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A Response to the Society of American Law Teachers Statement on the Bar Exam

Suzanne Darrow-Kleinhaus

In a perfect world there would be no tests, and a test like the bar exam would probably be outlawed instead of required for the practice of law. But not for the reasons the Society of American Law Teachers would have us believe.¹ The bar exam—or any exam—would be unnecessary because we would all be born with superior intellects, abilities, and capacities, and the assessment of individual competencies would be irrelevant. But in our world competence matters, as it does in the case of a lawyer's ability to engage in critical analysis. The bar examination, by testing competency in the most basic and essential analytical skills required for the practice of law, serves a necessary function.

The bar exam does not seek to test, nor could it possibly test, all of the skills associated with the practice of law. Rather, the bar examiners have recognized what can be tested effectively and test only those skills. This should be considered a strength of the exam and not a weakness, as SALT argues. Of course, the bar exam does not measure a candidate's ability "to perform legal research, conduct factual investigations, communicate orally, counsel clients, and negotiate" (447). These are skills rightfully measured by law schools. Similarly, the bar exam does not test or purport to test a candidate's commitment to public service or willingness to work with underserved communities; these are not skills but value judgments, surely not within the purview of the bar exam to consider, let alone examine. But the bar exam does test such skills as reading comprehension and reasoning, identifying and formulating legal issues, organizing information, following directions, and the ability to write.²

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1. See Society of American Law Teachers Statement on the Bar Exam July 2002, 52 J. Legal Educ. 446 (2002) [hereinafter SALT Statement]. Page references to the statement appear in parentheses in the text.
2. Each component of the bar exam assesses one or more of these basic lawyering skills. The essays test the ability to identify legal issues based on knowledge of the relevant law, to engage in legal reasoning, and to write in a logical, lawyerly manner. The Multistate Performance Test focuses on the ability to read and follow directions, synthesize and apply law from cases, separate relevant from irrelevant facts, and complete an assigned task in the allotted

Each of these skills is fundamental to the competent practice of law and is as important as the skills that SALT faults the bar exam for not testing.

I believe that the bar exam appropriately serves its purpose. I have come to this conclusion after five years of working with candidates who had failed the bar exam multiple times and who passed after we worked together. They passed because they learned to read carefully and actively. They passed because they learned the rules with precision and specificity. They passed because they learned to write a well-reasoned argument based on an analysis of the relevant issues and an application of the law to the facts. They passed because they learned that there were no tricks to be applied, only the law.

SALT's is but one of a growing number of voices criticizing the bar exam and advocating significant change.³ But there are serious flaws in SALT's understanding of the bar exam and its perception of the exam's role in the licensing process. Because such inaccuracies appear not only in the SALT statement but in other proposals to change the bar exam, they must not be allowed to go unchallenged.

The Bar Exam's Role in Assessing Competency

The bar examination seeks only to test the fundamental skills that should have been learned in law school. SALT faults the bar exam for not addressing the concerns of its Bar Exam Committee, concerns that might well be appropriate for the goals of the profession but not for the goals of the bar exam. It appears to have lost sight of two very important aspects of the bar exam: first, that bar passage is only one of a number of jurisdictionally set criteria candidates must meet before gaining admission to the practice of law,⁴ and second,

time. The MPT provides both the legal issue and the law because its goal is to test proficiency in the basic skills developed in the course of a legal education and not the ability to memorize. Finally, the Multistate Bar Examination tests the candidate's reading comprehension and reasoning skills as well as the candidate's mastery of the substantive law.

3. For some of the voices involved in the "significant efforts to rethink educational assessment in legal education and the bar examination," see SALT Statement, *supra* note 1, at 452 n.17. Other influential voices calling for substantial change to the bar exam include Lawrence M. Grosberg, chair of the New York City Bar's Committee on Legal Education and Admission to the Bar (advocate of the public service alternative) and Kristin Booth Glen, dean and professor of law, City University of New York.
4. Each state sets its own requirements for admission to law practice within its jurisdiction, including the precise composition of its bar exam, the score required for passage, and the computation of that score. In addition to bar passage, states typically impose age, education, and moral character requirements. Education requirements specify both general education requirements and specific legal education requirements. General requirements include college work requirements and, in some cases, high school requirements. Legal education requirements specify the requirements for the law school (i.e., ABA-accredited, provisionally accredited, or otherwise authorized by statute) or, in some cases, work-study alternatives such as supervised study in law offices or the courts (California, New York). Typically, moral character qualifications are satisfied by a passing score (as determined by the jurisdiction) of the Multistate Professional Responsibility Exam and passage of a professional responsibility course in law school. But a number of jurisdictions impose additional requirements such as compliance with court-ordered child- or family-support obligations (California, Colorado, Minnesota, Nevada), letters of reference (Massachusetts, New York), character and fitness interviews in addition to passing scores on ethics exams (New York, Indiana), and evidence of mental stability, including a current mental status examination if deemed appropriate (Colorado). Some states consider a candidate's financial situation as indicative of moral

that the bar exam does not purport to test more than the basic analytical skills required for legal practice. Still, the exam has become the most analyzed, criticized, and contested part of the bar admission process. Perhaps that is because it stands as one of the final hurdles to admission; perhaps it is simply because bar exam failures are visible for all to see.

I submit that the bar examination

- seeks to measure the analytical skills required for the practice of law, which requires an understanding of the rules and not just the ability to memorize.
- tests the ability to act and not react under pressure.
- requires a sound mastery of legal principles and basic knowledge of core substance for which tricks or techniques cannot be substituted.
- covers the subjects students should have learned in law school in preparation for the general practice of law.
- neither demands nor requires the sacrifice of skills-based courses for substantive courses.

The bar exam adequately assesses competency in the basic analytical skills required for the practice of law.

The bar exam is designed to see whether the law graduate has mastered the legal skills and general knowledge that a first-year practicing attorney should have. While this means a firm grasp of black letter law, it also means a solid grounding in basic analytical, reading, and writing skills. A candidate must demonstrate mastery of the fundamentals of IRAC (the Issue-Rule-Application-Conclusion structure of legal analysis), must read carefully, and must communicate in the language of the law. Further, the bar exam seeks to test these skills, when possible, in a context that relates to their practical significance. Accordingly, when it tests the applicant's ability to read and follow directions on the Multistate Performance Test, it addresses the lawyer's need to comprehend and adhere to the rules of the federal and state courts as well as the rules of individual judges; similarly, when the exam requires the candidate to complete an assigned task on the MPT within a prescribed time, it acknowledges what we all know to be true: that lawyers work under time constraints and deadlines.

Anyone who reads what the bar examiners write and looks at the exam questions can see that the bar exam is concerned solely with testing basic skills. In directions to applicants available in state publications, in postings on their Web sites, and in the National Conference of Bar Examiners' bulletins, the bar examiners tell candidates exactly what they expect when grading essays, and they all share the same expectation: a well-reasoned argument

character and may examine credit history (Hawaii, Kentucky, Louisiana, Nevada) or bankruptcy proceedings (Virginia). As of 2002, 34 jurisdictions provide for admission on motion based on prior practice and admittance in other jurisdictions. See Persons Taking and Passing the 2002 Bar Examination, B. Exam., May 2003, at 14–15.

based on an analysis of the relevant issues and an application of the law to the facts. The NCBE advises candidates:

Each of your answers should show: an understanding of the facts; a recognition of the issues included; the applicable principles of law; and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.⁵

Logical reasoning is so important that “credit is given . . . for well reasoned analyses of the issues and legal principles involved even though the final conclusion may be incorrect.”⁶

While bar exams vary by jurisdiction, each one tests the candidate’s ability to write.⁷ Some states consider the ability to communicate in a lawyerly manner so essential that the written portion of the exam is weighted more than the Multistate Bar Examination; in fact, some even give the essays twice the weight of the MBE.⁸

The essence of lawyering is communication. Essays afford the bar examiners a basis for evaluating a candidate’s ability to communicate knowledge of the substantive law in an organized and articulate way. That is why law schools

5. 2000 MBE Questions and Analyses 3 (2001). The New Jersey Board of Bar Examiners advises candidates “to identify and analyze issues and to present an organized, coherent and well-written response within the prescribed format.” Suggestions on Answering Essay Questions, Rules and Regulations on How to Apply for the New Jersey Bar Exam §1(c)(5), at <<http://www.njbarexams.org/barbook/aic5.htm>> (last visited June 4, 2004). In Missouri: “The examination does not seek a recitation of legal rules by rote, but rather a demonstration of knowledge of legal principles and the ability to think and reason by applying those principles to the facts so as to come to a logical and coherent conclusion. Answers that are not responsive to the question asked will receive little or no points.” See <<http://www.mble.org>> (last visited June 10, 2004).
6. New York Board of Law Examiners, The Bar Examination, at <<http://www.nybarexam.org/barexam.htm>> (last visited June 9, 2004).
7. Every state imposes its own essay-writing requirement for bar passage. Even states that have adopted the MBE either add their own state-based essay questions or direct the candidate to base answers on state law (Arkansas, Indiana, Kansas, Kentucky, Maine, Missouri, Mississippi, Montana, South Dakota, Utah, West Virginia). Further, while some states will transfer a passing MBE score from another jurisdiction, they still require the candidate to satisfy their own essay-writing requirements (every jurisdiction except the District of Columbia, Minnesota, and North Dakota). I found the information for this and the following footnote from the individual bar admissions Web sites accessed through the NCBE site <<http://www.ncbex.org>> and from American Bar Association, National Conference of Bar Examiners & Section of Legal Education and Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements (Chicago, 2003).
8. The 17 states giving greater weight to the written portion (either a combination of essays and the MPT or only the essays) include Arizona, Arkansas, California, Delaware, Idaho, Maine, Maryland, Mississippi, Montana, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Virginia. Weighting varies from doubling (Arizona, Arkansas, Maryland, Montana, Ohio), to a ratio of 55/45 percent, to 60/40, and to one instance (Idaho) where the written portion constitutes two-thirds of the score. Twenty-two states “combine” essay and MBE scores, which means that a higher score on one section can compensate for a lower score on the other. An applicant need not pass the MBE, the MPT, or the essay portion of the examination separately to achieve an overall passing score. The states that give greater weight to the written portion of the exam also combine scores to determine a passing score. Iowa combines scores but does not indicate whether both scores are of equal weight. Louisiana and Washington are not included in these numbers because they do not administer the MBE.

rely so heavily upon them. If there were viable alternatives, law schools would certainly use them. But they do not, and it is not likely that they will any-time soon.

Actually, bar exam essays are quite unlike law school's lengthy, issue-laden morass of parties and problems. Instead, the bar candidate finds a narrow, issue-driven question⁹ or a general question where the task is to evaluate possible courses of conduct or competing theories of the case. Unlike typical law school exam questions, even the general questions are focused and limited in the actual number of issues tested.

Bar examiners rely on essays for the same reason that law teachers do: writing a well-constructed legal essay is a learned skill that requires mastery of the law and the nature of logical argument. In working with candidates preparing to retake the bar exam, what I found perhaps most incomprehensible was that after three and sometimes four years of law school, and presumably after reading hundreds of cases, these candidates sounded nothing like lawyers. The language of Holmes, Cardozo, Brennan, and Blackmun had not made the slightest impression on them. In their essays, there was not a scintilla of evidence that they had even attended law school. The "problem" was not in the bar exam questions but in the way they approached and answered the questions. The concept of an issue-based analysis had eluded them; it was absent from their essays and, more important, from their thought process.¹⁰

9. Typically a conclusion must be based on answering a particular question. Was the court correct in granting the motion for summary judgment/ for the injunction/ to admit the testimony? Can the defendant successfully assert the defense of justification?
10. My assessments are based on first-hand knowledge: in working one on one with over two dozen New York bar exam retakers in the past five years, I've read several hundred failing bar exam essays. As of July 2003, 14 of 21 retakers I worked with passed the bar exam, principally on the strength of improved essay scores. Since New York releases only the MBE score to passing candidates, I was able to compare scores and determine that the difference between passing and failing was attributable to improved essay scores. New York provides unsuccessful candidates with a breakdown of scores on both the essays and the MBE and makes candidates' essay answers available for a small fee. I do not have New York statistics on passage rates for retakers, but states that publish such statistics and anecdotal evidence indicate a decreasing likelihood of passage with each taking of the exam (i.e., Massachusetts, 5th and more, 17.5 percent pass rate). See <[http://www.mass.gov/bbe/#Bar%20Exam%20 Results](http://www.mass.gov/bbe/#Bar%20Exam%20Results)> (last visited June 10, 2004). My success rate with retakers, while not 100 percent, seems to be better than the prevailing norm.

The first question I ask retakers is whether they've gotten their bar essays and reviewed them. *Every* retaker I've worked with has answered either "No" or "I ordered them but never looked at them." This is one of the primary reasons I've found that students continue to fail the exam: while they "study" again, they proceed exactly as they did before. I change the pattern: I insist on reviewing and analyzing past exam answers so the student can identify their weaknesses, which are invariably in analysis and gaps in understanding the substantive law. We also find carelessness in reading and failures to answer the question asked. In working with MBE questions, I make students explain to me why they've chosen this or that answer. Typically, we find that an incorrect answer is just as likely to be the result of faulty reading as lack of knowledge. Once these weaknesses are identified, the student works on addressing and correcting them.

In addition to working with retakers, I've worked with first-time takers as part of Touro's bar prep program. In the past four years I've conducted workshops for graduating students (both fall and spring graduates) and worked individually with a large number of these students. Unfortunately, it is the students least in need of my assistance (those in the top quarter of the class) who typically seek me out.

These are core legal skills. A licensing process that fails to assess the candidate's ability to write, analyze, and reason logically would be not only inadequate but suspect.

The bar exam tests understanding of the rules of law, not simply the ability to memorize.

The bar exam requires one to know the rules of law with precision and specificity; it also requires a solid understanding of those rules. Memorization plays a part, but no more nor less than it does throughout the educational process. We have all had to memorize the elements of the intentional torts, the rule against perpetuities, the types of jurisdiction, and the standard for summary judgment. The same principle applies here. While the process may begin with rote memorization, the end result is knowledge of the material, for the bar exam and for law practice.

If the bar exam were solely a test of memory skills, the students I worked with surely would have passed on their first attempt; they had memorized the rules of law. But because they did not really understand them, they could not recognize a rule when it assumed a different form or appeared in language different from what they had memorized. They needed to know when a particular rule was implicated by the facts. By failing to identify the issue, they failed to recognize when a particular rule was in controversy. Then it did not matter whether they knew the rule or not. They never got to apply it because they did not see the issue.

In working with students in academic difficulty, I have learned that deficiencies in these areas are as typical of poorly performing law students as of those graduates who fail the bar exam. Both groups have the same weaknesses: the inability to identify the legal issues, the failure to separate relevant from irrelevant material, and the absence of a reasoned, organized analysis which demonstrates an understanding of the relevant legal principles. If these deficiencies are not corrected by the time students graduate, it should come as no surprise if they fail the bar exam.

A solid knowledge of the rules of law is required to write bar exam essays and answer objective short-answer questions. Unfortunately, too many candidates walk into the bar exam without truly *understanding* enough black letter law. A candidate could spend hours studying intentional torts, presumably "know" the elements of a battery, and nevertheless answer questions incorrectly if this knowledge was based solely on memorization without genuine understanding. This is because the bar exam, like a typical law school exam, does not test a candidate's superficial knowledge of the law.

An example from a past MBE illustrates this point nicely.¹¹

Peavey was walking peacefully along a public street when he encountered Dorwin, whom he had never seen before. Without provocation or warning, Dorwin picked up a rock and struck Peavey with it. It was later established that Dorwin was mentally ill and suffered recurrent hallucinations.

11. National Conference of Bar Examiners, Multistate Bar Exam, Question 2 (1996).

If Peavey asserts a claim against Dorwin based on battery, which of the following, if supported by evidence, will be Dorwin's best defense?

- A. Dorwin did not understand that his act was wrongful.
- B. Dorwin did not desire to cause harm to Peavey.
- C. Dorwin did not know that he was striking a person.
- D. Dorwin thought Peavey was about to attack him.

I typically ask this question when I begin working with a student and use it as a kind of legal Rorschach test to evaluate the student's substantive knowledge and analytical skills. Of course, the correct answer is C, but most of my students answer the question incorrectly. Not surprisingly, B is the most popular choice among both first-time and repeat test takers. Why? Because if you read the question quickly and scan the answer choices, you jump to B because it contains the familiar battery language: "desire to cause harm." For example, one student who chose B explained that because a battery is the intentional harmful or offensive touching of another, if Dorwin did not intend to cause harm, then he could not have committed a battery. "Yes," I replied, "but did Dorwin have to intend harm to commit a battery?" The student conceded that Dorwin need not have intended harm to be found liable in battery.

Choice A is only slightly less popular than choice B. Like B, choice A reflects a student's tendency to react to an answer instead of applying the elements methodically to the issue. One student explained his choice of A as follows: if Dorwin did not understand his act to be wrongful, then it could not have been intentional. Just as in B, this reasoning is flawed because the intent element of battery is satisfied not only when the actor intends harmful or wrongful behavior, but if he acts with purpose or knowledge to a "substantial certainty." Dorwin need not have understood his act to be "wrongful" to have formed the requisite intent: he had only to know what would be the likely consequence of striking Peavey with a rock. Only choice C completely negates the intent element: if Dorwin had no idea (no "knowledge") he was striking a person, then he could not have formed the requisite intent to do the act.

A surprising number of students select D. Interestingly, there are two lines of incorrect reasoning to support this choice. One rationale is that self-defense is a valid justification to excuse Dorwin's act. "Where in the facts do you find any basis to believe that Peavey was about to attack Dorwin?" I asked. The students shook their heads. "Nowhere," each reluctantly conceded. Once again, they had reacted to a possible answer without analyzing it within the factual context of the problem. If they had, they would have realized that there were no facts in the question to lead Dorwin to believe Peavey was about to attack him. In fact, careful reading of the problem would have ruled this answer out completely because the first words tell us that "Peavey was walking peacefully"; it was "without provocation or warning [that] Dorwin picked up a rock."

The other line of reasoning relies on the M'Naughton rule regarding the insanity defense to a criminal act. But this was not a criminal prosecution. We are told that "Peavey asserts a claim against Dorwin based on battery," which must mean that it is a claim in "civil" battery; in criminal battery the state

initiates the action. The candidates who hit upon the M'Naughton rule failed to read the facts carefully.

Merely memorizing the elements of battery is insufficient here because the bar exam requires an analysis of the question followed by an analysis of each possible answer with respect to the legal issue posed above. Since each multiple-choice question is really a mini-IRAC, a candidate who fails to identify the issue or misreads the question will likely choose a wrong answer, even though all the candidates could probably recite the elements of a battery in their sleep.

The MBE is meant to weed out those candidates possessing anything less than mastery of the black letter law with a level of detailed sophistication. This is not to say that a candidate must walk into the exam knowing every single rule of law and its fine distinctions. Considering that a candidate can pass the bar exam despite answering almost 80 out of 200 questions incorrectly (depending on the weight accorded the MBE in a particular jurisdiction),¹² it is evident that one need not know every rule to be deemed “minimally competent” to practice law.¹³

Still, SALT objects to the MBE, claiming that these short-answer questions require candidates to apply the law in artificial ways unrelated to the practice of law: “No lawyer can competently make decisions without more context for the case and without the opportunity to ask more questions or to clarify issues” (448). While this is a true statement, it is not relevant to the bar exam. The point of the exam question is to create a hypothetical universe and test the candidate’s knowledge and thought process within that limited universe. The MBE question is crafted to contain all the facts relevant to resolving the issue. There is no need to go outside the question. The ability to read carefully and rely only on the facts presented and the reasonable inferences that can be drawn from them is a critical legal skill—one that the MBE seeks to test.

12. Only six states require candidates to achieve a set passing score for the MBE: Kentucky, Rhode Island (scaled range from 135 to 140), South Carolina, Tennessee, Vermont, and Wyoming. Out of 39 states identifying scoring standards, only South Carolina sets an automatic failure based on an MBE scaled score of less than scaled 110. A candidate with a scaled score of 110 conceivably answered less than 50 percent of the MBE questions correctly. Only four states give the MBE and essay scores equal weight: Alabama, Florida, Hawaii, Kansas.

13. The NCBE provides subject matter outlines indicating the scope of coverage for each of the six subjects covered on the exam: constitutional law, contracts, criminal law, property, evidence, and torts. Not only is each potential test topic identified within each subject, there is also a breakdown by percentage of how many questions will be taken from a particular category. For example, of the 33 questions on real property and future interests, only 25 percent (8 or 9 questions) come from real property contracts and mortgages. So it is extremely unlikely that there will be more than four or five actual mortgage questions. On the other hand, it is important to know that, of the 34 torts questions, approximately one-half will be negligence questions—almost 8.5 percent of the entire MBE.

Like the NCBE, the bar examiners of each state make vital information available to bar candidates, including the specific topics subject to examination. Most jurisdictions, if not all, include examples of past exam questions and sample answers. The Texas Board of Law Examiners, for example, goes so far as to include general guidelines to candidates for each of the tested subject areas. It offers specific, detailed comments on past exams as well, indicating the common problems encountered in grading the essays. See Past Examination Online, Texas Board of Bar Examiners, at <http://www.ble.state.tx.us/past_exams/mainn_pastexams.htm> (last visited June 4, 2004).

While it certainly might be improved,¹⁴ the MBE is a means of testing a range of substantive law while keeping the grading process manageable. Multiple-choice tests can be graded objectively, free from the possibility of human inconsistencies. Some candidates actually prefer multiple-choice questions because they find it easier to select the correct answer than to articulate one of their own in an essay.

The bar exam tests the ability to act and not react under pressure.

The bar exam requires a candidate to “think like a lawyer.” In law school we teach our students that lawyers act; they do not react. They think deliberately and respond accordingly. The bar exam tests the candidate’s ability to “think precisely, to analyze coldly.”¹⁵ Bar passage requires that a candidate respond to questions with an orderly thought process. The exam demands that a candidate remain calm under pressure and not panic.

Clearly the bar exam is anxiety-producing, but a certain level of anxiety is a good thing. Anxiety is a very real part of the lawyer’s everyday world of deadlines, conferences, and trials. A lawyer cannot afford to lose control because of pressure but must remain focused.

The bar exam requires a mastery of legal principles and core substance; tricks or techniques are no substitute.

When I work with candidates preparing for the bar, especially those who are retaking the exam, I do not teach tricks or strategies for bar passage, unless

- it is a trick to write an issue-based analysis.
- it is a trick to distinguish between legally relevant and irrelevant facts.
- it is a trick to include a solid discussion of the relevant rule of law before applying it to the facts.
- it is a trick to read carefully and thoughtfully and comprehend what you have read.
- it is a trick to organize one’s thoughts before writing.
- it is a trick to use language carefully to convey precisely what you mean.

One of the most serious misconceptions about the bar exam is that passing it depends on tricks and techniques. There are no tricks to be learned, only the law, as any retaker will unfortunately be able to tell you. This does not mean, however, that a candidate can afford to be unfamiliar with the exam itself. One must know what to expect.

We tell our students that the key to success is preparation—preparation for class and for exams in law school, preparation for clients

14. Indeed there is room for improvement, but not to the extent or for the reasons that SALT contends. For example, the fact patterns in the MBE questions could be shorter and still adequately test reading and analytical skills.

15. Karl N. Llewellyn, *The Bramble Bush: Our Law and Its Study* 116 (New York, 1930).

and for court in practice. Still, SALT condemns the bar exam because it requires preparation.¹⁶

Not only do law students prepare for exams by studying from past exams, but practitioners regularly consult previously written complaints, memos, and briefs when drafting new motions. This is especially true of new associates in their first year of practice. Sometimes the only guidance on a project a new associate receives is a file of similar documents showing what the firm expects in terms of format, composition, style, and even specific language. Preparing for the bar exam by working with released exam questions is no different.

Admittedly, bar review courses have come to play a role in the process. But the course will be insufficient for bar passage if the student comes to it without the fundamental skills that should have been acquired in law school. The course simply puts all the rules tested in the jurisdiction in a structured, cohesive package; it does not teach anyone how to analyze a question, write an essay, or think through a problem. It assumes that the candidate learned these skills in law school.¹⁷

The bar exam tests the subjects students should have learned in law school in preparation for the general practice of law.

The bar exam seeks to test a wide range of substantive law but focuses on the areas important to a beginning lawyer. It tests general topics because most law school graduates become sole or small-firm practitioners and need the basic bread-and-butter knowledge.¹⁸ It tests general subjects and not boutique areas because law students do not graduate as experts in a particular field, although most eventually specialize and practice in one or a few areas.¹⁹ The six subjects tested by the MBE are required courses in virtually every law school; they represent the core substance of a legal education.²⁰

Perhaps more important, the bar exam acknowledges our dual system of government and recognizes the lawyer's need to know both federal and state law. Still, the bar exam remains pretty much a creature of the state. Except for the MBE, it is state-specific. Presumably it reflects the interests of the jurisdiction, as determined by that jurisdiction. Different states may test different subjects—a diversity that reflects the complexities of our form of government and, more particularly, state sovereignty in such matters.

16. SALT sees the need for most law students to take a bar review course as giving the lie to “the argument that the bar examination is geared toward testing professional competence or aptitude in any meaningful way” (448). But the preparation of a bar course cannot compensate for ignorance or substitute for ability. It can only help to provide the framework for optimal performance.

17. The research indicates a strong correlation between law school grades and bar passage. Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 T. Marshall L. Rev. 517, 523 (1991).

18. Section of Legal Education and Admissions to the Bar, American Bar Association, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum* 27 (Chicago, 1992) (commonly known as the MacCrate Report).

19. *Id.* at 33.

20. See *supra* note 13.

The bar exam neither demands nor requires the sacrifice of skills-based courses for substantive courses.

Unfortunately, SALT's assertion that the bar exam has become a "driving force in the law school curriculum" (449) is accurate, at least in some law schools. But the problem is not the exam; it is the schools' misunderstanding of the skills required for bar passage. A school need not design a curriculum around the specific topics tested on the bar exam. Most if not all of the skills that the exam tests are already being taught routinely in law classes—both substantive and practice-based courses. Whether the course is Civil Procedure or Pretrial Litigation, students have to read, think logically about what they have read, and produce a written work product in one form or another. Every course requires legal reasoning. Any distinction between the so-called bar courses and clinical courses is a false one. Students can take both substantive and clinical courses without jeopardizing their bar passage.

SALT contends that concern with bar passage has so influenced law school admission decisions that schools seek "to admit students who will pass the bar exam" at the expense of other criteria, with the effect of reducing the number of students—and graduates—"who will be more likely to serve underserved legal communities" (449).²¹ As a member of my school's Admissions Committee, I can say that we look at the sum total of the application package and admit students we believe are capable of learning the law. Our rationale is that if they have the ability to learn the law, they will have the ability to pass the bar exam. This approach rightly places the burden on the institution to fulfill its obligation to the student, instead of the other way around.

Testing What Law School Teaches

Learning to think like a lawyer is the key to passing the bar. The fiction that success on the bar exam depends mainly on proficiency in taking standardized tests such as the LSAT²² is just that—a myth that does not survive

21. SALT "believes that law schools' main goal should not be to admit and train students who will pass the bar examination, especially when serving that goal often comes at the expense of admitting students who will be more likely to serve underserved legal communities" (449). Essentially SALT argues that the requirement of bar passage equals the loss of legal services to underserved legal communities because the graduates who would serve such communities are those more likely to fail the bar exam. SALT would have us believe that because there is some correlation between LSAT scores and bar exam scores, law school admissions officers give too much weight to the LSAT. *Id.* As studies of the bar exam have shown, however, the greatest indicator of bar passage is law school GPA (*infra* notes 23, 26, 27), and the decision to enter public service work is more a function of the law school environment than of the admission process (*infra* notes 36–39).

For the view that the amount of time a student spends studying may explain the connection between public service work, law school grades, and bar passage, see Andrea A. Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 385 (2002). Curcio conjectures that "many of those students getting the high grades spend their time studying, to the exclusion of all else." *Id.* But can one fault a student for making study a priority when time is at a premium and choices must be made?

22. SALT quotes Kristin Booth Glen:

If you take students who know how to take a test almost exactly like the bar examination and know how to take it successfully, as the LSAC study tells us is the case with the LSAT, you don't actually have to do much with those students in law school to assure their success on the bar examination (449).

scrutiny.²³ According to a comparison between incoming law students and law graduates from the same law schools, who had virtually identical average LSAT scores, “the highest MBE score earned by the novices was lower than the lowest score earned by any of the graduates.”²⁴ A logical conclusion is that “if general intellectual ability and test-wiseness were the major factors influencing MBE scores, both groups should have had very similar MBE scores.”²⁵ Additional research indicates that MBE scores “are highly correlated with other measures of legal skills and knowledge, such as scores on state essay examinations and law school grades.”²⁶ After controlling for law school quality, test reliability, subject matter and test type, time limits, and the ability to take tests, researchers concluded that “the higher the law school grade point average (LGPA), the greater the likelihood the applicant will pass. No other measured variable really mattered once there was control for LGPA.”²⁷

Problems with SALT's Suggested Alternatives to the Bar Exam

It would be unwise to abandon the bar exam in favor of any of SALT's suggested alternatives. The proposals either fail to adequately address the need for a uniform measure of minimum competency in the basic analytical skills required for law practice or risk the creation of a legal hierarchy based on the licensing process. Neither the proposed “diploma privilege” nor a licensing measure that relies on public service alternatives would properly serve the interests of the profession as a whole.

First, one goal of an exam that almost every U.S. law school graduate²⁸ has to pass must be to ensure some measure of uniformity and consistency among test takers who attended widely varying law schools. The requirement of bar

23. National Conference of Bar Examiners, *Myths and Facts About the Multistate Bar Examination* (Madison, 2001) [hereinafter *Myths and Facts*]. Research has found that the strongest predictor of bar exam passage is law school GPA. Linda F. Wightman, LSAC National Longitudinal Bar Passage Study (Newtown, 1998); see also Klein, *supra* note 17.

24. Stephen P. Klein, *The Performance of Novice Law Students and Law School Graduates on the Bar Exam* (Chicago, 1986). This research was conducted for the NCBE in July 1986; incoming law students took the morning session of the MBE.

25. *Id.*

26. *Id.* See also Stephen P. Klein, *Summary of Research on the Multistate Bar Examination* (Chicago, 1993). Klein's analysis of the empirical validity of the MBE included examination of the correlations between MBE and essay scores and the MBE's correlation with law school grades and LSAT scores. The studies found a strong correlation between MBE and essay scores with “an almost perfect correlation between MBE and essay scores when the unit of analysis is law schools rather than individual candidates.” *Id.* at 24. MBE scores were also found to be highly correlated with law school grades (LGPA) and LSAT scores. *Id.* at 25. Analyses of July 1992 data show that at “13 of California's 15 largest law schools, LGPAs were more highly correlated with MBE scores than with this state's essay scores (median LGPA/MBE/ and LGPA/essay correlations across the 15 schools were .62 and .56, respectively). The .06 difference between these correlations stems from the MBE's greater reliability (both correlations are .66 when corrected for reliability).” *Id.*

27. Klein, *supra* note 17, at 523–24 (finding that if students have the same LGPA, they are likely to do equally well on the bar exam, regardless of whether one of them is a minority student). Further, “a candidate in the bottom quarter [of the class] is much less likely to pass than is a candidate in the next quarter.” *Id.*

28. Wisconsin is the exception. All graduates of its two ABA-accredited law schools are granted a law license.

passage compensates to some extent for the differences between law schools and individual faculty.

Second, SALT's proposed ten-week practical skills component as a substitute for the bar exam is not only inappropriate but unnecessary. Basic legal education includes assessment of interviewing, advocacy, legal writing, and legal drafting skills. Passing such courses should be sufficient evidence of competency.

Third, SALT's proposal to adopt the teaching-term model of some Canadian provinces would eliminate neither the testing of substantive law nor the need for preparation. The Canadian licensing process relies heavily on both.²⁹ For example, admission to the bar in British Columbia requires the candidate to complete the ten-week Professional Legal Training Course and pass a two-part qualification examination,³⁰ which covers substantive law in eight areas and includes multiple-choice, true/false, and short-essay questions. Similarly, Upper Canada requires the candidate to successfully complete an eighteen-week academic phase and pass licensing exams in eight substantive courses before being called to the bar.³¹ The Law Society of Upper Canada offers candidates exam-writing tips similar to those provided by the NCBE and such states as New York and New Jersey—for example, “set yourself time deadlines for the exam questions and abide by those deadlines”; “[e]xtraneous information may change a correct answer into an incorrect answer.”³² Apparently there is unanimity not only in what bar examiners expect, but in what bar candidates produce to inspire such advice.

Fourth, the proposal for an alternative licensing system that would rely on a term of public service could create a tiered structure in the profession.

29. The lawyer's call to the bar in Canada is dependent on the laws of the province in which the candidate took a law degree.

30. The candidate must also complete 12 months of articles, including the 10-week PLTC. Part I of the examination covers four areas: commercial, company, creditor's remedies, and criminal procedure. Part II covers civil litigation, family, real estate, and estates. See Skills Assessments and Qualification Examinations, The Law Society of British Columbia, at <http://www.lawsociety.bc.ca/pitc/frame_pitc_about.html> (last visited June 4, 2004).

31. The Law Society of Upper Canada delivers the Ontario Bar Admission Course. The academic phase includes a three-week solicitor (real estate) module, a two-week barrister (criminal law) module, and a three-week barrister (civil litigation) module. Each module consists of skills development, assignments, assessments, lectures, seminars, and a licensing exam. The subjects of the remaining licensing examinations are public law, family law, professional responsibility, estate planning, and business law. The Law Society of Upper Canada, Course Structure, at <<http://education.lsuc.on.ca/pd/pdcoursestructure.jsp>> (last visited June 4, 2004). In March 2002 the Task Force on the Continuum of Legal Education introduced an interim report proposing a fundamental change in the way the Law Society currently readies candidates for their call to the bar. While one of the proposed reforms is to eliminate the Law Society's actual teaching of substantive law and procedure and leave that to the law schools, “it will continue to prepare and provide the Reference Materials for the subjects on which the candidates will be examined.” Task Force on the Continuum of Legal Education, Interim Report to Convocation ¶3, at <http://www.lsuc.on.ca/news/pdf/convmar02_continuum.pdf> (Mar. 21, 2002). It intends to maintain the licensing examinations based on these materials, comparing the approach to the American bar admission process. See *id.* at ¶¶ 33–34.

32. The Law Society of Upper Canada, Bar Admission Course Tips on Writing Examinations §§2.1.2, at <<http://education.lsuc.on.ca/Assets/PDF/BARExamWritingTips.pdf>> (last visited June 4, 2004). For comparison to American recommendations to candidates, see *supra* notes 6–8.

Perhaps there are tiers of law schools (as in the *U.S. News and World Report* rankings), but the equality among licensed attorneys is recognized by the general population and the profession.³³ An alternative licensing program could lead to a schism in the profession and create a legal caste system, one caste including those who sat for the bar exam, the other consisting of those who chose public service instead.

While SALT does not specifically advocate oral examinations in place of written ones, it suggests such a move when it faults the bar exam for not testing a candidate's ability to "communicate orally, counsel clients, and negotiate" (447). Oral exams are problematic for two reasons: first, there is neither time nor resources for a one-on-one dialog with each candidate;³⁴ and second, the inherent nature of dialog would make such a testing device ineffective and unreliable.

Besides being expensive and impractical, a system based on oral examinations would be inappropriate for evaluation purposes. Oral exams are inherently subjective and generally fail to assess a student's true knowledge. The dynamics of dialog necessarily intrude into the test situation; the questioner may unintentionally give the examinee clues as to the desired response. If you have ever conversed with a student who you thought knew the material and then been astonished by a dreadful final exam, then you know what I mean: there is often a profound difference between an oral presentation and a written one. In oral exchanges the student is as much led by the questioner's subliminal prompts as the questioner is led to fill in gaps in the dialog with her own perception of what the student "intends" to say. The natural prompting that occurs in dialog is entirely absent when the student is left alone to write. Written words stand on their own, and their meaning must be clear without interpretation or question.

SALT's Misunderstanding of the Bar Exam

When the SALT statement is examined in its entirety, it becomes apparent that what SALT blames on the bar exam is not properly attributable to the exam. SALT holds it responsible for everything from the type of exams

33. Committee on Bar Admissions and Lawyer Performance and Richard A. White, AALS Survey of Law Schools on Programs and Courses Designed to Enhance Bar Examination Performance (March 2002), at <<http://www.aals.org/Bar2001Report.pdf>> (last visited July 25, 2004) [hereinafter AALS Survey]. The committee concluded that law schools should be concerned about bar passage rates for many reasons, among them that "the profession's and the public's perception of both lawyers and law schools is in part dependent upon passing the bar."

34. When the California bar examiners included assessment of oral skills in their 1980 research project on the bar exam, they found that while oral skills could be tested fairly, the cost of doing so was prohibitive. Armando M. Menocal III said, "It was extremely difficult to [to perform oral testing] with 485 applicants. We could not consider it for 8,500." Performance Testing: A Valuable New Dimension or a Waste of Time and Money? B. Examiner, Nov. 1983, at 26 (panel presented at the ABA Annual Meeting, Aug. 1983, with panelists Douglas D. Roche, Moderator, Armando M. Menocal III, Jane Peterson Smith, and Albert Sachs). The same problem would be encountered in most jurisdictions and especially in such large ones as New York, where 9,407 candidates sat for the July 2003 bar exam. N.Y. State Board of Bar Examiners, July 2003 Bar Exam Results, at <<http://www.nybarexam.org/jul2003.htm>> (last visited June 4, 2004).

administered in law schools to the career choices of law graduates and ultimately to the composition of the profession. But the bar exam simply is not the engine behind every aspect of the law school experience.

In a classic case of the tail wagging the dog, SALT faults the bar exam for the type of exams administered in law schools: "If the bar exam assessed a broader range of skills, or assessed skills in various ways, law schools might also adjust their assessment modalities so that they were not all geared toward rewarding just one type of skill or intelligence" (449). Surely a law teacher would not adopt the same testing devices as a national or statewide exam unless he believed that essays and multiple-choice questions were appropriate devices to test the skills and substantive knowledge students should have acquired in his course.

It is also inappropriate for SALT to fault the bar exam for the typical law school practice of basing grades on a single final examination. A teacher can certainly choose to use midterms, quizzes, and writing assignments. This creates far more work for the teacher, but the bar exam does not dictate how she chooses to evaluate her students.

Not only does the bar exam impose no particular type of test on law schools, it imposes no requirement on where the candidate will practice, nor does it recognize any difference in areas of law. The bar exam tests the ability to read carefully, think and write concisely, and engage in legal reasoning because these skills are as fundamental to the practice of public interest law as they are for the practice of criminal law.³⁵ If a law school admits students who plan to represent underserved legal communities, the school and the individual students make those choices, not the bar exam.

According to the legal education literature, neither admissions officers nor the bar exams control the futures of law students; rather, it is the law school experience itself that is responsible for students' course selections and any loss of motivation to enter public service work.³⁶ The literature indicates that "a significant number [of law students] lose self-confidence, motivation to do public interest work, and their passion for learning" as a consequence of the competitive pressures of the law school environment.³⁷ This is clearly inconsistent with SALT's view that the bar exam drives these choices.

35. While some may argue that "different kinds of lawyers need different strengths" (Curcio, *supra* note 21, at 364), all lawyers need certain basic skills. The trial attorney and the corporate attorney both need to read carefully, whether it's court transcripts or financial statements; the public interest lawyer and the solo practitioner both need to write competently, whether representing a discrimination victim or a noncustodial parent seeking visitation rights.

36. A flood of recent legal scholarship documents the disturbing effects of the law school environment on law students. Some of it relies on interviews with law students. See, e.g., Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. Legal Educ. 75, 76 n.1 (2002). Some is based on empirical research; see, e.g., Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1375-80 (1997). Hess's article provides a comprehensive bibliography.

37. Hess, *supra* note 36, at 75. Hess reports: "Legal education literature documents a number of disturbing effects of law school on law students," where "[m]any students experience the law school environment as stressful, intensely competitive, and alienating." *Id.* at 75.

Day-to-day participation in the law school culture is responsible for a huge change in the well-being, values, and beliefs of the first-year law student.³⁸ While SALT claims that law students pass up clinical classes and courses such as environmental law, poverty law, civil rights litigation, law and economics, and race and the law because of concerns with bar passage (449), it is the institutional culture of law school that influences these decisions.³⁹

While it might be appropriate for SALT to urge law schools to inculcate certain values and suggest particular career paths to their students in an effort to guide the profession toward the achievement of specific goals, it is wholly inappropriate to place this burden on the bar exam. Since bar admission in nearly all jurisdictions requires a law degree, any requirements that law schools decide to impose on students would become *de facto* requirements for a law license.

Finally, while SALT concludes that the bar exam has a “disparate impact on people of color” (450), it offers no justification to support such a claim aside from a single bar passage rate.⁴⁰ Unfortunately, such inflammatory and harmful misconceptions about the bar exam persist, including the myth that it discriminates against minority applicants.⁴¹ The fact is that “the MBE neither widens nor narrows the gap in performance levels between minority applicants and other applicants.”⁴² Research indicates that “differences in mean

38. Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence, 52 J. Legal Educ. 112, 113 (2002) (“The tales of law student and lawyer depression, overwork, dissatisfaction, alcohol abuse, and general distress are legion, and many of us see, more clearly than we would like, the undoing of our students’ collective energy, enthusiasm, and engagement after only a few months of law school.”).

39. “[T]he exclusive valuing of thinking ‘like a lawyer’ directly discourages students from being themselves. They learn to inhibit the expression or consideration of ideals, values, and personal beliefs, and they lose sight of the potential satisfaction inherent in cooperation and mutually beneficial outcomes.” *Id.* at 118.

Hess similarly describes the negative effects of the law school environment on its students. He includes numerous excerpts from student interviews, including this:

I came to law school to use the law for public interest or social justice. And I think one thing that has gotten me down is the lack of acceptance for the notion of using a law degree for those purposes. We have this huge weight given to making it in a firm. And when someone expresses other interests, they’re looked at as a do-gooder, or on the fringes.

Hess, *supra* note 36, at 82.

40. To support its conclusion that “the current examination disproportionately delays entry of people of color into, or excludes them from, the practice of law” (450), SALT refers to the LSAC study (Wightman, *supra* note 23), finding a disparity of 21 percentage points between the eventual bar pass rates of whites and blacks.

41. Myths and Facts, *supra* note 23 (myth 6). While it is not disputed that, on average, members of racial/ethnic minority groups have lower bar pass rates than their classmates, the studies that have investigated the potential sources of the differences have found that candidates’ likelihood of passing the bar is tied closely to their law school grades and not to their racial/ethnic group. Research has shown that “two applicants with about the same LGPA from the same school have about the same probability of passing regardless of their racial/ethnic group.” Stephen P. Klein & Roger Bolus, The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups, B. Examiner, Nov. 1997, at 15.

42. Myths and Facts, *supra* note 23 (myth 6). See also Klein, *supra* note 26, at 35 (finding that one subtest does not consistently widen or narrow the gap between groups more than any other subtest).

scores among racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores or performance test scores."⁴³

Perhaps it is most telling that SALT has failed to mention such studies, especially those which indicate a strong correlation between higher grades in law school and success in passing the bar.⁴⁴ That link clearly supports the argument that the bar exam tests the skills learned in law school.⁴⁵ It further supports the claim that success on the bar exam is not a mere reflection of test-taking abilities but a measure of the skills and knowledge acquired through a legal education.

If there are differences between groups, the disparities existed before and during law school. While bar exam results may reflect differences between groups to some degree, the exam does not create these differences. SALT's statement that "the failure of the bench and bar to be as diverse as they could be is partly attributable to the existing bar exam" because it "disproportionately delays entry of people of color into, or excludes them from, the practice of law" (450) is unsupportable.⁴⁶ If it has been difficult to increase the diversity of the bar as much as we would like, the bar exam is not the source of our frustration.

When a student has mastered the basic skills of legal analysis, then the law school has accomplished its task of teaching the student how to learn the law. And when a student has learned how to learn the law, then bar passage is not an insuperable obstacle, but a requirement for entering the profession which must be met like any other.

43. Over the past 25 years, many studies have explored the possible sources for the differences between groups in bar exam scores and passing rates. Factors thought to be related to the differences, and therefore studied, have included the types of questions, the subject matter of the exam, the test format (essay, multiple-choice, or performance), the racial/ethnic backgrounds of the grader, the time limits imposed, and even the types of law schools from which the applicants graduate. No systematic relationship between the differences in mean bar exam scores and question characteristics, content coverage, test format, or reader characteristics has been identified. Klein & Bolus, *supra* note 41, at 10–12.

44. In attempts to account for the source of differences in bar passage rates, what was found to matter was the candidate's LGPA. This relationship was found to be "about three times stronger than the one between Law School Admission Test (LSAT) scores and LGPAs (or between LSAT and bar scores)." *Id.* at 12. See also Kristine S. Knaplund & Richard H. Sander, The Art and Science of Academic Support, 45 J. Legal Educ. 157, 201 (1995).

45. Klein & Bolus, *supra* note 41, at 12. Knaplund and Sander conclude that there are "obvious reasons why higher grades should be linked to greater success on the bar: law school exams test skills and areas of knowledge similar to those tested by bar examiners." Knaplund & Sander, *supra* note 44, at 201.

46. Bar passage is a function of a number of factors, but the closest link is between law school grades and bar performance. If there is a relationship between race and LGPA, this is the issue that should properly concern SALT. AALS Survey, *supra* note 33. According to that report, discussions with various law school faculty and administrators at the January 2001 AALS conference "indicated that many, but not all, students failing the bar come from the lowest academic quartile of the student body, suggesting a correlation between grades and bar passage rates." *Id.* The report also said that "other anecdotal evidence suggests that students who work, have family obligations, or learning issues also may be at risk." *Id.*