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A Merritt-orious Path for Lawyer Licensing

CAROL L. CHOMSKY,* ANDREA A. CURCIO,† & EILEEN KAUFMAN‡

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I. INTRODUCTION

More than two decades ago, Professor Deborah Merritt turned her attention to responding to the then-proliferating efforts to raise state passing scores for the bar examination. Writing with Lowell Hargens and Barbara Reskin, two professors of sociology, Professor Merritt challenged the methodology of the studies that purported to show the need to “raise the bar.”¹ In the process, she presciently raised broader concerns about the validity of the bar exam to assess lawyer competence and the impact of the bar exam on the diversity of the legal

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The authors are members of the Collaboratory on Legal Education and Licensing for Practice (<http://www.barcovid19.org>). The authors would like to thank Lane McKell, research assistant at GSU College of Law, for her invaluable assistance.

¹ 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, 929, 931–32 (2001).

profession. In the years since, Professor Merritt has continued to critique the bar exam, and her work has laid a foundation for the work of many others—including the authors of this piece—challenging the validity and adequacy of the current lawyer licensing system.

The reach of Professor Merritt's work far exceeds the impact of her academic scholarship. She is as concerned with practice as with theory, and her empirical work² and her involvement with those advocating for change³ have been instrumental in both leading and encouraging others on a similar journey.⁴ We, like others, have been inspired by her to continue our work to reform the lawyer licensing process. In this Essay, we discuss and expand on Professor Merritt's groundbreaking work re-envisioning the bar exam and developing more effective alternative licensing methods.

² See generally DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR 3 (Dec. 2020).

³ Professor Merritt is a member of the Collaboratory on Legal Education and Licensing for Practice, a group of 11 scholars, including the authors of this Essay, who began working together on lawyer licensing issues in 2017. See About, COLLABORATORY, <https://barcovid19.org/about/> [<https://perma.cc/N4P9-MEXG>]. The Collaboratory meets regularly and produces scholarly articles and op-ed pieces on a range of licensing reform issues. *Id.* Professor Merritt has been a key author and collaborator on most pieces the Collaboratory has produced and her scholarly and on-the-ground work makes her a sought-after speaker for state bar task forces examining alternative pathways to licensure.

⁴ See, e.g., Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AM. ASS'N OF L. SCHS. NEWS (2017), <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [<https://perma.cc/ASW8-SXHV>] [hereinafter Merritt, *Faculty Perspectives*]; Deborah J. Merritt, *Reflections of a Bar Exam Skeptic*, LAW SCH. CAFE (May 26, 2017), <https://www.lawschoolcafe.org/2017/05/26/reflections-of-a-bar-exam-skeptic> [<https://perma.cc/4U6L-85SG>] [hereinafter Merritt, *Reflections of a Bar Exam Skeptic*]; Deborah J. Merritt, *Bar Exam Scores and Lawyer Discipline*, LAW SCH. CAFE (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline> [<https://perma.cc/2DG5-YLLP>]; Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY COMMONS @ UNLV BOYD LAW 2–6 (Mar. 22, 2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2309&context=facpub> [<https://perma.cc/2HAN-9DES>] [hereinafter Angelos et al., *The Bar Exam and the COVID-19 Pandemic*]; Andrea A. Curcio, Marsha Griggs, Joan W. Howarth & Deborah Jones Merritt, *INSIGHT: Bar Exam Repeaters Shouldn't Be Pushed to Back of the Line*, BLOOMBERG L. (June 1, 2020), <https://news.bloomberglaw.com/us-law-week/insight-bar-exam-repeaters-shouldnt-be-pushed-to-back-of-the-line> [<https://perma.cc/EAD8-P5PC>]; Claudia Angelos, Eileen Kaufman, Deborah Jones Merritt & Patricia E. Salkin, *INSIGHT: New York's Bar Exam Changes Are Misguided—Here's a New Proposal*, BLOOMBERG L. (May 7, 2020), <https://news.bloomberglaw.com/us-law-week/insight-new-yorks-bar-exam-changes-are-misguided-heres-a-new-proposal> [<https://perma.cc/PLZ9-W74H>].

II. QUESTIONING THE BAR EXAM

The goal of lawyer licensure is to protect the public from incompetent lawyers. In most states, all applicants must pass a bar exam to be licensed,⁵ and most jurisdictions use the Uniform Bar Exam developed and marketed by the National Conference of Bar Examiners (NCBE).⁶ As the predominant pathway to licensing, it is essential that bar examinations—and especially the Uniform Bar Exam (UBE)⁷—truly test competence, and do so fairly. In fact, however, as documented by Professor Merritt and others, bar exams have a long history of disparate outcomes based on gender, race, and economic status, and they are far from true tests of competence.⁸ The inequity and inadequacy of the tests were highlighted by the experience of test-takers in 2020 and 2021 in the midst of the COVID-19 pandemic and the unrest following the murder of George Floyd⁹ and have been increasingly recognized by attorneys and academic commentators.¹⁰

⁵ While most states require a bar exam for licensure, Wisconsin has a diploma privilege alternative pathway to licensure. *Service for Attorneys*, WIS. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/3RFG-B2EZ>]; Wis. Sup. Ct. R. 40.03, <https://www.wicourts.gov/sc/rules/chap40.pdf> [<https://perma.cc/FLP5-JHDD>]. New Hampshire has an experiential learning pathway to licensure. *See* Rules of the Supreme Court of N.H., R. 42(XII), <https://www.courts.state.nh.us/rules/scr/scr-42.htm> [<https://perma.cc/M9QW-3A5X>].

⁶ *See* COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021, NAT'L CONF. OF BAR EXAM'RS & SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N (Judith A. Gundersen & Claire J. Guback eds., 2021), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf (on file with the *Ohio State Law Journal*).

⁷ The UBE has been adopted by the majority of jurisdictions and even those that have not adopted this version of the bar exam have adopted parts of the UBE and model the remainder of their exam on the UBE format. *See* COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021, *supra* note 6, at 19–20.

⁸ *See infra* Part II.B.

⁹ For an excellent summary of the conditions faced by 2020 potential bar licensees, see Letter from Annette E. Clark, Dean & Professor of L., on behalf of Seattle Univ. Sch. Of L. faculty to Hon. C.J. Debra L. Stephens (June 10, 2020), <https://taxprof.typepad.com/files/seattle-letter.pdf> [<https://perma.cc/2TVQ-WXEV>].

¹⁰ Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> [<https://perma.cc/Q4WR-B3RW>]; Ilya Somin, *The Case for Replacing the Bar Exam with "Diploma Privilege,"* VOLOKH CONSPIRACY (July 29, 2020), <https://reason.com/volokh/2020/07/29/the-case-for-replacing-the-bar-exam-with-diploma-privilege/> [<https://perma.cc/HQM2-WLVA>]; Angelos et al., *The Bar Exam and the COVID-19 Pandemic*, *supra* note 4, at 2; Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 958 (2020) [hereinafter Howarth, *Professional Responsibility Case*]; Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 39 (2020).

Even the NCBE itself has acknowledged that its version of the bar examination is outdated.¹¹ The time has come for change.

But acknowledging the flaws is only the first step in addressing the problems. Developing a new way—better yet, alternative ways—to license lawyers requires thoughtful engagement by lawyers, bar examiners, judges, and legal academics. Once again, Professor Merritt has led the way. In her groundbreaking study, *Building a Better Bar*, she has both identified the competencies that should be assessed for applicants and provided a set of recommendations to help reach that goal.¹² In the remainder of this section, we briefly outline the flaws of the current bar examinations. In the sections that follow, we review and develop proposals for addressing those flaws by changing what and how we test in bar examinations and then ask whether there are alternatives to a traditional test that would provide a better way to assess minimum competence. Throughout, we highlight and build on Professor Merritt's contributions to the discussion.

A. Bar Examinations Test the Wrong Things, and Badly

For decades, we,¹³ Professor Merritt,¹⁴ and other scholars¹⁵ have identified problems with the current bar exams that call into question their validity. First, the exams require memorization of thousands of rules. As we have previously documented, “[m]emorization does not equate to retained legal knowledge.”¹⁶

¹¹ Following a multi-year study, the NCBE has decided to re-vamp the bar exam so that it tests a wider range of lawyering skills and relies less on memorization of legal rules. *See* NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 20 (Apr. 2021), <https://nextgenbarexam.ncbex.org/reports/final-report-of-the-ttf/> [<https://perma.cc/YE7B-FVK9>] [hereinafter FINAL REPORT OF THE TESTING TASK FORCE].

¹² *See* MERRITT & CORNETT, *supra* note 2, at 70–77.

¹³ *See, e.g.,* Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 222–44 (2014) [hereinafter Curcio, Chomsky & Kaufman, *Testing, Diversity, & Merit*]; Eileen Kaufman, Andi Curcio & Carol Chomsky, *A Better Bar Exam—Look to Upper Canada?*, LAW SCH. CAFE (July 25, 2017), <https://www.lawschoolcafe.org/author/eileen-kaufman-andi-curcio-and-carol-chomsky/> [<https://perma.cc/D856-54SX>] [hereinafter Kaufman, Curcio & Chomsky, *A Better Bar Exam—Look to Upper Canada?*]; Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *How to Build a Better Bar Exam*, 90 N.Y. ST. BAR ASS'N J. 37, 37–38 (2018) [hereinafter Curcio, Chomsky & Kaufman, *How to Build a Better Bar Exam*].

¹⁴ *See, e.g.,* Merritt, *Faculty Perspectives*, *supra* note 4; Merritt, *Reflections of a Bar Exam Skeptic*, *supra* note 4; MERRITT & CORNETT, *supra* note 2, at 3–4.

¹⁵ Howarth, *Professional Responsibility Case*, *supra* note 10, at 958; Griggs, *supra* note 10, at 39; Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 351–52 (2003); Cassandra Burke Robertson, *How Should We License Lawyers?*, 89 FORDHAM L. REV. 1295, 1296 (2021).

¹⁶ Curcio, Chomsky & Kaufman, *Testing, Diversity & Merit*, *supra* note 13, at 233.

Indeed, as Professor Merritt's research confirms, new lawyers do not rely on memory; they research the law.¹⁷

Second, when administered as a uniform, national exam, the many rules that are tested are often not the rules that apply in the particular jurisdiction,¹⁸ so applicants are forced to memorize the wrong rules and to ignore even significant local variations that matter enormously in practice.

Third, a substantial portion of current bar exams test using multiple choice questions and essay questions based on a statement of facts written by the bar examiners. But that does not reflect how clients present legal problems or how lawyers go about answering those problems. Lawyers learn the facts through client and witness interviews, and then raise claims through creating narratives based on those interviews. Asking for "answers" to formulated scenarios fails to test what lawyers actually do and therefore fails to assess minimum competence.¹⁹

Fourth, the exams measure a variable unrelated to law practice: test-taking speed.²⁰ The multiple choice portion of the UBE provides examinees with only 1.8 minutes to answer each of 200 multiple choice questions—a test design that does not allow any time for thoughtfully digesting a legal problem and thinking through an analysis, but instead requires weeks of practicing rapid-fire multiple choice test-taking in order to learn the skill of answering a kind of question never faced in law practice, and to do so based on snap judgments instead of thoughtful inquiry.²¹ The UBE essay exam allows 30 minutes for each essay,²² an unrealistic time frame for any lawyer to evaluate a scenario and write a coherent and thoughtful analysis. The performance test portion of the UBE allows 90 minutes to read the case packet and write an answer to the problem posed, a pace not representative of law practice.²³ If speededness were an important characteristic of lawyering, having a speeded exam would be sensible, but it is not. Lawyers work under time pressures, of course, but their time constraints are not at all like the pressures of the bar exam. (Nor do lawyers answer multiple choice questions based on "canned" facts in practice, making those questions particularly inappropriate.)

¹⁷ MERRITT & CORNETT, *supra* note 2, at 24–25 (discussing why memorization is the antithesis of the lawyering skills that should be assessed).

¹⁸ *Id.* at 23–24.

¹⁹ *See id.* at 64.

²⁰ Curcio, Chomsky & Kaufman, *Testing, Diversity & Merit*, *supra* note 13, at 235.

²¹ *See id.* at 236–38 (illustrating, in a step-by-step manner, the thought processes examinees must go through to answer a bar exam multiple choice question).

²² *Multistate Essay Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mee/> [<https://perma.cc/4ZFS-V6Z8>].

²³ Curcio, Chomsky & Kaufman, *Testing, Diversity, & Merit*, *supra* note 13, at 226–27.

Finally, the exams test only a small portion of the skills lawyers need, an issue identified by many scholars²⁴ and confirmed by the National Conference of Bar Examiners' own studies.²⁵

B. Current Bar Examinations Reinforce Racial Disparities

Bar examinations were first adopted as part of a strategy to exclude people then considered undesirable, by race, by ethnicity, and by socioeconomic class.²⁶ Statistically, in jurisdictions where data is available, the percentage of BIPOC applicants who pass the exams is persistently and consistently lower than for White applicants.²⁷

These disparities have appeared in multiple bar administrations at least since the early 1990s.²⁸ In 2020, 66% of Black law school graduates passed the bar

²⁴ *Id.* at 241–42 (discussing the range of skills that should be, but are not, assessed); Merritt, *Faculty Perspectives*, *supra* note 4 (citing to a 2012 NCBE job analysis which revealed gaps in minimum competence skills measured); Glen, *supra* note 15, at 378–79; *see also* STATE BAR OF CAL., THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM 2 (May 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> [<https://perma.cc/63KB-S8BG>] (identifying a range of skills necessary to new lawyer competencies, many of which are not tested by the existing exam).

²⁵ FINAL REPORT OF THE TESTING TASK FORCE, *supra* note 11, at 6–13; *see also* MERRITT & CORNETT, *supra* note 2, at 5 (discussing two NCBE job analysis surveys).

²⁶ *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 64–66, 127–28 (1976); R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935-1975*, 109 AM. J. EDUC. 320, 328 (2001); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104, 113 (2003).

²⁷ *See* Howarth, *Professional Responsibility Case*, *supra* note 10, at 952–55.

²⁸ Numerous studies have detailed disparities. *See, e.g.*, LINDA F. WIGHTMAN & HENRY RAMSEY, JR., LAW SCH. ADMISSION COUNCIL, LSAC NAT'L LONGITUDINAL BAR PASSAGE STUDY, at viii (1998), <https://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/MWA2-WHSB>] (showing, *inter alia*, eventual pass rates of 77.6% for Black candidates and 96.7% for White candidates); NAT'L CONF. OF BAR EXAM'RS, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/GFT8-MMNA>] (finding that Black candidates passed at 68.5% and White candidates passed at 90.1%); *California Bar Examination Statistics*, ST. BAR CAL., <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> [<https://perma.cc/EV2Z-587T>] (through clickable links, showing similar disparities from 2009–2018 across multiple racial and ethnic categories every year). Many states do not collect data on race and ethnicity, but the consistent pattern of disparate outcomes across test administrations makes it likely the same results would be found in each state.

exam on their first try, as contrasted to 76% for Latinx candidates and 88% of White candidates.²⁹

Professor Merritt has been a leader in pointing to the racial disparities that resulted from raising the passing (“cut”) score and in criticizing the bar exam for contributing to the lack of diversity in the profession.³⁰ Her work proved crucial in defeating the efforts of many states to increase their passing scores in the 1990s and 2000s.³¹ That issue remains relevant today, as documented by a California study that showed how the selection of passing scores has an exclusionary effect on applicants of color³² and a study by the AccessLex Institute confirming that bar exam results are largely a function of the applicants’ resources.³³ Those most likely to pass are candidates who have the resources to study full-time for two months after graduation, purchase expensive bar preparation courses, and not be distracted by family obligations.³⁴

²⁹ AM. BAR ASS’N, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE 1 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statastat/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf (on file with the *Ohio State Law Journal*).

³⁰ Deborah Jones Merritt, *Raising the Bar: Limiting Entry to the Legal Profession*, in CLEARING THE BAR: HOW TO SET THE STANDARD, BAR EXAM’R, Nov. 2001, at 6, 9–11; Merritt, Hargens & Reskin, *supra* note 1, at 929–30.

³¹ For example, New York proposed in 2004 to increase its passing score from 660 to 675 over three years. The first five-point increase went into effect in 2005. After studies revealed the disparate impact of the increased passing score on racial minorities, the NY Court of Appeals determined not to implement the next two five-point increases. *See* N.Y. STATE BD. OF L. EXAM’RS, IMPACT OF THE INCREASE IN THE PASSING SCORE ON THE NEW YORK BAR EXAMINATION 1–6 (July 2007), <https://www.nybarexam.org/press/summary2.pdf> [<https://perma.cc/Q3FP-Z74W>] (summarizing three studies by the National Conference of Bar Examiners for the New York State Board of Law Examiners regarding the impact of the increase in the passing score on the New York Examination); *see also* Barbara L. Jones, *MSBA Assembly Votes Against Raising Bar Scores*, MINN. LAWYER: SAINT PAUL LEGAL LEDGER (July 3, 2000), <https://minnlawyer.com/2000/07/03/msba-assembly-votes-against-raising-bar-scores/> (on file with the *Ohio State Law Journal*) (reporting opposition in Minnesota to increasing the passing score, based on disparate impact of such a move). Following such opposition, including testimony by then-co-president of the Society of American Law Teachers Carol Chomsky drawing on the work of Professor Merritt, the Minnesota Supreme Court declined to change the passing score.

³² Mitchel L. Winick, Victor D. Quintanilla, Sam Erman, Christina Chong-Nakatsuchi & Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards* 3 (Oct. 15, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3707812> (on file with the *Ohio State Law Journal*). The study showed that when a state chooses its passing score, it is choosing the racial and ethnic make-up of the profession. *Id.* at 4.

³³ ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 5–6 (May 2021), <https://www.accesslex.org/NYBOLE> (on file with the *Ohio State Law Journal*).

³⁴ *Id.* at 11, 15, 49.

Professor Merritt has linked these results to the stark racial disparities produced by the bar exam, since candidates of color are less likely to have the financial resources necessary for bar exam success³⁵ and has noted the way stereotype threat may intersect with other aspects of the exam, including speededness, to exacerbate the challenges for BIPOC applicants.³⁶ These disparate results are exacerbated by the variation in cut scores across the country, and the differential effect that higher cut scores have on minority populations. In response to this evidence, California—with one of the highest cut scores in the country—and Rhode Island recently decided to lower their cut scores,³⁷ and other states are considering similar action.³⁸

Because the bar exam is not a valid test of competence,³⁹ the racial disparity that it produces is unacceptable. Indeed, it would be illegal if Title VII anti-discrimination requirements applied to licensing exams.⁴⁰ The assessment of minimum competence must be grounded in empirical evidence to ensure that our licensing system does not impose unnecessary barriers to candidates who

³⁵ Deborah Jones Merritt, Carol Chomsky, Claudia Angelos & Joan Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), <https://news.bloomberglaw.com/ip-law/racial-disparities-in-bar-exam-results-causes-and-remedies> [<https://perma.cc/BPS7-LG4F>].

³⁶ *Id.* That effect would not be surprising because working memory is a key component of successful test-taking. Jared Cooney Horvath & Jason M. Lodge, *What Causes Mind Blanks During Exams?*, CONVERSATION (Oct. 25, 2016), <https://theconversation.com/what-causes-mind-blanks-during-exams-67380> [<https://perma.cc/CY6B-ZVG7>]. Stereotype threat affects working memory. Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCH. 440, 451 (2003); Belle Derks, Michael Inzlicht & Sonia Kang, *The Neuroscience of Stigma and Stereotype Threat*, 11 GRP. PROCESSES & INTERGROUP RELS. 163, 164 (2008).

³⁷ *California Supreme Court Lowers Passing Score for Bar Exam*, KNBC (Aug. 10, 2020), <https://www.nbclosangeles.com/news/california-news/california-bar-exam-score-lower-coronavirus-test/2410791/> [<https://perma.cc/DL4P-W548>]; Order, *In re the Rhode Island Bar Examination (Reduction of Minimum Passing Score)*, at 1 (R.I. Mar. 25, 2021), <https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/RIBarExamination-ReductionMinimumPassingScore3-25-21.pdf> [<https://perma.cc/946W-Q622>]; see also Sam Skolnik, *Bar Exams May Soon Be Easier to Pass, as States Eye Changes*, BLOOMBERG L. (Mar. 29, 2021), <https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes> [<https://perma.cc/XXF5-QSNT>]. The California court initially refused to make the new lower cut score retroactive but then agreed to apply it to recent test-takers who narrowly failed under the higher standard if the applicants successfully completed 300 hours of supervised practice. See Order re Request for Approval of Proposed Amendments to the California Rules of Court 3–5 (Cal. Jan. 28, 2021), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-01/20210128062716391.pdf> [<https://perma.cc/YBE9-4TY9>].

³⁸ Skolnik, *supra* note 37.

³⁹ See *supra* Part I.A.

⁴⁰ See Curcio, Chomsky, & Kaufman, *Testing, Diversity, and Merit*, *supra* note 13, at 220; Howarth, *Professional Responsibility Case*, *supra* note 10, at 935; see also Eura Chang, *Barring Entry to the Legal Profession: How the Law Condone Willful Blindness to the Bar Exam's Racially Disparate Impacts*, 106 MINN. L. REV. 1019, 1056–57 (2021).

are competent to practice law.⁴¹ Professor Merritt has led the way to achieving that goal in her groundbreaking report, *Building a Better Bar Exam*. The following section describes the efforts of Professor Merritt and others to propose a licensing system that does a better job at measuring minimum competence while not unnecessarily excluding candidates of color.

III. CREATING A BETTER LICENSING SYSTEM: *BUILDING A BETTER BAR*

Those defending the current bar exams against challenges to their validity and fairness have justified the form of the exam by claiming that no better alternatives exist or are practical or that the knowledge and skills tested on the bar exam are so critical to lawyering that passing it is necessary, even if no other essential skills are assessed for licensing.⁴² For reasons we have outlined above and discussed repeatedly over the past two decades, the bar exam does *not* test essential knowledge and skills.⁴³ We, Professor Merritt, and others have also repeatedly described alternative pathways that would better assess minimum competence *and* address some of the racial and economic disparities of the bar examination.⁴⁴ The first step in reforming the examinations and developing those alternatives is to better identify what minimum competence means and how to test it. Here, too, Professor Merritt led the way.

In 2019–2020, Professor Merritt led a national study that engaged new lawyers and their supervisors in focus group conversations that provided important and persuasive empirical evidence about the knowledge and skills lawyers need as they begin their legal work.⁴⁵ The study went beyond the kinds

⁴¹ MERRITT & CORNETT, *supra* note 2, at 3.

⁴² See, e.g., Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 443, 453 (2004).

⁴³ Society of American Law Teachers Statement on the Bar Exam, 52 J. LEGAL EDUC. 446, 446–49 (2002) [hereinafter *Society of American Law Teachers Statement*]; Curcio, Chomsky, & Kaufman, *Testing, Diversity, and Merit*, *supra* note 13, at 222–42; Kaufman, Curcio & Chomsky, *A Better Bar Exam—Look to Upper Canada?*, *supra* note 13; Curcio, Chomsky & Kaufman, *How to Build a Better Bar Exam*, *supra* note 13, at 38.

⁴⁴ See Curcio, Chomsky & Kaufman, *Testing, Diversity, and Merit*, *supra* note 13, at 244–52; Kaufman, Curcio & Chomsky, *A Better Bar Exam—Look to Upper Canada?*, *supra* note 13; Curcio, Chomsky & Kaufman, *How to Build a Better Bar Exam*, *supra* note 13, at 41; Merritt, *Faculty Perspectives*, *supra* note 4; Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 845–51 (2004); Glen, *supra* note 15, at 415–17; Peggy Maisel, *An Alternative Model to the United States Bar Examinations: The South African Community Experience in Licensing Attorneys*, 20 GA. ST. U. L. REV. 977, 1001–03 (2004); Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 462–63 (2019); Society of American Law Teachers Statement, *supra* note 43, at 451–52.

⁴⁵ The AccessLex funded study, done in conjunction with the Institute for the Advancement of the American Legal System, conducted fifty focus groups across the country—forty-one groups with newly licensed lawyers and nine groups with supervisors of new lawyers. MERRITT & CORNETT, *supra* note 2, at 14. Focus group participants were

of surveys typically conducted to identify the knowledge lawyers need⁴⁶ by inviting the participating lawyers to talk in depth about the work they did in their first year or two on the job and what kinds of knowledge and skills they needed to do those tasks.⁴⁷ They also talked about what they learned “on the job,” how they went about learning those skills, the mistakes made during their first year, and the skills, knowledge, or supervision that would have helped avoid those mistakes.⁴⁸ After identifying the competencies they needed, participants were asked the degree to which the bar exam related to those competencies and whether the preparation for the bar exam helped them be ready to begin serving clients.⁴⁹

The study produced more than seventy-five hours⁵⁰ of transcribed discussion, a rich source of information but a challenge to analyze effectively. Making sense of the material required combing through and coding the hundreds of pages of transcripts to find commonalities and relationships.⁵¹ From her review of that data, Professor Merritt was able to identify what she categorized as twelve “building blocks” of new lawyer competencies, each of which is explained in the report with references to the related clusters of comments:

1. The ability to act professionally and in accordance with the rules of professional conduct;
2. An understanding of legal processes and sources of law;
3. An understanding of threshold concepts in many subjects;
4. The ability to interpret legal materials;
5. The ability to interact effectively with clients;
6. The ability to identify legal issues;

gender and racially diverse, worked in a wide array of practice areas, and an array of legal settings from solo practice to big firm practice, as well as in business, government, and public interest positions. *Id.* at 15–20.

⁴⁶In 2013, the NCBE surveyed new lawyers using lists of preidentified knowledge domains, skills, general lawyering tasks, and specific practice area tasks. Susan M. Case, *The Testing Column: The NCBE Job Analysis: A Study of the Newly Licensed Lawyer*, BAR EXAM’R, Mar. 2013, at 52, 52–53. Respondents used a Likert scale response of one to five to identify how important the respondent believed the knowledge, skill, or task was to the respondent’s performance as a lawyer. *Id.* The NCBE administered another new lawyer practice analysis survey in 2018–2019. NAT’L CONF. OF BAR EXAM’RS, FINAL REPORT OF THE TESTING TASK FORCE 6–7 (Apr. 2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Final-Report-April-2021.pdf> [<https://perma.cc/GFT8-MMNA>]. California also conducted a job analysis survey of new lawyers. STATE BAR OF CAL., THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM 1 (May 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> [<https://perma.cc/63KB-S8BG>].

⁴⁷MERRITT & CORNETT, *supra* note 2, at 5.

⁴⁸*Id.* at 23–24, 26–28, 30.

⁴⁹*Id.* at 20.

⁵⁰*Id.* at 13.

⁵¹*See id.* at 21–22.

7. The ability to conduct research;
8. The ability to communicate as a lawyer;
9. The ability to understand the “big picture” of client matters;
10. The ability to manage a law-related workload responsibly;
11. The ability to cope with the stresses of legal practice; and
12. The ability to pursue self-directed learning.⁵²

The strength of the study is its methodology—engaging newly licensed lawyers who had only recently experienced the transition to practice in identifying what they needed to know and what they had to learn through experience in order to practice competently at the outset of their careers. Professor Merritt’s familiarity with the intersecting worlds of legal academia, law practice, and licensing assessment gave her the unique ability to see the connections and name the competencies the participants described from their own recent experiences.

What is clear from this list of the necessary fundamental skills and knowledge is how little of it is reflected in the bar licensing process, and particularly in bar exams as they currently exist. The study participants themselves noted that a closed-book, time-pressured exam using multiple choice questions bears little relation to the work they did in practice, and that studying for and passing that exam did not focus them on the knowledge and skills necessary for practice.⁵³

Recognizing the inadequacy of the current testing model, Professor Merritt worked from the building blocks to outline recommendations for modifying the bar exam: focus any written exam on the competencies identified; use multiple choice tests sparingly or not at all; substitute performance tests for essay tests; make any retained essay or multiple choice tests open book; and provide more time for all written exam components.⁵⁴ Because a written test assesses only a limited set of the core competencies, Professor Merritt also suggested establishing licensing systems that would offer the opportunity for applicants to demonstrate acquisition of core competencies through clinical and other courses during law school.⁵⁵ The goal should be designing “an evidence-based licensing system that is valid, reliable, and fair to all candidates” and that could incorporate multiple “pathways to licensure, with each path assessing building blocks in a different manner.”⁵⁶

⁵² *Id.* at 30–61.

⁵³ MERRITT & CORNETT, *supra* note 2, at 63–69.

⁵⁴ *Id.* at 70–73.

⁵⁵ *Id.* at 73–76.

⁵⁶ *Id.* at 77–78.

IV. MOMENTUM FOR CHANGE

A. Racial Injustice and the Pandemic

Professor Merritt's study came at an auspicious time, just as two developments—the long-overdue reckoning with societal racial injustice and the consequences of the pandemic—combined with the longstanding critique of the bar exam to transform the debate about lawyer licensing. First, after years of neglect, the country began to confront the racial injustice endemic to our system of law. The deaths of George Floyd⁵⁷ and so many others at the hands of the police,⁵⁸ as well as the news stories about daily indignities suffered by people of color,⁵⁹ led to calls by state supreme judges and courts⁶⁰ and bar

⁵⁷ Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/5RLU-P65L].

⁵⁸ Li Cohen, *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names. (Part I: January-April)*, CBS NEWS (Sept. 10, 2020), <https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-u-s-in-2020/> [https://perma.cc/39QB-UYV7]; see also Li Cohen, *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names. (Part II: May-August)*, CBS NEWS (Sept. 10, 2020), <https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-us-in-2020-part-2/> [https://perma.cc/R9LP-5SQ7].

⁵⁹ See, e.g., Eric Levenson & Kristina Sgueglia, *There Were Two Calls Between Amy Cooper and 911 About a Black Birdwatcher in Central Park, Prosecutors Say*, CNN (Nov. 17, 2020), <https://www.cnn.com/2020/10/14/us/amy-cooper-central-park-racism/index.html> [https://perma.cc/W83Y-28HZ] (describing how a white woman called 911 alleging harassment when an African American bird watcher asked her to put her dog on a leash); Michelle Singletary, *Racial Microaggressions Take a Major Toll on Black Americans*, WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/business/2020/12/04/racial-microaggressions-black-americans/> [https://perma.cc/YF2C-5HU2] (describing a range of microaggressions); Brandon Griggs, *A Black Yale Graduate Student Took a Nap in Her Dorm's Common Room. So a White Student Called Police*, CNN (May 12, 2018), <https://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html> [https://perma.cc/C3L4-QQFQ] (describing how a black Yale grad student was interrogated by police after a white student found her sleeping in the dorm common area and called the police, and listing similar incidents of police being called on Black people for doing things like leaving their Airbnb or hanging out at Starbucks).

⁶⁰ Letter from The Supreme Court of Washington to Members of the Judiciary and the Legal Community 1 (June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> [https://perma.cc/8MLC-X3XQ]; Press Release, N. C. Jud. Branch, Chief Justice Beasley Addresses the Intersection of Justice and Protests Around the State (June 2, 2020), <https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state> [https://perma.cc/WH4Y-WYSW]; Letter from Chief Justice Bernette Joshua Johnson, La. Sup. Ct., To My Colleagues in the Judicial, Executive, and Legislative Branches 1 (June 8, 2020), https://www.lasc.org/press_room/press_releases/2020/2020-18_Justice_for_All_in_Louisiana.pdf [https://perma.cc/YJN7-32EP].

associations⁶¹ to address systemic racism within the justice system. The long-standing disparate impact of the bar exam, and the recognized need to diversify the profession have helped motivate re-examination of the bar licensing process. Second, as the country began grappling with the COVID-19 pandemic, Professor Merritt and others (including the authors) raised questions about the necessity and impact of holding bar exams in the face of health risks faced by exam takers, the exam's inherent validity flaws, the unequal impact of economic disruption on test-takers, and the racially disparate impact of the exam itself.⁶² Disparities caused by the anti-cheating software used to monitor online exam takers also began generating concern.⁶³ Professor Merritt played a leading role in raising these issues.⁶⁴ In the summer and fall of 2020, bar examinations did

⁶¹ *Addressing Systemic Inequities in the Justice System*, IND. ST. BAR ASS'N, <https://www.inbar.org/page/systematic-inequities> [<https://perma.cc/HC8S-KE6M>]; *CBA YLS Racial Justice Coalition*, CHI. BAR ASS'N YOUNG LAWS. SECTION, https://www.chicagobar.org/chicagobar/CBA/YLS_Students/YLS_Programs/Racial_Justice_Coalition/CBA/YLS_Law_Students/Racial_Justice_Coalition.aspx?hkey=ebfe07c0-1366-4f34-861d-a52ee6ea5be9 (on file with the *Ohio State Law Journal*); State Bar of Wis., *Board Sets Racial Justice Policies, Discusses Diversity & Inclusion CLE, Approves 2022 Budget*, WISBAR NEWS (Apr. 19, 2021), <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=28354> [<https://perma.cc/J9NH-Z7KX>].

⁶² See, e.g., Angelos et al., *The Bar Exam and the COVID-19 Pandemic*, *supra* note 4, at 2–7 (arguing in a white paper that the pandemic-related health risks, combined with the bar exam's flaws including its racially disparate impact, should lead to states adopting alternative pathways to licensure during the pandemic). Professor Merritt played a substantial role in authoring that white paper, which was downloaded almost 4,000 times in the last year. Her leadership in the Collaboratory on Legal Education and Licensing for Practice (see *supra* note 3) and her academic writing and blog posts have sparked others to add their voices to the criticism of the bar exam and the calls for change. See, e.g., Margarita Hernández Escontrías, *supra* note 10; Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, APPEAL (July 6, 2020), <https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/> [<https://perma.cc/X5DP-UEXA>].

⁶³ Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020), <https://www.jurist.org/commentary/2020/07/newsome-perrone-online-bar-exams/> [<https://perma.cc/MA3R-N3A2>]; Khari Johnson, *ExamSoft's Remote Bar Exam Sparks Privacy and Facial Recognition Concerns*, VENTUREBEAT (Sept. 29, 2020), <https://venturebeat.com/2020/09/29/examsofts-remote-bar-exam-sparks-privacy-and-facial-recognition-concerns/> [<https://perma.cc/892J-G8U9>].

⁶⁴ The following list is just a sample of the work Professor Merritt played a major role in authoring during the 2020 pandemic: Claudia Angelos et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 6, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/> [<https://perma.cc/86M5-8HNS>]; Collaboratory on Legal Education and Licensing for Practice, *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 168–69 (2020); Claudia Angelos, Andrea Curcio, Marsha Griggs & Deborah Jones Merritt, *INSIGHT: Clinical Education—A Safe and Sure Pathway to Law Licensure*, BLOOMBERG L. (July 8, 2020), <https://news.bloomberglaw.com/us-law-week/insight-clinical-education-a-safe-and-sure-pathway-to-law-licensure> [<https://perma.cc/S6YL-5SE4>]; Carol L. Chomsky, Joan W. Howarth, Eileen Kaufman & Deborah

change, albeit under emergency circumstances.⁶⁵ Some jurisdictions adopted a revised and shorter version of a national exam offered by the NCBE; some created their own essay-based exams; some made the examination open-book.⁶⁶

B. Momentum for Change in State Licensing

In the wake of the disruption to the administration of the bar exam in 2020 caused by the pandemic, the civil unrest following the murder of George Floyd, and the petitions and advocacy of 2020 law graduates who faced an unprecedented set of circumstances that led them to question the value of the bar examination,⁶⁷ supreme courts and bar examiners began to consider their own commitment to the current system of bar licensing. Several states—including Oregon, California, New York, Georgia, Washington, Minnesota, and Utah—created task forces, committees, or commissions to consider whether a better licensing system could be created.⁶⁸ Many of those groups have relied on

Jones Merritt, *INSIGHT: Lawyers Justice Corps—Public Service in a Time of Crisis*, BLOOMBERG L. (June 19, 2020), <https://news.bloomberglaw.com/us-law-week/insight-lawyers-justice-corps-public-service-in-a-time-of-crisis> [https://perma.cc/M6BR-KZB2]; THE COLLABORATORY, *Remote Bar Exams in 2020*, in AM. ASS'N OF L. SCHS. 2020 NEWSLETTER 6, 6–7 (2020); Curcio, Griggs, Howarth & Merritt, *supra* note 4; Deborah Jones Merritt, Marsha Griggs & Patricia Salkin, *Courts Should Look to 3 Bar Exam Alternatives During Crisis*, LAW360 (Apr. 23, 2020), <https://www.law360.com/articles/1266791/courts-should-look-to-3-bar-exam-alternatives-during-crisis> [https://perma.cc/BV8N-VWTS].

⁶⁵ A list of the changes made by jurisdictions across the country can be found at *COVID-19 and the July 2020 Exam*, Bar Exam'r, Fall 2020, at 12, <https://thebarexaminer.org/article/fall-2020/covid-19-july-bar-exam/> [https://perma.cc/7FMU-5N8Y].

⁶⁶ *Id.*

⁶⁷ See Rachel Stone, *Push for Diploma Privilege Unites Law Grads Nationwide*, LAW360 (July 8, 2020), <https://www.law360.com/articles/1289972/push-for-diploma-privilege-unites-law-grads-nationwide> [https://perma.cc/8M8V-4W6E] (describing nationwide advocacy effort for the diploma privilege). Graduating students filed petitions for a diploma privilege in many states. See, e.g., Petition for Emergency Rule Waiver, *In re: Temporary Waiver of the Bar Exam Requirement for Admission to the Bar and Provision of Emergency Diploma Privilege*, No. ADM10-8008 (Minn. June 22, 2020), <https://images.law.com/contrib/content/uploads/documents/292/Minnesota-Petition-filed-6-22-20.pdf> [https://perma.cc/59W4-G8EB] (petitioning to waive bar examination in Minnesota). Though most were denied. See *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [https://perma.cc/7L2G-V68L] (referring to petitions in Alaska, California, Connecticut, Florida, Idaho, Illinois, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, and Tennessee).

⁶⁸ Some task forces formed in 2020 already have issued reports. See, e.g., Letter from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, Or. State Bd. of Bar Exam'rs, Re: Recommendation of the Alternatives to the Bar Exam Task Force, to Bd. Members, Or. State Bd. of Bar Exam'rs (June 18, 2021), <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf> [https://perma.cc/KYM5-XBGQ] [hereinafter

Professor Merritt's work, and a number of them invited Professor Merritt to share the results of her research and explain how those results could be used to create a fairer and more valid licensing system. The work of these groups is in process, but for the first time there is active consideration of changing the bar examination, moving away from the UBE, and offering licensing alternatives to the bar examination, at least on a pilot basis. The task force in Oregon, for example, proposed and the Oregon Supreme Court approved in principle adding a supervised practice pathway and an experience-based learning pathway to licensing.⁶⁹ Both of those alternatives were explicitly grounded in the building blocks of minimum competence identified by Professor Merritt in *Building a Better Bar Exam*.⁷⁰

C. NCBE's NextGen Bar Exam

The NCBE has not been immune to the criticism of the UBE and to the calls for change. After decades of critiques about the exam's validity, the NCBE began in 2018 to reconsider the content, format, and delivery of the existing bar exam.⁷¹ It engaged in a study involving multiple groups of stakeholders, including bar admission officials, attorneys, and legal educators, that resulted in recommendations for substantial changes in the exam's content, format, and

Oregon State Board of Bar Examiners Letter] (Oregon); Supplemental Letter from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, Or. State Bd. Of Bar Exam'rs, to C.J. Martha Walters, Or. Sup. Ct. (Nov. 29, 2021), <https://taskforces.osbar.org/files/2021-11-29SupplementalReporttoJune182021ATEReport.pdf> [<https://perma.cc/BW75-LS6E>]; Staff Memorandum from the Task Force on the N.Y. Bar Examination, N.Y. State Bar Exam'rs (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/8YS8-DNHC>] [hereinafter Staff Memorandum NY State Bar Examiners] (New York). Others are in the midst of gathering information in order to make recommendations. See, e.g., *Joint Blue Ribbon Commission on the Future of the California Bar Exam Holds First Meeting*, ST. BAR CAL. (June 29, 2021), <http://www.calbar.ca.gov/About-Us/News/News-Releases/joint-blue-ribbon-commission-on-the-future-of-the-california-bar-exam-holds-first-meeting> [<https://perma.cc/R39D-FELL>] (California); *3/24/2021 – July Bar Exam to Be Remote, While Task Force Will Study All Aspects of Assessing Lawyer Competency*, SUP. CT. GA. (Mar. 24, 2021), <https://www.gasupreme.us/july-2021-bar-exam/> [<https://perma.cc/RKG2-NW4H>] (Georgia); *Washington Bar Licensure Task Force*, WASH. CTS., https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.LicensureTaskForce [<https://perma.cc/8F9U-952Z>] (Washington); Emily John Eschweiler, Dir., Minn. State Bd. of L. Exam'rs, Public Notice (June 21, 2021), <https://www.ble.mn.gov/wp-content/uploads/2021/06/Public-Notice-June-21-2021.pdf> [<https://perma.cc/Z9GD-A9HR>] (Minnesota).

⁶⁹ Oregon State Board of Bar Examiners Letter, *supra* note 68; Leanne Fuith, *Is There a Better Way to Admit Lawyers?: The Future of the Bar Exam Needs a Hard Look*, BENCH & BAR MINN., Dec. 2021, at 12, 14. The Supreme Court ordered the Oregon Board of Bar Examiners to convene committees to develop implementation plans for the proposal. *Id.*

⁷⁰ See Oregon State Board of Bar Examiners Letter, *supra* note 68.

⁷¹ FINAL REPORT OF THE TESTING TASK FORCE, *supra* note 11, at 2.

delivery methods.⁷² The new exam has been called NextGen by the NCBE.⁷³ As presently envisioned, it will substantially reduce the number of doctrinal areas being tested; focus on foundational concepts rather than more nuanced rules and exceptions; switch the majority of the exam to a closed-library case file format and use those materials for selected response, short answer and extended response constructed items; and build new performance test questions.⁷⁴ These changes have the potential to greatly reduce the rule memorization that is required for taking the current exam.⁷⁵ Additional recommendations include adding questions on previously untested areas such as: legal research; investigation and evaluation; client counseling and advising; negotiation and dispute resolution; and client relationship and management.⁷⁶

The proposed changes are an important step in the right direction, although it remains to be seen what recommendations will be adopted in practice. Even with these improvements, the exam will suffer from many of the problems identified above: it will contain multiple choice questions, will remain closed book except where there is reliance on case files, and will continue to impose very constrained time limits for examinees to answer questions. In addition, it is expected to be administered only by computer, a methodology that will present severe challenges to exam-takers as they juggle multiple small display windows to both access lengthy source materials and write lengthy answers for essay questions. Moreover, the NCBE has not yet committed to studying the effect (and especially the disparate impact) of time limits on test takers, a critical aspect that requires attention.⁷⁷

V. THRESHOLD CONCEPTS

As we and others have noted, among the shortcomings of the bar exam is that it tests too many subjects at too detailed a level, requiring memorization of a large number of legal rules that will rarely be used, if at all, in the test-taker's legal work.⁷⁸ What Professor Merritt's study makes clear (and what law school

⁷² *Id.*

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 20–22.

⁷⁵ *See id.* at 22.

⁷⁶ *Id.* at 21.

⁷⁷ One of the early studies on bar exam time limits suggested that extending the time allowed on the exam would help all test-takers and therefore would not address the overall disparate impact of the exam. Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAM'R, Nov. 1997, at 8, 11–12. The conclusion is questionable since different test-takers may be helped in different ways and amounts if the time were to be extended. More importantly, speed in response is not an appropriate thing to measure. *See supra* notes 20–23 and accompanying text. Since the exam is not curved to produce a particular set of outcomes, if everyone does better that might mean that more applicants will be able to demonstrate minimum competence and therefore pass the exam.

⁷⁸ *See supra* Part II.A.

clinical teachers have always understood) is that competent law practice is not based on knowledge of black-letter rules. Rather, what is necessary is knowing fundamental legal concepts, both in general and related to important doctrinal areas, so that the attorney knows how to approach a client's problem and can understand and apply the doctrinal rules the attorney will typically find, read, or re-read to ensure faithful application of the law.

The NCBE has acknowledged such criticism and has said that its NextGen bar exam will limit the subject areas tested and will focus on “foundational concepts” in those areas.⁷⁹ That approach appears to heed Professor Merritt's advice that any written examination—indeed, any bar licensing scheme—should test “understanding of threshold concepts.”⁸⁰ But just what does it mean to test “threshold concepts” that govern the law as a whole or in particular doctrinal areas?

Identifying what counts as a threshold legal concept is a critical step in ensuring that the bar examination tests the right things the right way. That should be the starting place for anyone constructing a bar exam, including the NCBE as it develops its NextGen exam. It is also crucial for developing supervised practice pathways to licensure by identifying what knowledge should be documented to demonstrate minimum competence. In this section, we offer some suggestions on how to build upon Professor Merritt's identification of “an understanding of threshold concepts in many subjects” as one of the building blocks of minimum competence.⁸¹

A. What Is a “Threshold Concept”?

In 2003, Professors Jan H.F. Meyer and Ray Land introduced the idea of “threshold concepts” to distinguish a particular set of learning outcomes from other core concepts in a discipline.⁸² “A threshold concept can be considered as akin to a portal, opening up a new and previously inaccessible way of thinking about something. It represents a transformed way of understanding, or interpreting, or viewing something without which the learner cannot progress.”⁸³ According to Meyer and Land and those who have worked to build on their ideas, identifying threshold concepts can help teachers organize course material, structure their teaching, and assess student understanding.⁸⁴ As

⁷⁹ FINAL REPORT OF THE TESTING TASK FORCE, *supra* note 11, at 20.

⁸⁰ MERRITT & CORNETT, *supra* note 2, at 37–38.

⁸¹ *Id.* at 3.

⁸² JAN MEYER & RAY LAND, THRESHOLD CONCEPTS AND TROUBLESOME KNOWLEDGE 1 (May 2003), <http://www.etl.tla.ed.ac.uk/docs/ETLreport4.pdf> [<https://perma.cc/2ELS-XMGG>].

⁸³ *Id.*

⁸⁴ Meyer and Land identify threshold concepts as being “transformative,” “probably irreversible,” “integrative,” probably “bounded,” and often “troublesome.” *Id.* at 4–5. Those terms are briefly explained below:

Professor Merritt explains, understanding these concepts “distinguish[es] individuals who have begun to master a subject from all others. Threshold concepts allow new learners to understand the ‘how’ and ‘why’ of their field rather than simply the ‘what.’”⁸⁵

While the threshold concepts framework was formulated for teaching and learning, not for assessing minimum competence, applying the idea of threshold concepts to law may help bar examiners envision what applicants truly need to know, both generally and in specific doctrinal areas. As discussed above, lawyers do not need to know the precise content of a defined set of particular doctrinal rules as they begin handling a client matter. But they do need knowledge—the kind of knowledge that will allow them to analyze client problems, identify the law to research, find the law, and craft arguments grounded in the law to solve or litigate those problems. In other words, they need to know threshold concepts—the concepts that transform novice learners into competent practitioners.

B. Threshold Concepts for All Legal Analysis

In legal education and practice, there are threshold concepts that transcend doctrinal areas. These concepts serve as organizing principles lawyers must understand to be able to situate a legal problem into a framework for understanding and analysis, and they typically appear (though sometimes in the background) in most doctrinal courses. As Joan Howarth explained in relationship to her Torts course:

As a Torts professor, I believe that the Torts course includes some knowledge that every lawyer must understand. This necessary knowledge base includes differences between civil and criminal law; common law development; burdens of proof; standards of review; differences between standards and rules; distinctions between elements and factors; differing roles of judges and juries,

Transformative: the concept shifts perception of the subject area, or a part of it, in a way that may also cause a shift in the student’s worldview or personal identity;

Irreversible (probably): the concept replaces an old perspective with a new perspective that is unlikely to be forgotten;

Integrative: the concept exposes previously hidden connections within the material;

Troublesome: the concept requires students to struggle with material that is counter-intuitive, foreign to the student’s worldview or to work with complex knowledge that contains paradoxes, seeming inconsistencies or subtle distinctions and which is sometimes based upon unstated assumptions;

Bounded (possibly): the concept is generally discipline or subject matter specific.

The descriptors above are summaries based upon Aidan Ricketts, *Threshold Concepts in Legal Education*, 26 J. EDUC. STUD. 2, 4 (2004), who himself summarized and paraphrased Meyer and Land. See Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. LEGAL EDUC. 689, 690–70 (2014) (elaborating on these concepts in context of legal education).

⁸⁵ MERRITT & CORNETT, *supra* note 2, at 37.

and of courts and legislatures; burdens of production and proof; the impact of procedural context on doctrinal analysis; . . . causation principles; . . . and types of damages.⁸⁶

We might add to this list knowing: the difference between common law and civil law decision-making; the methodology of statutory interpretation; the relationships among constitutional, statutory, and common law; the distinction between facts and law and between important/relevant and unimportant/irrelevant facts; and the various methods of dispute resolution. More abstract threshold concepts might include grasping the uncertainties and grey areas of law, the malleability of law based on context and interpretation, and the complexities of dealing with contested narratives.⁸⁷

Most or even all of these concepts would qualify under the Meyer and Land definition of threshold concepts, especially as being transformative, integrative, and often troublesome.⁸⁸ For example, students often come to law school thinking the law will provide certainty, objectivity, and clarity, only to discover the role that subjective judgment, uncertainty, and ambiguity play in legal concepts and argument.⁸⁹ Students often come to law school thinking that the law is a “given,” only to discover the historically and politically contingent underpinnings of legal rules. Students often come to law school thinking the substance of a legal rule is what decides a matter, only to discover the effect of procedure on substantive outcomes. And students come to law school with an undifferentiated and personalized sense of what matters in cases, only to learn that what facts “matter” is driven by the applicable legal rules.

These concepts are *organizing* principles rather than *doctrinal* principles. Bar applicants cannot make sense of a case or statute or use the law to make a legal argument without this kind of basic knowledge. Understanding threshold concepts is also necessary to develop competence in some of the other building blocks Professor Merritt identified, such as: understanding of legal processes and sources of law; the ability to interpret legal materials; the ability to identify legal issues; the ability to conduct research; and the ability to see the “big picture” of client matters.⁹⁰

⁸⁶ Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1, 6 (2019). Professor Howarth’s list included a few doctrinally-focused items that she suggested all lawyers should know. *Id.* Those kinds of items are discussed in the next section.

⁸⁷ See Weresh, *supra* note 84, at 690, 703, 710.

⁸⁸ See *supra* note 84.

⁸⁹ See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 832 (1988) (noting that “lay people are even more likely than lawyers to think of law as determinate, objective”).

⁹⁰ See MERRITT & CORNETT, *supra* note 2, at 31.

C. Foundational Doctrinal Concepts

In addition to understanding threshold analytic concepts—the concepts that underlie all legal understanding and analysis—a lawyer must also have an understanding of foundational concepts in crucial doctrinal or subject areas. When considering what doctrinal concepts to assess, particular care must be taken to identify and test doctrinal principles that are fundamental to “understanding [the] principles and policies that govern the [particular area of] law, rather than [on memorization of] specific black-letter rules.”⁹¹ Rules differ from jurisdiction to jurisdiction as well as over time, but knowing foundational doctrinal concepts allows lawyers to identify doctrinal issues, search for the appropriate rule, see nuances in the rule, and apply the rule effectively to a client’s circumstances.

Although Professor Merritt referred to these fundamental doctrinal concepts using the same terminology of “threshold concepts,” it may be helpful to think of these core doctrinal concepts instead as “foundational,” as the building blocks one needs to understand particular doctrinal areas.⁹² Such core principles are in some ways as fundamental as true threshold concepts—they form the basis for the ability to understand and analyze doctrinal problems—but they seem less likely to fit the Meyer and Land definition of being troublesome, transformational, and integrative.⁹³

What we call these core principles is less important than distinguishing them from the more particularized and detailed rules that a lawyer does not need to recall from memory in order to be competent and that a bar examinee should not be required to recall from memory in order to pass the exam. In each doctrinal area, there are both general principles that shape analysis and detailed rules that govern the outcome of the analysis. The focus of any bar exam—most especially the NCBE exam that is designed and entitled a “Uniform” exam—should be on knowing and being able to use the general principles that are foundational, not on recalling from memory the specific rule applicable in a particular jurisdiction. It is those general principles that applicants must understand, identify as relevant, and know how to apply; the particulars of the applicable rule should be available for applicants to review during a bar exam, rather than requiring them to know that rule.

In contract law, for instance, the need to show parties’ agreement is foundational, as is knowing that their agreement is often shown through communications that operate as what are called offer and acceptance; the way the “mailbox rule” works, however, is not foundational. The availability of a defense for infancy or mental incapacity is foundational, but the particulars of the defenses are not. In civil procedure, the idea of jurisdictional limits and the

⁹¹ *Id.* at 38.

⁹² Weresh, *supra* note 84, at 696–97 (explaining the difference between threshold concepts and core/foundational concepts).

⁹³ See *supra* note 84.

need to have appropriate venue is foundational, but the particulars of the jurisdictional and venue requirements are not. The existence of choice of law rules is universal, but the details are not. The existence of an objective-reasonable-person standard to determine negligence is universal, but the way the standard works, especially with respect to particular classes of plaintiffs and defendants, is not. The focus of the bar examination should be on the overarching and common concepts that underlie the particulars and that allow a minimally competent new lawyer to coherently discuss a doctrinal problem—after finding and checking the details of the rule.

D. Testing Threshold and Foundational Concepts

If a bar exam is constructed based on our recommendations, with testing focused on assessing the applicant's grasp of threshold analytic concepts and foundational doctrinal concepts rather than memory of particular legal rules, the entire test should be constructed as what is currently called a "performance test" (e.g., the Multistate Performance Test part of the UBE). A performance test provides the relevant source material—a closed library of cases, statutes, and documents that contain the legal authority to be used—and asks the applicant to use that material, and the applicant's knowledge and understanding of legal reasoning methodology, threshold analytic concepts, and foundational doctrinal principles, to identify the relevant issues, find the relevant law in the provided materials, and apply that law. The questions asked can be designed to rely upon knowledge of many of the threshold concepts and foundational doctrinal concepts and to require their use to solve client problems tapping a variety of doctrinal areas, but without requiring memorization of specific doctrinal rules.

Alternatively, a test could be constructed not based on a closed library of materials provided for particular questions but based on an identified library of knowledge for the test as a whole—and the test would be made "open book" so applicants can find the law that they need to use. In effect, applicants would be tested not on recall of rules but on their ability to identify what they need to know, find it, and then use it—a skill that lawyers exercise every day.

Whichever format is used, care should be taken to avoid making the exam speeded. The current exam is speeded perhaps primarily because it tries to cover many different subject areas based on lengthy outlines of doctrinal coverage. If the test instead focuses on evaluating the applicant's ability to read, understand, and apply the law based on threshold analytic concepts and foundational doctrinal concepts, it can avoid artificial time constraints and instead concentrate on ensuring applicants can do lawyering work effectively. A test constructed in this fashion will more accurately test what lawyers need for minimum competence because it will more directly replicate the skills new lawyers need in practice.

VI. ADDITIONAL REQUIREMENTS AND ALTERNATIVE PATHWAYS

We have suggested in this Essay ways in which a written bar exam may be modified to better assess entry-level lawyers, but as Professor Merritt notes in *Building a Better Bar*, a written test—even a modified written exam—is an inadequate way to assess many of the building blocks of minimum competence.⁹⁴ She recommends that states supplement any written exam they continue to require by adopting coursework requirements to ensure licensees have acquired building block skills that cannot be effectively assessed in a written exam.⁹⁵ Or, she suggests, states could offer alternative paths that would allow licensing based on completion of a set of courses and law school experiences or through a post-graduation supervised practice experience, each ensuring assessment of all the building blocks, including knowledge of threshold concepts in identified subject areas.⁹⁶ In this section, we describe how an already-existing program implements one of her suggested models and add our own proposal for an alternative post-graduation supervised practice program called the Lawyers Justice Corps.

A. Clinical Education Pathway

Professor Merritt suggests one pathway could “license lawyers based on successful completion of well-defined coursework,” including credits devoted to professional responsibility, research and legal writing, courses in foundational subject areas, courses on client interaction and negotiation, and classes focused on closely supervised clinical work.⁹⁷ As she and colleagues explained, a clinically focused legal education program of this kind would provide a “safe and sure pathway to law licensure” because graduates would have “demonstrated their ability to represent clients effectively, not just [to] memorize rules and apply them to packaged hypotheticals.”⁹⁸ Students who follow such a “clinical pathway” would be repeatedly engaging with real world legal problems and clients, would be closely supervised by faculty who would provide critical and formative feedback, and would learn the necessary professional skill of self-reflection to improve their lawyering skills.⁹⁹ The nature of clinical and closely supervised fieldwork courses would provide assurance that graduates would have demonstrated minimum competence in the twelve building blocks Professor Merritt has suggested for any assessment model.

⁹⁴ The participants noted that “[c]losed book exams, multiple choice questions, and time-pressured exams offer much less valid assessments” than written performance tests and supervised practice experiences. MERRITT & CORNETT, *supra* note 2, at 70.

⁹⁵ *Id.* at 79.

⁹⁶ *Id.* at 80–81.

⁹⁷ *Id.* at 81.

⁹⁸ Angelos, Curcio, Griggs & Merritt, *supra* note 64.

⁹⁹ *Id.*

In fact, a program implementing this model already exists and can serve as a model for establishing similar clinical pathways to licensing elsewhere. New Hampshire's Daniel Webster Scholar Honors Program (DWS), established in 2005, has demonstrated an outstanding ability to produce students who are practice-ready.¹⁰⁰ The two-year program "immerses participating students in experiential learning complemented by ongoing assessment and feedback."¹⁰¹ Among the required subjects that DWS participants study are Pretrial Advocacy, Trial Advocacy, Negotiations, Business Transactions, Client Counseling, Family Law, and Conflict of Laws.¹⁰² DWS students also must complete a capstone course called Advanced Problem Solving and Client Counseling¹⁰³ and prepare portfolios of work that are reviewed by bar examiners before a license is granted.¹⁰⁴ Employers compete to hire graduates of this program who, they report, are far better prepared to practice law than their colleagues whose licensing was based on the traditional bar exam.¹⁰⁵ The effectiveness of the DWS program was confirmed by a study conducted in 2013 by the Educating Tomorrow's Lawyers Initiative of the Institute for the Advancement of the American Legal System (IAALS).¹⁰⁶ That study concluded that the DWS program better prepares lawyers for the realities of practice and "gives us a glimpse into what is possible tomorrow if we are willing to look beyond the limitations of today."¹⁰⁷

The Oregon Supreme Court has approved in principle an experiential education pathway based loosely on the New Hampshire model.¹⁰⁸ Not every law school can offer as intensive a program as DWS, but as the Oregon Supreme Court recognizes, such a program demonstrates the efficacy of adopting robust coursework requirements as a pathway to licensing. Oregon will be exploring a scalable curricular pathway, with coursework and experiential requirements that can be made available to any law student who desires to be licensed in this manner. And because law school classes are open to all students, this form of licensing may avoid some of the discriminatory effect of the bar exam, although the pathway may be somewhat more difficult for those with family obligations or jobs that make it difficult for them to take clinics and externships during law school.

¹⁰⁰ Anne F. Zinkin & John Burwell Garvey, *New Hampshire's Daniel Webster Scholar Honors Program: Placing Law School Graduates Ahead of the Curve*, BAR EXAM'R, Sept. 2015, at 16; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS 1 (Jan. 2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf [<https://perma.cc/SZV9-5AGV>] [hereinafter IAALS].

¹⁰¹ Zinkin & Garvey, *supra* note 100, at 17.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See IAALS, *supra* note 100, at 1.

¹⁰⁶ *Id.* at 18–19.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ See Fuith, *supra* note 69, at 14.

B. Supervised Practice Pathways

During the emergency circumstances of the pandemic, we and others, including Professor Merritt, proposed adopting at least a temporary pathway to licensure through supervised practice after graduation.¹⁰⁹ Only Utah adopted such a measure,¹¹⁰ but others are considering that model, and the Oregon Supreme Court has approved in principle the creation of a permanent supervised practice pathway to licensing.¹¹¹ Such a pathway would allow law graduates to be licensed after working for a designated period of time under the direct supervision of a state-licensed attorney who would provide regular feedback and assessments, perhaps with review by bar examiners of applicant-submitted portfolios.¹¹² Like the clinical pathway, this alternative would assess competence in precisely the knowledge and skills that new lawyers need, and an assessment model could be developed to apply the insights of Professor Merritt's work, using Professor Merritt's twelve building blocks as a framework to best capture the skills and knowledge necessary for minimum competence.

Such a supervised-practice pathway would be the best kind of performance test for minimum competence, measuring the candidate's demonstrated ability to find and use the law in daily practice. To ensure coverage and consistency, states could establish guidelines to be used in the supervision and certification process, drawing from the work of legal academics with expertise in drafting rubrics¹¹³ and the experience of those who have used rubrics to assess fieldwork

¹⁰⁹ Angelos et al., *The Bar Exam and the COVID-19 Pandemic*, *supra* note 4, at 1. Many other states allowed law graduates to work under the supervision of a licensed attorney until normal administration of the bar exam could resume. *Id.* at 5.

¹¹⁰ See Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak, *In re Matter of Emergency Modifications to Utah Supreme Court Rules of Professional Practice, Rules Governing Admission to the Utah State Bar 3* (Utah Apr. 21, 2020), <https://www.utcourts.gov/alerts/docs/20200421%20-%20Bar%20Waiver%20Order.pdf> [<https://perma.cc/JNW8-GL92>].

¹¹¹ Fuith, *supra* note 69, at 14. Other states, including New York, California, and Minnesota are considering a supervised practice pathway. *See id.* at 14–15; New York City Bar, *Letter to the Working Group on the Future of the New York Bar Examination Offering Assistance* (Oct. 22, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/examining-the-future-of-the-new-york-bar-examination> [<https://perma.cc/E6LC-U9V6>] (New York City Bar); Staff Memorandum NY State Bar Examiners, *supra* note 68, at 13 (New York State Bar Association Task Force Report); *Blue Ribbon Commission on the Future of the Bar Exam*, ST. BAR CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Blue-Ribbon-Commission> [<https://perma.cc/23RN-RDKB>] (California).

¹¹² The Oregon proposal suggests between 1,000–1,500 hours. Oregon State Board of Bar Examiners Letter, *supra* note 68, at 2.

¹¹³ See, e.g., ANDREA SUSNIR FUNK, *THE ART OF ASSESSMENT: MAKING OUTCOMES ASSESSMENT ACCESSIBLE, SUSTAINABLE, AND MEANINGFUL* 36–37 (2017); KELLY TERRY, GERALD HESS, EMILY GRANT & SANDRA SIMPSON, *ASSESSMENT OF TEACHING AND LEARNING: A COMPREHENSIVE GUIDE FOR LAW SCHOOLS* 29–32 (2021); Neil Hamilton,

by externship students who are supervised by practicing attorneys.¹¹⁴ Model rubrics have also been developed in New Hampshire's Daniel Webster Scholars program,¹¹⁵ and the experience in using rubrics in medical certification may also be helpful.¹¹⁶ The American Association of Colleges and Universities, which has rubrics for colleges and universities to measure a range of skills including written and oral communication, critical thinking, and self-directed learning,¹¹⁷ has found that rubrics are valid and reliable measures of student learning and achievement¹¹⁸ and they would likewise be a valid and reliable measure of performance in supervised practice.

C. Lawyers Justice Corps

While any well-designed post-graduate supervised practice experience would provide a sensible alternative to the current system of licensing by bar exam, we have previously suggested one particular form of a supervised practice pathway to licensing—a Lawyers Justice Corps—that would respond to the current crisis in the availability of legal services for the poor and under-represented, as well as offering a more equitable way of licensing lawyers.¹¹⁹

Professional-Identity/Professional-Formation/Professionalism Learning Outcomes: What Can We Learn About Assessment from Medical Education, 14 U. ST. THOMAS L.J. 357, 410–11 (2018). Professor Merritt and IAALS recently agreed to work together to design assessment systems for alternative pathways to licensure, and they plan to consult with clinical faculty and public interest organizations as they develop those systems.

¹¹⁴ See, e.g., Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 CLINICAL L. REV. 467, 480 (2014) (citing Sophie Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 18 (2004)); Timothy W. Floyd & Kendall L. Kerew, *Marking the Path from Law Student to Lawyer: Using Field Placement Courses to Facilitate the Deliberate Exploration of Professional Identity and Purpose*, 68 MERCER L. REV. 767, 823–24 (2017).

¹¹⁵ IAALS, *supra* note 100, at 27–31.

¹¹⁶ Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399, 406–20 (2016) (discussing how medical educators developed milestones rubrics to assess medical residents). To see what those rubrics look like, see generally THE ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., INTERNAL MEDICINE MILESTONES (2021), https://www.acgme.org/portals/0/pdfs/milestones/internalmedicine_milestones.pdf [<https://perma.cc/8JRK-334M>].

¹¹⁷ To view various rubrics, see *VALUE Rubrics*, ASS'N OF AM. COLLS. & UNIVS., <https://www.aacu.org/value-rubrics> [<https://perma.cc/3W23-SBV6>].

¹¹⁸ KATHRYNE DREZEK MCCONNELL & TERREL L. RHODES, ASS'N OF AM. COLLS. & UNIVS., *ON SOLID GROUND* 4–5 (2017).

¹¹⁹ See generally Eileen Kaufman, *The Lawyers Justice Corps: A Licensing Pathway to Enhance Access to Justice*, U. ST. THOMAS L.J. (forthcoming 2022), <https://ssrn.com/abstract=3852313> (on file with the *Ohio State Law Journal*); Chomsky, Howarth, Kaufman & Merritt, *supra* note 64. These ideas build upon an idea originally proposed by Dean Emerita Kristen Glen for a Public Service Alternative to the Bar Exam. See generally Glen, *supra* note 15.

Pre-pandemic, more than 80% of the legal needs of the poor were unmet.¹²⁰ This unacceptable justice gap has now been compounded by the unprecedented business closings, job losses, food and housing insecurities, and healthcare crises of the pandemic.¹²¹ A Lawyers Justice Corps would put lawyers to work addressing these and countless other problems facing the most vulnerable segments of our society. Instead of spending three months and thousands of dollars on bar preparation, these graduates could immediately be put to work helping to close the persistent justice gap.

The Lawyers Justice Corps would consist of entry-level lawyers hired by organizations dedicated to representing underrepresented individuals and communities, with each state specifying which organizations qualify.¹²² Members of the Corps would be licensed after six months of supervised practice upon certification by their supervisor, but they would commit to working for the organization for at least a year. We envision that the six-month period would begin with a substantive training program, followed by rigorous supervision and regular feedback. Participants would create portfolios of their work, which, in addition to being reviewed by the direct supervisor, could also be evaluated by either bar examiners (as in the Daniel Webster program) or others (e.g., clinical professors hired for that purpose), possibly under state-established rubrics, to provide legitimacy and enhance consistency of the certification.

The Lawyers Justice Corps presents a particularly workable model for states interested in adopting a form of supervised practice licensing pathway.¹²³ It

¹²⁰ LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (June 2017), <https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74> [<https://perma.cc/KTD3-WU7A>].

¹²¹ See Lyle Moran, *The High Demand for Lawyers Amid the Coronavirus Pandemic*, ABA J. (Mar. 17, 2020), https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/march-2020/the-high-demand-for-lawyers-amid-coronavirus-pandemic/ [<https://perma.cc/6LHT-KYVB>]; *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/6DUE-92RV>].

¹²² New York, for example, already has an approved list of legal services providers that it uses for its Pro Bono Scholars Program. See HON. JANET DIFIORE, PRO BONO SCHOLARS PROGRAM: A LEGAL INITIATIVE 4–5 (2014), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/ProBono-Scholars-Program-Guide-2014.pdf> [<https://perma.cc/FW8L-GQQX>]. Other states have designated organizations qualified to supervise students pursuant to their student practice rules.

¹²³ Indeed, in 2020 the Legal Services Funders Network (LSFN) in California created a program in some ways similar to what we are proposing in order to expand opportunities for those who could operate under provisional licenses while unable to take the bar exam because of the COVID-19 emergency. *LSFN Fellows Program Overview*, LEGAL SERVS. FUNDERS NETWORK, <https://www.legalservicesfundersnetwork.org/fellows-program-overview> [<https://perma.cc/29WP-3SCW>]. The Post-Graduate Law Fellows they supported provided more than 15,000 hours of service and more than two-thirds of them stayed with their legal services hosts after their fellowships ended. *LSFN Public Interest Law Post-Graduate Bar Fellowship*, LEGAL SERVS. FUNDERS NETWORK, <https://www.legalservicesfundersnetwork.org>

narrows the range of placements to organizations that provide services to underrepresented individuals and groups. These organizations typically have orientation, training, and supervision programs already in place that ensure quality representation even from the newest lawyers and that protect the organization's clients. Because the member would be practicing under the supervisor's license for the first six months, there would be an additional incentive for the supervisor to provide rigorous training and oversight. By limiting the supervised practice pathway to legal service organizations, at least initially, the Justice Corps would avoid the inequities of apprenticeship models in other countries, where placements have been easier to find for privileged law graduates and where apprentices have sometimes been mistreated, with little recourse because they are dependent on the employer for certification.¹²⁴ In contrast, legal services providers choose candidates with a demonstrated commitment to public interest work, they seek and often hire a more diverse pool of graduates,¹²⁵ and both the candidates and the Justice Corps employer would be committing to each other beyond the necessary apprenticeship period. In addition to providing a better measure of assessing lawyer competence, the Lawyers Justice Corps would create a cadre of social justice lawyers dedicated to satisfying our profession's obligation to provide legal services to those unable to pay.¹²⁶

VII. CONCLUSION

The significance of Professor Merritt's work on attorney licensing reform cannot be overstated. Her research, writing, and advocacy both laid the groundwork for and continue to advance the discussion of critical issues in professional licensure, as discussed throughout this Essay. She has both defined the problem—the invalidity of our current licensing system—and offered solutions—pathways to a more effective and equitable system based on the twelve building blocks that define minimum competence. For decades, she has led the way, both in her own scholarship and in collaboration with a host of

/fellows [<https://perma.cc/CU4G-8UNC>]. The program was such a success that it was continued in 2021, even though graduates were able to take the bar exam as usual. *Id.* The Lawyers Justice Corps would be different from the LSFN program in two critical ways: it would offer full-time work at entry level salaries (the LSFN fellows are given stipends to work part-time) and, most importantly, participants would be licensed based on the successful completion of their supervised practice without taking a traditional bar exam.

¹²⁴ Oregon State Board of Bar Examiners Letter, *supra* note 68, at 3. The Oregon Task Force noted these unfair barriers endemic to apprenticeship model but concluded that the lack of access to meaningful, paid articling positions can be avoided by a supervised practice pathway that constitutes only one pathway to licensure. *Id.* at 14–18.

¹²⁵ See AM. BAR FOUND. & NAT'L ASS'N FOR L. PLACEMENT, AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 72 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf [<https://perma.cc/6ADU-6NAE>].

¹²⁶ MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2019).

others, to reach this moment when change is on the horizon. We know firsthand the cooperative spirit that animates her and that has been instrumental in creating the opportunities to advance this work. We are privileged to be among those who join together to celebrate Professor Merritt and all she has contributed—and continues to contribute—to our profession.