PUTTING ETHICS TO THE (NATIONAL STANDARDIZED) TEST: TRACING THE ORIGINS OF THE MPRE

Paul T. Hayden

INTRODUCTION

On March 14, 1980, 4,208 bar applicants from six states, sitting in thirty-three different test locations in sixteen different states, took an identical two-hour examination on the subject of lawyers' professional responsibility. The Multistate Professional Responsibility Exam ("MPRE"), a multiple-choice exam whose passage was required for bar admission in those six states, had arrived. It was clearly a test whose time had come. After the first exam session, states began rapidly to jump aboard the MPRE bandwagon. The number of applicants taking the exam nearly doubled from 1980 to 1981. In 2001, over 56,000 applicants sat for the exam. Today, passing the MPRE is required for admission to the bar in all but three states: Maryland, Washington and Wisconsin. In the span of two decades, we have thus seen the flowering of a remarkable phenomenon: the establishment of a national bar examination on legal ethics in a country in which the states purportedly control bar admission. At the time, the birth of the MPRE undoubtedly seemed to most an insignificant blip on the historical screen. In hindsight, however, it was anything but that.

* Professor of Law and Jacob J. Becker Fellow, Loyola Law School, Los Angeles; B.A., Yale (1979); J.D., UCLA School of Law (1984); successful MPRE examinee (1983) and member of the State Bar of California (1984 to present). Thanks to Diane L. Hayden for her careful reading and insightful suggestions. Further thanks to Loyola Law School of Loyola Marymount University and to Dean David W. Burcham for generous financial support.

1. Letter from the Chair, 59:2 Bar Examiner 2, 2 (1990); Letter from the Chairman, 49 Bar Examiner 44 (1980).
2. The six states were California, Minnesota, Kansas, South Carolina, New Hampshire, and Wyoming. Letter from the Chairman, 49 Bar Examiner 43, 44 (1980).
4. Id.
5. Id. at 21. The MPRE is also used in the District of Columbia, Guam, the Northern Mariana Islands, Palau, and the Virgin Islands. Id.
6. Naturally, it did not seem insignificant to those who produced it. The chairman of the National Conference of Bar Examiners predicted that "the fiscal year 1979-1980 will find the Conference involved in the most ambitious and far reaching
The MPRE’s immediate success surprised even its most fervent backers. When discussion of the MPRE began in 1976 at the National Conference of Bar Examiners (“NCBE”), bar-exam testing on legal ethics was on the wane in a number of states, primarily “because the reliability factor in ethics examinations was dubious.”7 Not only were essay questions difficult to grade with consistency, but essays on ethics often allowed even the scoundrels to slide by with empty platitudes. The NCBE had modest goals for the test, and equally modest predictions for its ultimate expansion: “Even the most optimistic agreed that fifteen jurisdictions were the most that would ever participate.”8 While bar examiners have expressed joy that the test has greatly exceeded those expectations, other segments of the bar have been far less fulsome with praise. Most law professors appear to regard the exam at best as a tolerable embarrassment unworthy of much attention. What little commentary that has been offered from that quarter has been uniformly and fundamentally negative.9 One might say that among legal academics the overall reaction to the test has been one of hostile indifference. Beyond the Ivory Tower, some leaders of the organized bar have leveled weighty complaints about the test’s limitations and negative effects. The influential 1992 MacCrate Report signals its agreement with the view that the exam actually discourages instruction in “professional values” and causes legal educators to overemphasize narrow regulatory provisions at the
expense of dealing with more meaningful ethical concepts.10 Even some judges have been outspoken critics.11

With such assessments from key constituencies, why did the MPRE happen in the first place, and why has it thrived? The answer is that several strong historical forces coalesced in the late 1970s to propel the MPRE’s initial development, and continue today to sustain it. It did not spring forth fully formed from the head of Zeus, or Watergate, either. While the Watergate scandal of 1973-74 cannot be dismissed as irrelevant to any ethics reform of the late 1970s,12 its influence on the creation of the MPRE is easy to overstate.13 The MPRE’s


12. Watergate sent strong shock waves through the legal profession, especially with respect to legal ethics. While the scandal was a momentous historical event, culminating in the only resignation of a President of the United States, it actually “raised no challenging issues of professional responsibility. The lawyer conduct in Watergate that shocked the nation—burglary and obstruction of justice—was indefensible and, for the most part, undetected.” Simon, supra note 9, at 1. Public perception was largely otherwise, however. As one contemporaneous observer put it, “with the advent of new scandals in Washington . . . our stock has sunk to what is, perhaps, its lowest point in the past twenty years.” Burton R. Laub, Law—A Bad Trade but a Noble Profession, 42 Bar Examiner 156, 157 (1973). Of course, dissatisfaction with lawyers is a “chronic grievance” that does not turn on any particular scandal of the day. Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1239 (1991). Today, only 19 percent of the American public has confidence in lawyers, according to an ABA survey. Robert A. Clifford, Now More Than Ever, 28:3 Litigation 1, 74 (2002). Interestingly, at least one survey at the time of Watergate showed that the scandal did not have any negative impact on the percentage of people who regarded law as a preferred occupation for themselves. See Law as a Career, 60 A.B.A. J. 315, 315, 318 (1974) (recognizing that the survey shows that “things might not be as bad as supposed”); see also Watergate—A Lawyers’ Scandal?, 60 A.B.A. J. 1257 (1974) (arguing that Watergate should be regarded more as a source of pride than shame for lawyers, given the greater number of heroic lawyers involved in its clean-up).


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creation was the logical result of an historical progression of events in three related areas of law: the drafting of the ethics rules; the evolution of bar examinations; and changes in law school accreditation standards. In each of these three areas, there was a longstanding and pronounced trend towards greater national standardization. In the late 1970s currents in all three areas flowed together to produce the first national standardized test in legal ethics. While we may never get a fully “national” bar exam or “national” bar governed by “national” ethics standards—and I offer no argument on the merits one way or the other here\(^\text{14}\)—the launching of the MPRE was certainly a remarkable and genuine step in that direction.\(^\text{15}\)

I make no attempt here to provide a substantive critique of the current MPRE as a testing tool. Nor do I join the largely one-sided debate over the exam’s effects on the teaching of legal ethics.\(^\text{16}\) Rather, by tracing the major currents that fed the test’s development, some of which go back a century, I offer something of a reassessment of its significance in the grander scheme of things. Only by seeing the MPRE in its proper context, as a product of a powerful movement towards national standardization that was occurring in three different areas of the lawyers’ world, can we hope to understand how it came to be and why it continues to roll along.

Part I of this article provides a brief descriptive overview of the exam itself. Part II discusses how the development of the MPRE was influenced by the evolution of legal ethics rules from vague platitude to nationally-standardized black letter. Part III places the MPRE in the larger context of bar examinations, as they evolved from oral exams to written exams to objective exams national in scope. Part IV explores the influence on the MPRE’s creation of changes in national accreditation standards for law schools.

I. A DESCRIPTION OF THE MPRE AND ITS PURPOSES

The MPRE is a 125-minute standardized test, administered three times a year, containing 50 multiple choice questions dealing with lawyers’ professional conduct.\(^\text{17}\) Except for Florida, all of the states that require the MPRE allow law students to take the exam while still in school.\(^\text{18}\) Each question provides a fact pattern, followed by a

\(^{14}\) See infra Part III.C.


\(^{16}\) See supra note 9 and accompanying text.

\(^{17}\) Nat’l Conference of Bar Exam’rs, 2002 MPRE Information Booklet, at 3, 30 [hereinafter 2002 MPRE Booklet].

\(^{18}\) See Daly et al., supra note 9, at 196 n.9.
specific question and four possible answers. The examinee, of course, is instructed to "pick the best answer." The purpose of the test, according to the NCBE, the organization that developed and administers it with the assistance of the American College Testing Service, is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct. Questions are currently based on "the law governing the conduct of lawyers," as found in the American Bar Association ("ABA") Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, and "controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules." As the most recent MPRE Information Booklet explains in more detail, questions dealing with the discipline of lawyers are governed by the Model Rules, while questions beyond that context are designed to measure an understanding of the generally accepted rules, principles, and common law regulating the legal profession in the United States; in these items, the correct answer will be governed by the view reflected in a majority of cases, statutes, or regulations on the subject. To the extent that questions of professional responsibility 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, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be assumed to apply, unless otherwise stated.

The MPRE's current coverage, which first took effect in March, 1999 after years of study, is broader than in prior exam incarnations. The NCBE's advice to students preparing for the current test includes the suggestion that they consult not only the Model Rules of Professional Conduct, but also the ALI's Restatement of the Law

20. Id.
21. Id. at 3.
22. Id. at 30. While the exam's coverage has changed somewhat over the years, its purpose has remained largely the same. The NCBE Board of Managers approved this statement of purpose for the first MPRE:

To require that all persons admitted to practice law be well aware of the ethical standards of the legal profession. The purpose would[ ] be ... to insure that they study and be prepared to cope with the ethical problems of the legal profession. It would not be a test to determine one's ethical standards and it should be no reproach to anyone who fails. It would only mean a lack of knowledge of the established standards.

Letter from the Chairman, supra note 6, at 128.
24. Id. at 31. In accordance with this broader coverage, any particular session of the MPRE may now contain questions not only about discipline or the propriety of hypothetical conduct under the rules, but also about litigation sanctions, disqualification, and civil and criminal liability. Id. at 32.
25. Id. at 3.
Governing Lawyers, promulgated in May, 1998. When the test was first administered in 1980, its questions covered only issues raised by the text of the Model Code of Professional Responsibility and the Model Code of Judicial Conduct. Soon after the ABA launched the Model Rules of Professional Conduct in 1983, the MPRE’s coverage changed, as well: while the Code of Judicial Conduct remained fair game, applicants were asked also about issues raised by both the Model Code and the Model Rules—although there was no testing on areas in which the Model Code and the Model Rules diverged. The recent broadening of the test’s coverage has by any measure improved it, but perhaps predictably has done little to assuage most critics.

Passing the MPRE is required for admission to the bar in all but a few states. Whether the institution of the bar examination itself is necessary or even useful is constantly debated, although the serious wrangling occurred more in the past than it does today. Several rationales for the bar exam have been asserted over the years. Perhaps the most common is that the bar examination helps insure that only those competent to practice law obtain a license do so, which protects future clients from harm at the hands of the unqualified. As the lead paragraph in the premiere issue of The Bar Examiner explains,

The bar examiners as an agency of the state represent the interests both of the practicing lawyers and the public. It is their duty not only to see that those candidates who are admitted measure up to

26. Id. at 35.
27. See Letter from the Chairman, supra note 6, at 128; Multistate Professional Responsibility Examination, 50:1 Bar Examiner 21, 23 (1981) (remarks of Joe Covington) (describing the drafting process in detail); Id. at 25-28 (remarks of Eugene L. Smith) (same).
29. This is not to suggest that the former incarnations contained poorly-framed questions, only that their coverage was quite narrow. The MPRE is developed by a six-member committee made up of experts in professional responsibility, and each question is thoroughly vetted by additional experts before its inclusion in the test. Even after the test is given, experts review the statistical performance of each question before computing the final scores. 2002 MPRE Booklet, supra note 17, at 30.
30. See, e.g., Levin, supra note 15, at 409-11 (criticizing most aspects of the test even after recent revisions in coverage); Logan, supra note 15, at 1028-30 & n.29 (opining that broader coverage is better, while still criticizing the test on many grounds).
31. The MPRE is graded separately from the rest of the bar exam in all jurisdictions that use it. An applicant must therefore achieve a passing score on the MPRE alone, regardless of his or her performance on the rest of the bar exam, in order to gain admittance to practice.
32. The key arguments on both sides are found in two articles by giants of the profession: Leon Green, Why Bar Examinations?, 33 Nw. U. Ill. L. Rev. 908 (1939), and Erwin N. Griswold, In Praise of Bar Examinations, 60 A.B.A. J. 81 (1974).
the general standards of the bar, but also that they meet the independent standard of what the public has a right to expect of a lawyer.\textsuperscript{34}

Another frequently-voiced justification for the bar exam is that it holds law schools accountable for the quality of their programs and their students.\textsuperscript{35} It not only provides an "outside source of checks on the law schools," but also "serve[s] to stimulate law schools to maintain high standards of legal education."\textsuperscript{36} As one bar official said in 1959,

[If you find in a certain law school that no one in the bottom 25 percent passed the examination, while in other law schools the percentage was much higher, it is a pretty definite indication that that particular law school is graduating applicants who should not be graduated.... The primary purpose of the bar examiners... is to conduct an objective examination that will determine whether the law schools are doing their job properly and whether they are maintaining adequate standards.\textsuperscript{37}

In short, the bar exam is thought to provide a standardized measure of the competence of both the applicant and the institution from which the applicant received his degree. As a member of the Ohio Board of Bar Examiners said four decades ago, "I know that bar examination results are not sure-fire proof of the quality of preparation of applicants taking the examinations. They are, however, the only standardized and demonstrable proof available."\textsuperscript{38}

The MPRE rests on similar, although not identical, justifications. It is thought to be a test of competence with respect to legal ethics, but within a limited scope. The NCBE asserts that "the MPRE is not a test designed to determine an individual's personal ethical values."\textsuperscript{39} It is not, therefore, a substitute for a character and fitness examination. Nor does the test require the examinee to demonstrate competence in the ability to engage in a thoughtful and extended analysis of ethical options presented by a particular set of facts. One NCBE leader has called it "an awareness test," whose "goal is to make the applicant acutely mindful that the profession considers

\textsuperscript{34} Will Shafroth, \textit{Bar Examiners and Examinees, Preface to 1 Bar Examiner 1} (1931) (appearing in the bound edition).
\textsuperscript{35} See \textit{id.} (noting that bar exams "test the training which has been given in the law schools," forcing law schools to "a keener realization that their products must have more than a theoretical knowledge of law").
\textsuperscript{36} Yoshio Shigezawa, \textit{Observations—Bar Examiners and Bar Examinations—1974, 43 Bar Examiner 147, 147 (1974).}
\textsuperscript{37} \textit{How to Use the Questions and the Statistical Services of the Bar Examination Service Committee, 29 Bar Examiner 10, 27 (1960)} (remarks of John T. DeGraff, Chairman of the Bar Examination Service Committee).
\textsuperscript{38} \textit{Qualifications of Applicants Seeking to Take a Bar Examination: A Panel Discussion, 31 Bar Examiner 78, 83 (1962)} (remarks of Loren E. Souers, Jr.).
\textsuperscript{39} 2002 MPRE Booklet, \textit{supra} note 17, at 30.
ethics a matter of the highest priority in the practice of law.\footnote{40} But of course such a general awareness would not be of much assistance in passing the test. Rather, the applicant must demonstrate some facility with applying the underlying doctrine on which the test is based, once the Model Code, then the Model Rules, now a broader set of rules. This is not, of course, all there is to ethics, but it is something.\footnote{41} As to the MPRE's function in assessing how law schools are doing, the MPRE does provide (as does the more general bar examination) an imperfect check on law schools' effectiveness in teaching their students the doctrines of professional responsibility being tested. Unlike the general bar exam, which in large part tests legal reasoning skills, the MPRE provides a much narrower assessment. At a minimum, the existence of the MPRE probably guarantees that the doctrine of professional responsibility will be taught in a separate course at most law schools.\footnote{42}

II. THE STANDARDIZATION AND LEGALIZATION OF ETHICS RULES

A national multiple-choice examination on legal ethics requires a body of nationally-standardized rules of professional conduct.\footnote{43} In 1970, with the ABA's promulgation of the Model Code of Professional Conduct, such rules came onto the scene. The Code's adoption was the most important step in the "increasing transformation of legal ethics into formally adopted codes having no necessary relationship to ethics or morality."\footnote{44} Ethics rules that had begun as "fraternal norms" became "judicially enforced regulations."\footnote{45}

The history of the national standardization of legal ethics rules begins not in 1970, but with the ABA's appointment in 1905 of a five-member committee to study the drafting of a "code of professional ethics."\footnote{46} The Report of the Committee on Code of Professional

\footnote{40. Susan K. Boyd, The ABA's First Section: Assuring a Qualified Bar 98 (1993) (quoting Francis D. Morrissey, then NCBE president).}

\footnote{41. As one of the drafters said in 1981, "None of us are simple or naive, and we know the problems that exist in practice and are sensitive to the plight of lawyers." \textit{Multistate Professional Responsibility Examination}, 50:1 Bar Examiner 21, 29 (1981) (remarks of Eugene L. Smith). Yet the drafters believed that passing the test "will ensure to the organized Bar that the examinee has a speaking familiarity with the relatively hard rules of professional conduct which are ascertainable within the two Codes." \textit{Id.} at 28.}

\footnote{42. For some qualifications, see infra notes 245-49 and accompanying text.}

\footnote{43. \textit{See Multistate Professional Responsibility Examination}, 50:1 Bar Examiner 21, 23 (1981) (remarks of Joe Covington) ("In order to offer a test for all jurisdictions, it must be based on reasonably well defined uniform subject matter.").}

\footnote{44. Maura Strassberg, \textit{Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics}, 80 Iowa L. Rev. 901, 906 (1995).}

\footnote{45. Hazard, supra note 12, at 1249.}

\footnote{46. 29 ABA Reports 600 (1906) (quoting the 1905 resolution); Strassberg, supra note 44, at 906.}
Ethics, delivered to the ABA in St. Paul in the summer of 1906, stressed the need for clear, uniform rules that could be used to discipline unethical lawyers of low character who were joining the ranks at an alarming pace. "We cannot be blind," said the report, "to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past and the tendency more and more to reduce our high calling to the level of a trade."\(^{47}\) The report spoke of "changed conditions" in the bar due to "the influx of increasing numbers, who seek admission to the profession mainly for its emoluments."\(^{48}\) It lamented the new world in which "the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion... so long as they... violate no criminal law."\(^{49}\) Lawyers, the report continued, should serve only during good behavior—and "'good behavior' should not be a vague, meaningless or shadowy term devoid of practical application."\(^{50}\) Rather, standards of ethics should be "crystallized into a written code" that could be used to exclude a lawyer who violates its provisions from practicing or retaining membership in professional organizations such as the ABA.\(^{51}\)

Despite this practical goal, the resulting Canons of Ethics as adopted by the ABA in 1908 tended more toward moral exhortation than rigid rule,\(^{52}\) and were thereby limited as effective disciplinary codes.\(^{53}\) The Canons' drafters also expressly disclaimed that they

\(^{47}\) 29 ABA Reports 600, 601 (1906) (Report of the Committee on Code of Professional Ethics).

\(^{48}\) Id. at 601.

\(^{49}\) Id.

\(^{50}\) Id. at 602.

\(^{51}\) Id. By the time the ABA promulgated the Canons in 1908, 31 states had either adopted or were in the process of adopting ethics rules for lawyers. These codes obviously lacked any pretense towards national uniformity and were themselves usually not well-designed for disciplinary uses. Peter A. Joy, Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct, 15 Geo. J. Legal Ethics 313, 324-25 (2002). For example, the Alabama bar had adopted such a code of ethics in 1887, from which the Canons were "largely copied." Charles W. Wolfram, Modern Legal Ethics § 2.6.2, at 54 n.21 (1986); see also Strassberg, supra note 44, at 906-07 n.33. The ABA committee's 1906 report specifically cited codes of ethics adopted by the bar associations of Virginia (1887), Wisconsin (1901), West Virginia (1902), and Kentucky (1903), "merely as illustrations of practicability," 29 ABA Reports 604 (1906).

\(^{52}\) For example, Canon One stated that the "duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance." Canon Twelve stated that "[i]n fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them." The Canons are reprinted in, inter alia, Professional Responsibility Standards, Rules and Statutes, 2002-03 Edition 647 et seq. (John S. Dzienkowski, ed.) [hereinafter Professional Responsibility Standards].

\(^{53}\) See Hazard, supra note 12, at 1254 n.77; Joy, supra note 51, at 325.
comprised a complete set of ethics rules, recognizing in the Preamble that "[n]o code or set of rules can be framed, which will particularize all the duties of the lawyer. . . . [T]he enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."\textsuperscript{54} These limitations prompted Supreme Court Justice Harlan Fiske Stone to describe the Canons in 1934 as "for the most part generalizations designed for an earlier era."\textsuperscript{55} The Canons' historical significance is unquestioned, however, simply because they were promulgated by a national group of elite lawyers as a uniform statement of the way ethical lawyers behave,\textsuperscript{56} and because they were widely adopted and followed in most states for over six decades.\textsuperscript{57}

By the mid-1960s, bar leaders recognized the need for a more effective ethics code.\textsuperscript{58} It was not scandal that drove this particular reform, it was change. The 1960s witnessed the first waves of what would become an enormous new explosion in the number of lawyers, and clear signs of a coming radical shift in who those new lawyers were—that is, the same sort of situation that had helped inspire the drafting of the Canons over a half century before. Between 1963 and 1973, total law school enrollment went from 49,552 to 106,102, and new admissions to the bar more than doubled.\textsuperscript{59} The ABA's Section on Legal Education and Admissions to the Bar reported at the 1974 mid-year meeting that "[e]xcept for 1968, total enrollment has grown steadily for the past 20 years and has more than doubled in the last ten years."\textsuperscript{60} The percentage of female law school students, for decades stuck in the three-to-four percent range, had begun to climb in 1967-68, and reached 20% in 1974-75.\textsuperscript{61} Between 1972 and 1973 alone,

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54. Canons (preamble), reprinted in Professional Responsibility Standards, supra note 52, at 647.
56. Of course, the Canons made no attempt to reflect (or protect) all lawyers' interests equally. The membership of ABA at the time represented only three percent of the total number of lawyers in the country, and was drawn from an elite stratum. Wolfram, supra note 51, § 2.6.2, at 54 n.23. The Canons, embodying the general tenor of George Sharswood's 1854 volume called An Essay on Professional Ethics, took several positions that made it more difficult to represent "certain classes of clients," most notably adopting restrictions on advertising and solicitation. David R. Papke, The Legal Profession and Its Ethical Responsibilities: A History, in Ethics and the Legal Profession 37-38 (Michael Davis & Frederick A. Elliston, eds.) (1986). Further, the Canons focused heavily on litigation and were silent on many important ethical duties that arise in other kinds of practice. Wolfram, supra note 51, § 2.6.2, at 54.
57. The original 32 Canons of Ethics were expanded by the addition of Canons 33 to 47 between 1928 and 1969. See Joy, supra note 51, at 324-25.
58. ABA President Lewis Powell appointed a committee to amend the Canons in 1964. See Wolfram, supra note 51, § 2.6.3, at 56.
60. Id. at 515.
61. Richard K. Neumann Jr., Women in Legal Education: What the Statistics Show,
there was a 37.8% increase of women in first year law school classes. In 1974, for the first time in history, there was not a vacant seat in a law school class in the United States. In this period there were even some calls to shut down all the law schools for a few years to avoid lawyer overpopulation. In the midst of these changes, the bar’s elite came to the obvious conclusion that legal ethics could no longer be simply part of an unwritten “gentlemen’s code,” enforced by the informal sanction of shame. Rules of conduct had to become more and more formal. Whether this “legalization process has resulted in the disintegration of the profession’s sense of self,” or whether demographic heterogeneity has caused the increasing legalization of the rules is, of course, debatable.

Human motivation is always rife with ambiguities, and here is no exception. It is tempting to ascribe bar leaders’ renewed attention to “professionalism” and ethics rules in times of demographic shifts merely to petty self-interest or to racism and sexism. When one looks at just three key periods of bar reforms — the late nineteenth to early twentieth centuries; the 1930s to 1940s; and the mid-1960s to early 1970s — it is hard not to see the bar’s “ethics focus” as representing in part a conservative and self-interested response to the influx of would-be lawyers of perceived “questionable character.” During each of these periods, most of the self-proclaimed “leaders of the bar” were white men. And the newcomers included (as time marched on)


62. 99 ABA Reports 515 (1974). see also Shirley Raissi Bysiewicz, 1972 AALS Questionnaire on Women in Legal Education, 25 J. Legal Educ. 503 (1973) (analyzing reasons for increased numbers of women entering law schools); Millared H. Ruud, That Buregong Law School Enrollment is Portia, 60 A.B.A. J. 182-83 (1974) (analyzing the numbers and concluding that there has been a “phenomenal increase in the demand for approved legal education in the past decade,” due in large part to an almost ten-fold increase in female law students during that time); James P. White, Is That Buregong Law School Enrollment Ending?, 61 A.B.A. J., 202 (1975) (analyzing reasons for enrollment explosion).


65. See W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 Vand. L. Rev. 1955 (2001) (discussing recent calls for a renewal of informal, community-based sanctions); David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799 (1992) (discussing efficacy of informal sanctions in regulating lawyer misconduct). In 1967, the ABA formed a Special Committee on Evaluation of Disciplinary Enforcement (the Clark committee) to address public complaints about the inadequacy of lawyer disciplinary processes in the states. In 1970, the committee’s report concluded that there was a “scandalous situation” afoot. See Joy, supra note 51, at 327.

66. Hazard, supra note 12, at 1242.

67. The ABA mistakenly admitted three black lawyers to membership in 1911. Upon learning their race, the ABA’s executive committee declared that “the settled practice of the Association has been to elect only white men as members.” Boyd, supra note 40, at 101. Ultimately the ABA, under internal pressure, decided to allow
immigrants from Eastern Europe, Catholics, Jews, women, and members of racial minorities. Those in power were undoubtedly suspicious of these new lawyers, and anxious to preserve their own exalted position in society. Discrimination was rationalized on the ground that “only those with a shared background could share the values of a single code of ethics.” We should never forget or deny that sordid past. But to attribute reforms in legal ethics (or even rhetoric about needed reforms) solely to evil motives—especially in the more recent periods—is to undervalue an entirely legitimate motivation: a genuine concern to redefine and reaffirm the core values of the legal profession as its composition changes.

Rapid changes in lawyer numbers and demographics have frequently created powerful ripples within the organized bar. Such a trend was recognized by the men who formed the American Bar Association in 1878, with the stated object to “uphold the honor of the profession of law.” They contributed to the creation of the Association of American Law Schools in 1900, at a time of remarkable expansion in numbers, when night law schools were churning out lawyers who lacked not only the social pedigree of the leaders of the bar, but frequently a high school education. A belief that bar examiners were “admitting too many new lawyers” was a prime factor in the creation of the NCBE in 1931. When returning World War II veterans flooded into law schools—and admissions directors “were getting applicants from colleges they had heard of but

the three to remain members, but required future applicants to indicate their race. Non-whites were allowed to join the ABA (with some restrictions) beginning in 1943. Full admission of black lawyers was not approved until 1950. Id.

68. See Lawrence M. Friedman, A History of American Law 538 (2d Ed. 1985) (describing the night law schools of the late nineteenth century as “breeding grounds for the ethnic bar”).


70. Perhaps the most outrageous comment by a respectable legal ethicist was uttered by Henry Drinker in the late 1920s, when he commented that many ethical lapses were committed by “Russian Jew boys” because they did not possess true American ideals. See Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 184 n.41 (1983) [hereinafter Stevens, Law School].

71. See, e.g., Papke, supra note 56, at 29 (analyzing the often conflicting motives of legal ethics reformers); Stevens, Law School, supra note 70, at 100-02 (discussing the mixed motives of those attempting to raise law school standards in the early 1900s).

72. 1 ABA Reports 16 (1878) (draft constitution of the ABA).

73. The lawyer population explosion was truly amazing between 1870 (when there were 28 law schools and 1,600 students) and 1900 (when there were about 100 schools and 13,000 students). Thomas, supra note 33, at 237.

74. There were nine night law schools in 1890, twenty in 1900. Friedman, supra note 68, at 619.

75. See Boyd, supra note 40, at 15-16 (implying that new standard requiring high school diploma for law students suggests that, prior to the standard, students could enroll in law school without a high school diploma).

76. Id. at 37-38. See also Editorial, 1 Bar Examiner 211 (1932) (focusing on the “overcrowded condition of the bar”).
knew nothing about"—the Law School Admission Counsel was formed, and the Law School Admission Test was developed to provide a standardized criterion.77

So in the 1960s, as changes rocked the nation and the profession, work began on drafting a new kind of ethics code, one tighter and more definite than the Canons had been.78 The ABA Committee that began that project was made up “mostly [of] senior practitioners of long standing in the organized bar,” who conducted deliberations in closed meetings, held no hearings, and circulated no interim drafts before publishing their final draft in 1968.79 The final product, approved the following year by the ABA and promulgated in 1970, was the first code to “embrace[] legally binding norms in the form of the Disciplinary Rules, albeit also retaining (in the Ethical Considerations) the fraternal voice of the Canons.”80 Most states quickly adopted them, following a “highly organized campaign” by the ABA to achieve that goal.81

These rules formed the core text that was to be tested on the MPRE ten years later. The examiners, looking to the national, standardized code, could now frame questions like this for examinees in any state to answer:

Although licensed to practice law in State, Attorney Alpha does not practice law but works as an investment broker. Alpha could have elected inactive status as a member of the bar, but chose not to do so. Recently, in connection with a sale of worthless securities, Alpha made materially false representations to Victim, an investment customer. Victim sued Alpha for civil fraud, and a jury returned a verdict in Victim’s favor. Alpha did not appeal.

Is Alpha subject to discipline?

A. Yes, because Alpha was pursuing a non-legal occupation while an active member of the bar.

B. Yes, because Alpha’s conduct was fraudulent.

C. No, because Alpha was not convicted of a crime.

77. Boyd, supra note 40, at 51-52. The LSAT, which first went into use in 1948, began as an experiment conducted by the law schools at Columbia, Harvard and Yale, in conjunction with the Educational Testing Service of Princeton. Id. at 52.


79. Hazard, supra note 12, at 1252-53.

80. Id. at 1251.

81. Wolfram, supra note 51, § 2.6.3, at 56 (noting that, by 1972, “every jurisdiction had taken steps to adopt the Code except three states”).
D. No, unless the standard of proof in the state is the same in lawyer
disciplinary cases and civil cases.\textsuperscript{82}

The question has but one answer (B, of course), an answer that
came from the text of the Code.\textsuperscript{83} We had a national, standardized
test on legal ethics—albeit one that, like the Code itself, could not
possibly address the complete spectrum of issues raised by the topic.\textsuperscript{84}

The Code itself was soon criticized on a number of grounds, and
threats of an antitrust action by the U.S. Department of Justice
prompted the ABA to begin a wholesale revision of the Code just
seven years after its promulgation.\textsuperscript{85} The ABA’s Kutak Commission
(named after its chair, Omaha lawyer Robert Kutak) began its work
in 1977 and within two years drafts were circulating.\textsuperscript{86} In contrast to
the secretive drafting process of the Code, this one was open and
“quasi-legislative”—draft after draft circulated for comments, revision
after revision responded to those comments.\textsuperscript{87} The Model Rules that
finally emerged (as promulgated by the ABA in 1983) “affirmed that
the standards of professional conduct were legal obligations and not
merely professional ones.”\textsuperscript{88} In format, the Model Rules look much
like a Restatement of the Law, with black-letter rules followed by
often-lengthy Comments designed to “provide guidance for practicing
in compliance with the Rules.”\textsuperscript{89} The Model Rules have now been
adopted by almost all states, although there have been several state
variations on key rules, most notably confidentiality.\textsuperscript{90}

The text of the Model Rules does not provide a complete picture of
legal ethics any more than the Code or the Canons did. The drafters
never believed otherwise. The Model Rules’ Preamble states that
while “[m]any of a lawyer’s professional responsibilities are

\textsuperscript{82} The question is contained in the 2002 MPRE Booklet, \textit{supra} note 17, at 37.

\textsuperscript{83} DR 1-102 (4) provides that a lawyer shall not “engage in conduct involving
dishonesty, fraud, deceit, or misrepresentation.” The answer is the same under MR
8.4(c).

\textsuperscript{84} The MPRE has always been designed only to test “knowledge of established
ethical legal standards,” originally as contained in the written codes alone. \textit{Multistate
Professional Responsibility Exam, 50:1 Bar Examiner 21, 22 (1981) (remarks of Joe
Covington); Id. at 26 (remarks of Eugene L. Smith) (admitting the limited scope of the
MPRE, but concluding that the “distinctive [rules] to the profession” as embodied
in the Code “not only can be taught, they can be tested upon”).

\textsuperscript{85} Wolfram, \textit{supra} note 51, \textsection 2.6.4, at 60-61.

\textsuperscript{86} Id. at 61.

\textsuperscript{87} Hazard, \textit{supra} note 12, at 1253.

\textsuperscript{88} Id. at 1254.

\textsuperscript{89} ABA Model Rules of Prof’l Conduct, Scope, \textit{reprinted in} Professional
Responsibility Standards, \textit{supra} note 52, at 10 [hereinafter Model Rules].

\textsuperscript{90} Over eighty percent of U.S. jurisdictions have adopted some version of the
Guide} \textsection 1.15, at 7-8 (2002). The ABA’s massive Model Rules revision project,
called Ethics 2000, has recently been completed and states have begun to react to it.
\textit{See} Professional Responsibility Standards, \textit{supra} note 52, at 5 (describing the status of
the revision); \textit{id. at 7 et seq.} (containing the full text of the revised rules).
prescribed in the Rules,” substantive and procedural law outside the rules as well as “personal conscience and the approbation of professional peers” also defines proper lawyer behavior.91 Further, the Scope section recognizes that “The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes . . . and substantive and procedural law in general.”92 While this “other law” is spread throughout many sources—in pre-computer days we would say it could be found all over the law library—even this disparate doctrinal material has been subjected to substantial ordering by the American Law Institute’s promulgation of the Restatement of the Law Governing Lawyers in 1998. For example, the Restatement contains sections on civil liability, the attorney-client privilege, and the formation of the lawyer-client relationship—areas expressly not addressed by the Model Rules. While the Restatement is not a true codification,93 it certainly represents a further move towards national standardization of the rules defining ethical lawyering.94 The Model Rules have largely completed what the Code had started in 1969, transforming the rules of ethics into positive doctrine95—doctrine imminently suited for multiple-choice testing. With each successive set of ethics rules, from the Canons to the Code to the Rules, the ABA has “moved toward more definite and complete statements of a lawyer’s obligations to clients, courts,  

91. ABA Model Rules (as amended 2002) (Preamble), reprinted in Professional Responsibility Standards, supra note 52, at 8. 
92. ABA Model Rules, Scope, reprinted in Professional Responsibility Standards, supra note 52, at 10. 
93. The movement to codify American law—to “gather together the real principles of law, put them together, and build a simple, complete and sensible code” that could be enacted by legislatures—peaked during the last third of the nineteenth century. See Friedman, supra note 68, at 403-11. California’s enactment of its Civil Code in 1872 was probably its high point. Id. at 405. For concise analyses, see, e.g., Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage 55-56, 70-71, 105-06 (2000); Grant Gilmore, The Ages of American Law 25-28 (1977). 
94. This is a major purpose of any Restatement. The ALI’s original conception was to produce “a source to enable a lawyer to learn without the necessity of consulting further authority, the simple and certain matters of the law.” John P. Frank, The American Law Institute 1923-1998, in ALI Seventy-Fifth Anniversary 4, 10 (1998). Benjamin Cardozo, while a vice-president of the ALI, said of the Restatements that “no project so important for the simplification of our common law and for its harmonious development has been launched during all the years of its history upon the soil of the new Pavlovian World.” Id. at 14. This particular drive to bring order to perceived chaos in the decisional law has been traced to Dean Roscoe Pound’s influential speech to the ABA in 1906, in which he lambasted the splintered state of law and lawyering. See N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, in Frank, supra, at 49, 53-55. 
opposing parties, and third persons." While this movement has been criticized, it has by any estimate flourished over the past century. The Restatement of the Law Governing Lawyers furnishes another collection of black-letter rules. With the nationally-uniform source material for multiple-choice testing in legal ethics growing like kudzu, this key precondition for the MPRE's existence has only become stronger over the last two decades. Indeed, it seems accurate to see the MPRE's success in sweeping across the nation as a "tacit endorsement" of the concept of a national code of ethics.  

III. THE NATIONAL STANDARDIZATION OF BAR EXAMINATIONS

A. The Progression from Oral to Written Bar Examinations

The MPRE would not have appeared in the form it did had it not been for the earlier evolution of bar examinations from informal and highly variable tests to more nationally standardized ones. One can see two immediate antecedents to the MPRE: the Multistate Bar Exam ("MBE"), which was first given in 1972, and the California Professional Ethics Exam, first offered in 1975. To understand the strength of these connections, however, one must take a longer look backwards.

Bar examinations of any kind were rare in our nation's early history. In the colonial period, admission to practice was most frequently accomplished by motion to the court after the applicant had served a long apprenticeship in a law office, or by proof to the

97. See, e.g., Michael K. McChrystal, The Battle for the Future of Professional Responsibility: The Meaning of Professionalism, 59:2 Bar Examiner 16, 16 (1990) ("In the past two decades ... the dominant lawyer ethos has been covered by rule after rule. Decisions in professional responsibility cases are more frequently expressed in technical analysis of rule language and extensive citation of decisional law, and the ethos giving rise to those decisions is hidden from view more often than ever before."); Deborah L. Rhode, Institutionalizing Ethics, 44 Case W. Res. L. Rev. 665, 730-31 (1994) (noting that one problem with the "bar codification processes stems from the insistence on uniform standards for increasingly diverse professional settings," leading to a kind of "lower common denominators" approach to legal ethics); Simon, supra note 9, at 5-6 (criticizing black-letter ethics rules as failing to capture the key role of lawyer judgment in many hard ethical choices).
98. Mary C. Daly, Resolving Ethical Conflicts in Multi-Jurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?, 36 S. Tex. L. Rev. 715, 733 (1995); but cf. Hake, supra note 9, at 739 (arguing that "[l]egal ethics has a local rather than national flavor, in the sense that most actual ethical decisions are made by local bar authorities and local courts," but admitting that training at a "national law school" produces an idealized view of uniformity). I simply note that at times, perception is reality; Levin, supra note 15, at 406 & n.44 (disagreeing with Daly, while admitting that any idea to drop the MPRE "flies in the face of growing calls for national rules of professional responsibility").
court of prior membership in one of the English Inns of Court.  

Oral bar examinations were sometimes given; New Jersey required an oral exam as early as 1755. After the Revolution, these practices continued until the 1830s when, in the Jacksonian era, some states offered bar admission without any examination or other qualification whatsoever. The most noteworthy example was Indiana, whose 1851 Constitution provided that “Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.” (This provision was not repealed until 1932.)

In most states, the oral bar examination tradition continued well into the nineteenth century, with the applicant typically being questioned in open court by judges. As the number of bar applicants grew, the oral examination fell increasingly to lawyers appointed to ask the questions and evaluate the responses. Whether conducted by judges or appointed bar examiners, the oral exams were usually short and focused on rote formalities such as time limits and forms of pleading. As one NCBE chairman put it, in those days “there was little more formality in being admitted to the bar than there is today in getting a library card from a public library.” Oral bar exams functioned as a test—albeit usually a non-standardized and truncated one—of both competence and character. That is, the examiner’s task was not only to test the examinee’s knowledge of at least some legal matters, but also to gauge the examinee’s worth as a person. One ABA official described oral bar

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100. George Neff Stevens, Diploma Privilege, Bar Examination or Open Admission, 46 Bar Examiner 15, 16-17 (1977) [hereinafter George Stevens, Diploma Privilege].  
101. Cameron, supra note 99, at 9 & n.12.  
103. For a discussion of this provision, see, e.g., Bernard C. Gavit, Indiana’s Constitution and the Problem of Admission to the Bar, 16 A.B.A. J. 595, 595 (1930).  
104. George Stevens, Diploma Privilege, supra note 100, at 17.  
105. Id.  
106. Id.  
108. In a 1934 opinion, the California Supreme Court seemed to express some degree of wistful longing for the “old days” where a man’s character could be sized up in a face-to-face oral bar exam during which the judge could “give considerable consideration to what, for a better name, was called ‘the background’ of the applicant’s preparation,” including his “personal appearance and other phases of the personality of the applicant.” In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P.2d 829, 832 (Cal. 1934). From today’s perspective, such a process looks like an effective vehicle for insidious discrimination. In the 1930s a county character and fitness examiner from Pennsylvania spoke of applicants “whom the Board does not think have been brought up in the proper way, others whose very manners are so unprepossessing that it does not seem logical that they should be admitted. The most difficult question ... is as to whether they should reject a man because of his appearance, his manner, or general surroundings. They do not
exams as allowing for a "careful individual personality appraisal." The certification of each applicant's "character and fitness" has been a constant requirement in this country, and continues today in different forms. Today, state bar examiners or separate character committees generally conduct the inquiry into each applicant's character and fitness.

Examinations were sometimes bizarrely informal. In what is undoubtedly the most famous example of this point, Abraham Lincoln was appointed to examine an applicant named Jonathan Birch. Birch was summoned to Lincoln's hotel room in Bloomington, Illinois. When the door opened, according to Birch, he found Lincoln taking a bath.

I shall never forget the queer feeling that came over me as his lank, half-nude figure moved to and fro between me and the window...

'How long have you been studying,' he asked. 'Almost two years,' was my response. 'What books have you read?' I told him, and he said it was more than he read before he was admitted to the bar. .

Then he resumed the examination. He asked me in a desultory way the definition of a contract, and two or three fundamental questions. Beyond these meager inquiries, as I now recall the incident, he asked nothing more.

As he continued his toilet, he entertained me with recollections—many of them characteristically vivid and racy—of his early practice. . The whole proceeding was so unusual and queer . that I was at a loss to determine whether I was really being examined at all or not.

think he should practice law but they have nothing against him." Character Examination of Candidates, 1 Bar Examiner 63, 67 (1931). Another examiner sitting on the same panel remarked with apparent surprise, "Sometimes you have wonderful character evidence displayed even though the applicant is not well educated or his parents were born in Russia." Id. at 72.


110. See generally Frederick A. Elliston, The Ethics of Ethics Tests for Lawyers, in Ethics and The Legal Profession 50 (Michael Davis & Frederick A.Elliston, eds.) (1986); Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985); see also Will Shafroth, A Study of Character Examination Methods in Forty-Nine Commonwealths, 3 Bar Examiner 195 (1934) (surveying the state approaches at that time and making recommendations); Richard L. Sloane, Note, Barbarian at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law, 15 Geo. J. Legal Ethics 397 (2002) (addressing many of the modern controversies).

111. The story is retold in Albert A. Wold, Lawyer Lincoln 153-54 (1936). It may also be found in Jarvis, supra note 11, at 376. A slightly less detailed (and thus less colorful) version is recounted in Megan, 3 Bar Examiner 269, 269 (1934).

112. Wold, supra note 111, at 153-54.
Lincoln reportedly jotted down a few lines on a sheet of paper, put it in an envelope, and directed Birch to take it to Judge Logan in Springfield. Birch recalled that Logan read the note and gave him the required certificate “without asking a question beyond my age and residence, and the correct way of spelling my name.”

As is clear from that well-worn story, the institution of oral bar examinations did not reflect a very high degree of standardization. Different examiners would ask entirely different questions and evaluate the responses in different ways. It was largely in response to these shortcomings that written bar exams developed in the latter part of the nineteenth century. The first written exam was given in Massachusetts in 1855, although only those candidates who could not demonstrate that they had three years of legal study had to pass it, and this experiment lasted only until 1859. Sporadicrevivals of a written examination requirement surfaced from time to time until a genuine movement gained momentum late in the century. The New York Supreme Court began to require written examinations in 1877. In 1880, New Hampshire became the first state to establish a statewide board of bar examiners, with state-wide jurisdiction. By the following year, that state as well as Rhode Island, Nevada and Idaho were requiring a written bar exam. The ABA called in 1892, 1908, 1918, and 1921 resolutions for candidates for the bar to be subject to an examination to determine fitness to practice. Between 1890 and 1914, most states came to require written bar exams. Requiring a

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113. Id. at 154.
115. Jarvis, supra note 11, at 374 (citing Wolfram, supra note 51, § 5.3, at 198, and Alfred Z. Reed, Training for the Public Profession of the Law 101 n.3 (1921)).
116. See id.
118. Karger, supra note 102, at 9.
120. See id. at 114; 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, 1192, 1201 (1995) (discussing decline of the diploma privilege and the rise of bar exam requirements).
121. Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 Fordham L. Rev. 817, 833 (2000). Well into the twentieth century, however, passing a bar exam was not the only route to admission to practice law. See George Stevens, Diploma Privilege, supra note 100, at 15-20, & 71-102 (history of each state’s admissions requirements, as of 1976). As late as 1956, eight states granted a “diploma privilege”—allowing graduates of certain accredited schools to become members of the state bar without sitting for the bar exam. Admissions to the Bar by States—1956, 1957, 1958, 1959, 29 Bar Examiner 84-85 (1960). In 1962, Dean Eugene Rostow of Yale Law School thought it appropriate (and perhaps even necessary) to open a speech to a group of bar examiners with the declaration: “First, let me make certain things clear. I am not one of the deans who feel that the law schools should have diploma privileges and that bar examinations should be abolished.” The Law School Dean Looks at the Bar Examination and the Examiner: A Panel Discussion, 31 Bar Examiner 99, 99 (1962) (remarks of Eugene V. Rostow). Over the next decade,
written examination for admission rather than relying on less formalized processes set the stage for the reforms to come, and ultimately led directly to the development of national standardized bar examinations, in the form of the MBE, and eight years later, the MPRE.

B. Towards Greater Standardization: Objective Questions on Bar Examinations

1. The Impetus for Objective Questions

When written bar examinations came into being, essay questions were generally used exclusively. While essays are excellent testing mechanisms, they do suffer from two related weaknesses: grading can be quite subjective and (even with grading inaccuracies) they take a long time to evaluate. Subjectivity is a standing problem with essays no matter how many must be graded; that problem is lessened by the adoption of some multiple-choice questions on an exam, as testing experts have concluded for some time. The time problem, however, becomes acute mainly when the number of examinees outstrips the number of graders. When that happens, bar examiners are faced with a tough choice: either hire more graders, or use some non-essay questions. When such a situation arose in New York in the late 1920s, bar examiners in that state addressed the problem by using some “yes-no” questions on its bar exam, a practice that lasted for several years. A few other states, including Illinois, were using objective questions in the mid-1960s, during that numbers crunch.

charges of racial discrimination (based on comparatively high failure rates among African-American applicants) drove the National Bar Association to call for the abandonment of bar examinations and the adoption of diploma privileges. Shigezawa, supra note 36, at 147. Today, however, only Wisconsin has a diploma privilege, and no other state seems to be flirting actively with the idea, whatever its merits. See Beverly Moran, The Wisconsin Diploma Privilege: Try It, You'll Like It, 2000 Wis. L. Rev. 645.

122. See Stephen P. Klein, Are Your Test Scores Only Half Safe?, 48 Bar Examiner 137, 137 (1979) (“The reason the essay portion poses special problems is that after the applicant has written an answer, there is a rogue’s gallery of biases and artifacts that are likely to influence the score assigned to that answer.”).

123. See id. at 137.

124. See John Kirkland Clark, The Preparation of Bar Examination Questions, 1 Bar Examiner 78, 79 (1931) (“For those, then, who have to deal with large numbers of applicants, the method of using ‘short-form’ questions to be appraised on a ‘true-false’ basis,—to be answered simply ‘yes’ or ‘no’—has seemed to be desirable, if not essential.”)

125. New Jersey Asks New York, 2 Bar Examiner 216-19 (1933) (stating that as of 1933, the New York bar examiners had been using 150 such questions on each bar exam for the past five or six years to test the “knowledge-content” of the applicant); Philip J. Wickser, Law Schools, Bar Examiners and Bar Associations: Cooperation vs. Insulation, 2 Bar Examiner 151, 153 (1933) (describing the New York bar exam).

126. Relative Use of Essay and Objective Examinations, in Bar Examiners'
Florida began using some multiple-choice questions on its bar exam in 1966.\textsuperscript{127}

Bar examiners came to see such questions as more than a necessary evil. Testing experts have long asserted that well-drafted objective questions are fully capable of testing high-level mental processes, despite a widespread belief to the contrary.\textsuperscript{128} Such questions are also thought to offer some substantive advantages over essays. Objective questions force the examinee to address issues the examiner wants addressed, preventing the "reshaping [of] the question to [the examinee's] own purpose," as can be done with essays.\textsuperscript{129} Using objective questions also allows for much broader coverage of any particular subject area, whereas essays allow deeper coverage.\textsuperscript{130} Giving multiple-choice examinations is also thought to provide some tangible practical benefits over essay examinations. First, "[o]btaining an accurate and objective score ... is a simple and straightforward task."\textsuperscript{131} Second, using such questions on part of a bar exam frees state bar examiners for other important tasks—such as doing character and fitness checks of applicants.\textsuperscript{132}

2. The Coming of the Multistate Bar Exam

In the late 1960s, bar examiners faced a numbers problem of unprecedented dimensions. John Germany, former Florida bar examiner and NCBE President, described the situation like this: "Beginning in 1968 the number of applicants began to overwhelm us and the rickety system we had used for testing began to break down under the weight of these numbers. This problem was not unique to Florida, it was a national concern."\textsuperscript{133} In response to the jump in law students and bar examinees, the NCBE began a broad critical study of


\textsuperscript{128} John A. Winterbottom, \textit{Relative Merits of Essay and Objective Examinations}, in Bar Examiners' Handbook, supra note 117, at 146, 147-48, 150 (opining that the best exam would combine essay and objective questions, to "take advantage of the strengths of both types of examination").

\textsuperscript{129} Id. at 147.


\textsuperscript{131} Klein, supra note 122, at 137.

\textsuperscript{132} See John DesCamp, et al., \textit{Admission to the Oregon State Bar}, 45 Bar Examiner 16, 20 (1976) (stating this as a reason for the adoption of the MBE in Oregon); see also Germany, supra note 127, at 1012 (stating that Florida's bar examiners spent over eighty percent of their time on character and fitness evaluations).

\textsuperscript{133} Remarks of John Germany—A Farewell Address, 45 Bar Examiner 108, 108 (1976).
the bar examination process in 1967. The following year saw the appointment of a 12-member NCBE Special Bar Examination Committee comprised of law professors, law school deans, bar examiners, and professional testers. The committee noted "increasing concern in all States over the mounting burdens being faced by boards of bar examiners," caused primarily by burgeoning law school enrollments. Many state bar exam boards hired additional personnel to grade the written exams, but the time lag between the administering of the bar exam and the reporting of results continued to grow. In one widely-reported instance, Ohio's bar exam, given in July, was not graded until December. The NCBE committee studied earlier uses of multiple-choice questions and became satisfied that such experiments had worked.

In 1970 the special committee made its report to the NCBE board, which appointed a standing committee to begin drafting the first MBE, comprised of 200 multiple-choice questions covering five subject areas: torts, contracts, real property, evidence, and criminal law. The NCBE contracted with the Educational Testing Service (the same company that administered the LSAT and other standardized tests) to coordinate the drafting and administering of the new examination. Questions in each of the five subject areas were drafted by separate committees made up of three legal scholars and two bar examiners, assisted by ETS testing experts.

The first MBE was administered on February 23, 1972, to roughly 5,000 applicants in 19 states. Adoptions by other states rapidly followed, foreshadowing the similar success of the MPRE eight years later. Over 23,000 applicants in 35 states took the MBE in 1973.

134. Eckler MBE Statement, supra note 127, at 42.
137. Id.; Eckler MBE Statement, supra note 127, at 7.
140. Id.; see also Blom, supra note 136, at 11. Constitutional law—arguably a more relevant subject-area than ethics in terms of stemming future Watergates—was added to the MBE's coverage in 1976.
142. Id.
143. Id. at 9.
144. The NCBE did not adopt a neutral, take-it-or-leave-it marketing strategy with state bar examiners once the MBE had been written. As one former NCBE Chairman candidly admitted, the standing Bar Examination Committee "had the task of convincing bar examiners that an objective test, properly devised, could perform as well or better than the traditional essay examination. In a profession where written communication is considered to be of high importance, this was by no means an easy task." Yoshio Shigezawa, Address at Conference of Chief Justices, 43 Bar Examiner 153 (1974). The NCBE succeeded grandly, despite such difficulties of persuasion.
By 1976, forty-four jurisdictions had adopted the MBE, with only eight states not participating.\textsuperscript{146} Three decades after its initial appearance, the MBE has become part of the bar examination in all but two states, Louisiana and Washington; in 2001, just under 65,000 applicants took it.\textsuperscript{147}

By all accounts, the MBE has helped solve the problem of the large number of bar applicants overwhelming the examination system itself. As a former NCBE Chairman said in 1979 about the Georgia experience, the coming of the MBE “saved our lives in terms of the number of applicants we were getting and the antiquated machinery we had for handling the ever increasing numbers.”\textsuperscript{148}

\textbf{C. The Ultimate Standardization: The Promise of a National Bar Examination}

The MBE would never have gained acceptance, and the MPRE would never have been possible, had it not been for the fact that many influential bar leaders believed that we should have a truly national bar exam, a standardized test that could be used in every state. Proponents of such a test assert that the very system of state control over bar admissions produces intolerable inefficiencies when states are essentially testing on the same materials. For example, in 1972, NCBE Chairman John Eckler lamented of “a great duplication of effort” and a “waste of manpower” in the pre-MBE world in which bar examiners from fifty-two U.S. jurisdictions were needlessly “preparing bar examinations in various forms, presenting those bar examinations, and grading them.”\textsuperscript{149} The NCBE’s special committee appointed to study bar exams found that “each Board of Bar Examiners was doing the same thing as boards in other States were doing. There was an obvious duplication of effort and inefficiency in the husbanding of available skill and talent.”\textsuperscript{150}

The concept of a national bar exam, which is a corollary to the broader and more controversial proposition that we should have a “national bar” (with no state variation in admissions criteria) was not new in the 1960s. Indeed, the historical record demonstrates that calls for uniformity in admissions standards, including the bar exam, have been fairly continuous since the organized bar first got organized. At the very first meeting of the ABA in 1878, the association adopted a

\textsuperscript{145} Id.
\textsuperscript{148} \textit{Discussion of Multistate Bar Examination Program}, 48 Bar Examiner 53, 53 (1979) (remarks of Chairman Trammell E. Vickery).
\textsuperscript{149} Eckler MBE Statement, supra note 127, at 6.
\textsuperscript{150} Eckler, \textit{August 1974}, supra note 135, at 128.
resolution calling for the Committee on Legal Education and Admissions to the Bar to “report, at the ensuing annual meeting, some plan for assimilating throughout the Union, the requirements of candidates for admission to the bar, and for regulating, on principles of comity, the standing, throughout the Union, of gentlemen already admitted to practice in their own States.”151 The Committee’s report the following year recommended that laws be enacted for that very purpose, specifically urging that states admit to the practice of law “those who have practised for three years in the highest court of the state of which they are citizens.”152

At the first meeting of the NCBE in Atlantic City in 1931, one of its founders expressed the hope that the NCBE could do for bar examinations what the American Law Institute had done for the common law, stressing the “beneficial tendency of standardization among the various states.”153 He predicted that “many state boards would welcome a decided approach towards standardization in questions propounded. In this respect it is certain that many states would regard themselves as having made definite improvements if their questions were more similar to those given by the efficient boards in New York and Pennsylvania.”154 Another NCBE officer argued that it was time for a “national board of law examiners” that could coordinate the drafting of uniform exam questions by national experts: “Can anyone doubt that Wigmore can prepare a better examination on Evidence or Williston a better examination on Contracts than could the average bar examiner?”155

In 1941, the ABA’s Section on Legal Education and the Bar approved of a “standardized National Bar Examination, to be modeled after the National Medical Examination, with questions to be prepared by experts and to be offered on the same day across the country.”156 The Section on Legal Education decided that such an exam should be written and submitted to state bar examiners, who could choose to use it or not.157 This proposed essay examination drew the support in principle of the AALS and the NCBE.158 The recommendation was ultimately shelved for further study when the

151. 1 ABA Reports 26 (1878).
152. Report of the Committee on Legal Education and Admissions to the Bar, 2 ABA Reports 209, 235 (1879). This concern continues to this day, focused on developing workable rules for “multi-jurisdictional” practice. See ABA, Report of the Commission on Multijurisdictional Practice (August 2002) (setting forth ten recommendations for changes in the ABA’s current rules and practices).
154. Id.
157. Id.
158. Karger, supra note 102, at 11.
Section decided that it should not act too hastily in pushing for such a reform. Still, prominent leaders continued to call for the adoption of a national bar exam, keeping the flame alight.

Those at the NCBE continued to believe that a major problem with state-administered bar exams was unevenness in quality, and to address this situation set up a central clearinghouse of bar essay questions in 1953, known as the Bar Examination Service. By the late 1960s this exam bank contained over 4,000 questions, which state bar examiners could order from a printed catalog containing digests of each available question. The bar examination service improved the state exams, and by its very nature led to a greater degree of standardization. But more pronounced uniformity was just around the corner.

The MBE’s appearance in 1972 represented the partial birth, at least, of a national bar exam. Its multiple-choice format meant that the NCBE not only offered uniform questions for the states to ask, it provided uniform answers. If “A” is the “best answer” to question 47 in Idaho, it is also the “best answer” in Georgia and Nebraska. (This provides a far greater degree of standardization, arguably, than a uniform national essay exam that did not provide uniform answers for each state.) This unprecedented national standardization of bar admissions was a controversial development, even after a century of debate and some feints in that direction. NCBE Chairman Eckler was well aware of the longstanding debate over the merits of a national bar examination; the concept was by then openly endorsed not only by the NCBE, but also by the Association of American Law Schools and the ABA’s Section of Legal Education and Admissions to the Bar. Eckler (who served as chairman of both the original special

160. See, e.g., James E. Brenner, Improving Bar Examinations: Some Suggestions, 36 A.B.A. J. 279, 283 (1950) (proposing a high-quality national bar exam that could be used in any state); Herbert W. Clark, Bar Examinations: Should They Be Nationally Administered?, 36 A.B.A. J. 986 (1950) (arguing that a national bar examination would eliminate most of the problems with the present state-run scheme); L. Dale Coffman, A Uniform National Bar Examination: An Economical Improvement, 36 A.B.A. J. 623 (1950) (arguing that a truly national bar exam has been proposed for over 20 years, and that all it needs for implementation is adequate funding).
161. Bar Examiners’ Handbook, supra note 117, at 18. The NCBE had served as an informal clearinghouse from its very beginnings. See Wallbank, supra note 153, at 35.
163. The Passing Mark and How It Should Be Determined, 32:1 Bar Examiner 12, 27 (1963) (remarks of Len Young Smith, President of the Illinois Board of Bar Examiners).
165. See Karger, supra note 102, at 11.
committee and the standing committee that drafted the first MBE) also recognized the political danger of overt acknowledgement that the test was a very real step in that direction. This concern prompted the NCBE to drop its plan to call its standardized test “National,” and to rename it “Multistate.” [167] “[T]o name it ‘national’ was to kill it,” Eckler said. “[T]he States have been fiercely proud and protective of their sovereignty and in no place is sovereignty more jealously guarded than in admission to a State bar.” [168] Ultimately Eckler defended the exam from critics by denying that it represented an assault on state control over bar admissions, stating that “[t]he Multistate Bar Examination is available to any state that wishes to use it. It does not require national participation nor national control for its success. Any state can use the Multistate examination, interpret its grades any way it wishes, put its cut-off of pass and fail wherever it will. Each state board is master of its own examination.” [169] Eckler was entirely correct to separate the idea of a national bar exam from truly national admission; the states could all give a uniform bar exam and still control the decision about whether to admit any particular applicant to practice. [170] But the decision to name the test “multistate” rather than “national” while politically savvy, does not obscure its true character.

In retrospect, the flowering of the strong support for a national bar exam (which took the form of the MBE) was another necessary precondition for the creation of the MPRE. Today, many bar elites continue to support the idea of a fully national bar exam, often citing the MBE as evidence not only that such a test is feasible, but that we are now on that road anyway. [171] As it turns out, by the time the MBE was finalized, the NCBE was already contemplating other national bar admissions tests. In the same year that Chairman Eckler was disowning the “national test” characterization, former NCBE Chairman Yoshio Shigezawa told the Conference of Chief Justices:

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167. Id. at 129.
168. Id.
169. Id. at 129-30.
171. Id. at 245; Griswold, supra note 32, at 83 (arguing that “[t]here is a strong need for a comprehensive and widely adopted national bar examination,” and noting that much progress has already been made in that direction); Eric Williams, A National Bar—Carpe Diem, 5:2 Kan. J.L. & Pub. Pol’y 201 (1996) (arguing that we already have a de facto national bar in several areas of practice, and that “given the great similarities of bar exams offered across the country, a true national bar exam requires little substantive change but great procedural upheaval”); Bar Examiner’s Handbook, supra note 117, at 18 (noting “a considerable body of view favoring a nationally administered bar examination”); see also Ted Schnyder, Professional Discipline in 2050: A Look Back, 60 Fordham L. Rev. 125, 127 (1991) (a humorous look into the future, when we have a uniform national ethics code and a federal lawyer licensing and disciplinary system); Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335, 403-04 (1994) (discussing the feasibility of uniform ethics rules at the federal level, citing the multistate testing on most bar exams).
"I hope that some day in the not too distant future, the [NCBE] will be able to prepare and offer to all States an essay examination of the quality achieved in the Multistate Bar Examination. The National Conference will then be in a position to offer a completely packaged bar exam."\(^{172}\)

Such a completely packaged bar exam, of course, would be designed to be national in scope, as all NCBE products have been.\(^ {173}\) The legal ethics exam was just one more piece of the complete puzzle.

D. Ethics Testing on Bar Examinations

1. Historical Background

Although the MPRE was the first national legal ethics exam, it is a complete myth that the states did not test on legal ethics before the MPRE. In fact, the subject of legal ethics was tested on written bar exams for decades, and sometimes at great length, before the MPRE came along. A study of the Ohio bar exam in the early 1930s showed that “[i]t often happens that the subject of Legal Ethics receives six [essay] questions upon an examination while Constitutional Law or Contracts are covered in only five.”\(^ {174}\) The flavor of some of these early ethics questions is captured in this example from the Pennsylvania Bar Exam, circa 1930:

A, one of your clients, who has been committed by order of court to the X asylum on the ground of insanity, requests you to petition the court for his release. W, A’s wife, and B, A’s brother, urge you to tell A that you are so petitioning the court, when in fact you are not. They are joined in this request by O and P, whom you know to be eminent psychiatrists, who state that A should not be released at present, but that his mental condition will be improved by hearing such a statement from you. What action should you take?\(^ {175}\)

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\(^{172}\) Shigezawa, supra note 144, at 154.

\(^{173}\) The MPRE was the second of the NCBE’s nationally-standardized bar exams, but it has not been the last. Since the MPRE’s creation, the NCBE has produced both a uniform essay exam (the Multistate Essay Examination, a three-hour, six-question exam covering ten subjects not covered by the MBE, first promulgated in 1988, and used in 14 jurisdictions in 2001), and a uniform performance exam (the Multistate Performance Test, which examines “an applicant’s ability to use fundamental lawyering skills in a realistic situation,” first produced in 1997 and used in twenty-seven jurisdictions in 2001). 2 Bar Examiner 21-24 (2002).

\(^{174}\) Malcolm K. Benadum, A Study of Ohio Bar Examinations, 2 Bar Examiner 137, 140 (1933) (also finding that applicants made passing scores on ethics questions at a higher rate than in any other subject). Id. at 143.

\(^{175}\) A Bar Examination from Pennsylvania, 1 Bar Examiner 49, 55 (1931). A complete 1930 analysis of this question would seem to require the application of several of the Canons of Ethics, including 6 (Adverse Influences and Conflicting Interests); 8 (Advising Upon the Merits of a Client’s Cause); 15 (How Far a Lawyer May Go in Supporting a Client’s Cause); 22 (Candor and Fairness); 29 (Upholding the Honor of the Profession); and 32 (The Lawyer’s Duty in Its Last Analysis).
While undoubtedly not all states treated the subject as well as Ohio and Pennsylvania, a survey of bar examiners in 1949 showed that legal ethics was tested on the bar in thirty-five of the forty-nine jurisdictions—more frequently than such subjects as trusts, sales, taxation and administrative law.\textsuperscript{176} A survey of thirty-five states and the District of Columbia in the late 1960s showed that twenty-six of them continued to test on ethics on their state bar exams.\textsuperscript{177} Requests for legal ethics essay questions from the NCBE's Bar Examination Service rose dramatically just before the MPRE's appearance, demonstrating a renewed testing interest in many states,\textsuperscript{178} undoubtedly driven in part—but not wholly—by the continued fallout from Watergate.

By the mid-1970s, the NCBE had begun to formally address state bar ethics testing practices. The resulting study uncovered tremendous variation from state to state. For example, the length of the test sections ranged from five minutes to two hours.\textsuperscript{179} Another problem was that most jurisdictions integrated the results of the ethics questions with those of the entire exam, producing a situation in which "an individual could demonstrate absolutely no awareness of ethical principles" but could pass because of high scores on other questions.\textsuperscript{180} Yet another problem was that bar examiners found it difficult to write decent essay questions on legal ethics.\textsuperscript{181} Some state boards had, in apparent frustration, completely dropped professional responsibility from bar exam coverage in the years preceding the MPRE,\textsuperscript{182} although the data from the Bar Examination Service refute any claim that most had done so. Some states had even strengthened their ethics requirements. Florida required applicants to pass a separate one-hour examination on professional responsibility.\textsuperscript{183}

\textsuperscript{176} George Neff Stevens, \textit{Scope and Subject Content of Bar Examinations}, 19 Bar Examiner 99, 103-05, 115 (1950).

\textsuperscript{177} The Bar Examiners' Handbook, supra note 117, at 318-19 (Table 8: Subjects Most Frequently Tested on Examinations).


\textsuperscript{180} \textit{Id.}


\textsuperscript{182} \textit{Id.}

meaning that applicants could no longer fail the ethics questions and slide by because of solid answers in torts and criminal law. And California, so often an innovator, went Florida one better (one hour, that is).

2. California’s Professional Responsibility Examination

California’s answer to the problem of ethics testing on the bar was to develop a multiple-choice test, known as the Professional Responsibility Examination (commonly called the “PREX”), first given to applicants in that state in February, 1975. The two-hour exam contained forty questions based on the text of the California Rules of Professional Conduct and the ABA Model Code. Law students were eligible to take the exam, and as in Florida, each applicant had to pass the PREX separately from the rest of the bar exam before being admitted to practice. Examinees were instructed that “[t]he answer to each question is the same” under both Codes, meaning of course that there were no questions in areas on which the two codes diverged. Questions asked not only about whether a lawyer would be subject to discipline for engaging in certain kinds of conduct, but also whether some stated action would be “proper” or would comport with the lawyer’s “ethical obligation.” Many questions (like all good multiple-choice questions) required at least some knowledge of several rules for a complete analysis. For example, this was Question 16 on the inaugural California test:

Attorney represents Client in a matter involving a claim by the United States Internal Revenue Service (IRS) for unpaid income taxes for the years 1971-1973. Client informs Attorney that before consulting Attorney, Client gave IRS false financial statements for the years in question.

It is proper for Attorney to

(A) continue to represent Client and make no disclosure

(B) inform IRS concerning the false financial statements

(C) immediately withdraw from the case

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184. The entire February 1975 examination, along with the instructions and an answer key, is reprinted in 46 Bar Examiner 191 (1977).
(D) advise client that Attorney will withdraw from the case unless Client makes a full disclosure to IRS.¹⁸⁸

Other questions covered issues relating to such matters as bar admissions, advancing funds to clients involved in litigation, engaging in unlawful conduct not related to law practice, conflicts of interest in several settings, proper handling of client funds, fees, and the propriety of specified settlement tactics. The California test was drafted by a small team of law professors, including John F. Sutton, Jr., of the University of Texas (reporter-draftsman of the ABA Model Code) and Wayne Thode of the University of Utah (reporter-draftsman of the ABA Code of Judicial Conduct) at the core of the team.¹⁸⁹ The exam’s success led to the NCBE’s retention of the entire California drafting team to write the national exam that became the MPRE.¹⁹⁰ In effect, this pedigree insured that the MPRE had been thoroughly vetted for years, with California applicants the guinea pigs, at the time of its very first offering. Undoubtedly this eased the MPRE’s rapid and virtually uniform acceptance by bar examiners in other states.

IV. THE STRENGTHENING OF LAW SCHOOL ACCREDITATION STANDARDS

A. The Development of the Standards for Law Schools

From its very founding, the ABA was a proponent of greater standardization of law schools in order to improve the quality of the education students received.¹⁹¹ This was viewed as a centrally-important remedy for the perceived crisis created by the influx of new lawyers of low ethics and poor schooling, given “the intimate relation of education and professional character.”¹⁹² At the second annual meeting of the fledgling organization in Saratoga Springs, New York, in the Summer of 1879, the chair of the Committee on Legal Education and Admissions to the Bar signaled basic agreement with the New York Bar Association’s charge that

the general standard of professional learning and obligation began to decline in American cities about the year 1840, and preserved a downward tendency until 1870, when it reached its lowest ebb... [T]his is ascribed to the changes in laws regulating admission to the bar, and by means of which the ignorant, and, it is said, the

¹⁸⁸. The correct answer is D, according to the test’s answer key.
¹⁸⁹. Eugene F. Scoles, A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination, 59:2 Bar Examiner 20, 21-22 (1990). Professor Scoles was also an original member of the drafting team.
¹⁹⁰. See id. at 22.
¹⁹¹. Stevens, Law School, supra note 70, at 93.
¹⁹². Report of the Committee on Legal Education and Admissions to the Bar, 2 ABA Reports 233 (1879).
unprincipled, were launched on professional experience and temptations in extraordinary numbers, without preparation of any suitable kind. 193

The solution proposed? "[I]t may be safely asserted," the committee's report continued, "that the true instrumentality for improvement in our country now is, as it has always proved to be elsewhere, the school of law." 194 This same ABA Committee adopted a resolution urging the states to recommend that law schools teach a number of core subjects, the first listed being "Moral and Political Philosophy." 195

The ABA continued to focus on raising standards as the number of law schools grew, and this was thought to be best accomplished by national standardization. As Robert Stevens explains,

The association might have opted for institutionalizing diversity, although that would have run counter to the egalitarian ethos of the nation. It would have seemed even more un-American in the last part of the nineteenth century, a period when standardization was a national watchword, not only in the profession but throughout industry and commerce.... [A]lmost all were adamant that a uniform type of law school should control entry to the profession. 196

By 1891, however, only one of every five lawyers admitted to practice in the United States had attended law school. 197 The ABA's continued interest in pushing for its standardized law school agenda led to the creation of the first ABA section, the Section of Legal Education and Admission to the Bar, in 1893, which was dedicated to provide an opportunity for focused study and discussion of legal education. 198 The Section began to take the leadership role in developing law school standards; in 1896 the Section adopted a resolution that the ABA should formally adopt such standards. 199 The ABA was not yet accrediting law schools, however, and in 1900 the Section on Legal Education created the Association of American Law Schools to help with a regulatory function. 200

193. Id. at 212.
194. Id.
195. Id. at 235. The ABA's earliest efforts to reform legal education focused on greater standardization with higher standards—"to give symmetry to legal education as a system; to have it advance and reach, as far as practicable, homogeneity, and a common standard." Id. at 232. The ABA's refusal to require any single model of teaching legal ethics during the debates over Standard 302(a) demonstrates a contrary position—one decidedly pro-diversity, with respect to how particular subjects are taught. See infra notes 213-15 and accompanying text.
196. Stevens, Law School, supra note 70, at 92 (footnotes omitted).
197. Id. at 95.
199. Id. at 12.
200. Id. at 15.
It was not until 1921 that the ABA adopted its first Standards for Legal Education under the leadership of Elihu Root, a former U.S. Secretary of War, Secretary of State, Senator, and winner of the 1912 Nobel Peace Prize. Root's committee's motion for the adoption of these standards was seconded by William Howard Taft, the Chief Justice of the United States and the former President. This event marked the beginnings of the ABA as a law school accrediting agency, even though the ABA at that time did not have any enforcement powers. In 1923, the ABA issued its first list of approved law schools (made up of schools that complied with its Standards). Through the remainder of the decade, the ABA and the AALS worked closely together to develop new regulations for law schools, including minimum teacher-student ratios, library volumes, and pre-law school educational experience for students. During this time the number of law schools rose dramatically (from 142 in 1921 to 173 in 1928), only half of which were on the ABA and AALS approved lists. One result of these developments was to cause law schools to be more alike, and this was clearly the ABA's goal. There was, in other words, an "accelerating homogenization of law schools" attributable to the ABA's Standards.

While the 1921 Standards were revised frequently (such as by upping the minimum number of volumes required in the law library and the minimum number of full-time professors), the ABA did not begin a complete revision of the Standards until the late 1960s. It was

201. Id. at 21.
202. Id. at 24.
203. Id.
204. See id. at 28.
205. Stevens, Law School, supra note 70, at 172 (describing the ABA as "an entirely voluntary body").
206. Id. at 173.
207. Id.
208. Id. at 173-74.
211. The 1921 Standards are reprinted in 1 Bar Examiner 277 et seq. (1932), and in James P. White, Legal Education in the Era of Change: Law School Autonomy, 1987 Duke L.J. 292, 294-95.
212. Stevens, Law School, supra note 70, at 179.
this revision, with its professional responsibility requirement, that provided yet another of the MPRE’s strong historical roots.  

B. The Professional Responsibility Requirement

One of the most important steps towards the MPRE was the ABA’s 1973 adoption of Standard 302(a), which required each ABA approved law school to provide and require for all student candidates for a professional degree, “instruction in the duties and responsibilities of the legal profession,” as well as to offer “training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy.” Contrary to some casual readings, the Standard did not and does not require the teaching of any separate course in the subject. Indeed, in the following year the State Bar of Arizona unsuccessfully presented a resolution to amend Standard 302(a)(iii) to require schools to provide a “course for credit” on legal ethics. The Section on Legal Education presented a substitute motion, passed by the House by voice vote, which added a second paragraph to 302(a)(iii):

Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instructions.

213. Arthur Karger, Bar Admission Standards and Academic Freedom of the Law Schools: Are They in Conflict?, 49 Bar Examiner 29, 31 (1980) (“By way of implementation of the ABA requirement . . . the NCBE has developed a new multi-state examination on the subject of professional responsibility.”).

214. The full text of the 1973 Standards for the Approval of Law Schools may be found in Report No. 1 of the Section of Legal Education and Admissions to the Bar, 98 ABA Reports 351, 352 et seq. (1973). For a detailed account of the debate leading up to its approval, see House Disapproves UMVARA, Supports the Exclusionary Rule, and Adopts New Law School Standards, 59 A.B.A. J. 384, 388-90 (1973). The original draft brought before the House did not require students to take such instruction in professional responsibility, it merely required schools to offer it. The Standard was amended from the floor. Id.; see also Robert W. Meserve, President’s Page, 59 A.B.A. J. 327 (1973) (highlighting this change as evidence of the ABA’s “desire that there be greater law school emphasis on the teaching of professional responsibility”).

215. The current Standard (renumbered as 302(b)) now reads in full: A law school shall require all students in the J.D. program to receive instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.

ABA Standards for Approval of Law Schools 24 (2001) [hereinafter ABA Standards].


217. Id.
It is tempting to attribute the adoption of Standard 302(a) to the Watergate scandal, but such a literal connection simply cannot exist. The ABA’s revision of law school accreditation rules had been in the works long before any of the Watergate events had occurred. The ABA began its process of revising its 1921 Standards for Legal Education in the late 1960s. The first draft was put out for comment in December, 1971. After two more drafts, the ABA’s Section on Legal Education and Admissions to the Bar approved the new Standards in toto on August 15, 1972. That comprehensive set of new Standards (including 302(a)) was adopted by the House of Delegates at the ABA’s mid-year meeting in February, 1973. It is true that the Watergate break-in had occurred June 17, 1972 (that is, eight months prior to the ABA’s final approval of the new standards), and most of the Watergate burglars had pleaded guilty in January, 1973. G. Gordon Liddy (the lone lawyer-burglar) was convicted of the burglary in March, 1973—the month after the ABA’s passage of 302(a). But other key events in the affair had not yet occurred, and the extent of the cover-up was not yet known. Attorney General John Mitchell’s obstruction of justice and perjury (for which he was later indicted) did not even occur until March 20, 1973, when he testified falsely before a grand jury. That lawyers were involved to any real extent at all in the planning or cover-up did not become known until the Senate Watergate hearings were held, between May 17 and August 7, 1973. The existence of the Nixon tapes (which broke the lawyer part of the story) was the dramatic centerpiece of those hearings; the Nixon tapes were subpoenaed on July 23, 1973—five full months after 302(a)’s adoption. Scholars are certainly not wrong to connect Watergate to the rapid creation of required ethics courses

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218. Forward to ABA Standards, supra note 215, at 5.
219. Id.
220. Id. at 5-6.
221. Id. at 6.
222. See United States v. Liddy, 509 F.2d 428, 432 n.2 (D.C. Cir. 1974).
223. United States v. Liddy, 510 F.2d 669 (D.C. Cir. 1974) (affirming his conviction). After Liddy’s disbarment in New York, the President of the ABA commented with apparent relief that Liddy “had not been a member of the American Bar Association for several years.” Robert W. Meserve, President’s Page, 59 A.B.A. J. 803 (Aug. 1973).
225. See R.W. Apple, Jr., Prologue to The Watergate Hearings—Break-in and Coverup: Proceedings of the Senate Select Committee on Presidential Campaign Activities 1, 1 (N.Y. Times staff eds., 1973) (stating that, when the hearings began in May, 1973, “[t]he full import of the case had not yet been driven home to the American people, particularly that vast segment of the population with the good sense to occupy itself, most of the time, with things more edifying than the latest hijinks in Washington”).
in law schools—\(^{227}\) that did generally occur after the full lawyer involvement in the scandal had become clear—\(^{228}\) but Standard 302(a) itself was motivated much more by the burgeoning enrollments in law schools in the late 1960s and early 1970s, and changes in who was going to law school in that same period.—\(^{229}\)

C. Changes in Legal Ethics Instruction in Law Schools

Many law schools reacted to the new ABA standard by adding new required courses in professional responsibility, and most of them were teaching the Model Code of Professional Responsibility, which had been promulgated just a few years earlier.—\(^{230}\) This was the beginning of a new attention to legal ethics instruction that has continued to this day.

Not until 1898, however, did a course in professional responsibility appear in a law school, at Ohio State.—\(^{231}\) Over the next two decades, most law schools came to offer separate courses in the subject.

\(^{227}\) Beginning in the mid-1970s, while in college and working as a legal assistant for a New York law firm, I heard many law students and recent graduates refer to legal ethics courses as “Watergate courses.”

\(^{228}\) Especially if 1970s and 1980s legal reforms are to be attacked as weak because they were lame knee-jerk responses to the Watergate scandal, we should be careful about seeing causal connections that may not exist upon closer scrutiny. See, e.g., Ayer, supra note 13, at 1809 (“[T]he undertow of the Watergate scandal . . . the legal education establishment started slapping ‘ethics’ requirements on just about everything: the law curriculum, the bar exam, the continuing education agenda, and so forth.”); Daly et al., supra note 9, at 194 (“In response to the Watergate scandal, the ABA adopted Standard 302(a)(ii) in 1974.”); Kissam, supra note 13, at 1984 (“[T]he Watergate affair aroused public and professional concerns about the ethical behavior of lawyers, and the profession responded by establishing a professional ethics part to state bar examinations and by requiring law schools to teach ‘legal ethics.’”).

\(^{229}\) See supra notes 58-64 and accompanying text. Tellingly, the first published commentary on the Watergate scandal from the President of the ABA appeared in the July, 1973, issue of the ABA Journal—months after the ABA’s approval of new law school standards. See Robert W. Meserve, President’s Page, 59 A.B.A. J. 681 (1973) (asserting that “[n]o one needs a course in ethics to know that burglary or perjury is illegal and immoral”). In President Meserve’s speech to the ABA at its annual meeting in August, 1973, he focused on Watergate but made no mention at all (of course) about any connection to the earlier adoption of the professional responsibility requirement. See Robert W. Meserve, The Legal Profession and Watergate, 59 A.B.A. J. 985 (1973). At that same meeting, the Assembly adopted a resolution condemning “any action on the part of members of the legal profession which might cast aspersions upon the integrity of the profession,” a resolution that was about Watergate but made no mention of it. See Watergate, Sex, and Marijuana Dominate Debate at Washington August Meeting, 59 A.B.A. J. 1131-32 (1973).

\(^{230}\) Karger, supra note 102, at 11 (linking the MPRE’s creation to the fact that “the Code of Professional Responsibility was part of the curriculum of every ABA-approved law school, as mandated by the ABA’’); see also Letter from the Chairman, 45 Bar Examiner 3, 3 (1976) (attributing the NCBE’s consideration of giving an ethics exam to “this being a required course in some law schools and the growing number of States that are testing on ethics”).

\(^{231}\) Rhode, Perspasive Method, supra note 9, at 35.
although instruction tended to take the form of lecture series by lawyers or judges. Thus, while ethics was frequently taught in law schools as the twentieth century rolled by, it was not taught very much, or very well. Most observers concluded that ethics courses were “unpopular and generally ineffective” and that many law schools had thereby “neglected to ground our students in legal ethics and the professional responsibility of the lawyer.” As a California bar official noted in 1953, effective “instruction in professional responsibility is indeed one of the missing elements in legal education.” Even the Chief Justice of the United States criticized law schools in a 1972 speech for “fail[ing] to inculcate sufficiently the necessity of high standards of professional ethics.”

The first serious renewal of interest in instruction in professional ethics in these dark times was instigated not by the organized bar, but rather by law students. One important change in the demographics of law students in the 1960s had nothing to do with race or gender and everything to do with politics. Law students of the late 1960s were far more politically active and reform-minded than their 1950s counterparts. Many of them demanded curricular reforms that would make legal education more relevant to such issues as poverty and race relations. Enter clinical legal education and the Council on Legal Education for Professional Responsibility (“CLEPR”), a corporation founded in 1968 by the Ford Foundation to provide seed money for such programs. While some schools had clinical programs in the 1950s, it was CLEPR (and the Foundation’s money) that greatly broadened the scope of these programs, giving 107 law schools a

\[232. \text{Id.} \]
\[233. \text{Philbrick McCoy, The Law Student and Professional Standards: The Problem of Teaching Legal Ethics, 40 A.B.A. J. 305, 305 (1954) (offering good summaries of this history, from quite different perspectives); Rhode, Pervasive Method, supra note 9, at 35; Eugene F. Scott, A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination, 59:2 Bar Examiner 20, 20-22 (1990).} \]
\[234. \text{Arthur T. Vanderbilt, The Five Functions of the Lawyer: Service to Clients and the Public, 40 A.B.A. J. 31, 32 (1954).} \]
\[235. \text{George Neff Stevens, Legal Education for Practice: What the Law Schools Can Do and Are Doing, 40 A.B.A. J. 211, 214 (1954).} \]
\[236. \text{Homer D. Crotty, Character and the Law Schools: Professional Conduct Should Be Emphasized, 39 A.B.A. J. 385, 386 (1953).} \]
\[238. \text{Laura G. Holland, Invading the Ivory Tower: The History of Clinical Education at Yale Law School, 49 J. Legal Educ. 504, 514-15 (1999).} \]
\[239. \text{Packer & Erlich, supra note 209, at 37.} \]
\[240. \text{Holland, supra note 238, at 516.} \]
\[241. \text{See Antoinette Sedillo Lopez, Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 Clinical L. Rev. 307, 312 (2001) (describing the development of the clinical program at the University of New Mexico).} \]
total of $6.5 million in grants over a ten year period. One scholar called the rise in clinical legal education “[t]he most promising development in the teaching of professional responsibility,” because it “has the potential to create young lawyers with a heightened sense of the ethical dimensions of legal work.” Clinics offer something other than classroom ethics instruction, to be sure, giving students the ability to fulfill pro bono obligations while learning valuable lessons in ethical lawyering.

Compared to the virtually unquestioned success of the clinical legal education movement, the ABA’s actions in the early 1970s to require schools to offer instruction in professional responsibility was a relative failure. An informal study by Professors Cramton and Koniak in 1995 showed that “a number of major law schools require little or no instruction in legal ethics.” Their sad conclusion, that legal ethics today occupies only a minor role in the law school curriculum at many schools, appears irrefutable. Still, the mid-1970s increase in courses in professional responsibility, while neither reaching all schools nor resulting in the allocation of adequate units for them to be effective, helped support the creation of the MPRE. Somewhat ironically, the MPRE may now be supporting the required ethics course at many law schools.

While there is now great diversity in the way legal ethics is taught in law schools, Standard 302(a)(iii), as amended in 1974 to require

243. Papke, supra note 56, at 45.
245. See Stevens, Law School, supra note 70, at 240-41.
247. Cramton & Koniak, supra note 9, at 147 n.14.
248. Id. at 147-48.
249. See Morrissey, supra note 7, at 5 (“The widespread acceptance of the examination has triggered a greater demand for teaching in this critical area.”); see also The Law School Dean Looks at the Bar Examination and the Examiner: A Panel Discussion, 31 Bar Examiner 99, 100 (1966) (remarks of Eugene V. Rostow) (commenting on the fact that the “scope of the bar examination has its effect not only on curriculum committees in law school but also on the students’ election of courses,” calling it “part of our system of checks and balances”). For complaints about this phenomenon, see supra note 9.
250. Articles appear regularly in the Journal of Legal Education and the Journal of the Legal Profession, among other places. Law review symposia on this topic include
instruction in the Model Code, undoubtedly influenced the teaching of professional responsibility in the direction of having more of a national, unified, doctrinal focus. That movement pointed the way, along with the other developments discussed in this article, to the creation of the MPRE.

CONCLUSION

While some normative criticism of the MPRE undoubtedly has merit, the test has been largely either ignored or trivialized by most outside the ranks of the bar examiners themselves. When the exam is seen in the context of the broader forces that created and sustain it, however, its historical significance becomes evident. It was far more than a superficial attempt to respond to Watergate or to any other short-lived crisis or trend. Rather, a long look backward shows the exam as an important product of a much older movement towards the national standardization of the rules of professional responsibility for lawyers, of bar admission requirements, and of legal education’s treatment of legal ethics. It is likely these currents and the attitudes that feed them, more than the ripples of particular lawyer scandals, that will shape the future of bar exam testing on professional responsibility.

Admittedly, the MPRE is and always will be a limited test—far too limited by its very format to stand as a “comprehensive” national examination in legal ethics or the law of lawyering. Passing the test does not signal that the successful examinee will be an ethical practitioner; “The most unethical individual in the world can study the Code and tell you what it is they are not supposed to do.” Recognizing its limits should simply spark ideas for augmenting it with some other, less rule-based forms of evaluation of bar applicants and instruction of practicing lawyers. For example, more states should test

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251. The adoption of the Model Rules reinforced this tendency. Students can leave a course in professional responsibility without any grasp of their home state’s rules and laws, just as they can leave any other course that way, but they usually know the ABA’s models. Students in Nebraska learn the same general body of legal ethics “law” as students in New Jersey or Georgia, just as they do in torts or contracts or criminal law. Although the MPRE admittedly reinforces this phenomenon by testing on that same uniform national material, it is the existence of the rules themselves, not the test, that leads some students to believe that legal ethics begins and ends with those rules. See Crampton & Koniak, supra note 9, at 172-76 (stressing the fundamental error of such a narrow view of ethics).
252. Bar exams in general test competence in only a limited way. As the Chief Justice of Nebraska said over twenty years ago, “the only thing that a bar examination can really test, upon graduation, is an individual’s ability to analyze and his or her knowledge of the then substantive law. That is all that it can possibly do.” Bar Admissions, Development and Problems, 50:1 Bar Examiner 36, 41 (1981) (address of Hon. Norman Krivosha).
253. Id. at 42.
professional responsibility issues on the essay and performance parts of the bar exam, and meaningful continuing education courses should continue to be developed.

Undoubtedly, the NCBE and the organized bar—with or without the help of legal academics who are not already formally involved with either—will continue to work to improve the test’s coverage and methodology. As the underlying form or scope of the rules and the law of lawyering change, the exam too will change. As perceptions evolve about what is important and what is not, the exam will change to reflect those perceptions. As we learn even more about the science of testing, the exam will reflect that new learning. The MPRE may well outlive many of us now teaching legal ethics. Its true origins lie in strong historical forces and practical considerations, which through the years have only become more pronounced.

254. See Logan, supra note 15, at 1024, 1031-32 (making the same recommendation). California currently tests professional responsibility on its essay exam; it did so, for example, in February, 2001. That question was largely doctrinal, focusing on advertising and solicitation and the use of nonlawyer assistants. State Bar of California, California Bar Examination, Essay and Performance Test Subject Coverage (Feb. 2001).


256. Academics are getting more involved. The AALS Committee on Bar Admission and Lawyer Performance conducted a study in 2001 of the extent to which law schools prepare students directly for the bar exam. In the summer of 2002, representatives of the AALS, the ABA and the NCBE met to consider creating a “Joint Working Group on Legal Education and Bar Admission,” which would, among other things, draft a statement of recommended standards for law schools’ involvement in the bar admission process. Dale Whitman, Thinking About Bar Admissions, AALS Newsletter, Aug. 2002, at 4.

257. The MPRE was developed with the help of testing professionals from ACT. See supra note 21 and accompanying text. A growing body of scholarship in the legal journals focuses on testing science, making that field more accessible to legal academics than it used to be. See, e.g., Lawrence M. Grosberg, Should We Test for Interpersonal Lawyering Skills?, 2 Clinical L. Rev. 349 (1996); Lisa Kelly, Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education, 7 S. Cal. Interdiscip. L. J. 41 (1998).