA, INT’L COUNCIL FOR VETERINARY ASSESSMENT, <https://www.icva.net/navle> (last visited Feb. 18, 2019).

<sup>150</sup> Those subjects include anatomy, physiology, pharmacology, microbiology, and pathology. *Id.*



as the same basic science subjects are tested.<sup>151</sup> The tests are different, of course, in that the multiple choice questions on the VEA generally place basic science content in the context of veterinary medicine practice, including, for example, details of the condition, age, species, and breed of a presenting animal.<sup>152</sup> Also, significantly, the Step 1 test is required for physician licensing, but the VEA is not required for veterinary licensing. As its name suggests, the VEA is a mechanism for educational assessment.

The VEA is useful to veterinary schools because it provides a way to measure their students' success in learning the application of basic science principles to veterinary practice, and provides a way for individual veterinary schools to measure themselves in comparison to other veterinary schools. The VEA is useful to veterinary students because it gives them a measure of their academic accomplishment and trajectory toward licensure<sup>153</sup> without waiting for the licensing exam that will be administered near the end of their fourth year of professional education. Students who are not able to succeed on the VEA are given useful information, especially because, like too many law graduates, new graduates of veterinary school face issues of high student debt and a challenging job market.<sup>154</sup>

#### D. Implementation of a Voluntary Post-1L Test

Development of a national post-1L test to be used by law schools and law students does not fall automatically under the umbrella of either of the two dominant law testing entities, the Law School Admission Council (LSAC) or the National Conference of Bar Examiners (NCBE), although either or both could have a role. A jurisdiction like California, which has been using the California Performance Test since 1983<sup>155</sup> and has administered preliminary bar exams for students from unaccredited law schools since

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<sup>151</sup> Kristin P. Chaney, Kenita S. Rogers & Virginia Fajt, *Academic Standards & Progression*, in *VETERINARY MEDICAL EDUCATION: A PRACTICAL GUIDE* 286, 292 (Jennifer L. Hodgson & Jacquelyn M. Pelzer eds., 2017) (explaining that the VEA is similar to Step 1 of the USMLE because it tests the same fundamental science subjects). Chaney et al. also note that as Step 1 predicts success in clinical clerkships and licensing exams, "there is similar data to support use of the VEA for student success on the NAVLE." *Id.* (citing Jared A. Danielson et al., *Relationships Among Common Measures of Student Performance and Scores on the North American Veterinary Licensing Examination*, 238 J. AM. VETERINARY MED. ASS'N 454, 454–61 (2011) [hereinafter Danielson et al., *Student Performance*]).

<sup>152</sup> ICVA provides a sample VEA exam. See *Veterinary Educational Assessment Practice Test*, INT'L COUNCIL FOR VETERINARY ASSESSMENT, <http://www.starttest.com/ITDVersions/11.1.0.1/ITDStart.aspx?SVC=72ce57ea-c6a9-49d2-92ae-33ff3ddbcb0f> (last visited Feb. 18, 2019).

<sup>153</sup> Danielson et al., *Student Performance*, *supra* note 151, at 454–61.

<sup>154</sup> Telephone Interview with Dr. Heather Case, *supra* note 148 (on file with authors).

<sup>155</sup> Barbara M. Anscher, *Turning Novices into Experts: Honing Skills for the Performance Test*, 24 HAMLINE L. REV. 224, 225 n.3 (2000).

1939, could lead this innovation. Creation of this national test by a coalition of stakeholders might yield some beneficial new strategies for coverage and design.

Significant educational benefits would be served by making this test available to be voluntarily adopted by law schools. The voluntary test could also help to improve attorney licensing tests. Developing a post-1L test of critical thinking on first-year subjects and an associated performance test focusing on legal writing and research could provide an important opportunity to think about the meaning of minimum competence, bar examination formats, and staged assessment. A fresh look at test design in a new context such as this one could also provide an opportunity to address long-standing concerns about high-stakes tests including stereotype threat and speededness.<sup>156</sup> By choosing a more limited number of doctrinal areas to test the candidate's ability to apply legal doctrine to new fact patterns, the post-1L test would challenge the assumption that assessment of attorney competence means memorization of a broad traditional doctrinal knowledge base, rather than evidence of a much broader set of skills and methods.<sup>157</sup> Perhaps most significantly, development of this voluntary educational post-1L assessment could provide "proof of concept" for bar examiners to adopt a phased licensing system. A post-1L test could be incorporated into the structure of attorney licensing, not only as a prerequisite for limited licensure after two years of law school,<sup>158</sup> but also eventually as the first phase of licensing for every attorney.

### *E. Staged Licensing*

#### 1. Learning from Other Fields

Many professions use staged licensing exams in recognition that learning in the context of professional education happens in stages, as novices develop expertise. The initial phases of such exams focus on "book learning" and fundamentals of reasoning and knowledge within the profession, while the later stages focus on clinical competence. Consider the licensing tests taken by physicians, dentists, and engineers.

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<sup>156</sup> On stereotype threat, see STEELE, *supra* note 91; Clydesdale, *supra* note 91; Steele, et al., *supra* note 91; Whaley, *supra* note 91. On speededness, see *supra* note 90.

<sup>157</sup> E.g., Merritt et al., *supra* note 100, at 13.

<sup>158</sup> See *infra* text accompanying notes 247–265.

The United States Medical Licensing Examination consists of three steps.<sup>159</sup> Most medical students take Step 1 at the end of their second year of medical school, Step 2 in their fourth year, and Step 3 during the first or second year of postgraduate training.<sup>160</sup> Step 1 is a one-day multiple choice test designed to assess basic scientific knowledge, specifically whether the student “understand[s] and can apply important concepts of the sciences basic to the practice of medicine, with special emphasis on principles and mechanisms underlying health, disease, and modes of therapy.”<sup>161</sup> Step 2 consists of a multiple choice test of clinical knowledge and a separate clinical skills test using standardized patients.<sup>162</sup> Step 3, taken after graduation from medical school, is a two-day test consisting of multiple choice questions and computer-based case simulations designed to “assess[] whether [one] can apply medical knowledge and understanding of biomedical and clinical science essential for the unsupervised practice of medicine, with emphasis on patient management in ambulatory settings.”<sup>163</sup>

To become licensed, a dentist must have earned a degree from a dental school, have passed written National Board Dental Examinations (NBDE), and then passed a clinical exam.<sup>164</sup> The dental student is eligible to take Parts I and II of the NBDE following successful completion of the relevant courses.<sup>165</sup> Students typically take Part I after their first or second years when basic science courses have been completed and Part II during the third or fourth year, after courses in the additional subjects tested.<sup>166</sup>

Engineers typically graduate from an approved engineering program, become an “engineering intern” or “engineer-in-training” by passing the

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<sup>159</sup> See generally *What is USMLE?*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/> (last visited Feb. 18, 2019).

<sup>160</sup> *Frequently Asked Questions (FAQ)*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/frequently-asked-questions/> (last visited Feb. 18, 2019).

<sup>161</sup> *Step 1*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/step-1/> (last visited Feb. 18, 2019).

<sup>162</sup> *Step 2 CK*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/step-2-ck/> (last visited Aug. 1, 2018); *Step 2 CS*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/step-2-cs/> (last visited Feb. 18, 2019).

<sup>163</sup> *Step 3*, U.S. MEDICAL LICENSING EXAMINATION, <https://www.usmle.org/step-3/> (last visited Feb. 18, 2019).

<sup>164</sup> *Obtaining Licensure*, AM. STUDENT DENTAL ASS'N, <https://www.asdanet.org/utility-navigation/career-compass-home/grad-career-options/obtaining-licensure> (last visited Feb. 18, 2019).

<sup>165</sup> *Id.*

<sup>166</sup> Starting in 2020, the NBDE will combine parts I and II in a redesign intended to integrate basic, dental, and clinical sciences. *Id.* “The new test relies less on rote knowledge and information recall than the current NBDE examinations do, and instead it emphasizes the decision-making process relevant to the safe practice of dentistry through the integration of the basic sciences and dental and clinical science.” *INBDE Information for Test Takers*, JOINT COMM'N ON NAT'L DENTAL EXAMINATIONS, [https://www.ada.org/~media/JCNDE/pdfs/inbde\\_facts\\_students.pdf?la=en](https://www.ada.org/~media/JCNDE/pdfs/inbde_facts_students.pdf?la=en) (last visited Feb. 18, 2019).

Fundamentals of Engineering (FE) exam, complete four years of qualifying engineering work, typically under the supervision of licensed engineers, and then pass a Principles and Practices of Engineering (PE) exam to become licensed.<sup>167</sup> Staging attorney licensing exams makes equally good sense.

## 2. Timing for a First Stage Attorney Licensing Exam

The first year of law school is the most uniform and is understood to provide the foundation of lawyerly critical thinking skills including legal analysis, doctrinal application, legal research, legal writing, and legal reading.<sup>168</sup> Also, interestingly, current bar exams test mainly first-year doctrine. Therefore, a first stage licensing exam at the end of the first year could logically test mastery of core first-year skills of legal reading, legal writing, and application of doctrine to new fact scenarios. A student could take the post-1L exam as soon as at the end of the first year, and, if unsuccessful, could take it again following the 2L year, and again during the 3L year.

## 3. A Possible Model from California

California's First Year Law Students' Examination (FYLSE or "baby bar exam") offers the beginning of a model for this test. Unlike most other states, California allows graduates of unaccredited law schools to sit for the bar exam. But those students face a preliminary hurdle. By statute since 1939, California has required students at unaccredited law schools to "have passed during the period of [their] law study such preliminary examinations as may be required by the examining committee."<sup>169</sup> Apparently following established practice, the statute was amended in 2002 to specify that the preliminary exam be given after completion of the first year of law study.<sup>170</sup> This requirement does not apply to students at ABA or California accredited law schools.<sup>171</sup>

The FYLSE is a one-day exam given twice a year consisting of 100 multiple choice questions and four essays on Torts, Contracts, and Criminal

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<sup>167</sup> *How to Get Licensed*, NAT'L SOC'Y OF PROF'L ENGINEERS, <https://www.nspe.org/resources/licensure/how-get-licensed> (last visited Feb. 18, 2019).

<sup>168</sup> See EDUCATING LAWYERS, *supra* note 113, at 50–74.

<sup>169</sup> CAL. BUS. & PROF. CODE § 6060(h)(1) (Deering 1939).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 6060(h)(2).

Law.<sup>172</sup> For purposes of sitting for the bar exam, California does not recognize any credits for courses taken at unaccredited law schools unless the student has passed the baby bar. The “baby bar exam” is a grueling experience for those taking it, since it involves 100 multiple choice questions and four essay exams administered in one day.<sup>173</sup> Moreover, this examination can be criticized in its details on much the same grounds as the current full-scale post-graduation bar examination.<sup>174</sup>

Whatever the drawbacks of its current design, California’s baby bar exam provides precedent and experience for administering a post-1L exam. The rationale for California’s baby bar exam for students at unaccredited law schools is consumer protection, meaning protection of the public (a summative assessment). At the same time, it also protects the students who enroll in unaccredited law schools, offering an assessment of their law schools’ capacity to provide the meaningful education and prospects they deserve. The test gives students useful and timely information about their chances of ultimately passing the bar exam, without having to invest three or four years of lost opportunities and law school tuition to receive their first criterion-based assessment. In light of the high costs and uncertain employment outcomes for many students at accredited law schools, this consumer protection rationale now makes sense for them, as well.

#### 4. Benefits to Legal Education and Public Protection from a Post-1L Licensing Test

Ultimately, a fair, reliable, and valid post-1L licensing test would be part of a more rational attorney licensing system. As with other professions, becoming a competent attorney requires a combination of “book learning” and clinical competencies. Except for some recent exceptions, legal education has been dominated by the first, book learning, and given short-shrift to the second, clinical experience. Unsurprisingly, attorney licensing replicated that traditional imbalance in legal education. Perhaps oddly, though, bar exams following graduation from law school are linked more directly to academic subjects and competencies from the first year of law school than to the range of deeper thinking and competencies required for practice.

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<sup>172</sup> *First-Year Law Students’ Examination*, ST. B. OF CAL., <http://www.calbar.ca.gov/Admissions/Examinations/First-Year-Law-Students-Examination> (last visited Feb. 18, 2019).

<sup>173</sup> *Id.*

<sup>174</sup> *See infra* Part V.

By establishing competence in doctrinal application early, staged licensing exams would permit jurisdictions to test more advanced skills after graduation, and more fairly require greater clinical experience in law school. Staged licensing exams would also improve legal education. Bar exams today present the challenge of memorizing a massive amount of doctrine. Yet the analytical skill required to apply that doctrinal knowledge to bar exam questions is mechanical and relatively shallow.

Once a student passes her preliminary licensing exam, she can focus on more ambitious courses and specialization instead of returning to first-year subjects and skills at the foundational level of analysis from the first year. Staged licensing starting with a post-1L exam should provoke legal educators to become more purposeful about using the rest of law school to deepen our students' critical thinking skills beyond knowledge and mechanical application of doctrine to deeper analysis, synthesis, evaluation, and metacognition.<sup>175</sup> These more advanced cognitive competencies can be assessed in a post-J.D. licensing examination.<sup>176</sup>

As colleagues in professional education in other fields already seem to understand,<sup>177</sup> teaching deeper critical thinking is entirely consistent with expanding experiential education.<sup>178</sup> Thus the residency requirement we propose is entirely congruent with our ambition to require more advanced cognitive skills from law students, both of which reforms would be facilitated by creation of a new, national, post-1L exam.

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<sup>175</sup> See BLOOM ET AL., TAXONOMY, *supra* note 119; Jones, *Assessment*, *supra* note 119, at 98; Krathwohl, *Revision*, *supra* note 120, at 212, 214.

<sup>176</sup> See *infra* text accompanying notes 273–291 (explaining post-JD test emphasis on more advanced cognitive skills, including metacognition).

<sup>177</sup> See, e.g., MARK QUIRK, INTUITION AND METACOGNITION IN MEDICAL EDUCATION: KEYS TO DEVELOPING EXPERTISE 11–12 (2006) (quoting Mark Graber, *Metacognitive Training to Reduce Diagnostic Errors: Ready for Prime Time?*, 78 ACAD. MED. 781 (2003)) (“The persistent popular view is that the ‘expert becomes so from an overwhelming mastery of content-specific knowledge.’ On the contrary, it is proposed here that the expert becomes so from an overwhelming mastery of the skills required to continuously master content-specific knowledge. This marks a fundamental shift in our approach to medical education. . . . Although content mastery is still a critical outcome, metacognition and intuition—the processes of learning from and acting on experience—are the capabilities of medical expertise.”).

<sup>178</sup> See, e.g., DOCTRINE-SKILLS DIVIDE, *supra* note 133; SUSAN BRYANT ET AL., TRANSFORMING THE EDUCATION OF LAWYERS: THEORY AND PRACTICE OF CLINICAL PEDAGOGY (2014) [hereinafter BRYANT ET AL., CLINICAL PEDAGOGY]; Deborah Jones Merritt, *Crossing the Divide*, in DOCTRINE-SKILLS DIVIDE, *supra* note 133, at 347.

### III. REQUIRED RESIDENCIES

#### A. Introduction

Successful completion of an experiential education residency should be required prior to either full or limited licensure as an attorney. Residencies are associated with doctors, not lawyers.<sup>179</sup> We use “residency” purposefully to situate attorney licensing in this broader professional context and to emphasize our rejection of the long-standing neglect of clinical experience in law school accreditation and attorney licensing requirements.

The required residencies will vary widely as to areas of practice and pedagogy based on community needs, law school missions, and faculty approaches. But each residency should feature: (1) experience assuming primary responsibility for client representation; (2) with supervision by an excellent attorney; (3) in the context of an academic program that includes (a) identification of key learning goals, (b) emphasis on instilling habits of reflective practice, and (c) assessment of competencies expected to be learned. Requiring these residencies will expand the lawyering skills<sup>180</sup> and advance the professional formation<sup>181</sup> that the law student brings to licensure.

As is well-studied,<sup>182</sup> law is exceptional among professions in not requiring substantial clinical experience prior to licensure. Historically, law schools were reluctant to incorporate skills training as an integrated part of their curricula beyond the legal analysis skills typically associated with traditional casebook pedagogy.<sup>183</sup> This reluctance reflected law schools’

<sup>179</sup> For a detailed description and evaluation of residency training for physicians in the United States, see MOLLY COOKE, DAVID M. IRBY & BRIDGET C. O’BRIEN, EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY 113–60 (2010) [hereinafter COOKE ET AL., EDUCATING PHYSICIANS]. The term “residency” is unusual in legal education, but not absent. Elon University School of Law describes itself as the “first law school to provide all students with a 2 ½ year curriculum and full-time, faculty-directed residencies.” *The Elon Edge: Leadership for a New Era in Law*, ELON LAW, <https://www.elon.edu/e/law/index.html> (last visited Feb. 18, 2019). The University of New Hampshire School of Law calls its externships “legal residencies.” *Legal Residencies (Externships)*, U. N.H. SCH. OF L., <https://law.unh.edu/academics/experiential-education/legal-residencies-externships> (last visited Feb. 18, 2019).

<sup>180</sup> “Law schools . . . need to give the teaching of practice a valued place in the legal curriculum so that formation of the students’ professional judgment is not abandoned to chance.” EDUCATING LAWYERS, *supra* note 113, at 115.

<sup>181</sup> Professional formation “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.” *Id.* at 28. Its primary goal “is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.” *Id.*

<sup>182</sup> See, e.g., *id.* at 91–125; Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICKINSON L. REV. 551 (2018) [hereinafter Joy, *Uneasy History*].

<sup>183</sup> See DOCTRINE-SKILLS DIVIDE, *supra* note 133, at ch. 7 (addressing profound harms from legal education’s prevalent categories of doctrine and skills); Katherine R. Kruse, *Legal Education and*

preoccupation with moving beyond “apprenticeships,” gaining respect within the academy, and achieving prestige through the scholarly prowess of their core faculty. Legal educators’ disinterest in clinical education was rationalized and reinforced by a culture in which major law firms preferred to “train their own” personnel.<sup>184</sup> Law schools’ lack of commitment to experiential learning was never unchallenged; even in the 1930’s visionary academics like Jerome Frank called for the development of a “clinical law school.”<sup>185</sup> But legal education continued through most of the twentieth century in the tight grip of an emphasis on classroom analysis of doctrine at the expense of other settings to learn doctrinal analysis, additional lawyering skills, and deeper professional formation.<sup>186</sup>

By the 1970’s, in the wake of Watergate, national leaders sought to integrate training in legal skills, ethics, and service to clients.<sup>187</sup> In 1993, the core ABA Standard regarding a law school’s mission was expanded to include preparation for practice, not just preparation for admission.<sup>188</sup> Impressive battles were fought within the ABA accreditation process to establish requirements for experiential education and long-term security of position for clinical professors.<sup>189</sup> Recent updates in ABA accreditation standards mandate that law students enroll in six hours of “experiential education” before graduation, where “experiential education” is defined with reference to particular instructional models, including clinics, externships, and simulations.<sup>190</sup>

The push for skills-based or applied education stems from the view that law graduates should have a basic level of lawyering skills and that

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*Professional Skills: Myths and Misconceptions about Theory and Practice*, 45 MCGEORGE L. REV. 7, 9–13 (2013) (highlighting the lawyering skills taught in traditional casebook classrooms); Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL’Y 11, 28 (2013) [hereinafter Tokarz et al., *Crossroads*] (building on Kruse, *supra*, rejects the common usage of “lawyering skills” to mean skills taught in experiential courses that erases the critical analytical skills taught in traditional law school classrooms).

<sup>184</sup> See EDUCATING LAWYERS, *supra* note 113, at 91–125.

<sup>185</sup> Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907, 913 (1933); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

<sup>186</sup> See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1956–59 (2012).

<sup>187</sup> See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 18–20 (2000) (describing funding during the “second wave” of clinical education).

<sup>188</sup> ABA Standard 301(a) was expanded in 1993: “A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession.” Joy, *Uneasy History*, *supra* note 182, at 572. Today Standard 301(a) requires law schools to prepare its graduates for “effective, ethical, and responsible participation as members of the legal profession.” See ABA STANDARDS 2018-19, *supra* note 52, at 15.

<sup>189</sup> See Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

<sup>190</sup> See ABA STANDARDS 2018-19, *supra* note 52, at 16–18.



experiential education is more effective instruction for adult students.<sup>191</sup> Following increased pressure from accreditors and a declining legal job market, in the last decade more law schools have placed experiential learning and preparation for legal practice in the heart of their missions.<sup>192</sup> Our proposal goes farther, in that it requires a residency that provides structured learning from lawyering experience and client responsibility prior to full or limited licensure.<sup>193</sup>

### B. Client Representation

Ethical and effective client representation is at the heart of being a lawyer. Oddly and indefensibly, in most U.S. jurisdictions today new attorneys can be licensed without ever having seen a client, let alone represented one. We propose that jurisdictions require—as a prerequisite for attorney licensure—successful completion of a residency that features supervised, first-chair<sup>194</sup> client representation in a clinic or externship, whether oriented to public policy, transactions, or litigation.

Typical experiential educational strategies include clinical programs (supervised by law school faculty), externships (supervised by lawyers at external placement sites and by law school faculty), simulations involving specific skills (such as trial advocacy or negotiation), and practicums that

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<sup>191</sup> See, e.g., MARANVILLE ET AL., *supra* note 51; *Task Force on Admissions Regulation Reform Phase I Report*, ST. B. OF CAL. 1, 1 (June 24, 2013), <http://meetings.calbar.ca.gov/Agenda.aspx?id=10731&tid=0&show=100007402&s=true#10011733> [hereinafter Calif. TFARR Phase I Report] (framing need for experiential education as matter of public protection); *Report and Recommendations*, A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC. 1, 3 (2014), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) (urging emphasis on broader skills in law schools and licensing).

<sup>192</sup> AM. BAR ASS'N COMM. ON THE PROF'L EDUC. CONTINUUM, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, *TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY* (2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/june2013councilmeeting/2013\\_open\\_session\\_e\\_report\\_prof\\_educ\\_continuum\\_committee.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf).

<sup>193</sup> Our insistence on client representation, reflective practice, supervision, and assessment is not new. See, e.g., Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 244 (1992) [hereinafter Laser, *Professional Competence*].

<sup>194</sup> Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 395–96 (2012) (advocating that each student progress through simulated practice, mentee, and first-chair roles).

may situate practice-related activities in substantive course contexts.<sup>195</sup> Each of these strategies can prove sound educationally and be an important segment of the required residency. But we insist that every “residency” include at least one clinical or externship course in which students have direct and primary responsibility for client representation under the close supervision of an attorney.<sup>196</sup>

In advocating for a requirement of live client representation and responsibility, we join those who understand client representation and responsibility as the best way to learn how to become an excellent lawyer, or even a minimally competent one.<sup>197</sup> “Learning the law . . . loses a key dimension when it fails to provide grounding in an understanding of legal practice from the inside.”<sup>198</sup> Direct client representation is similar to practice requirements in medicine,<sup>199</sup> veterinary medicine,<sup>200</sup> dentistry,<sup>201</sup> social work,<sup>202</sup> and many other professions. Direct, “first chair” legal representation

<sup>195</sup> Standard 304 describes simulation courses, law clinics, and field placements. See ABA STANDARDS 2018-19, *supra* note 52, at 17–18. For useful definitions of experiential education, clinics, externships, etc., see Alliance for Experiential Learning in Law, *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 17–23 (2015).

<sup>196</sup> See also Joy, *Uneasy History*, *supra* note 182, at 580 (urging law schools to “provide every law student with a real-life practice experience in which each student is able to assume the role of a lawyer”); Laser, *Professional Competence*, *supra* note 193, at 244 (“[L]aw students learn the art of lawyering best through reflective, live-client clinical education in a realistic setting under the close supervision of experienced clinical professors.”).

<sup>197</sup> See, e.g., STUCKEY, BEST PRACTICES, *supra* note 134, at 9, 12–13 (advocating mandatory clinic or externship); Joy, *Uneasy History*, *supra* note 182, at 580 n.169 (quoting Laser, *Professional Competence*, *supra* note 193, at 250 (1992) (“Only by being in the role of a lawyer in a clinic or a well-structured externship is a law student able to develop professional judgment by ‘applying legal doctrine, skills, and values in the real world of practice.’”); Robert R. Kuehn, *Universal Clinic Legal Education: Necessary and Feasible*, 53 WASH. U. J.L. & POL’Y 89 (2017) (advocating mandatory client representation).

<sup>198</sup> EDUCATING LAWYERS, *supra* note 113, at 8.

<sup>199</sup> Medical students spend two of the four years of medical school in clinical settings. COOKE ET AL., EDUCATING PHYSICIANS, *supra* note 179, at 21.

<sup>200</sup> Veterinary students must spend at least one of the four academic years of veterinary college in “hands-on clinical education.” COE Accreditation Policies and Procedures: Requirements, AM. VETERINARY MED. ASS’N (Sept. 2017), <https://www.avma.org/ProfessionalDevelopment/Education/Accreditation/Colleges/Pages/coe-pp-requirements-of-accredited-college.aspx>.

<sup>201</sup> “The comprehensive care experiences provided for patients by students should be adequate to ensure competency in all components of general dentistry practice.” COMM’N ON DENTAL ACCREDITATION, ACCREDITATION STANDARDS FOR DENTAL EDUCATION PROGRAMS 1, 30 (2018), <https://www.ada.org/~media/CODA/Files/pde.pdf>.

<sup>202</sup> “It is a basic precept of social work education that the two interrelated components of curriculum – classroom and field – are of equal importance within the curriculum.” COUNCIL ON SOC. WORK EDUC., EDUCATIONAL POLICY AND ACCREDITATION STANDARDS FOR BACCALAUREATE AND MASTER’S SOCIAL WORK PROGRAMS 1, 12 (2015), <https://www.cswe.org/getattachment/Accreditation/Standards-and-Policies/2015-EPAS/2015EPASandGlossary.pdf>.

during law school is possible under well-constructed student practice rules,<sup>203</sup> a logical first stage in attorney licensing. The unpredictability of actual client matters and the weight of assuming responsibility for clients' interests in the face of those uncertainties must be experienced to be understood. Public protection requires this learning to begin in the context of professional education, not after licensure.

### C. Attorney Supervision

The key distinction between client representation under a student practice rule compared to licensure as an attorney is that the student lawyer is actively supervised by an attorney, whether a law professor, field supervisor, or both. Standards and pedagogies for such supervision are well-developed.<sup>204</sup> In essence, the attorney supervisor ensures that the representation provided by the law student meets or exceeds the level of professional competency owed to the client.<sup>205</sup> Supervision involves training and coaching related to steps throughout the representation, including interviews, phone calls, investigations, drafting, negotiations, and court appearances. The student lawyer and the supervising attorney both sign court documents, and both are present when the student attorney appears in court. But the oral argument, under the first-chair model, is made by the student under the watchful eye of a supervising attorney ready to intervene if necessary. The student attorney should take the lead in each step along the way.

### D. Academic Structure

Learning from experience is central to the importance of the residency. But undertaking initial client representations in the context of a structured, purposeful academic setting expands the professional learning far beyond

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<sup>203</sup> For an extensive description of the history of student practice rules and a detailed discussion of 2014 changes made to the District of Columbia student practice rule, see Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207 (2015).

<sup>204</sup> See, e.g., Ann Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework* [hereinafter Shalleck & Aiken, *Conceptual Framework*], in BRYANT ET AL., CLINICAL PEDAGOGY, *supra* note 178, at 169; Jane H. Aiken & Ann Shalleck, *The Practice of Supervision*, in BRYANT ET AL., CLINICAL PEDAGOGY, *supra* note 178, at 205.

<sup>205</sup> See Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 815–16 (2004).

simply having had the experience.<sup>206</sup> Three features of the residency's academic context are especially important: (1) identification of learning goals, (2) purposeful inculcation of habits of reflective practice and self-regulation, and (3) assessment of competencies learned.

### 1. Learning Outcomes

Aligned with the practice of many law professors teaching in clinical<sup>207</sup> and externship<sup>208</sup> programs, ABA accreditation standards now require learning goals to be identified for every law school clinic and field placement or externship program, as for the entire academic program.<sup>209</sup> In this way accreditation of law schools is becoming more aligned with other accreditors who have recognized identification of learning goals and assessment of learning outcomes as fundamental to sound education.<sup>210</sup> Many law professors have preached the same message.<sup>211</sup> Learning goals for clinics and field placements or externships would typically include increased doctrinal knowledge in the area being practiced; new or increased competency on a number of lawyering skill; and, importantly, attainment of attributes consistent with growing into a professional identity, or professional formation, including first-hand experience resolving ethical challenges. Professor Neil Hamilton has described the need for clear learning goals related to professional identity: "Without clear educational objectives or learning outcomes in terms of the elements of professional formation, 'professional education tends to emphasize the minimum floor of

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206 "What a resident learns in the course of her residency education is not the result of random patient experiences. It is purposeful and developmental and reflects—or should reflect—a careful structuring, sequencing, and progression of roles, activities, and responsibilities to support learning." COOKE ET AL., *EDUCATING PHYSICIANS*, *supra* note 179, at 126.

207 For a thoughtful delineation of multiple aspects of fundamental goals for learning in clinics, including, for example, improving capacities to manage uncertainty, see Susan Bryant, Elliott S. Milstein & Ann Shalleck, *Learning Goals for Clinical Programs*, in BRYANT ET AL., *CLINICAL PEDAGOGY*, *supra* note 178, at 13; *see also* Lisa Radtke Bliss & Donald C. Peters, *Delivering Effective Education in In-House Clinics*, in MARANVILLE ET AL., *BUILDING*, *supra* note 51, at 188–215.

208 Effective externship programs articulate and assess learning goals. *See generally* Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 *CLINICAL L. REV.* 467 (2014); Carolyn Wilkes Kaas with Cynthia Batt, Dena Bauman, & Daniel Schaffzin, *Delivering Effective Education in Externship Programs*, in MARANVILLE ET AL., *BUILDING*, *supra* note 51, at 224–230.

209 Standard 301(b), ABA STANDARDS 2018-19, *supra* note 52, at 15; Standard 302, *id.* at 16.

210 For an account of recent ABA Standards changes framed within accreditation more broadly, *see* Wegner, *Accreditation*, *supra* note 51, at 412–16.

211 "Educators should identify the foundational concepts needed to understand more advanced concepts and ensure that students have an opportunity to master them." Deborah Maranville, *Transfer of Learning*, in MARANVILLE ET AL., *BUILDING*, *supra* note 51, at 90, 92 (citing JOHN D. BRANSFORD, ET AL., *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL* (2000)).

competence, compliance with legal duties and avoidance of malpractice exposure.”<sup>212</sup>

## 2. Reflective Practice & Self-Regulation

Instilling habits of reflection is a long-standing goal of clinical<sup>213</sup> and externship<sup>214</sup> pedagogy and a hallmark of professional identity formation more generally.<sup>215</sup> “Deliberate reflection provides the new professional with a process to develop professional judgment.”<sup>216</sup> Simply having professional experience and even learning from one’s mistakes is not reflective practice. Reflection without structure may be superficial.<sup>217</sup> The goal, rather, is to instill habits of critical reflection to promote a lifetime of self-knowledge and continuous learning.<sup>218</sup>

## 3. Assessment of Learning

At a basic level, the requirement of *successful* completion of a residency assumes that the law student’s performance in the residency will be assessed. But careful assessment of the resident’s performance means much more than a concluding grade.<sup>219</sup> The residency should be framed by learning outcomes

<sup>212</sup> Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation’s Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763, 769 (2011) (quoting Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 476 (2008)).

<sup>213</sup> See, e.g., Susan Bryant, Elliott S. Milstein, & Ann C. Shalleck, *Learning Goals for Clinical Programs*, in BRYANT ET AL., CLINICAL PEDAGOGY, *supra* note 178, at 34–35.

<sup>214</sup> See Kaas et al., *supra* note 208, at 219.

<sup>215</sup> See, e.g., STUCKEY, BEST PRACTICES, *supra* note 134, at 66–67; Larry O. Natt Gantt, II & Benjamin V. Madison III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, in MARANVILLE ET AL., BUILDING, *supra* note 51, at 260–68; Donald A. Schon, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995) (discussing uncertainty and need for reflection on reflection); Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. D.C.L. L. REV. 447; Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 326–27 (2014) [hereinafter Casey, *Reflective Practice*]. Much of the work on reflective practice in legal education builds on DONALD C. SCHON, EDUCATING THE REFLECTIVE PRACTITIONER, TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS (1987) and DONALD C. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN PRACTICE (1983).

<sup>216</sup> Casey, *Reflective Practice*, *supra* note 215, at 319. “Professionals who engage in reflective practice make a conscious decision to integrate reflection into their practice. For them, the process of engaging in conscious and deliberate reflection becomes integrated into the practice.” *Id.* at 319 n.10.

<sup>217</sup> See *id.* at 320 n.13.

<sup>218</sup> See EDUCATING LAWYERS, *supra* note 113, at 145.

<sup>219</sup> On assessment in law schools, see STUCKEY, BEST PRACTICES, *supra* note 134, at 235–63; Barbara Glesner Fines, *An Institutional Culture of Assessment for Student Learning*, in MARANVILLE ET AL., BUILDING, *supra* note 51, at 415–21.

identified at the outset and assessment of the law student's achievements and deficits in demonstrating those identified competencies throughout and at the end of the residency.<sup>220</sup> Thoughtful assessment of student performance is a necessary aspect of effective experiential education; law professors have developed expertise in assessment methods and strategies in clinics<sup>221</sup> and field placements or externships.<sup>222</sup> Indeed, assessment of learning goals, generally including formative and summative efforts, is now required in credit-bearing clinical and externship programs in ABA accredited law schools.<sup>223</sup> Assessment should be part of the residency's formal structure and continuous throughout the residency, creating context and support for the ultimate judgment of successful (or unsuccessful) completion of the entire residency.

### E. Residency Credits and Timing

Although more ambitious experiential credit requirements have been proposed<sup>224</sup> and are well-established in some law schools,<sup>225</sup> we suggest that the required residency include fifteen academic credits, of which at least six must be in a clinic or externship with direct client representation.<sup>226</sup> Fifteen credits are the course load of a typical semester. The State Bar of California's Task Force on Admissions Regulation Reform recommended that California require fifteen credits of experiential learning prior to licensure.<sup>227</sup> The

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220 Cf., COOKE ET AL., EDUCATING PHYSICIANS, *supra* note 179, at 117 (discussing how the assessment of residencies has recently changed to competency assessment).

221 See, e.g., STUCKEY, BEST PRACTICES, *supra* note 134, at 235 nn.680–791; Bliss & Peters, *supra* note 207, at 204–07; Shalleck & Aiken, *supra* note 204, at 198–201.

222 See generally Kaas et al., *supra* note 208, at 224–30; Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 CLINICAL L. REV. 467 (2014).

223 See Standard 314, ABA STANDARDS 2018–19, *supra* note 52, at 23.

224 E.g., Tokarz et al., *Crossroads*, *supra* note 183, at 15 (proposing a requirement of 21 credits of experiential learning including at least five in a clinic or externship).

225 The Washington and Lee University School of Law requires 18 upper level experiential credits, some of which must include client representation. See *Experiential Education at W&L Law*, WASH. & LEE UNIV. SCH. LAW, <https://law.wlu.edu/academics/experiential-education> (last visited Oct. 6, 2018). The University of the District of Columbia School of Law requires 14 credits of clinics alone. See *Curriculum: Full-time J.D. Program*, UNIV. D.C. SCH. LAW, <https://www.law.udc.edu/page/FullTimeCurriculum> (last visited Oct. 6, 2018). CUNY Law School has required all students to take 16 to 20 experiential credits, with a minimum of 12 credits in clinics. See *Academic Planning*, CUNY SCH. LAW, <http://www.law.cuny.edu/academics/planning.html> (last visited Oct. 6, 2018).

226 Karen Tokarz, *A Three-Year Curriculum That Engages Law Students and Prepares Them for Practice*, in MARANVILLE ET AL., BUILDING, *supra* note 51, at 59, 61.

227 Calif. TFARR Phase I Report, *supra* note 191, at 15; STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REG. REFORM PHASE II FINAL REP. (2014),

Council for the ABA Section on Legal Education sought comment in 2013 on an “alternate proposal” to make fifteen credits of experiential education an accreditation requirement.<sup>228</sup> The Clinical Legal Education Association (CLEA) endorsed that fifteen-credit accreditation proposal<sup>229</sup> and the fifteen credit California Task Force proposal.<sup>230</sup> Although neither the California nor the ABA proposal for fifteen experiential credits has been adopted, the New York Court of Appeals established fifteen credits of “practice-based experiential coursework designed to foster the development of professional competencies” as one way a candidate can establish compliance with the skills competencies required for admission to the New York bar.<sup>231</sup>

The requirement of at least six credits in a clinic or externship with direct client representation ensures that the candidate for licensing has spent the equivalent of two standard three-credit courses representing clients. The educational value of facing a number and variety of practice challenges when representing clients under faculty supervision is crucial. Client representation in a clinic or externship of at least six credits provides opportunities for growth and time to inculcate habits of reflection and deeper professional identity than would be possible with fewer credits.

The timing of the components of the residency should be flexible, as long as they are completed before licensing is sought. Law schools could choose to create intensive, immersive one-semester residencies or, alternatively, sequence the elements of the residency over multiple semesters. Under the limited license model we propose,<sup>232</sup> the residency credits, including the direct client representation, could be taken entirely in the fourth semester, the last academic semester before limited licensure. Or some of the

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[http://www.calbar.ca.gov/Portals/0/documents/bog/bot\\_ExecDir/2014\\_TFARRPhaseIIFinalReport\\_092514.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_TFARRPhaseIIFinalReport_092514.pdf).

<sup>228</sup> A more limited six-credit requirement was ultimately adopted. *See* ABA STANDARDS 2018-19, *supra* note 52, at 16.

<sup>229</sup> CLINICAL LEGAL EDUC. ASS’N, COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS OF EXPERIENTIAL COURSES I (2013), <http://www.cleaweb.org/Resources/Documents/2014-01-14%20CLEA%20Chapter%203%20comment.pdf>.

<sup>230</sup> CLINICAL LEGAL EDUC. ASS’N, COMMENT OF THE CLINICAL LEGAL EDUCATION ASSOCIATION ON THE PHASE II IMPLEMENTING RECOMMENDATIONS OF THE CALIFORNIA TASK FORCE ON ADMISSIONS REGULATION 1 (2014), <http://www.cleaweb.org/Resources/Documents/9-10-14%20CLEA%20comment%20to%20CA%20Task%20Force%20FINAL.pdf>.

<sup>231</sup> NEW YORK RULES OF THE COURT OF APPEALS FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW § 520.18(a)(2), N.Y. COURT APPEALS, <https://www.nycourts.gov/ctapps/520rules10.htm> (last visited Feb. 28, 2019).

<sup>232</sup> *See infra* Part IV.

residency credits could be earned in earlier semesters, providing a foundation for the more advanced client representation portion of the residency.<sup>233</sup>

The University of New Hampshire's Daniel Webster Scholar Program<sup>234</sup> shows how a residency prior to full licensing could be spread over four semesters and how a residency can be integrated with licensing. Webster Scholars pursue a highly structured and extensive program of experiential courses in which sophisticated assessment is pervasive, even including assessment by bar examiners of samples from portfolios of students' work. Successful completion of the program qualifies students for licensing in New Hampshire without sitting for the traditional bar exam. Researchers concluded that students in the Webster Scholar Program out-performed attorneys with two years of experience who had been licensed after taking the bar exam.<sup>235</sup> This ambitious collaboration in New Hampshire between legal educators, bar examiners, and the Supreme Court has elevated the effectiveness of novice attorneys by improving both legal education and attorney licensing.

The fact that New Hampshire is a small state with a single law school helps to explain why it was the first jurisdiction to have integrated a law school residency program with licensure. The residency portion of our proposal builds on the success of the Webster program, while the additional components we propose—a post-1L test, limited licenses after two years, and more ambitious testing for full licensure—is a restructured system within which every jurisdiction could require a residency before licensure.

#### IV. LIMITED LICENSURE

Return to the metaphor used at the opening of this Article. Consider the sounds of chimes ringing or of marching footfalls pounding. Do our licensing structures foster complex, changing harmonies? Or do our structures enable hierarchical directives requiring the kind of lock-step compliance that can bring bridges tumbling down.

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<sup>233</sup> CUNY requires students to complete three simulation experiential courses prior to enrolling in a clinic. See *Academic Planning*, CUNY SCH. LAW, <http://www.law.cuny.edu/academics/planning.html> (last visited Oct. 6, 2018).

<sup>234</sup> See *Daniel Webster Scholar Program (DWS)*, UNIV. N.H. SCH. LAW, <https://law.unh.edu/academics/experiential-education/daniel-webster-scholar-program-dws> (last visited Oct. 7, 2018).

<sup>235</sup> See Alli Gerkman & Elena Harman, *AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS* 1, 18 (2015), [https://iaals.du.edu/sites/default/files/documents/publications/ahead\\_of\\_the\\_curve\\_turning\\_law\\_students\\_into\\_lawyers.pdf](https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf).



### A. Introduction: Prior Claims, Targeted Responses

Some have suggested that law school education should be reformed by shortening its curriculum to only two years of formal instruction (that is, shortening the number of required credits by 1/3, rather than simply compacting three years of instruction into two calendar years by requiring summer programs).<sup>236</sup> Others have responded that, with the increasing complexity of practice and the need for more practical skills instruction, such an approach would ill-serve the public.<sup>237</sup> But the duration of legal education cannot be decided in isolation from licensing. Most jurisdictions require candidates for admission to have graduated from an ABA accredited law

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<sup>236</sup> HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 80 (1972) (“[E]ither diversify the three years [of law school] so that the student acquires the rudiments of an understanding not merely of what has hereto been understood as “the law” but of the interrelations of social knowledge with the law or (b) reduce the minimum time-serving requirement to two years with a resulting emphasis on doctrinal analysis.”); see also Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility after Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599, 607 (2012) (arguing that students should have the option to take bar examination after two years, thereby creating market pressures for law schools to improve their third year offerings); Daniel Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES (Jan. 17, 2013), <https://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html> (discussing a proposal for New York to allow students to take bar examination after two years of study). President Obama, a former law professor at the University of Chicago, echoed these sentiments. See Peter Lattaman, *Obama Says Law School Should be Two, Not Three Years*, N.Y. TIMES (Aug. 23, 2013), <https://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/>. Some schools have developed options for students to graduate after two years if they attend year-round, but such systems have not been particularly successful. See Elizabeth Olson, *The 2-Year Law Education Falls Flat*, N.Y. TIMES (Dec. 25, 2015), <https://www.nytimes.com/2015/12/26/business/dealbook/the-2-year-law-education-fails-to-take-off.html>.

<sup>237</sup> The *Carnegie Report* called for more intensive, integrated instruction in practical skills. See EDUCATING LAWYERS, *supra* note 113, at 82–125. For evidence of the increasingly complex curriculum, see A.B.A. SECTION LEGAL EDUC. ADMIN., A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010 1, 15–16 (Catherine L. Carpenter ed., 2010). For an argument that two-year programs would undercut essential interdisciplinary instruction, see Martha C. Nussbaum & Charles Wolf, *Two-Year Degree Improves Legal Education: Nussbaum and Wolf*, BLOOMBERG NEWS (June 16, 2013), <https://www.bloomberglaw.com/product/blaw/document/MOC67J0UQVI9?bc=W1siU2VhcmNoIFJlc3VsdmHMlClvcHJvZHVjdC9ibGF3L3NIYXJjaC9yZXN1bHRzLzlwOWZlZjY5OTA4ZDA0ZThkMzllMTA4NTYzYjIxOWVmlld-f9ed5b83efc5bbb96d63bed3e6ae8902ce389684&headlineOnly=false&highlight=%26quot%3BTwo-Year+Degree+Improves+Legal+Education%3A+Nussbaum+and+Wolf%26quot%3B>.

school,<sup>238</sup> and ABA accreditation standards require credit hours suitable for three years of full-time study.<sup>239</sup>

A common justification for the three-year JD requirement to sit for the bar is that state law licenses in the United States are general law licenses that do not limit the areas of practice and do not distinguish between litigators and office-lawyers.<sup>240</sup> The American system accordingly does not embody the differential training and licensure found in England and Wales, where distinctive practices are employed for licensure of litigators (barristers), office lawyers (solicitors), and notaries.<sup>241</sup> General licensure in the U.S. is said to require that all lawyers receive a comprehensive education (over three years) and that the comprehensive bar examination after three years of law school should assess competence to perform in any and all substantive areas of practice permitted an attorney. We question these assumptions.

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<sup>238</sup> For information on state bar admission requirements, see NCBE & ABA COMPREHENSIVE GUIDE, *supra* note 7, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2018\\_ncbe\\_comp\\_guide.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2018_ncbe_comp_guide.authcheckdam.pdf). Some states do not require candidates to have graduated from ABA accredited law schools in order to sit for the bar examination. *See id.* at 8–9. A handful of states continue to allow candidates for admission to engage in law-office study for at least part of their education. *See id.* (including California, Maine, New York, Vermont, Virginia, and West Virginia). Some states allow at least some students under some circumstances to sit for the bar before graduation, albeit that they require graduation for ultimate licensure. *See id.* at 1 (including Arizona, Indiana, Iowa, Louisiana, Mississippi, Missouri, New York, North Carolina, Oregon, Texas, Vermont, Virginia, West Virginia, and Wisconsin). In some instances, these rules simply address circumstances in which students are summer graduates.

<sup>239</sup> *See* Standard 311, ABA STANDARDS 2018-19, *supra* note 52, at 21 (requiring at least 83 credit hours for graduation); Standard 310, *id.* (requiring minimum hours per credit).

<sup>240</sup> NCBE President Judy Gundersen made this important point during her presentation at the FIU Law Summit on Legal Education on April 13, 2018.

<sup>241</sup> Barristers (litigators) must have membership in one of the Inns of Court in London and complete a “pupillage” as a means of receiving intensive mentoring and education over the years. *See generally* THE BAR COUNCIL, <https://www.barcouncil.org.uk/> (last visited Sept. 3, 2018). For information on “qualifying as a barrister,” see *Qualifying as a Barrister*, B. STANDARDS BD., <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/> (last visited Sept. 3, 2018). Solicitors (office lawyers) are regulated by the Law Society and must pass a theoretical examination as well as complete a program of “articling.” *See Becoming a Solicitor*, L. SOC’Y, <https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/> (last visited Sept. 3, 2018). For a recent report on changing practices relating to licensure of solicitors in England and Wales, see Julie Brannan, *Training for Tomorrow: The Reform of Education and Training Requirements for English and Welsh Solicitors*, 86 THE BAR EXAMINER 17 (Winter 2017-18) [hereinafter *Training for Tomorrow*]. Notaries authenticate documents and transactions. *See The Notarial Profession*, THE NOTARIES SOC’Y, <https://www.thenotariessociety.org.uk/pages/the-notarial-profession> (last visited Sept. 3, 2018).

*B. Preliminary Questions about General Licensure and  
Specialization: What Comes First?*

Typically, state bars allow those possessing a general license to apply for specialist certification approximately five years after initial admission.<sup>242</sup> Certification for a specialist designation generally requires a rigorous assessment of advanced competence, including significant practice hours in areas of specialization, peer assessments, completion of extensive continuing legal education requirements, and success on a specialized advanced examination.<sup>243</sup> Thus, in the current paradigm, specialization can only be achieved and recognized following general licensure and intensive experience thereafter.

Is ordering general licensure first and specialization later an inevitable and uncontested sequence? Scholars of expertise who have investigated wide ranging skilled populations such as tailors and midwives suggest more than one way to order specialization and general practice. Lave and Wenger found that traditional experts prepare neophytes to follow in their footsteps by initially allowing them to be “legitimate” peripheral participants who are accepted as learners in a community of practice, gain an overview of practices, and then gradually gain in-depth expertise.<sup>244</sup> So, for example, apprentice tailors receive a broad orientation to sewing a large garment but then concentrate in detail on particular aspects (buttonholes, tailoring).<sup>245</sup> Based on this evidence of the development of expertise, should law students initially be prepared in depth to work in an area of specialization, and only later expand their training to provide them with a wider range of preparation for practice across a range of doctrinal fields?<sup>246</sup>

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<sup>242</sup> For a summary of state certification options, see *Sources of Certification*, A.B.A. CTR. FOR PROF'L RESP., (Mar. 2, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standing-committee-on-specialization/resources/resources\\_for\\_lawyers/source\\_of\\_certification/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standing-committee-on-specialization/resources/resources_for_lawyers/source_of_certification/)

<sup>243</sup> See AM. BAR ASS'N, ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS (2014), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_standards\\_for\\_accreditation.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_standards_for_accreditation.authcheckdam.pdf).

<sup>244</sup> See generally JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991). Their studies focused on Yucatec Mayan midwives, tailors in Liberia, United States Navy quartermasters, butchers in American supermarkets, and nondrinking alcoholics involved with Alcoholics Anonymous. See *id.* at 65.

<sup>245</sup> See *id.* at 71–72 (discussing tailors).

<sup>246</sup> As a corollary inquiry, it may be reasonable to ask whether bar examinations should try to assess more in-depth expertise of applicants for admission in particular substantive contexts, particularly given the increasingly specialized nature of legal practice in the United States. See, e.g., Alan James Kluegel, *The Firm as a Nexus of Organizational Theories: Sociological Perspectives on the Modern Law Firm*, 12 ANN. REV. L. & SOC. SCI. 459 (2016) (discussing specialization).

*C. The Role of Society's Needs in Developing Legal Licensing Systems*

The legal profession's approach to licensure often seems divorced from considerations relating to society's needs. For example, California's recent debates about bar admission standards turned in part on the opinions of many licensed lawyers who believed that licensing tests should continue to use the same standards that they believed they had faced.<sup>247</sup> Similarly, many debates about limited licenses focus on the perceived interests of lawyers more than of the public.

A growing number of states have attempted to grapple with recommendations to license "super paralegals" who might be able to address areas in which there is a substantial justice gap as a result of too few lawyers who are able and willing to address public needs in such areas as family law, landlord-tenant law, veterans' rights, immigration rights, and debtor-creditor disputes.<sup>248</sup>

Washington State has been a leader in the movement to license "limited legal technicians," and has focused on the need for skilled super-paralegals with expertise in family law.<sup>249</sup> The Washington State system assumes that those seeking limited licensure do not have experience in law school. Candidates must instead complete focused coursework related to family law, complete the equivalent of significant supervised practice, and pass a

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<sup>247</sup> For information on California bar passage studies generally, see STATE BAR OF CAL., FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STUDIES (2017), <https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf>. For information on a survey of California lawyers opposing changes in California cut scores, see STATE BAR OF CAL., REPORT TO THE ADMISSIONS AND EDUCATION COMMITTEE AND THE COMMITTEE OF BAR EXAMINERS REGARDING PUBLIC COMMENTS ON THE STANDARD SETTING STUDY (2017), <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001998.pdf>.

<sup>248</sup> For a recent study of the "justice gap" by the Legal Services Corporation, see LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

For an exemplary analysis of how "super paraprofessionals" might address the justice gap, consider the report of the Oregon Task Force on the Future of the Legal Profession, OR. STATE BAR, FUTURES TASK FORCE: REPORTS AND RECOMMENDATIONS OF THE REGULATORY COMMITTEE AND INNOVATIONS COMMITTEE (June 2017), [https://www.osbar.org/\\_docs/resources/taskforces/futures/FuturesTF\\_Reports.pdf](https://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf). A recent article summarizes some of these differing strategies. See *Limited Practice Legal Professionals: A Look at Three Models*, 87 THE BAR EXAMINER, at 16 (Winter 2018-19) (considering approaches adopted in Utah, Washington, and Arizona).

<sup>249</sup> See *Limited License Legal Technician*, WASH. ST. BAR ASS'N, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians> (last visited Dec. 19, 2018).

licensing examination.<sup>250</sup> Very few candidates have been licensed to date, in large part because of this challenging licensing regime.<sup>251</sup> Although the courts have supported development of this career path as a means of addressing the justice gap, practicing lawyers have tended to resist competition with those securing licensure through this system.<sup>252</sup>

Numerous other states have developed alternative pathways to provide legal services to those in need, even if providers are not fully licensed lawyers.<sup>253</sup> Consider the following innovations:

- Arizona allows “document preparers.”<sup>254</sup>
- California allows “courthouse facilitators”<sup>255</sup> and document preparers.<sup>256</sup>
- New York City allows limited license technicians to assist unrepresented litigants in landlord-tenant and consumer-debt cases. Those engaging in such undertakings are called “court navigators.”<sup>257</sup>

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<sup>250</sup> See *Become a Legal Technician*, WASH. ST. B. ASS'N, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians/become-a-legal-technician> (last visited Dec. 19, 2018) (describing licensure requirements).

<sup>251</sup> See AM. BAR FOUND., PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 6–7 (Mar. 2017), [http://www.americanbarfoundation.org/uploads/cms/documents/preliminary\\_evaluation\\_of\\_the\\_washington\\_state\\_limited\\_license\\_legal\\_technician\\_program\\_032117.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf) (evaluating the Washington state system as considered by the American Bar Association); see also Mary Juetten, *Legal Technicians Belong in Courtrooms*, A.B.A. J.: ACCESS TO JUST. (Apr. 13, 2018, 7:00 AM), [http://www.abajournal.com/news/article/legal\\_technicians\\_belong\\_in\\_court](http://www.abajournal.com/news/article/legal_technicians_belong_in_court) (reporting that only 30 limited license legal technicians have been authorized to practice in Washington State).

<sup>252</sup> See Mary Juetten, *The Path Forward for the Legal Technician Model*, A.B.A. J.: ACCESS TO JUST. (May 11, 2018, 8:30 AM), [http://www.abajournal.com/news/article/the\\_path\\_forward\\_for\\_the\\_legal\\_technician\\_model/](http://www.abajournal.com/news/article/the_path_forward_for_the_legal_technician_model/).

<sup>253</sup> Practices across the United States have been documented by the recent ABA Commission on the Future of Legal Services. See A.B.A. COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICES PROVIDERS 1, 3–8 (2015), [https://www.americanbar.org/content/dam/aba/images/office\\_president/delivery\\_of\\_legal\\_services\\_completed\\_evaluation.pdf](https://www.americanbar.org/content/dam/aba/images/office_president/delivery_of_legal_services_completed_evaluation.pdf). The recent Oregon State Bar Futures Task Force Report recommends action on paraprofessional licensing and provides an updated description of developments in Arizona, California, Colorado, Nevada, New York, Utah, Washington, and Ontario, Canada. See OR. STATE BAR, FUTURES TASK FORCE, PARAPROFESSIONAL WORKGROUP REPORT AND RECOMMENDATIONS 4, 9–15 (2017) [hereinafter OR. ST. B., FUTURES TASK FORCE], [http://www.osbar.org/\\_docs/resources/taskforces/futures/FuturesTF\\_Reports.pdf](http://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Reports.pdf).

<sup>254</sup> OR. ST. BAR, FUTURES TASK FORCE, *supra* note 253, at 8–9.

<sup>255</sup> ABA COMM'N ON THE FUTURE OF LEGAL SERVS., *supra* note 253, at 5–6.

<sup>256</sup> *Id.* at 7 (California and Nevada also allow such activities).

<sup>257</sup> See REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS 3–5 (2016), [http://www.americanbarfoundation.org/uploads/cms/documents/new\\_york\\_city\\_court\\_navigators\\_executive\\_summary\\_final\\_with\\_final\\_links\\_december\\_2016.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_executive_summary_final_with_final_links_december_2016.pdf) (evaluating this program).

- A recent Oregon Task Force suggested limited licensure to address high-need areas including landlord-tenant and debtor-creditor needs.<sup>258</sup>
- The Utah Supreme Court has authorized Licensed Paralegal Practitioners to undertake some lawyering functions related to family law, forcible entry and detainer, and debt collection.<sup>259</sup>

These jurisdictions have created separate tracks for education and licensure of non-lawyers, rather than exploring ways in which law students in the pipeline to practice might be able to serve such compelling public needs.

*D. A Way Forward: Limited License for High Need Practice Areas After Two Years in Focused J.D. Curriculum*

We believe that grappling successfully with the justice gap requires engaging more critically with assumptions underlying the current bar licensure system. In our view, the current regime of an uninterrupted three-year legal education, associated substantial debt, blunting of student aspirations to meet compelling public needs, and post-JD bar exam requirements contribute significantly to the access to justice emergency.

We propose a fresh approach that would turn traditional assumptions about general and specialized training and licensure on their head. In our view, it would be possible to identify highly-motivated, highly-able students who wish to devote initial years in practice to addressing the justice gap, and to train and empower them to do so, while reducing their debt loads and ensuring their future opportunities.

In particular, we recommend creating a multi-faceted framework that would facilitate avenues for law students to engage with the justice gap in high-need areas during their initial years in practice. In many ways, our approach would track the approach taken by Teach for America, a preeminent approach to preparing highly-talented graduates of exceptionally strong

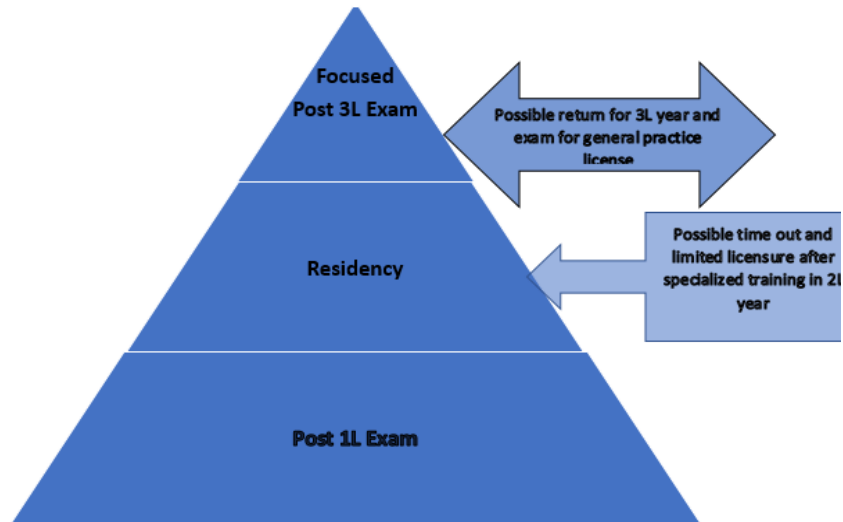
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<sup>258</sup> OR. STATE BAR FUTURES TASK FORCE, EXECUTIVE SUMMARY 3, 7 (2017), [http://www.osbar.org/\\_docs/resources/2017FuturesTFSummary/offline/download.pdf](http://www.osbar.org/_docs/resources/2017FuturesTFSummary/offline/download.pdf).

<sup>259</sup> See UT Special Practice Rule 14-802 (as amended Nov. 1, 2018); Bob Ambrogio, *Utah Nears Licensing of Paralegals to Practice Law in Limited Circumstances*, <https://www.lawsitesblog.com/2018/08/utah-nears-licensing-paralegals-practice-law-limited-circumstances.html> (last visited Jan. 24, 2019). This initiative was taken in response to a 2015 report from Utah's Limited Legal Licensing Task Force, which examined practices in other states including Arizona, California, Colorado, Florida, Louisiana, Nevada, Oregon and Washington. See UTAH STATE COURTS, SUPREME COURT TASK FORCE TO EXAMINE LTD. LEGAL LICENSING, REPORT AND RECOMMENDATIONS 50–55 (2015), [http://www.utcourts.gov/committees/limited\\_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf](http://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf).

undergraduate programs to devote two or more years of service to high-need schools, while also gaining advanced educational degrees.<sup>260</sup> We offer the following diagram about how such a system might work.

Rethinking Licensure: Progression



### 1. Initial Qualification

Candidates for a limited license would need to demonstrate strong achievement on a post-1L bar examination by demonstrating initial competence in understanding first-year doctrine, demonstrating reasoning and analysis, and documenting performance skills in legal writing and research.<sup>261</sup> That approach would assure that these students are ready to move forward with advanced training and would be able to build on a solid foundation in meeting future client demands. It would also provide an incentive for first-year law students to achieve at the highest level possible in order to qualify for a limited license following a second year of education.

<sup>260</sup> See generally TEACH FOR AMERICA, <https://www.teachforamerica.org> (last visited May 11, 2018).

<sup>261</sup> See *supra* text accompanying notes 112–177 (proposing such a post-1L test).

## 2. Second Year Preparation

Candidates for a limited license would then enroll in a second year of law school that would provide targeted study of subjects relevant to their anticipated areas of limited specialized practice. They would also be expected to complete the equivalent of a semester's focused residency (under the supervision of experienced law faculty or practitioners) in their area of anticipated practice.

## 3. Specialized Practice Assessment

Those seeking a limited license would, at the end of their second year of law school, be subject to a specialized assessment of their knowledge and skills, potentially including a targeted licensing examination and careful review of evaluations by supervisors who can assess candidates' capacity to practice.

## 4. Financial Support for Those Serving High-Need Populations

Those serving high-need populations should be supported in their efforts. Ideally, states, bar associations, and other nonprofit organizations should create programs designed to subsidize payment of student-loan debt for those who are prepared to take on substantial commitments of public service to meet high-priority public needs following two years of law school.<sup>262</sup> There may be ways to create partnerships between students who take on such responsibilities and other practice groups (such as nonprofit or legal aid organizations) who could assist in this process. Ideally, sound partnerships with nonprofits and legislation of new models should help law students prepared to embark on an early trajectory toward public service to limit and control the consequences of their educational debt.<sup>263</sup> If student debt

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<sup>262</sup> The American Bar Association has a helpful website that compiles information on federal and state programs, among others. See *Loan Repayment Programs*, A.B.A., [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/loan\\_repayment\\_assistance\\_programs/](https://www.americanbar.org/groups/legal_aid_indigent_defendants/loan_repayment_assistance_programs/) (last visited Sept. 15, 2018).

<sup>263</sup> See generally Raymond H. Brescia, *When Interests Converge: An Access-to-Justice Mission for Law Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 205 (2017) (discussing role of law schools in supporting public interest work). For information on existing federal debt relief policies that affect those undertaking public service careers, see *Policy Proposal: Public Service Loan Forgiveness*, ACCESSLEX, <https://www.accesslex.org/policy-proposal-public-service-loan-forgiveness> (last visited Sept. 14, 2018). For discussion of income-driven loan repayment policies, see John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287 (2018) (discussing challenges of income-driven loan repayment policies).



can be controlled, perhaps costs of professional services to those of limited means can be too.

### 5. Subsequent Options

Our proposal recognizes models embedded in other forms of post-baccalaureate education. Ph.D. programs typically provide enrolled students with an option to complete comprehensive examinations and then opt for a master's degree, rather than pursuing a full-scale Ph.D.<sup>264</sup> Students who choose to opt into this form of significant service following their second year of legal education should not be penalized. Instead, they should be empowered to enroll subsequently in their original law school, as a visitor in a law school near their area of service, or online in order to complete their full course of study and achieve a J.D. degree.<sup>265</sup> Students embarking on a limited license should not have to compromise and fail to achieve a full three-year law degree and a general law license based on passing a traditional full-scale bar examination. Instead, a sophisticated law licensing system should create incentives to develop the expertise of junior lawyers, encourage them to meet pressing public needs, and allow them to move forward in their professional careers without penalty.

### *E. Conclusion*

This Part has demonstrated the importance of considering a limited license system that would allow law students who show strong promise to receive a limited license following their second year of law school, thereby allowing them immediately to serve client needs while working to pay off earlier debt. Under this schema, talented law students who do well on the overall assessment embodied in an initial post-1L exam, complete a focused second-year curriculum targeting doctrinal and clinical programs to prepare them to serve clients in an area of high need, and fulfill specialized licensing requirements could practice in a field of specialty after their second year. They could simultaneously or in subsequent years complete the requirements to receive a traditional three-year JD degree and sit for the bar examination in order to secure a general license. This approach would accomplish a

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<sup>264</sup> Similarly, Michigan State University College of Law and Cleveland State University College of Law offer masters degrees to students who successfully complete the first year of the J.D. program. *See supra* note 146.

<sup>265</sup> Three-year degrees would be possible for those undertaking a limited licensure trajectory because they would qualify as "visitors" who could complete their last year of law school at another law school and transfer their credits back to their home school. *See* STANDARD 505 (ABA STANDARDS 2018-19), *supra* note 52, at 34 (permitting credits taken at other law school).

number of objectives: (a) it would create incentives for law students to do well in their first year of study; (b) it would allow them to engage in targeted study during their second year; (c) it would make it possible for them to begin to address the needs of clients in high-need contexts without having such substantial debt; (d) it would let them decrease their debt during a period of public service to address significant areas of need by clients of limited means; and (e) it would allow them to complete a full three-year law degree and receive a general law license following a period of specialized service to those facing significant gaps in access to justice.

The proposed strategy differs from other options being proposed in states concerned by problems with access to justice. It provides for highly competent legal practitioners who are specifically prepared to address substantial needs of clients who could not otherwise afford lawyers. It pushes back against lawyers' claims that paraprofessionals are not well equipped to provide such services.

This model would help practitioners willing to take on low-cost client representation in areas of high need by providing them with highly skilled associates with limited licenses. It encourages practitioners to mentor and support the limited license lawyers taking on these significant commitments to assist those who otherwise lack legal representation. The model would also invigorate law schools by including mature students with practice experience in upper level classes.

This strategy is quite different from the approaches recommended by Packer and Ehrlich in 1972, and others since, to simply force students to compress their studies into two years of law school to reduce their debt loads. Instead, it seeks to create incentives for talented law students to up their game and assist clients in areas of high need, to gain experience, and to buy down some of their law school debt, before they in time return to gain a three-year J.D. and take the full post-3L bar exam. Increasing competency, limiting debt, fostering access to justice, facilitating long-term career planning for J.D. graduates and ultimately general bar licensure. What could be better?

## **V. REIMAGINING THE POST-3L LICENSING REGIME**

Imagine a possible future in which licensing authorities and bar examiners agree to adopt a more innovative bar licensure system, one that incorporates staged examinations, starting after the 1L year, followed by a required residency during law school, ending with a final licensing examination after completion of the J.D. Imagine further that the traditional two-day examination following the completion of law school could be reconfigured to assess minimum lawyer competence more ambitiously and

comprehensively. What might this re-envisioned post-J.D. assessment look like?

The options outlined below rest on a desire to protect the public by testing in a more meaningful fashion the minimum competencies that beginning lawyers actually need, including higher-order thinking skills and metacognitive/reflective capabilities. They also draw on evolving practices in other countries that test bar applicants across a baseline of subject areas, then allow them an opportunity to be examined in more depth in selected areas of concentration. Fundamentally, they stress assessment of a wider range of practice-oriented competencies.

Our premise of improved public protection through greater fidelity to practice also leads to consideration of different testing techniques, four of which are presented here. First, we argue for open-book (confined universe) advanced bar examinations. Next, we suggest new approaches to framing questions, even within the traditional multiple choice item structure favored by bar licensing authorities. We also urge consideration of the utility of short-answer questions to assess more advanced skills required of novice attorneys. Finally, we urge moving beyond today's performance tests to more active simulations, or documentation through dossiers or portfolios of work products that could be assessed directly.

#### *A. Competencies for Possible Emphasis*

##### *1. Advanced Subject Matter Content*

If a new post-1L exam covering first-year subjects is widely embraced, a new post-3L examination could focus on subject matter beyond the first year. Eliminating repeat coverage of first-year content would open time and space for fresh approaches to assessment of the legal knowledge aspect of minimum competence. These revisions should recognize that the doctrinal subjects necessary for every novice attorney to learn are relatively limited in an era of specialization, changing doctrine, and easy access to legal sources. Building consensus on advanced subject areas to be covered would enhance the benefits of uniform testing and license portability that have propelled adoption of the Uniform Bar Exam.<sup>266</sup>

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<sup>266</sup> Note that this question is not the same as an inquiry about how different states might impose additional CLE or other requirements to ensure that their licensees have command of state-specific legal principles.

## 2. Advanced Thinking

A fresh approach should also arguably assess higher-order thinking skills, rather than continuing to emphasize simple, mechanical analysis based on memorized content. Current bar examinations that primarily test on memorized content and simple application signal that students need not build more sophisticated thinking skills beyond the first year. The current licensing exam system seems to require legal analysis at a uniform, basic level, creating differing degrees of difficulty based on the prominence or obscurity of the rules being tested, without recognizing the different levels of thinking required to address entry-level lawyers' obligations to meet client needs. We believe that current difficulties in bar passage are related to the great breadth of doctrinal rules and exceptions that must be memorized, not the sophistication of the analysis required. Conceivably, post-3L bar examinations could evaluate advanced application and synthesis of legal principles, evaluation of options, and even creative problem-solving of the sort that clients need.

Expert educational researchers and psychometricians have developed insights about "difficulty" and "cognitive demand" in licensing examinations<sup>267</sup> that should be of great importance to legal educators and bar examiners. In these researchers' view, licensing examinations should take into account not only the difficulty of questions, meaning how many candidates get them right, but also their "cognitive demand." That is, the questions should reflect the level of advanced thinking skills required to meet practice-based requirements.

Educational researchers Davis and Buckendahl have posited that a four-part cognitive taxonomy should be employed in developing licensing exams.<sup>268</sup> In their view, the starting point for licensure examinations is minimum competence of practitioners, but that such minimum competence cannot be framed in terms of content knowledge and simple application alone. Instead, tests meant to assess minimum competence must also take into account the depth of intellectual work required in performing relevant tasks. For example: is the relevant competency simply remembering content, or is it understanding and applying doctrine in context, analyzing and evaluating a situation, and making judgments, or perhaps creating solutions

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<sup>267</sup> Susan L. Davis & Chad W. Buckendahl, *Incorporating Cognitive Demand in Credentialing Examinations* [hereinafter *Cognitive Demand*] in HIGHER ORDER THINKING, *supra* note 102, at 304.

<sup>268</sup> *Id.* at 323.

by putting together a new approach?<sup>269</sup> These insights are consistent with the best work on law school pedagogy.<sup>270</sup>

These researchers recommend that subject-matter content and cognitive demand be addressed in licensing test development to meet the baselines demanded by meaningful job analysis. They further recommend that subject-matter experts involved in developing test questions be trained on testing frameworks associated with different levels of “cognitive demand” (that is, levels of higher-order thinking). As an additional check, they suggest that an independent review be undertaken to determine the level of cognitive demand associated with particular questions.<sup>271</sup> In that regard, they acknowledge that higher levels of “cognitive demand” likely require different types of questions, beyond the simple forms of single-item-response items familiar in multiple choice tests.<sup>272</sup> This would disrupt the already challenging yet relatively simplistic bar examination construction universe in which we live, but should be pursued.

### 3. Metacognition and Reflection

Many law professors, especially clinical, legal writing, academic support, and teachers of first-year subjects, understand that metacognition and the ability to reflect are among the most important skills that students can develop in order to meet their obligations to future clients.<sup>273</sup> Simply put, “metacognition” is one of a number of higher-order skills (also including reasoning, argumentation, problem solving/critical thinking) that lawyers need in order to understand what they *don’t know* and what avenues they need to pursue in order to meet their obligations to clients without falling prey to blind-spots.<sup>274</sup> “Reflection” likewise demands that practicing lawyers

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<sup>269</sup> *Id.*

<sup>270</sup> See, e.g., Bryant, Milstein & Shalleck, *supra* note 213, at 13; Robert D. Dinerstein & Elliott S. Milstein, *Learning to Be a Lawyer: Embracing Indeterminacy and Uncertainty*, in BRYANT ET AL., CLINICAL PEDAGOGY, *supra* note 178, at 327. See generally Merritt, *supra* note 178, at 347.

<sup>271</sup> Davis & Buckendahl, *Cognitive Demand*, *supra* note 267, at 318–19.

<sup>272</sup> *Id.* at 317. See *infra* Part V.B. and text accompanying notes 304–324 (discussing new testing techniques).

<sup>273</sup> E.g., Bryant, Milstein & Shalleck, *supra* note 213, at 13, 25; Rosa Kim, *Lightening the Cognitive Load: Maximizing Learning in the Legal Writing Classroom*, 21 PERSP.: TEACHING LEGAL RES. & WRITING 101, 103 (2013); see Patti Alleva & Jennifer A. Gundlach, *Learning Intentionally and the Metacognitive Task*, 65 J. LEGAL EDUC. 710, 714 (2016) (reflecting on the role of metacognition in teaching civil procedure).

<sup>274</sup> See Davis & Buckendahl, *Cognitive Demand*, *supra* note 267, at 26–27 (defining metacognition as “thinking about and regulating one’s thinking” and arguing that metacognition is comprised of three sub-components: declarative knowledge, including knowledge of ourselves; procedural knowledge, including knowledge of strategies; and conditional knowledge, including insights about why and when to employ certain strategies). Psychologists refer to the lack of metacognitive abilities

develop habits of assessing their own performance in order to avoid errors that would put clients at risk.<sup>275</sup>

As discussed above,<sup>276</sup> an exam intended to assess student development at the end of the first year of law school should endeavor to assess a basic level of metacognition. To assure that beginning lawyers have sufficient ability to protect their clients by appreciating their own limitations, a post-3L bar examination should endeavor to assess metacognition and reflection at a higher level, with a focus on metacognition in practice-oriented contexts. By the time students graduate from law school they should have completed a significant residency requirement.<sup>277</sup> They should have recognized that “not knowing what you do not know” is of great significance to clients whose lives and livelihoods are in a lawyer’s hands. Accordingly, a post-3L licensing examination should incorporate questions designed to evaluate applicants’ appreciation of what they do not know and how they might proceed in the face of uncertainty.<sup>278</sup> Such questions might be framed with an eye to advanced cognition, skills development, or ethics in advanced fields.

Current bar examinations emphasize content knowledge, expecting candidates to possess fundamental and arcane knowledge in a variety of areas and to respond correctly to multiple choice questions that require selection of one best answer.<sup>279</sup> That approach may reinforce a comforting but false impression that legal doctrine is static.<sup>280</sup> In contrast, legal educators emphasize the ambiguity, malleability, and changing nature of doctrine.<sup>281</sup> Testing application of settled law to hypotheticals with artificially settled facts is particularly at odds with the actual nature of law practice, where practitioners typically need to address conditional factors (if X is true, what

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as the “Kruger-Dunning effect,” referencing an important theory developed by Cornell researchers. *See generally* Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999).

<sup>275</sup> *See, e.g.*, Bryant, Milstein & Shalleck, *supra* note 213, at 23–24; *see also supra* text accompanying notes 214–219 (describing reflection as a crucial aspect of residencies).

<sup>276</sup> *See supra* text accompanying notes 120–128 (advocating for assessment of metacognition in first-year test).

<sup>277</sup> *See supra* Part III.

<sup>278</sup> *See* Shulman, *Education of Professionals*, *supra* note 41, at 519.

<sup>279</sup> This approach seems consistent with practices of licensing boards in other fields. *See* Luecht, *supra* note 34, at 447–48 (explaining that knowledge-based assessments are popular because subject matter experts can be trained to produce a large number of multiple choice questions, test forms can cover a large number of topics, and such questions are relatively easy to score).

<sup>280</sup> *See* Howarth, *Teaching in the Shadow of the Bar*, *supra* note 1, at 929.

<sup>281</sup> *See* Patricia White, Chair, A.B.A. Comm’n on the Future of Legal Educ., Keynote Comments at AccessLex Research Symposium (Apr. 26, 2018); Robert D. Dinerstein & Elliott S. Milstein, *Learning to be a Lawyer*, *supra* note 270, at 327.

answer is appropriate; if Y is true, what answer is appropriate; if it is unclear whether X or Y is true, how should a competent lawyer proceed?). Test-developers' emphasis on reliability and consistency of examinee performance may have compromised equally crucial testing standards related to fairness and validity that require licensing examination tasks or questions that better emulate the ambiguities and uncertainties inherent in the doctrinal aspect of law practice.<sup>282</sup>

As is true in numerous other respects, the field of medicine provides important insights that legal educators and bar-licensing authorities should consider. A recent analysis of medical clinical reasoning, teaching strategies, and assessment techniques is illuminating.<sup>283</sup> In the researchers' view, there are four aspects to clinical reasoning: knowledge, knowledge organization, cognitive processes, and metacognitive processes.<sup>284</sup> Testing knowledge is readily done using multiple choice and short-answer questions.<sup>285</sup> Knowledge organization entails strong mental representations of typical symptoms; an interconnected, flexible, and accessible knowledge base; and a large and varied body of examples of clinical presentations.<sup>286</sup> When it comes to cognitive processes (ability to identify relevant features and generate hypotheses; coordinate analytical and nonanalytical processes; and contextualize problems), clinical reasoning, mini-clinical evaluations, oral case standards, and use of standardized patients are best.<sup>287</sup> When it comes to metacognitive processes (ability to monitor for potential errors or biases and ability to reflect on one's own reasoning), different approaches are needed, such as written case studies with embedded errors, clinical justifications, or assessment of self-regulated learning.<sup>288</sup>

It is not easy to specify how advanced cognitive and metacognitive skills might be articulated, defined, and recognized, or how they might be tested within the context of legal education and law licensure. However, the insights provided by medical educators suggest that there are critical aspects of

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<sup>282</sup> E.g., Merritt, *supra* note 178, at 352–53 (discussing how the doctrine in practice is less central and even less static than many law professors imagine).

<sup>283</sup> See Meredith E. Young et al., *How Different Theories of Clinical Reasoning Influence Teaching and Assessment*, 93 ACAD. MED. 1415 (2018); see also MEREDITH E. YOUNG ET AL., SUPPLEMENTAL DIGITAL LIST 1 (2018), [https://download.lww.com/wolterskluwer\\_vitalstream\\_com/PermaLink/ACADMED/A/ACADMED\\_2018\\_05\\_24\\_YOUNG\\_AcadMed-D-16-01260\\_SDC1.pdf](https://download.lww.com/wolterskluwer_vitalstream_com/PermaLink/ACADMED/A/ACADMED_2018_05_24_YOUNG_AcadMed-D-16-01260_SDC1.pdf).

<sup>284</sup> Young et al., *supra* note 283.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* According to the medical researchers, typical symptoms can be tested by multiple choice and short-answer questions, but other aspects may need to be tested by concept mapping, extended item matching, objective structured clinical exams, or written clinical case vignettes. *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

competent lawyering that current licensing do not consider at all. Moreover, research has suggested that third-year law students' cognitive skills do not significantly advance beyond those possessed at the end of the first year.<sup>289</sup> We are concerned that typically unstructured law school curricula may not advance law students' cognitive skills after the first year as much as would be desirable. Perhaps faculty members do not articulate higher levels of cognition that students might emulate. Perhaps students lose their "growth"-oriented mindset after the first year and hunker down to just get by, assuming that their cognitive skills cannot advance or that it is not worth the trouble to try to advance them without associated academic rewards unavailable under curved grading systems.<sup>290</sup> Perhaps, as students focus on the bar exam in their last year in lieu of more advanced study and more demanding clinical courses, they lower their sights to the more elementary levels of the taxonomy of educational objects required by bar-examination questions.

In light of the importance of metacognition and the ability to reflect and learn from blind spots, a meaningful post-3L bar examination would ideally include different sorts of questions designed to assess applicants' metacognition, and as a by-product encourage law schools to foster higher levels of metacognition among their graduating students.<sup>291</sup> Protection of the public requires law-licensing examinations to include a meaningful strategy for addressing this possible deficit.

#### 4. Focused In-depth Inquiry in Areas of Expertise

Bar examiners emphasize that U.S. jurisdictions certify candidates for general licensure as lawyers, in contrast to systems in the United Kingdom that distinguish between barristers (litigators) and solicitors (office lawyers).<sup>292</sup> This is important but should not keep states and bar examiners from recognizing and responding to significant, long-standing trends toward specialization in law practice and law school.

Studies of the legal profession show that law practice has become much more specialized, albeit some lawyers still engage in general, local

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<sup>289</sup> For a discussion of the detachment experienced by 3L students, see Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244–45 (2001). For a study concluding that there was little growth in ability to read cases as between first year and third year law students, see LSAC, DOROTHY H. EVENSEN ET AL., DEVELOPING AN ASSESSMENT OF FIRST-YEAR LAW STUDENTS' CRITICAL CASE READING AND REASONING ABILITY: PHASE 2 (2008), <https://www.lsac.org/docs/default-source/research-%28lsac-resources%29/gr-08-02.pdf>.

<sup>290</sup> For a recent article that contends that law school itself fosters a "fixed," rather than "growth" mindset, see Sue Shapcott et al., *The Jury Is in: Law Schools Foster Students' Fixed Mindsets*, 42 LAW & PSYCHOL. REV. 1, 28 (2017–2018).

<sup>291</sup> See *infra* text accompanying notes 304–324.

<sup>292</sup> See *supra* note 241.



practice.<sup>293</sup> Law schools have increasingly accommodated specialization moving away from the earlier tradition of breadth without depth in the law school curriculum.<sup>294</sup> For example, educators understand that students interested in criminal practice (as prosecutors or defenders) would benefit from taking a structured in-depth curriculum exploring related subjects as well as engaging in externships and clinical opportunities. Like many colleagues, we may advise our students interested in criminal law to forego courses in trusts and estate and probate law, for example, to focus on courses that bear on their future as criminal lawyers. The relatively few required upper level courses in many law schools today reveal this educational trend. These changes in practice and law school curricula should provoke consideration of specialization in licensing.

England and Wales are well ahead of the United States in recognizing that advanced assessments of competence for practice should allow candidates to select from a menu of broad areas of specialization. Candidates there choose two subjects for their examinations of competence to practice.<sup>295</sup> Such applicants for admission to the bar have already passed a baseline test (such as the post-1L test proposed here) to demonstrate their knowledge of a comprehensive range of subjects arising in practice. However, the British system adds a means for assessing not only the *breadth* of preparation but also the *depth* of understanding, preparation, and competence in areas in which candidates hope to engage in their future professional careers.<sup>296</sup>

We urge a refocus of law licensure away from the current commitment to testing “breadth” (on a relatively shallow basis in terms of cognitive demand), to an exploration of how to test some subject domains in “depth.”

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<sup>293</sup> The ABA has collected links to state-based studies of changes in the legal profession. See *Future of the Legal Profession*, [https://www.americanbar.org/groups/bar\\_services/resources/resourcepages/future.html](https://www.americanbar.org/groups/bar_services/resources/resourcepages/future.html) (last visited Feb. 19, 2019).

<sup>294</sup> For recent, thoughtful comments on law school curricula and the importance of attending to specialized contexts of law practice, see Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implications*, 94 NEB. L. REV. 1, 3 (2015). See generally Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281 (2018).

<sup>295</sup> The Solicitors Regulation Authority for England and Wales has announced a new competence statement for solicitors. See *Statement of Solicitor Competence*, SOLICITORS REG. AUTHORITY, <https://www.sra.org.uk/solicitors/competence-statement.page> (last visited Feb. 19, 2019). A new solicitors’ qualifying examination is expected to be in place by 2020. See *SQE Assessment Organization Appointed*, SOLICITORS REG. AUTHORITY, <https://www.sra.org.uk/sra/news/press/sqe-assessment-organisation-appointed.page> (last visited Feb. 19, 2019). For discussion of the new Solicitors’ Exam, see *Training for Tomorrow*, *supra* note 241, at 22–26. Phase 2 of the new exam will require candidates to select among areas of concentration (including criminal practice, dispute resolution, property/wills/trusts/estates, commercial and corporate practice). Within the selected areas, candidates will be required to complete a range of practical skills assessments including the following: client interviewing; advocacy/persuasive oral communication; case and matter analysis (including negotiation and planning); legal research and written advice; legal drafting). *Id.* at 25.

<sup>296</sup> See *supra* text accompanying note 292.

Assessing deeper knowledge of a small number of chosen subjects permits a judgment on the candidate's capacity to achieve equivalent depth in whatever new, utterly unpredictable subjects that lawyer might encounter over the course of his or her career.

### 5. Performance of Additional Practice-Related Skills

Bar examiners have long emphasized examination protocols that focus on cognition: knowledge of legal principles and application in associated scenarios.<sup>297</sup> In recent decades, bar examiners, and psychometricians have improved bar exams by using more sophisticated measurement standards and psychometric calculations to create highly reliable tests.<sup>298</sup> But with the exception of whatever fraction of the exam is devoted to performance tests,<sup>299</sup> this reliability has been achieved for tests that concentrate on assessing a single competency, the ability to apply (memorized) settled doctrine to new hypotheticals. This skill is necessary but not sufficient for competent law practice. In our view, a new balance needs to be struck, with greater attention to assessment of a wider range of lawyering competencies.

Our practice of allowing this single cognitive competency to stand in as the full measure of a competent lawyer has roots in legal education.<sup>300</sup> As discussed above, U.S. legal education historically emphasized the purely theoretical aspect of legal education at the expense of the clinical.<sup>301</sup> But legal education has been transformed in recent decades by new commitments to experiential education. One reason bar exams have not followed may be examiners' fears that their hard-won reliability (or predictability of scores) could be jeopardized by significant changes in the tests and in particular by efforts to test additional lawyering competencies. Law schools may also be hesitant to press for such changes because many tenure system faculty have little practice experience and little interest or expertise in teaching a wider

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<sup>297</sup> See Spencer, *supra* note 186, at 1986.

<sup>298</sup> See Susan M. Case, *Back to Basic Principles: Validity and Reliability*, 75 THE BAR EXAMINER 23, 24–25 (Aug. 2006) [hereinafter Case, *Back to Basic Principles*].

<sup>299</sup> See *supra* text accompanying notes 137–138 and *infra* text accompanying notes 315–316.

<sup>300</sup> Indeed, legal education's single-minded attention to judicial opinions has unfortunately continued despite the growth of statutes that have replaced the common law. Some schools have added courses in regulation or legislation, or electives that feature statutory regimes (such as taxation, administration law, or administrative law) to the first year to try for a better balance. Michigan State University College of Law, for example, requires first year students to take Constitutional Law and the Regulatory State, which introduces administrative law. See *Required Curriculum for Students Entering Fall 2018 or Later*, MICH. ST. U.C. LAW, <https://www.law.msu.edu/registrar/curriculum.html> (last visited Feb. 19, 2019).

<sup>301</sup> See Spencer, *supra* note 186, at 2011–12.

range of lawyering competencies. Protection of the public requires the next era in attorney licensing exams to face these challenges.

Law faculty need to embrace the responsibility to teach a wider range of professional competencies. Bar examiners and psychometricians need to develop and implement tests that look forward to candidates' capacity to function as lawyers, not primarily backwards to their abilities as law students in traditional classes.<sup>302</sup> In short, protection of the public requires examiners and psychometricians to focus as relentlessly and ambitiously on fairness and validity as they do on reliability,<sup>303</sup> always working to reduce the distance between the competencies assessed in licensing examinations and the practice of law.

### B. Testing Techniques

Addressing specialization, higher order cognitive skills, metacognition, and a wider range of lawyering skills is likely to require new testing techniques as part of a general shift from knowledge-based assessments to knowledge-based and performance-based assessments.<sup>304</sup>

#### 1. Open Book Strategies to Approximate Practice More Closely

Law professors typically advise students not to rely on memorization, but rather to always check current case-law, statutory, and regulatory requirements in order to serve their clients competently. Bar exams fail to recognize this basic principle of lawyer competence and instead ask applicants to rely on their memories to address the range of subjects and questions posed.

Bar examiners need to grapple with this fundamental disconnect between ethical law practice and testing protocols for admission to the bar.

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<sup>302</sup> Performance tests are an important first step. *See supra* text accompanying notes 137–138 (discussing use of performance tests in a post-1L test; *infra* text accompanying notes 315–316 (suggesting ways to modify performance tests for post-JD examinations). For additional insights about performance testing, *see* Sara J. Berman, *Integrating Performance Tests Into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEGAL PROF. 147 (2018); *see generally* ROBERT L. JOHNSON ET AL., *ASSESSING PERFORMANCE: DESIGNING, SCORING, AND VALIDATING PERFORMANCE TASKS* (2009).

<sup>303</sup> *See* TRACY A. MONTEZ, *OBSERVATION OF THE STANDARD SETTING STUDY FOR THE CALIFORNIA BAR EXAMINATION* 10 (2017), <http://www.calbar.ca.gov/Portal/0/documents/admissions/Examination/Tracy-Montez-ReviewBarExamstudy.pdf> (“Given that a state-specific occupational analysis does not appear to have been conducted, it is critical to have this baseline for making high-stakes decisions.”).

<sup>304</sup> *See* Luecht, *Licensure Examinations*, *supra* note 34, at 448–49.

Increasingly, those in other countries have put aside “closed book” examinations in favor of licensing regimes that more closely approximate ethical practice standards. For example, the Law Society of Ontario (including Toronto) has developed a new testing regime that allows applicants to review and employ materials made available in an open-book format as they take licensing examinations.<sup>305</sup> Open-book testing is also supported by educational researchers. They have increasingly acknowledged that traditional taxonomies (such as Bloom’s)<sup>306</sup> are not hierarchical,<sup>307</sup> meaning in particular that demonstrating analytical or application capabilities is not dependent on memorization of core content. Application can just as easily be tested by providing candidates taking licensing examinations with actual sources on which to rely.<sup>308</sup>

If, as we believe, practicing lawyers would be *prima facie* incompetent if they relied on their memories and failed to evaluate current case law, statutes, and regulations in advising their clients, bar examiners are not serving the public when they adopt licensure examinations that undermine these professional standards.

Other benefits of open-book examinations bear noting. Providing candidates for admission with materials in advance allows them to prepare adequately and may reduce methodological concerns relating to test speededness and reduces the risk of discrimination based on disability.<sup>309</sup> Providing materials also communicates ethical norms regarding appropriate practice and representation. This approach also facilitates more sophisticated multi-faceted assessment, since it requires candidates to read, assess, evaluate, and use associated legal resources.<sup>310</sup> Therefore, we urge bar examiners to consider the many benefits of adopting an open-book assessment strategy.

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<sup>305</sup> See *Licensing Exam Study Materials*, LAW SOC’Y ONTARIO, <https://lso.ca/becoming-licensed/lawyer-licensing-process/study-materials?lang=en-> (last visited Feb. 19, 2019); see also Andrea A. Curcio et al., *How to Build a Better Bar Exam*, 90 N.Y. ST. B. ASS’N J. 37, 38–40 (2018) [hereinafter Curcio et al., *Better Bar Exam*].

<sup>306</sup> For a discussion of Bloom’s Taxonomy, see *supra* text accompanying note 119.

<sup>307</sup> Davis & Buckendahl, *Cognitive Demand*, *supra* note 267, at 311.

<sup>308</sup> See Paul Maharg, *The Culture of Mnemosyne: Open Book Assessment and the Theory and Practice of Legal Education*, 6 INT’L J. LEGAL PROF. 219, 219–39 (1999) (reviewing literature and arguing that use of open-book exams for licensure purposes requires examination of attitudes about relationship of theory and practice).

<sup>309</sup> See *supra* text accompanying note 90 (discussing topics related to speededness).

<sup>310</sup> For a discussion of the benefits and drawbacks of open-book and closed-book examinations, see Beth Johanns et al., *A Systematic Review Comparing Open-Book and Closed-Book Examinations: Evaluating Effects on Development of Critical Thinking Skills*, 27 NURSE EDUC. PRAC. 89 (2017) (providing a literature review on use of open-book and closed-book examinations in nursing education classes and finding benefits of each in that context).

## 2. Fresh Frameworks for Multiple Choice Questions

Multiple choice questions are a preferred form of assessment on licensure examinations because they are readily scored, provide broad coverage of relevant content, and fit readily within psychometric evaluation frameworks for high-stakes licensing exams, especially related to reliability.<sup>311</sup> Multiple choice questions also bring significant downsides, including superficiality in addressing cognitive demand, mechanical application, and over-simplification far from the realities of law practice.<sup>312</sup> Professors Carol Chomsky, Andrea Curcio, and Eileen Kaufman have recently offered insights about ways in which “case files” might provide a foundation for a variety of multiple choice questions that touch on relevant knowledge, but also on crucial questions of interpretation of cases, synthesis of case law, and understanding of counsel’s obligations related to strategy, fact-finding, and ethical issues.<sup>313</sup>

## 3. Short Answer Questions

Introducing short-answer questions may be part of the key to assessment of advanced thinking, metacognition, and more practice-oriented legal judgment. Instead of “selected-response” questions (typically including multiple choice questions), short-answer responses could require candidates to evaluate what information (from case-law, statutes, or facts) is missing, rather than simply identifying an apparently definitive choice among multiple options provided.

Consider the following examples of options for short answers (or even multiple choice questions) to address more advanced competencies:

- x. There is insufficient information to answer this question because more evidence is needed to explore a, b, c by doing d, e, f;
- y. The answer to this question is unclear because jurisdictions approach the question in conflicting ways, so the following policy issues need to be considered: \_\_\_\_;

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<sup>311</sup> Case, *Back to Basic Principles*, *supra* note 298, at 23.

<sup>312</sup> For a discussion of the short-comings of multiple choice tests, see Clauser et al, *Testing for Licensure*, *supra* note 103, at 708 (providing that disadvantages include the fact that answers are selected, not constructed; some believe that this format rewards applicants who can “guess well”; questions reward what examinees “know” rather than what they can “do” and who may not perform well in practice; such questions reward those who have knowledge of trivial facts and are “test wise;” and such questions tend to allow those knowledgeable about test-taking rules to do well even if they lack necessary proficiency).

<sup>313</sup> See Curcio et al., *A Better Bar Exam*, *supra* note 305, at 38–39.

z. In order to answer this question, I would need to consult with a senior partner and explore the following questions:

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Augmenting traditional testing frameworks to allow for short-answers to explain responses is well-known in academia. Such an approach may prove challenging to psychometricians responsible for developing high-stake tests, but psychometric considerations should follow identification of crucial competencies, not control the competencies to be tested. Also and importantly, machine learning increasingly supports grading of essay and short-answer questions.<sup>314</sup> Taking advantage of these technological advances could enable much more ambitious attorney licensing tests using short answers and other new techniques.

#### 4. Alternative Strategies for Demonstrating and Documenting Expertise: Simulations and Portfolios

##### a. *Simulations, Including Performance Tests*

Existing performance tests provide a closer approximation of law practice than traditional multiple choice or essay questions.<sup>315</sup> Ideally, as discussed above, a post-1L test would include a performance test that focuses on legal writing and research in a context for which students are adequately prepared by their first year of law school.<sup>316</sup> Advanced performance tests following the 3L year might build on that baseline and require examinees to undertake more sophisticated tasks such as developing a negotiation framework, discovery plan, outline for discussion with a client seeking advice on estate planning, or script for witness examination in a criminal case.

But simulations beyond writing and drafting are also possible. Other professional licensing fields such as medicine have relied on such strategies for some time<sup>317</sup> but, despite calls to incorporate similar strategies within the framework of law licensure in the United States,<sup>318</sup> little has happened.

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<sup>314</sup> See, e.g., Mark D. Shermis et al., *Recent Innovations in Machine Scoring of Student and Test Taker—Written and Spoken Responses*, in Lane et al., TEST DEVELOPMENT, *supra* note 66, at 335.

<sup>315</sup> See Swygert & Williamson, *Using Performance Tasks*, *supra* note 139, at 294, 299.

<sup>316</sup> See *supra* text accompanying notes 138–139.

<sup>317</sup> For a description about how medical licensing examinations employ standardized patients, see Step 2 CS, U.S. MED. LICENSING EXAMINATION, <https://www.usmle.org/step-2-cs/> (last visited Feb. 19, 2019).

<sup>318</sup> See Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 841–42 (2004). We do not necessarily agree that using trained actors as

Meanwhile, other countries have moved forward. For example, law licensing authorities in England and Wales have adopted a system that requires candidates for admission as solicitors to meet preliminary requirements and then complete a series of assessments based on simulations, including tasks such as client counseling, negotiation, and more.<sup>319</sup>

U.S. law licensing authorities may yet consider whether to incorporate simulated practice-based simulations as part of their licensing frameworks, particularly if such frameworks are developed and proven effective in other settings, such as within England and Wales.<sup>320</sup>

*b. Portfolios*

Licensing authorities in some fields have begun to consider whether portfolios of actual work products completed by candidates for licensure might reasonably be evaluated as a means of assessing candidates' minimal competence and eligibility to practice.<sup>321</sup> Arguably, state-based task forces composed of practitioners and law professors might be able to develop systems for law student work-based portfolios that could document student work and allow assessment of work product as a more meaningful strategy to assess competence than the current system of licensing examinations.<sup>322</sup>

Portfolios are not yet a widely accepted tool for assessment in professional licensing. At the same time, they can provide evidence of actual performance capability, rather than using the proxy of an examination to endeavor to approximate such capability. There are undoubtedly important issues to be considered should portfolio assessment gain greater interest

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standardized clients is necessary, but we do support alternative assessment strategies that take into account how candidates for bar admission may be able to work with prospective clients.

<sup>319</sup> For a discussion of new testing strategies affecting solicitors in England and Wales, see Julie Brannan, *Training for Tomorrow*, *supra* note 241.

<sup>320</sup> *Id.* at 24–25 (discussing initial baseline testing on core subjects, legal research and writing); *id.* at 25 (discussing option for testing in specialized contexts including criminal practice, dispute resolution, property/wills/estates/trusts, commercial/corporate practice, and identifying areas of simulations assessments in selected areas including client interviewing, advocacy/persuasive oral communication, case and matter analysis including negotiation planning, legal research and advice, legal drafting).

<sup>321</sup> For a discussion of the potential use of portfolios in dental licensure, see Richard R. Ranney & Ronald Hambleton, *Do Portfolio Assessments Have a Place in Dental Licensure: Point-Counterpoint*, 37 J. AM. DENTAL ASS'N 30, 30–42 (2006).

<sup>322</sup> The University of New Hampshire's Daniel Webster Scholars Program, discussed above as an example of a sequenced residency program (see *supra* text accompanying notes 234–235), is also an important example of an attorney licensing model that uses portfolios of student work product assessed by law faculty, practitioners, and judges. See *Daniel Webster Scholar Program (DWS)*, UNIV. N.H. SCH. OF LAW, <https://law.unh.edu/academics/experiential-education/daniel-webster-scholar-program-dws> (last visited Feb. 19, 2019).

among legal licensing authorities<sup>323</sup> important issues to be considered will include, for example, the content of portfolios, inferences to be drawn from portfolio evidence, and decisions regarding competency as evidenced in portfolios. At the same time, it may be fruitful for legal educators, practitioners, and legal licensing authorities to begin to explore what kind of compilation of actual evidence relating to competency might be advisable and engage in research to determine how traditional bar examinations do or do not provide adequate evidence to judge such capabilities.

## 5. Component-Based Testing

States such as Florida have adopted strategies that allow bar applicants who pass some but not all components of the bar exam to carry forward successful performance on bar exam components they passed, and then retake only the components they did not pass on the next test administration, rather than having to retake all components.<sup>324</sup> This model tracks the system employed in licensure of certified public accountants. Those taking the CPA exam must pass the four components of the licensure examination within 18 months.<sup>325</sup> This approach of allowing applicants more flexibility in sitting for and successfully passing licensure examination components makes sense because it allows applicants to concentrate on certain content areas or types of assessment in preparing for a given examination administration. Applicants can then return to demonstrate their skills and abilities in other areas and on other types of assessment instruments.

### C. Conclusion

In testing, as in so many other areas, new technologies offer the promise of transformation. U.S. law licensing authorities and those responsible for pre-admission testing (LSAC) are at the beginning of considering computer-based testing that could change the landscape for assessments prior to and

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<sup>323</sup> For information on California's experiment in using portfolios for dental licensure, see *Licensure by Portfolio Examination*, DENTAL BD. CALIFORNIA, [https://www.dbc.ca.gov/applicants/dds/lic\\_by\\_portfolio.shtml](https://www.dbc.ca.gov/applicants/dds/lic_by_portfolio.shtml) (last visited Feb. 19, 2019).

<sup>324</sup> See *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FLA. BD. B. EXAMINERS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748> (last visited Feb. 19, 2019) (comparing "overall method" and "individual method"); see also *MBE Score Transfer Information*, FLA. BD. B. EXAMINERS, <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/C72305F78AE3CC08852581EF00608534> (relating to transfer of scores).

<sup>325</sup> See *CPA Exam Overview*, <https://www.aicpa.org/becomeacpa/cpaexam.html> (last visited Feb. 19, 2019).



after law school.<sup>326</sup> Significant pressures are now at work on the LSAC to develop more flexible online testing formats in the face of challenges to allow law schools to use the GRE in lieu of the LSAT.<sup>327</sup> Even without similar competitive pressures, we hope the National Conference of Bar Examiners (NCBE) and the larger state bar examiners will recognize the opportunities to engage with new technologies to enable assessment of the kinds we advocate for here.

Implementation of alternative strategies such as we suggest will require three distinct areas of expertise: (1) the competencies needed for competent lawyering today; (2) pedagogical and curricular practices for the education and professional formation of future lawyers; and (3) standards for high-stakes credentialing tests. Thus, advances will require legal educators, leaders in the profession, and bar examiners to work together. The NCBE's recently established task force to consider the future of law licensing examinations<sup>328</sup> is an important inquiry that is likely to consider ideas about competencies and techniques similar to ours. The NCBE has invited fresh ideas about legal licensing exams and systems. Our suggestions are intended to answer that call and perhaps inspire others to propose additional testing reforms.

## CONCLUSION

A new, national post-1L test could enhance law student learning, improve law schools' educational programs, and ultimately enable staged licensing to better protect the public. A requirement that every new lawyer had practiced law in a law school residency could improve legal education and broaden and deepen the competencies and attributes of attorneys. The possibility of limited licensure after two years of law school for areas of unmet needs could address access to justice concerns by bringing new cadres of focused lawyers to underserved communities. Improved, competency-

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<sup>326</sup> The NCBE has taken a preliminary step by beginning conversion of the National Professional Responsibility Exam to a computer-based delivery system, expected to be fully in place by 2020. *See Conversion to Computer-Based Testing for the MPRE*, NAT'L CONF. B. EXAMINERS (June 14, 2018), <http://www.ncbex.org/news/mpre-conversion/>. Law School Admissions Council (LSAC) researchers have studied various aspects of computer-based testing. *See, e.g.*, Bernard P. Veldkamp, *Some Practical Issues in Computerized-Adaptive Testing With Response Times* (RR 14-06), LSAC, <https://www.lsac.org/data-research/research/some-practical-issues-computerized-adaptive-testing-response-times-rr-14-06> (last visited Feb. 19, 2019).

<sup>327</sup> The ABA Council of the Section on Legal Education and Admissions to the Bar proposed in 2018 to eliminate the admissions test requirement. Subsequently the Council withdrew the proposal prior to ABA Council of Delegates consideration and is accordingly reconsidering its position. *See* Karen Sloan, *ABA Holds Off on Removing LSAT Requirement for Law Schools*, LAW.COM (Aug. 6, 2018, 7:58 PM), <https://www.law.com/2018/08/06/aba-holds-off-on-removing-lsat-requirement-for-law-schools/>.

<sup>328</sup> Information about the NCBE Task Force can be found at TESTING TASK FORCE, NAT'L CONF. B. EXAMINERS, <https://www.testingtaskforce.org/> (last visited Feb. 19, 2019).

based post-J.D. licensing exams that use new testing technologies to reflect the demands of today's profession could better protect the public *and* improve legal education. These are feasible, concrete, and potentially transformative steps. Systemic law licensing reform is daunting, but the rewards are large.

Ringling changes is daunting, too. Precise coordination is required. The bells are heavy. The ropes can burn. The music descends into chaos when any ringer falters. But when it works, the bell ringers accomplish what no individual could do alone. Legal licensing is ripe for new coordinated efforts. Those of us in law—whether in legal education, licensing, or in practice—are the bell ringers. We hear the ringing changes of law licensing reform in the near-distance, getting louder.