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Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility

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Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility

David A. Logan*

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I. Introduction

There is a crisis in the legal profession. Thoughtful observers from the academy have expressed alarm,¹ as have bar leaders,² and opinion polls regularly reflect little public respect for lawyers.³ The possible reasons for this

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1. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) (describing ethical problems encountered in practice of law and analyzing contemporary law school curriculum); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (claiming legal profession "now stands in danger of losing its soul").

2. See generally SOL LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994) (describing changes in structure of law firms and in legal profession); Jerome J. Shestack, *Let's Renew Public Confidence in Our Profession*, 41 *ADVOC.* 3 (1998).

3. See Chris Klein, *Poll: Lawyers Not Liked*, *NAT'L L.J.*, Aug. 25, 1997, at A6 (citing data indicating that percentage of public that views law as occupation "of great prestige"

crisis are many, but a broad consensus reflects the need for the profession to bolster ethics and professionalism in all phases of a lawyer's life.⁴ Although, at present, every law school covers Professional Responsibility (PR) in its curriculum and every state in some manner tests PR on its bar exam, it is increasingly apparent that these efforts are insufficient. This Essay argues that more can, and should, be done. Specifically, law schools should devote increased resources to PR in the curriculum, and every jurisdiction should test an applicant's knowledge of the PR law of that jurisdiction on the essay portion of its bar exam.

II. A Brief History of the Teaching of Professional Responsibility in Law Schools

For most of the history of legal education in the United States, law schools did not consider PR a part of the core law school curriculum. In the early part of this century, judges and practitioners would appear at law schools to lecture on professionalism matters, but these events were sporadic, and if attendance was required at all, students typically received no academic credit.⁵ More systematic instruction was viewed as unnecessary, as law schools assumed that students learned what was necessary from the posting of the ABA Canons of Professional Ethics in the building and from individual faculty members who presumably transmitted lessons on professionalism in the context of their substantive courses.⁶ By the late 1950s, most law schools offered some formalized ethics instruction but typically in an ungraded, one-hour format, reflecting limited institutional commitment to the subject.⁷ This disinterest was evidenced further by the fact that the course was considered the "dog" of

dropped from 36% to 19% from 1977 to 1997); see also Michael Asimow, *Lawyers as Fallen Idols: Whatever Happened to Our Golden Image?*, NAT'L L.J., Feb. 8, 1999, at A22 (linking increasingly negative depiction of lawyers in popular culture to falling public esteem for profession).

4. For a contrary view, stating that no crisis exists, see generally Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (criticizing recent developments in professional responsibility reform and describing developments as "legal liberalism").

5. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 35 (1992) (explaining that ethical instruction remained minimal throughout early twentieth century). These occasional lectures were, of course, in addition to the professionalism exhortations regularly provided during orientation and graduation, a tradition that persists unabated today. See generally Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981 (1995) (describing lack of consensus that exists regarding correct way to teach ethics).

6. Rhode, *supra* note 5, at 35-36.

7. See *id.* at 36 (explaining that survey conducted in late 1950s demonstrated that vast majority of law schools offered only one, ungraded hour of ethics instruction each week).

the curriculum, often assigned to a politically impotent member of the junior faculty, to a practitioner long on war stories, or, as a last resort, to the dean.⁸ Students hardly were challenged, as the content of these courses often went no deeper, and was no more engaging, than a "chanting [of] the [ABA] canons."⁹ When leaders of the American Association of Law Schools (AALS) recommended that law schools pay increased attention to PR, member schools balked. Furthermore, the ABA did little to promote the teaching and learning of the subject in conjunction with the reaccreditation process.¹⁰

In the aftermath of the high-profile Watergate scandal in the early 1970s and the serious wrongdoing of many lawyers, the ABA imposed a requirement that all accredited schools provide "instruction in the duties and responsibilities of the legal profession."¹¹ Over the next two decades the vast majority of schools came to satisfy this obligation by requiring that students take a two- or three-credit hour survey course in PR.¹² In recent years some schools have offered additional electives, often tied to the ethical problems arising in partic-

8. See W. William Hodes, *What Ought to Be Done – What Can Be Done – When the Wrong Person Is in Jail or About to Be Executed?*, 29 LOY. L.A. L. REV. 1547, 1555 (1996) (describing changes in image of professional responsibility professors); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 37-38 (1995) (discussing survey in which lawyers described legal ethics course as undesirable to teach).

9. James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 83 (1991); see Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 274 (describing American Bar Foundation study that reported, among other depressing conclusions, that law students were of view that "legal ethics are not important").

10. See Rhode, *supra* note 5, at 37 (explaining difficulty AALS encountered in convincing law schools to pay increased attention to ethics).

11. ABA Standards for the Approval of Law Schools, Standard 302(a)(iii) (1974). The Standard continued, "Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibility of the legal profession . . . are all covered." *Id.* The current ABA standard provides: "A law school shall require of all students in the J.D. degree program instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession . . ." ABA Standards for the Approval of Law Schools; Standard 302(b) (1998). It will be interesting to see if the lawyer misconduct associated with the Clinton White House will result in any changes in legal education. One would hope that "Monicagate" will, at a minimum, prompt reflection upon how lawyers are trained to obfuscate, if not prevaricate. See Terry Carter, *Terms of Embitterment*, A.B.A. J., Nov. 1998, at 42, 43 (discussing "gamesmanship that is part of lawyering"); David Margolick, *Like Sex Acts, Lawyer's Job a Matter of Definition*, N.Y. TIMES, Sept. 26, 1998, at A1 (criticizing President Clinton and his lawyers for using technicalities and literalism as justifications for their conduct).

12. See Michael Millemann, *The Institutional Barriers and Advantages Panel*, 39 WM. & MARY L. REV. 489, 494 (1998) (explaining that some schools have eschewed even survey courses, relying upon variety of "intensive" exposures to PR).

ular practice areas, such as Tax or Criminal Law. A few schools have instituted specialized ethics programs, while many others have teachers who from time-to-time use the so-called "pervasive method" – raising PR issues in non-PR courses. And, of course, clinical courses typically have an ethical component.¹³ Last, faculty generally appear to be taking PR scholarship more seriously, as authors increasingly raise professionalism issues in non-PR casebooks and knotty issues are thrashed out in law review articles and symposia.¹⁴

In my view, the approach taken by most law schools is insufficient. The two- or three-credit hour survey course does not provide adequate time to cover the range of PR issues likely to face practitioners, let alone to expose students to important questions not answered, or even addressed, by the ABA and state codes.¹⁵ The survey nature of the course also makes it exceedingly difficult to raise the matters of moral philosophy and personal ethics that lawyers' multiple roles implicate. Additionally, the large enrollments characteristic of most survey courses tend to deter student discussion of and engagement in the values-oriented issues endemic to professionalism questions.¹⁶ Large classes also make it difficult to attempt innovative teaching techniques, like role-playing.¹⁷ Further, the "ethics block" approach sends exactly the

13. See *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR, app. B. at 39-59 (reporting results of *Law School Survey on Professionalism*); see also Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 458-59 (1998) (summarizing range of curricular innovations).

14. See Rhode, *supra* note 5, at 41-42 n.52 (discussing coverage in casebooks). In addition to specialty journals, such as the *Georgetown Journal of Legal Ethics* and the *Journal of the Legal Profession*, law reviews increasingly have devoted symposium issues to the topic. Two recent examples of symposia are *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239 (1998) and *The Law and Economics of Lawyering*, 84 VA. L. REV. 1411 (1998). The completion of the American Law Institute's RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS project should further burnish the standing of PR in the academy and, hopefully, translate into broad faculty support for increased curricular attention to the subject. *ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, 14 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA), No. 8, at 211 (May 13, 1998).

15. See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147-48 (1996) (describing contemporary approaches to legal ethics courses).

16. See Lerman, *supra* note 13, at 476-78 (describing how law school experience affects attitudes toward values). A number of scholars have argued that class size is a key factor in creating a positive and inclusive classroom atmosphere, conducive to learning. See Elizabeth Mertz et. al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 9-16 (1998) (describing participation patterns in large versus small classes); Sarah E. Theimann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 29-39 (1998) (describing effect class size has on participation).

17. See Lerman, *supra* note 13, at 484-86 (discussing the resource implications of law schools adopting more student-centered professionalism courses).

wrong message to students. It suggests that PR is somehow separate from the practice of law, a touchy-feely subject removed from the rigorous analysis necessary to master Constitutional Law, Evidence, and the like. Last, because PR typically is not offered to 1Ls, law schools imply that the subject is not a core aspect of law practice, despite the fact that PR is the only topic students are sure to face in the real world of lawyering, no matter what their eventual practice setting.¹⁸

There is hope in this regard. Both the AALS and the ABA have put professionalism issues front-and-center. The AALS, under the leadership of Deborah Rhode, a longtime champion of increased teaching PR throughout the curriculum, made "The Professional Responsibility of Law Schools" the theme for the organization's 1999 Annual Meeting,¹⁹ and the ABA pursued a similar focus during the recent presidency of Jerome Shestack.²⁰

III. A Brief History of the Testing of Professional Responsibility on the Bar Exam

From the earliest, a few states tested applicants on their knowledge of PR as part of their essay-only bar exams. However, examiners found it difficult to draft and to grade essay questions because the strategy of examinees was to provide the answer that was the "most moral," and the conventional wisdom was "they can never flunk you for being too ethical."²¹ Because such flawed exam questions were perceived to provide inadequate testing of reasoning and discrimination skills, some states stopped testing PR entirely. As a result, many states admitted candidates to the bar without requiring that they demonstrate any knowledge of the law of PR.

Into the breach in the early 1980s came the Multistate Professional Responsibility Exam (MPRE). The MPRE was patterned on the Multistate Bar

18. Justice Ruth Bader Ginsburg recounts the story of the Contracts professor who described a certain legal tactic that deeply disturbed a 1L. "But Professor, ethics, what about Professional ethics?" the student asked. "Ethics, my boy," the professor replied, "is taught in the second year." Ruth Bader Ginsburg, *Supreme Court Pronouncements on the Conduct of Lawyers*, J. INST. FOR STUDY OF LEGAL ETHICS 1, 2 (1996); see Leslie Bender, *The Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387, 391 (1992) (noting that first-year curriculum conveys messages to students regarding which topics are important to lawyers – the so-called substantive courses, and those that are not – ethics).

19. See Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 24 (1999) (announcing that theme of 1999 AALS meeting was professional responsibilities of professional schools).

20. See Jerome Shestack, *Commentary: President's Message*, 84 A.B.A. J. 8, 8 (1998) (stating that everywhere he traveled throughout nation theme that he stressed was professionalism).

21. Norman Redlich, *Testing for Professional Responsibility*, B. EXAMINER, Nov. 1981, at 18, 19.

Exam (MBE), which for more than a decade had tested general principles in "core" subject areas (Torts, Contracts, Property, Evidence, Criminal Law, and Constitutional Law) in a multiple-choice format. The MPRE, like the MBE, was attractive to bar officials burdened by drafting and grading essay questions for the sharply increased number of applicants. An objective, national PR exam also was responsive to critics, especially in the academy, who believed that state essay exams were graded sloppily, uneven in quality, and parochial in focus.²² A further advantage of the MPRE was that the multiple-choice format allowed testing of a far broader range of PR law than essay testing. The MPRE, like the MBE before it, became very popular; in the space of only a few years, almost every jurisdiction came to require a passing score on the MPRE as part of its bar admission process,²³ while only twenty-five jurisdictions list PR as a topic that is fair game for testing on their state law/essay bar exams.²⁴ Despite its popularity, there has been a chorus of critics of the MPRE from the very start.²⁵

A. Scope

Originally, the MPRE was seriously underinclusive. It covered only those topics for which the answer was identical under both the ABA's Model Code of Professional Responsibility and the ABA's more recent Model Rules of Professional Conduct. As a result, many important questions never could be tested because the model ABA regimes mandated different answers. On the other hand, the MPRE was overinclusive because it tested on the ABA Code of Judicial Ethics, despite the fact that very few lawyers ever become judges.

Furthermore, because many important questions of Professional Responsibility cannot be answered by reference to *any* ABA code, the MPRE did not test (and thus students need not study and learn) essential principles of what Geoffrey Hazard terms the "invisible law of lawyering"²⁵ (Evidence, Civil

22. Eugene F. Scoles, *A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination*, B. EXAMINER, May 1990, at 20, 21.

23. See 1999 BAR/BRI Digest 17, 38 (providing state-specific bar exam information). Maryland and Washington are the only states that currently do not require a passing score on the MPRE. *Id.*

24. See generally 1999 BAR/BRI Digest (providing bar exam information).

25. For a more thorough development of the criticisms this essay discusses, see generally Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395 (1998) and the authorities cited therein. Defenders of the MPRE often take to the pages of the *Bar Examiner*, a publication of the National Conference of Bar Examiners (NCBE), the developers of the MBE and MPRE. See Marygold Shire Melli, *Letter from the Chair*, B. EXAMINER, May 1990, at 2 (arguing that MPRE requires examinees to "master" PR).

26. Geoffrey C. Hazard, Jr., Foreword to Symposium, *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 240 (1998).

Procedure, Criminal Law, and Constitutional Law, not to mention the law of civil liability for attorney negligence). Most importantly, the scope of the MPRE was flawed because of its very nature as a national test: It paid no attention to the Professional Responsibility law of the testing jurisdiction.²⁷ Finally, the narrow scope of the MPRE gave law students, and thus fledgling attorneys, the misleading and potentially dangerous impression that familiarity with this narrow set of rules represents a working knowledge of PR.²⁸ There is hope for the underinclusiveness problem, however. Beginning with tests given in the Spring of 1999, the revised MPRE now is said to cover the "generally accepted rules, principles, and common law regulating the legal profession in the United States."²⁹

B. Format

The MPRE is a fifty-question multiple choice exam. Some academics doubt whether PR issues (or at least the important ones) are susceptible to multiple-choice testing,³⁰ and even supporters admit that multiple-choice testing by itself is an unreliable tool to predict an applicant's performance in actual practice.³¹ Critics also charge that the multiple-choice format is charac-

27. The failure to test state PR law creates the ironic (indeed perverse) risk that a student who actually knows the idiosyncratic PR law of his or her own state actually is handicapped on the MPRE.

28. See Cramton & Koniak, *supra* note 15, at 172-75 (noting that ethics codes neglect many legal ethics topics). Evidence of this pernicious phenomenon comes from the regular requests that I get from students who ask to be exempted from the final exam in PR because of their passing score on the MPRE. Believe it or not, some states actually allow a variation; Connecticut and New Jersey exempt students who earn a "C" or better in their PR courses from the obligation to pass the MPRE. 1999 BAR/BRI Digest 8, 28.

29. MPRE INFORMATION BOOKLET 27 (1999) (copy on file with *Washington and Lee Law Review*). Further proof of the intent to test on a broader range of PR issues is found in the statement that MPRE questions may "arise in the context of procedural or evidentiary issues such as the availability of litigation sanctions or the scope of the attorney-client evidentiary privilege . . ." *Id.* at 28. Unfortunately, the overinclusiveness caused by the MPRE's coverage of judicial ethics apparently will continue. *Id.* at 31.

30. See Levin, *supra* note 25, at 404 n.35 (discussing why multiple choice testing often is unreliable); see also Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 381 n.12 (1996) ("Offered answers may include varying ranges of correct choices. Sometimes two answers are correct and the test taker must choose between two correct answers . . . Query: Is this a fair and intelligent indicator of a person's knowledge of the law?" (citing *In re Voorhees*, 403 N.W.2d 738, 740-42 (S.D. 1987))).

Multiple-choice testing on the bar, in turn, fuels law student concern with (or, some would say, obsession with) black letter law in the classroom at the expense of exploring ambiguities and policy, thereby stunting the growth of skills that are essential for successful lawyering.

31. See Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, B. EXAMINER, Feb. 1999, at 25, 27 (acknowledging that MPRE may not provide strong informa-

terized by trick questions and hidden assumptions,³² and bar review lecturers and other observers have been known to claim that a good MPRE strategy involves the search for "the second most ethical answer."³³ In any event, any multiple-choice exam risks rewarding students who are good guessers and those who can identify buzzwords, while not testing careful analysis and reasoned explication of answers.³⁴ Some critics go so far as to argue that the MPRE's multiple-choice format prompts students to focus on minimally acceptable conduct, encouraging an ethical "race to the bottom."³⁵

C. Degree of Difficulty

All law students fear the "regular" bar exam. Not so the MPRE;³⁶ the pass rate in many jurisdictions is significantly higher than that on the regular bar exam. I can testify that the word in law school corridors is that a few

tion about how applicant actually will perform in practice and that "multiple forms of assessment" improve reliability of state bar licensing efforts).

32. See Don H. Reuben, *Second Time Around*, CAL. LAW., Aug. 1996, at 95 (stating that examinees need "extrasensory ability to divine the answer being sought by the exam's sadistic authors" because many questions are "crafted to trick by way of subtlety and hidden assumptions"); Rhode, *supra* note 5, at 41 (characterizing MPRE as containing "ambiguous questions, choices between unsatisfying answers, and a focus on relatively obscure provisions of ethics codes"). Bar examiners from time-to-time have offered spirited defenses to these charges. See *Myths and Facts About the Multistate Bar Exam*, B. EXAMINER, Feb. 1995, at 18 (denying that MBE questions are "needlessly difficult, arcane, and tricky").

33. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 774 n.40 (1990) (explaining that practitioner advised that when in doubt, pick "the second most ethical answer"); Rhode, *supra* note 5, at 41 (stating that in order to pass MPRE, "[i]t is often enough to take a brief bar preparation class and, when in doubt, pick the second most ethical course of conduct"). I plead guilty to a similar offense committed during my bar review lectures on PR.

34. See *In re Voorhees*, 403 N.W.2d 738, 742 (S.D. 1987) (Henderson, J., concurring and dissenting) (explaining that students studying for MPRE "must become buzzword artists"); Jarvis, *supra* note 30, at 381 n.12 (citing University of Virginia Law School professor John C. Jeffries Jr. for proposition that MPRE rewards "mechanistic, buzzword oriented simplicity").

35. See ABA Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 267 (1986) (noting that preparation for MPRE "can focus law students' attention away from the fact that a wide range of behavior may be acceptable, but some kinds of behavior may be more appropriate than others").

36. See, e.g., Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, 63 N.Y.S. B. J., July/Aug. 1991, at 34, 40 n.22 (decrying "breezy and give-away quality" of MPRE and fact that "everyone passes with time to spare"); Jarvis, *supra* note 30, at 385 n.14 (claiming that high pass rates have prompted observers to "question [MPRE's] utility"); Redlich, *supra* note 21, at 20 (commenting that MPRE has been described as "not exclusionary and not particularly difficult").

hours with bar review materials is all that it takes for a student to get his or her MPRE ticket punched.³⁷

IV. An Equal Protection Argument for Greater Curricular Coverage and "Double Testing" of PR

Law schools send a message about the relative importance of PR by relegating it to a two- or three-hour survey course. Contracts, not to mention Sales and related courses, command many more curricular hours than PR; the same goes for Property and Torts, and the list goes on.³⁸

State bars also send important messages by virtue of what subjects are tested on the bar exam, as well as by how they are tested. Multiple-choice testing is insufficient in itself to test fundamental subjects. This insufficiency is evident from the large number of jurisdictions which "double test," that is, that cover Contracts, Torts, Property, Evidence, Criminal and Constitutional Law on the MBE but also test those subjects on the essay/state law portion of the bar exam. What this says to aspiring lawyers is that the Commerce Clause and hearsay exceptions are so essential to being a minimally-qualified attorney that they are subject to double-testing. Not so the duties of confidentiality, limits on ex parte contacts, or the law of conflicts of interest (once the modest hurdle of the MPRE is out of the way). This state of affairs persists, despite the fact that many lawyers will never raise a constitutional challenge or argue in front of a jury. In contrast, the law of PR is essential to all lawyers, in whatever subject areas, in all practice settings. Further, ignorance of state PR law can cost a lawyer her license, while some ethical missteps expose her to civil liability. Nonetheless, PR law often is tested only via the MPRE.

37. Of course, an exam can provide scant challenge for a range of reasons: because the questions are too easy; because the grading of individual answers is too forgiving; or because the passing score is pegged so low that only a handful will fail. In the MPRE context, many states are guilty of this last mistake.

Comparison of the two standardized exams is instructive. The MBE is reported on a 200-point scale, with a mean score of 143 on recent July examinations. Passing standards vary from state-to-state, but typically range between 135 and 140. On recent MBEs, 70% of the examinees earned a 135 or higher. In contrast, the MPRE is scored on a 150-point scale. A passing score may be as low as 70 (32 correct answers out of a possible 50) and must be as high as 85 in a few; about half of the states pass an applicant with a scaled score of 75. MPRE INFORMATION BOOKLET (1999) at 1. On recent tests, 80% of the examinees earned a score of 85 or above (high enough to pass in any jurisdiction), while over 90% scored 75 or above (high enough to pass in a majority of jurisdictions). Letter from Jane Smith, Director of Testing, NCBE, to David A. Logan, Professor of Law, Wake Forest University (Nov. 17, 1998) (on file with *Washington and Lee Law Review*).

38. See Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 ARIZ. L. REV. 439, 439-40 (1995) (pointing out that symbols are important, as modern semiotics teaches us).

Essay testing can focus on more subtle issues than the MPRE. For example, essays may require the examinee to distinguish between minimally acceptable conduct and aspirational goals. Essay answers also provide important information about the examinee's writing skills and general facility with legal reasoning, replacing rule-bound descriptive knowledge with a focus on careful analysis.³⁹

The current reliance on the MPRE has negative ramifications in law schools as well. The multiple-choice format promotes "tunnel vision" because students see issues as susceptible to black and white conclusions, reinforcing their "relentless search for certainty," the bane of most classrooms.⁴⁰ Increased state bar testing of PR thus could have a symbiotic effect helpful to those of us in the academy who wish to enhance PR coverage in the law school curriculum.⁴¹

V. Conclusion

The practice of law has changed dramatically in the last half-century. Long-term professional relationships, both among lawyers and among lawyers and clients, have become rare as market forces increasingly trump loyalty. Client mobility has created pressure for the provision of transient, technical legal advice, rather than the considered judgment of a wise counselor, and young lawyers have few opportunities to find role models.⁴² These changes in the nature of law practice, in turn, make it all the more imperative that

39. Unlike contracts or torts, few lawyers specialize in PR, so the pool of attorneys competent to draft and grade PR questions for the bar exam may not be as large as that for some subjects. However, attorneys who have worked with grievance and ethics committees for state bars presumably are competent, as are the many others (including law professors) who have provided CLE training in PR.

40. See Millemann, *supra* note 12, at 497 (identifying constraints on reform); see also Cramton & Koniak, *supra* note 15, at 171 (stating that MPRE prompts many law students to "approach their [law school] ethics course with tunnel vision – viewing it as preparation for the MPRE"); Levin, *supra* note 25, at 405 (commenting that MPRE "promotes the view that professional responsibility can be reduced to following some black letter rules"); Rhode, *supra* note 5, at 41 (claiming that MPRE "tends to both trivialize the subject matter and to encourage law school courses to focus on bar exam preparation").

41. See Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 928 (1997) (discussing pernicious effects of bar exam upon what subjects are taught, and how they are taught, in law school).

42. See KRONMAN, *supra* note 1, at 109-34 (reflecting on erosion of ideal of "lawyer-statesman" due to institutional pressures); LINOWITZ & MAYER, *supra* note 2, at 37 (lamenting change of lawyers' roles from wise counselor to technician); Lisa G. Lerman, *Blue-Chip Billing: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 219-23 (1999) (summarizing dramatic changes in legal profession that have led to "dominance of income generation as a primary goal" in recent decades).

lawyers enter the practice with a command of the law of Professional Responsibility. They must understand not just PR's mandatory minima, but also its philosophical roots and aspirational goals, the majority rules and general principles as set out in the ABA codes, as well as the law of the specific jurisdiction in which the lawyer will practice. Thus, the fledgling lawyer should be required to know the regulations, statutes, and state court and state bar ethics committee interpretations thereof in the jurisdictions in which he or she practices.⁴³

All law schools provide exposure to the substantive law of PR, but often in ways that marginalize its significance. More instructional resources need to be devoted to the teaching of PR, with both survey and topic-specific courses pushing deeply and widely into the subject. Perhaps just as important is the need to teach PR in small sections, which facilitates meaningful interchange among teachers and students. After graduation, new lawyers should be required by licensing authorities to display a mastery of Professional Responsibility principles, broadly defined, a result that is much less certain if the only hurdle is the successful completion of the MPRE. What Dean Norman Redlich observed almost two decades ago remains true in many jurisdictions:

Regrettably, we are still offering a second-class examination. We are saying to students that there is something different about professional responsibility. . . . We now seem to be saying to students, "We will test for your knowledge of professional responsibility, but don't worry too much about it. Sit down with the Code of Professional Responsibility for a few days, and you will pass it. If you don't pass it the first time, take it a second, third, or fourth time, take it whenever you want, and one way or another you will be admitted to practice. You really have to be pretty hopeless if you cannot pass this exam."⁴⁴

It is my view that all state bars should include a Professional Responsibility component in the "regular" bar exam process, which students will have to prepare for as they do for other core subjects, and which will be at least as difficult as the "regular" bar exam. Most importantly, each state bar should test applicants on the state's particular ethics law, and do so in an essay format. Such changes would benefit legal education, all lawyers, and the legal system.

43. Indeed, the absence of aspirational standards in the ABA's Model Rules is one of the factors that prompted the ABA to establish Ethics 2000, which is working on a comprehensive overhaul of the ABA Model Rules. *Ethics 2000 Commission Hears Plenty of Suggestions for Reforming Model Rules*, Laws. Man. on Prof. Conduct (ABA/BNA), No. 10, at 264 (June 10, 1998).

44. Redlich, *supra* note 21, at 20-21.

NOTES
