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Joan W. Howarth

Michigan State University College of Law, howarth@law.msu.edu

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Recommended Citation

Joan Howarth, Teaching in the Shadow of the Bar, 31 U.S.F. L. Rev. 927 (1996-1997).

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Teaching in the Shadow of the Bar

By JOAN HOWARTH*

IN HER KEYNOTE Address for the *Berkeley Women's Law Journal's* Tenth Anniversary Symposium,¹ Trina Grillo exhorted those of us who work in legal education to “focus on how the law and the dominant culture structurally produce subordination.”² She promised: “I know that laws and rules ignore the real lives of [poor, minority, and other underrepresented] women; I can do what I can to make ignoring them more difficult to do.”³ Specifically, Trina Grillo targeted standardized tests:

[W]herever I work, I can begin to struggle against the tyranny we have permitted the Educational Testing Service, the Bar Examiners, and other such organizations—for the most part private, power-mad, and secret—over decisions about who gets into school, who gets a job, who is thought of as smart, and who thinks well of herself once having arrived.⁴

With this essay I am accepting Trina Grillo's challenge to focus serious attention on the particular standardized test that serves as gatekeeper for our profession—the bar examination.

When we conceive of the bar exam as a particularly grueling and potentially unfair rite of passage between law school and the practice of law, we collude in hiding the pervasive power of the bar exam. The bar examination permeates and controls fundamental aspects of legal education at law schools across the country.⁵

* Professor of Law, Golden Gate University. I thank the participants in the Trina Grillo Symposium for their helpful comments.

1. See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 *BERKELEY WOMEN'S L.J.* 16 (1995).

2. *Id.* at 28.

3. *Id.*

4. *Id.* at 28–29.

5. Given the strong correlation between LSAT and bar scores (*see* Hunt, *infra* note 7), the high LSAT scores of students at the most elite law schools immunize those institutions from the same preoccupation with bar passage rates that other law schools face. However, students at the elite schools are not necessarily immune. Success at even an elite law school does not assure bar examination success. The first-time bar passage rate on the July 1996 California Bar Exam was: 92.6% for Yale; 86.2% for Georgetown; 85.7% for Harvard; and 76.5% for Cornell. *See* California Bar Association, Committee of Bar Examiners, *GENERAL BAR EXAMINATION STATISTICS, OUT-OF-STATE ABA APPROVED LAW SCHOOLS WITH TEN OR MORE TAKERS* (July 1996). The first-time bar passage rate on that same bar exam was 88.2% for Stanford Law School. *See* California Bar Association, Committee of Bar Examiners, *GENERAL BAR EXAMINATION STATISTICS, ABA APPROVED LAW SCHOOLS IN CALIFORNIA* (July 1996).

First, of course, the bar exam is a key factor in determining who gets into law school. The ubiquitous, unfair,⁶ and surely simple-minded reliance on the LSAT is justified in large part by the well-established correlation between LSAT scores and bar passage rates.⁷ All but the most elite law schools face constant pressure regarding bar passage rates. If anything, that already over-heated pressure is likely to increase now that the American Bar Association (ABA) is publishing a book aimed at prospective law students providing current bar examination statistics for each accredited law school.⁸ The legal newspapers in California already routinely publish the comparative passage rates of California law schools for each examination. Such information is relevant to those who hope to practice law and should be available to prospective students. But the notion that any particular student is more likely to pass the bar by attending a law school with a higher bar passage rate is not true.⁹ Given the correlation between the two standardized tests, over-reliance on the LSAT is largely driven at less elite law schools by bar passage pressure.

In addition to determining who gets into law schools, bar exams determine the curriculum that schools teach. The bar creates the canon of legal education, making certain courses central and exiling others to the periphery. The "core" courses in a law school's curriculum are very likely to be the courses tested on the jurisdiction's bar exam. For example, Wills and Trusts is at the core, while Employment Discrimination is marginal. Corporations is crucial, yet Lawyering Skills is not. Even within core subjects, the material to be studied is determined in part by the bar exam. In Torts, for example, casebooks are most likely to include recapture of chattels and ignore sexual harassment not simply because of the interests or biases of the

6. See generally Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993) (concluding that only through exposure and disclosure of standardized tests can true eradication of bias occur); David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979) (arguing that the administration and content of standardized tests are inherently culturally biased).

7. See, e.g., Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 766-67 (1996) (finding that the correlation between the LSAT and bar passage indicates that both measure the same thing).

8. See AMERICAN BAR ASSOCIATION, A.B.A. APPROVED LAW SCHOOLS: STATISTICAL INFORMATION ON AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS (1997) (providing bar passage rates for the summer 1995 bar exams).

9. See, e.g., Elizabeth Tennyson, *Who's Passing the Bar?*, THE NATIONAL JURIST, Mar./Apr. 1997, at 31-32. At North Carolina Central University in Durham, a historically black law school, Dean Percy Luney remarks: "[W]e take people with far lower LSATs than any other law school in the state and get them to pass the bar. So, in perspective, who may be doing a better job of teaching?" *Id.*

authors, but also because of the perceived need to cover bar exam material.¹⁰

Even more insidious than the bar's influence on what areas of the law are deemed important, is the bar's influence on *how* the law is understood. Most bar exams consist of multiple choice questions, essays, and (in a growing number of states) performance tests.¹¹ The multiple choice questions are produced by the National Conference of Bar Examiners (NCBE) for multiple jurisdictions, and are designed to be "balanced between [testing] legal reasoning skills and memorization of legal principles."¹² The essays are similar; the performance tests require applicants to solve problems based on a packet of simulated legal documents.

The bar reinforces teaching that the law is fixed, neutral, and natural, rather than contingent, mutable, and often deeply flawed.¹³ But, to understand what legal doctrine one should use on behalf of a client, we need to understand a doctrine's limitations and inequities—where it is fragile and where it is solid. The bar's memorization and analysis program undermines and defeats such knowledge, rewarding instead the application of rules. The bar assumes that the rule's existence is justification enough—the end of legal analysis, rather than the beginning.

In addition to determining who gets in and the substance and goals of what gets studied, the bar exam helps to determine who achieves academic success in law school. The one-hour, issue-spotting question on the bar exam is ubiquitous in legal education.¹⁴ Who knows whether this provides the best testing method? Many of us excuse our lack of exploration of this

10. The bar examiners suggest that "[i]n the selection of subjects for bar examination questions, the emphasis should be upon the basic and fundamental subjects that are regularly taught in law schools." American Bar Association & National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 1996-1997*, A.B.A. SEC. OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR vii (1996) [hereinafter ABA & NCBE]. The "which came first?" reasoning of whether law schools or bar examiners determine the core subjects is similar to the reasoning of the argument regarding the justification of the bar exam through correlation with the LSAT.

11. See ABA & NCBE, *supra* note 10, at 32-37 (1996); see also Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1191-1202 (1995) (providing a history of bar examinations).

12. *Myths and Facts About the Multistate Bar Examination*, 64 THE BAR EXAMINER 18 (Feb. 1995) [hereinafter *Myths and Facts*].

13. For example, according to the bar examiners, the bar examination "should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles . . ." ABA & NCBE, *supra* note 10, at vii. This benign description suggests that the "logical solution" and "reasoned analysis" are natural and value-free, as is the choice of some legal principles as "fundamental." *Id.*

14. See generally Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 435 (1989) (examining the "values, limits, and adverse effects" of law school examinations).

question in part because we are concerned about preparing for the bar exam. Bar examiners tend to justify their work in part by pointing to the correlation between bar passage rates and law school success.¹⁵ That correlation proves very little, however, given the similarity between most law school tests and the bar exam. We can say with assurance that the students getting top grades in law schools show a great aptitude for bar exam testing, and vice-versa, but we are certain of little else.¹⁶

The bar exam also determines who flunks out. Many law schools in states that have especially demanding bar exams (e.g., California) routinely disqualify a significant number of students. These law schools explicitly justify those strict disqualification decisions on the grounds that continuing to take the money of a student not likely to pass the bar is tantamount to consumer fraud. The complementary argument, often paired with the first, is that the school needs to ensure that its bar passage rate does not drop.¹⁷

In each of these ways, the bar exam shapes our institutions, our students, and ourselves as teachers. In each of these ways, the bar exam is a power that takes dreams away from our students and ourselves.

The pervasive influence of bar examinations on legal education would be of less concern if we could be assured that today's bar exams do a good job of shaping the legal profession. But even when considered as simply a post-law school screening device, bar examinations are dogged by two persistent, related, and fundamental criticisms. First, bar examinations do not test readiness or aptitude to practice law.¹⁸ Second, bar examinations perpetually produce racially disparate results.¹⁹

15. "Cumulative undergraduate grade-point average and law school gradepoint average are highly reliable measures [of bar exam results]." Alfred B. Carlson & Charles E. Werts, *Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results*, in 3 REPORTS OF LSAC SPONSORED RESEARCH 211, 220 (Law School Admission Council 1976).

16. *See id.*

17. *See* Allyson Quibell, *School Gets Testy Over Low Pass Rate*, THE RECORDER, Mar. 31, 1997, at 4.

18. *Cf.* Hansen, *supra* note 11, at 1231-35 (proposing to implement a one or two semester lawyering project requirement followed by a mandatory six month supervised clerkship); Hunt, *supra* note 7, at 763-69 (refuting the "Myth of the Bar Exam as a Test of Minimum Competence").

19. *See generally* Hunt, *supra* note 7 (pointing out that defenders of the current bar examination call for better academic preparation for minority students that, in theory, will lead to higher LSAT scores and higher law school grades, that will, in turn, yield higher bar passage rates); Katherine L. Vaughns, *Towards Parity in Bar Passage Rates and Law School Performance: Exploring the Sources of Disparities Between Racial and Ethnic Groups*, 16 T. MARSHALL L. REV. 425, 434-44 (1991) (arguing that students of color still receive unequal education, and this "inadequate educational background" leads to lower bar passage rates). For a discussion of the generally unsuccessful litigation related to these complaints, see Hansen, *supra* note 11, at 1206-08; Hunt, *supra* note 7, at 733-63; Vaughns, *supra*, at 444-52.

In a recent article defending the Multistate Bar Exam (MBE)—the multiple choice questions currently used by most jurisdictions—the NCBE countered claims that the multistate exam is simply a “multiple guess” exam with a study that showed that a law school’s graduates did better on the multistate exam than students about to start at the same law school.²⁰ Armed with this less than startling showing, the multistate examiners argued that “[t]he novices and graduates had virtually identical mean LSAT scores, so if the ability to take multiple-choice tests were the major factor influencing MBE scores, both groups should have had similar MBE scores.”²¹ Should those of us teaching law be profoundly humbled or honored by this argument? Surely to uphold the MBE’s validity by pointing out that attending three years of law school improves one’s score is to damn with the faintest of praise.

The hegemonic shaping of legal education by the bar exam and the unproven connection between bar examination and practice success is especially troubling given the historic and continuing race²² and gender²³ disparities in bar passage rates. Although most states refuse to release race and gender data, the California Bar Examiners publishes data for each test. The most recent results, from the July 1996 Bar Exam, are typical: of first time applicants who attended ABA-approved law schools in California, 82% of Whites passed, compared with 51.1% of Blacks, 64.4% of Hispanics, 74.6% of Asians, and 71% of other minorities.²⁴ The disparities were similar for first time applicants from out-of-state ABA-approved law schools²⁵ and for all 5644 first time test takers from every kind of law school.²⁶

20. *Myths and Facts*, *supra* note 12, at 18.

21. *Id.*

22. See Hunt, *supra* note 7, at 729 (concluding that “all of the studies agree that state bar examinations appear to have a discriminatory impact along racial, ethnic, and gender lines”).

23. For data related to bar exams’ discriminatory impact on women applicants, see Hunt, *supra* note 7, at 726 n.8. For recognition that what appear to be gender differences in SAT results might be attributable to racial differences, see Katherine Connor & Ellen J. Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN’S L.J. 13, 25 (1992).

24. See California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—FIRST TIME TAKERS ONLY (July 1996).

25. Of applicants from out-of-state ABA-approved law schools, 75.4% of Whites, 33.8% of Blacks, 50.8% of Hispanics, 58.6% of Asians, and 61.3% of other minorities passed the July 1996 California Bar Exam. See *id.*

26. Of all the 5664 first time test takers, 73.6% of Whites, 38.3% of Blacks, 55.6% of Hispanics, 67.6% of Asians, and 63% of other minorities passed the California Bar Exam. See *id.* Of these first time takers, only 105 were Black, 228 were Hispanic, and 398 were Asian. See *id.*

Of the 857 first time takers who passed the February 1996 California Bar Exam, only 13 were Black (23.2% of Black takers), 43 were Hispanic (51.8% of Hispanic takers), and 57 were Asian (50.9% of Asian takers). See California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—FIRST TIME TAKERS ONLY (Feb. 1996).

More males than females passed in every category of first time test takers.²⁷ Although male and female repeat test takers did equally poorly on the July 1996 exam (16.4%),²⁸ White repeat test takers scored significantly better than repeat applicants of color in every category of law school.²⁹ California is the only jurisdiction that currently routinely publishes racial and gender data on its test results, but a 1991 report of the New York State Judicial Commission on Minorities showed the average passage rates for the New York July exams between 1985 and 1988 to be 31.1% for Blacks, 33.3% for Native Americans, 40.9% for Hispanics, 62.9% for Asian-Americans, and 73.1% for Whites.

The Law School Admissions Council will soon provide national information from its major bar passage study.³⁰ Preliminary data from that study

Of applicants from ABA-approved law schools in California who took the July 1995 California Bar Exam, 87% of White first time takers passed, compared with 63.2% of Blacks, 67.3% of Hispanics, 78.7% of Asians, and 77.8% of other minorities. *See* California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—FIRST TIME TAKERS ONLY (July 1995). Similar disparities held true for each category of first time test takers. *See id.*

In July 1994, 90.8% of White first time test takers attending California ABA-approved law schools passed the California Bar Exam, compared with 67.5% of Blacks, 74.9% of Hispanics, 83.1% of Asians, and 80.6% of other minorities. *See* California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—FIRST TIME TAKERS ONLY (July 1994). Of all first time test takers in July 1994, 81.3% of Whites passed the bar, compared with 53% of Blacks, 62% of Hispanics, 71.5% of Asians, and 60.5% of other minorities. *See id.*

27. For applicants from California ABA-approved schools, 79.1% of the men passed the California Bar Exam, compared with 76.4% of the women. California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—FIRST TIME TAKERS ONLY (July 1996). For out-of-state ABA-approved law schools, 69.6% of the men passed the bar, compared with 66.2% of the women. *See id.* For California-accredited law schools that are not ABA-approved, 44.4% of the men passed the bar and 38.4% of the women passed the bar. *See id.* Of all first time test takers, 70.4% of the men passed the bar, compared with 67.6% of the women. *See id.*

28. *See* California Bar Association, Committee of Bar Examiners, GENERAL BAR EXAMINATION STATISTICS, ETHNIC STATISTICS—REPEAT TAKERS ONLY (July 1996).

29. *See id.*

30. For descriptions of the study, see Hunt, *supra* note 7, at 729–31 (describing the study as an excellent first step but arguing that monitoring of effectiveness of educational reforms is also necessary); Henry Ramsey, Jr., *Law Graduates, Law Schools and Bar Passage Rates: A Description of the Bar Passage Study and Its Objectives*, 60 THE BAR EXAMINER 21 (Feb. 1991); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 5 n.8 (1997). The study followed the careers of first-year students from over 163 ABA-approved law schools from Fall, 1991 until three years after law school graduation or bar exam passage, which ever came first. *See* Wightman, *supra*, at 5 n.9.

suggests similar racial disparities in eventual bar passage rates across the nation.³¹

While awaiting the bar passage study, we need not wait to examine the bar examiners' current stance on racial and gender bias issues. Not surprisingly, bar examiners actively and aggressively promote the fairness of their procedures, tests, and results. The NCBE takes the position that the racial and ethnic disparities are not caused by problems with the tests: "Research indicates that differences in mean 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.*"³² In other words, the testing validates itself. The bar examiners assume that "measures of ability to practice law" are the other portions of the bar exam. They use tests with law school grades to validate the tests themselves.³³

The supposed validity and lack of bias of the bar exams is belied by the bar examiners' own research. In 1994, the NCBE commissioned a study of "the gender, ethnicity and naming conventions used in the MBE as a

31. The initial bar results from the study have been released in the context of a study about the negative impact of elimination of race in law school admissions. *See* Wightman, *supra* note 30. A fundamental finding of the study is that a high percentage of students who were admitted to law school through race-based affirmative action programs successfully pass the bar. *Id.* at 38. *See also* Chris Klein, *Law School Diversity Hinges on Race Policy*, NAT'L L.J., Mar. 14, 1997, at A1. These positive numbers still reflect racial disparities, however. For each racial or ethnic group, the study provides bar passage figures for those whose predicted admission would have been yes or no without affirmative action programs. Within each racial or ethnic group, the students predicted to have been admitted to law school without affirmative action (that is, on the basis of LSAT and G.P.A.), have higher bar passage rates than those predicted not to have been admitted. *See* Wightman, *supra* note 30, at 38. Of those predicted to have been admitted without affirmative action, 96.6% of Whites, 95.45% of Puerto Ricans, 94.2% of Asian Americans, 93% of Hispanics, 92% of Mexican Americans, 90.2% of Blacks, and 85.2% of American Indians had passed the bar within three years of finishing law school. *See id.* Of those not predicted to have been admitted to law school without affirmative action, 93.3% of Whites, 88.2% of Asian Americans, 82.8% of Hispanics, 87% of Mexican Americans, 76.4% of American Indians, 72.9% of Blacks, and 72.5% of Puerto Ricans passed bar exams within three years of finishing law school. *See id.* These results suggest that the racial disparities are reduced when considering passage after multiple attempts.

32. *Myths and Facts*, *supra* note 12, at 19 (emphasis added). The performance test was added in California in 1983. Telephone interview with Peter Honigsberg, Professor, University of San Francisco School of Law (Sept. 3, 1997). The performance test was added in response to criticisms regarding the perpetual disparities between white people and people of color. The NCBE is now offering a performance test for the first time. In California, the addition of the performance test did nothing to change the racial disparities.

33. The LSAT is useful because it predicts bar passage; the bar is valid because it replicates disparities on the LSAT.

whole.”³⁴ The bar examiners are careful not to acknowledge that naming conventions in the exams have any impact on test results: “When a test question performs differently for one gender or cultural group as opposed to another, it is seldom possible to link that difference to gender- or culture-related content in the item itself.”³⁵ Although the bar researchers acknowledge one study that found that “black examinees scored higher than white examinees on National Teacher Examination items with ‘black content,’”³⁶ they refuse to conclude that gender or racial content of questions has any impact in test results. In spite of their disinclination to acknowledge that bias in test content has any impact on test takers, the NCBE is attempting to eradicate gender stereotypes that it identified in the July 1994 exam because it is “the right thing to do.”³⁷ Analysis of that exam revealed that the characters (items) in questions were predominately male: “males outnumbered females in items by a ratio of nearly 3 to 1.”³⁸ Not only did males predominate, but so did sex role stereotypes:

Males were much more likely than females to be property owners, police officers, and perpetrators or suspects. In addition, they filled other stereotypical roles such as farmer, hunter, banker, and inventor. Females were more likely to be victims and patients, and they filled such stereotypical roles as nurse and baker.³⁹

The NCBE is attempting to clean up these sex-role stereotypes and to eliminate racial or ethnic bias by eliminating any racial or ethnic names from the questions.⁴⁰ In essence, the MBE is designed to be a “colorblind” examination. “[R]ace is referred to only when it is essential to testing a point of law, most frequently in issues relating to Constitutional Law (e.g.,

34. Lynda Leidiger & Mary M. Sandifer, *Names, Gender, and Ethnicity in the MBE*, 65 THE BAR EXAMINER 21, 22 (August 1996). “The study resulted in recommendations that were implemented beginning with development of the MBE that will be administered in July of 1997.” *Id.* at 22.

35. *Id.* at 21.

36. *Id.* at 22 (discussing a 1974 study of the National Teacher Exam reported by D.M. Medley & T.J. Quirk, *The Application of a Factorial Design to the Study of Cultural Bias in General Items on the National Teacher Examination*, 11 JOURNAL OF EDUCATIONAL MEASUREMENT 235 (1974)).

37. *Id.*

38. *Id.* at 23. “A tally of actors in the 200 items revealed 208 males, 76 females, and 44 with unspecified gender (e.g., creditor, witness, clerk).” *Id.*

39. *Id.* at 23. The study also found astereotypical roles, which they identified as “flight attendant” and “cosmetic surgery patient” for males and “wild animal veterinarian,” “sporting goods store proprietor,” and “real estate appraiser” for women. *Id.* One wonders whether a woman lawyer would be counted as an astereotypical role.

40. See *Checklist for Preparation of Essay Questions*, 64 THE BAR EXAMINER 36, 37 (Nov. 1995) (suggesting that preparers “[n]ever use names that . . . have racial, political, or sociological overtones. Such names tend to distract the applicants”).

discrimination) or criminal law (e.g., jury selection)."⁴¹ Eliminating especially sensitive or distracting questions from tests is completely appropriate. The bar examiners' strategy of eliminating "distraction" by eliminating race is problematic, however. How can race be eliminated from the law? Such efforts are often more of a whitewashing, where the "un-raced" subject is white and where the only race not noticed is whiteness.⁴² The bar examiners' policy to "[n]ever use names that are whimsical or pejorative or that have racial, political, or sociological overtones"⁴³ could easily be a policy to eliminate all but names familiar to white, middle-class psychometricians. Indeed, the researchers who conducted the study of names attempt to confront this issue:

[T]he first names now being selected are not intended to suggest any specific races or cultures. Some might perceive this decision as choosing anonymity over diversity, and perhaps even conclude that, gender balance notwithstanding, the names reflect a WASP sensibility. This could not be farther from the intent of the process.⁴⁴

But the bar examiners find that the diversity of the applicant pool makes anything but race neutrality too unwieldy:

[E]xaminees come from a multitude of cultural backgrounds that are only hinted at by such broad labels as Asian and Hispanic. For instance, to mandate that a certain percentage of names be "Asian" would require judicious representation of the main groups in that category, including Japanese, Chinese, Korean, Filipino, Vietnamese, Pakistani, etc. There is equal diversity among the groups loosely termed Hispanic, American Indian, and so on. Similarly, "Caucasians" include Irish, Swedish, Italian, Russian, Canadian, etc.⁴⁵

In other words, "neutral" or "universal" names are better than the tumult of attempting to be inclusive. Much critical race scholarship, of course, cautions against either the desirability or the achievability of a colorblind ap-

41. *Id.*; see Lediger & Sandifer, *supra* note 34, at 25-26 (suggesting, as well, that "[e]thnicity, culture, or a specific foreign country are included only when essential").

42. See STEPHANIE M. WILDMAN, ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 1-4 (1996).

43. *Checklist for Preparation of Essay Questions*, *supra* note 40, at 37 ("Such names tend to distract the applicants and distract from the validity of the question."). The bar examiners explain that "[f]unctional names are preferable because they do not connote gender or ethnicity, or otherwise introduce elements that could distract or provoke an examinee." Lediger & Sandifer, *supra* note 34, at 23.

44. Lediger & Sandifer, *supra* note 34, at 24.

45. *Id.* at 24 ("In an exam like the MBE, where so many of the questions involve wrongdoing, it is a delicate task to apportion the roles equally among all groups without unintentionally causing offense."). The bar examiners' resistance to what they perceive as the chaos that might be caused by deliberately including names of Korean, Polish, Chinese, Native American, etc., origins echoes the frustration of the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which saw the systemic problems of racism throughout the criminal justice system as a good reason not to try to address racial inequities in the administration of the death penalty. See *id.*

proach to the world.⁴⁶ Consider the approved list of “nonassociative names” used on the 1994 MBE test: “Smith, Jones, Horace, Sonya, Maria, Malcolm, Mavis, Dexter, and Tom”; why is “Mavis” more universal than José—the fourth most common name given to Californian boys in recent years?⁴⁷ A false claim of universality permeates the bar examiners’ justifications.

These criticisms of the bar are nothing new and are, undoubtedly, more stale than startling. We all know, as Trina Grillo knew, that the bar examinations are terribly flawed: they are not especially effective at screening incompetent, immoral, or lazy law graduates from becoming lawyers; they reflect and reinforce racial and gender bias; and they corrupt the education we offer in fundamental ways.⁴⁸ Trina assumed our critical stance towards the bar—her message was to do something about it. Trina reminded us that our commitment to challenge subordination requires us to become much more ambitious about and engaged with bar exams.

Engagement with the machinery of bar examinations is not an inviting prospect. No one anticipates or remembers bar examinations with joy. Once over the hurdle, few want to turn back to change the rules. Adding to our resistance is our widespread understanding of the bar examination system as something larger than any of us, something beyond our ability to challenge. The bar exam is embedded in the culture of lawyers as a terrible, wasteful ordeal, but not as something to be changed. But the bar examination techniques, goals, and methods are not immutable, unless we continue

46. See generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (arguing that the “United States Supreme Court’s use of color-blind constitutionalism . . . fosters white racial domination”); Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 51 (1994) (arguing that law schools have a hidden message that African American students are “inferior and dangerous to white students”).

47. Leidiger & Sandifer, *supra* note 34, at 23; see Ed Fishbein, *Short Stuff*, THE SACRAMENTO BEE, Apr. 8, 1993, at A2.

48. I invited participants at the Symposium to offer their ideas about the strengths and weaknesses of the current bar exams. Virtually no strengths were identified. The weaknesses noted by law teachers included: “It narrows the value base of the curriculum; it narrows the mind”; “The exam itself bears no relation to being a lawyer. [It] merely awards ability to cram and uncritically regurgitate; *thinking* about the problem, appreciating its complexities and ambiguities is the worst thing you can do on the test”; “[T]he bar only covers the ‘law’ as it stands and not the implications or the applications of the law”; “[It] creates [an] anti-intellectual attitude on part of students [and is] justification for getting rid of minority and other disadvantaged groups”; “[It] does not measure what makes a good lawyer and [that] means we don’t think about that in our curriculum”; “[It] teaches status quo”; “[W]e spend . . . not enough [time] on process/technique/creativity”; “[It values] commercial law areas at the cost of ‘softer’ areas such as counselling skills, ADR, practical skills, [and] judgment”; “It causes us to think that ‘law’ is a bunch of facts, that knowledge is simply information”; “[I]t does not measure one’s ability to *practice* law”; “[It] creates machine-like thinkers for mainstream law firms rather than critical thinkers, culturally sensitive and effective lawyers for the public interest.”

to imagine them that way. I was shocked to learn that the Committee of Bar Examiners of California had voted in 1984 to eliminate the essay portion of the California bar, which would have eliminated Civil Procedure, Corporations, Wills, Trusts, and Community Property as examination subjects.⁴⁹ The Board of Governors rebuffed that reform effort, but the fact that such a large change came close to adoption should remind us of what is possible. Yet, as an activist public interest lawyer, I was utterly oblivious to that battle when it was being fought. The California Bar Examiners recently considered eliminating Corporations, Trusts, and Wills and Succession as subjects the bar tests.⁵⁰ Now, as an activist public interest law teacher, I was completely oblivious to that effort as well. These proposals were also rejected, undoubtedly without much participation by progressive law teachers or practitioners. If the African National Congress can defeat apartheid, and gay and lesbian activists can re-envision marriage, surely the bar examination as we know it is not impervious.

Recognizing that truth, Trina Grillo's call was to engage the bar exam. The starting place could be our concerns on behalf of future clients: What kind of licensing examinations would best serve the people who need lawyers? Once we allow ourselves to ask that question, many more suggest themselves. For example, since most lawyerly communication is oral,⁵¹ why is the exam entirely written?⁵² Why are the subjects so tired and dusty? Why do we test on Trusts, but not on Title VII? Why trespass to chattels, but not sexual or racial harassment? Why is the exam closed-book? Why do the bar examinations continue to pretend that every lawyer is a generalist, or even that there is a canon of basic law?⁵³ Why not give the bar exam after two years of law school, allowing the last part of legal education to be

49. See Robert M. Snider, *Performance Anxiety: A Bar Exam for the Eighties*, L.A. LAWYER, Feb. 1985, at 10, 14. The reform move by the Committee of Bar Examiners was rebuffed through passage of a State Bar Board of Governors resolution that defined the contents of the Bar exam that stated, for the first time: "The General Bar Examination shall consist of written essay questions, the Multistate Bar Examination and the Performance Test." *Id.*

50. See Memorandum from Jerome Braun, Senior Executive, The State Bar of California, to Deans of California Law Schools (Apr. 16, 1997) (on file with author).

51. See Greenberg, *supra* note 46, at 117 n.266 (describing studies in which disparate attorney groups ranked oral communication as the most important skill).

52. See Hansen, *supra* note 11, at 1200 ("[T]he written bar examination principally developed as a replacement for oral bar exams.").

53. One current New York bar examiner provides this answer:

There is, simply, a body of legal knowledge which is essential even to approaching a legal problem, much less solving it—principles of fiduciary duty, trusts, equitable remedies, jurisdiction, exclusionary rules of evidence, sales, and real property. Those who argue otherwise would, in effect, nullify the professional standing of lawyers. If knowledge of the law is not important, and if counseling, negotiating, advocating, and fact finding are activities which anyone can perform competently without a legal education, what is left of the standing of lawyers?

conducted without regard for the bar? Why not test counselling skills? Mediation abilities? Why not test critique of doctrine, surely as crucial for client advocacy as memorization? With some states requiring continuing education on the elimination of bias, why doesn't the bar exam test on elimination of bias? Those are my questions; you must have many more. In the same way that some of us have engaged bar commissions studying gender, racial, or sexual orientation bias in our profession, we can place bar examination reform on our agendas as individuals, as faculties, and within our professional organizations.

In addition to this ambitious agenda, our engagement with the machinery of bar examinations can begin on a smaller scale. For example, all of us law professors who incorporate non-casebook material into our classes—including feminist, critical race, and other critiques—could routinely and loudly alert the bar examiners to the actual subjects covered in our classes. Bar examiners purport to cover those subjects covered in law school,⁵⁴ so we should inform them that our Torts classes, for example, include sexual and racial harassment, stalking, and other issues not yet recognized as “fundamental” by bar examiners.⁵⁵

In addition to becoming more engaged with the “private, power-mad and secret”⁵⁶ institutions that create and administer the bar exams, we must engage the bar exam in our classrooms. Our contempt for the bar exam sometimes turns into contempt for our students' goals of passing it. Preparing for success on the bar is not the most important skill that students acquire in law school, but it is on the list. Law teachers should not be condescending towards our students' honest, serious, and valid desire to successfully jump over the hurdle of the bar exam. Recognizing this desire as an honorable goal does not require us to jettison other goals that are more honorable, such as our task of preparing our students for a lifetime of careful, effective representation of clients. We serve both goals best by giving the bar exam a place in our teaching. Our choices are much broader than

Charles T. Beeching, Jr., *A Bar Examiner's Perspective on Minimum Competence*, 65 THE BAR EXAMINER 6, 9 (Nov. 1996). *But see* Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap Section of Legal Education and Admissions to the Bar, 1992 ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 279 (the MacCrate Report) (challenging notion that an applicant can and should know the law in all the subjects tested on the bar).

54. See ABA & NCBE, *supra* note 10, at vii (quoting bar examiners' claim to cover subjects taught in law schools).

55. The interaction with the bar examiners can be institutionalized by assigning academic deans or deans of students to regularly collect and disseminate such information. In addition, the Society of American Law Teachers (SALT) and the Teaching Methods section of the Association of American Law Schools could be organized to routinely collect and disseminate this type of information.

56. See *supra* note 4 and accompanying text.

either ignoring or pandering to the concern that students bring into the classroom.

Three recent thoughtful commentaries on the bar exam have each argued in different ways that the explanation for racial disparities in bar passage rates is structural racial bias in law school. Katherine Vaughns argues that traditional, white-male-law-school pedagogy and the resultant alienation of students of color in law school leads to lower bar passage rates.⁵⁷ Cecil Hunt finds the source of people of color's lower bar passage rates in their experiences in law school of being "guests in another's house."⁵⁸ Judith Greenberg argues that law school education is constructed within an unstated norm of whiteness, in which law schools claim to be color-blind, treating African American students as if their race is irrelevant, but in fact promoting an understanding that African American students are inferior and dangerous.⁵⁹ Each of these commentators finds the law school to be problematic, rather than the students of color. In other words, the disparities in bar passage rates reflect alienation of students of color from legal education, their outsider status being constantly reinforced, and failure expected.⁶⁰ We need to take these critiques seriously. Inclusivity and multiplicity of perspectives in legal education is necessary in preparing students to provide excellent representation to clients. And, as Greenberg, Vaughns, and Hunt argue, it is crucial as well to assist all of our students in passing the bar.

Although making students of color more than "guests in another's house"⁶¹ must reach every aspect of legal education to be effective, those steps should include conscious teaching of bar examination skills. The bar examination should be brought into our classrooms in such a way that each student can make it his or her own. For example, my colleague, Rod Fong, and I designed an advanced Constitutional Law seminar that combined so-

57. See Vaughns, *supra* note 19, at 434, 453-61.

58. See Hunt, *supra* note 7, at 774.

59. See Greenberg, *supra* note 46, at 55.

60. Claude Steele has identified what he calls "stereotype vulnerability." See Vaughns, *supra* note 19, at 431-33. In addition to collecting sources related to the crucial role that "socio-psychological factors" play in law school and bar success, Katherine Vaughns recounts a comment by Armando M. Menocal III, then chair of the California Committee of Bar Examiners: "He opined whether calling a press conference the day before the next bar administration, announcing that the problem causing the disparate impact on minority bar applicants had been 'corrected,' would resolve the problem." *Id.* Steele gave two groups of black and white Stanford students challenging verbal skills questions from the Graduate Record Exam. See Ethan Watters, *Claude Steele Has Scores to Settle*, NEW YORK TIMES MAGAZINE, Sept. 17, 1995, at 45. One group was told the test was to research "'psychological factors involved in solving verbal problems.'" *Id.* The other group was told the test was to determine "'genuine . . . verbal abilities and limitations.'" *Id.* The black students and white students who thought they were simply in a research project scored the same. See *id.* The black students who thought their skills were being tested scored well below their white student counterparts. See *id.*

61. See Hunt, *supra* note 7, at 774.

phisticated legal issues (e.g., the Religion Clauses) with basic legal analysis and test taking skills. This class successfully required the students not only to answer bar-exam-type questions—both essay and multiple choice—but also to create them. In a sense, we asked students to play the role of professor or bar examiner. Although we designed these assignments to enable students to become less passive in their approach to and understanding of bar-type questions, inevitably the task of creating questions invited the students to bring their own experiences, interests, values, and creativity into the tests they created. Perhaps that invitation can be made even more explicit, requiring each Torts student, for example, to periodically produce a multiple choice question (in multi-state format) on specific topics, using each student's own friends, family, or even enemies to be the characters in the story.⁶² Of course, teaching and testing doctrine are not all we do, and not even the most important things that we do. Perhaps, ironically, I am suggesting that we can reduce the insidious power of the bar exam over our students and our classrooms by routinely teaching about bar exam techniques. By naming, teaching, and critiquing bar exam skills, we can reduce their power. And, perhaps, the routine engagement with and critique of the bar exam in our classrooms will further motivate our campaign to reform the bar examinations themselves.

Conclusion

This Symposium honors Trina Grillo's scholarly achievements, her passion for teaching, and her personal integrity. With this call to action, I am attempting to honor her activism. Listening to the powerful tributes to Trina during the Symposium, I was struck by Trina's gift of seeing each person's true potential. Trina took seriously much that many of us know but find too hard to remember: the student who is academically disqualified or who fails the bar examination might be the most brilliant in the class or the most needed within the profession. My tribute to Trina is to try to borrow some of that vision that pushed her to activism. Imagine teaching and learning law outside the shadow of today's bar. Imagine a time in the future when the bar's licensing requirements are rigorous, just, and designed to enhance the responsiveness of the legal profession to underrepresented people, rather than designed to perpetuate the elitism of the profession. That vision, and our work to make it real, can be added to the long list of Trina Grillo's legacies.

62. I'm envisioning a basic form, used perhaps every other week. The form would provide a space to announce the doctrinal area to be tested, followed by room for the factual scenario, the call of the question, and the four choices. The bottom half of the page would be devoted to the student's description of the issue, rule, analysis (applying facts to each choice), and conclusion.