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Abolish the MPRE

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ARTICLE

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Abolish the MPRE

Abstract. In nearly every jurisdiction, applicants to the bar must pass the Multistate Professional Responsibility Examination (MPRE). Its purpose, according to its owner, the National Conference of Bar Examiners (NCBE), is "to measure candidates' knowledge and understanding of established standards related to the professional conduct of lawyers." It does test whether an examinee has kept in short-term memory the rules and exceptions that make up part of the understanding of what it means to serve as a lawyer. However, success (or initial failure) on the MPRE has not been correlated with ethical conduct or misconduct. For example, the Texas Board of Law Examiners does not keep records of the success or failure of Texas bar applicants. The numbers of lawyers who have been disciplined and have needed more than one attempt to achieve a passing score on the MPRE is unknown. No correlation between professional misconduct and performance on the MPRE has been demonstrated or disproved. The MPRE's utility lies largely in focusing law students on the subject, in the hope that such study will stick once they are licensed. Because the MPRE was not meant to serve as an "exclusionary" mechanism, achieving a passing score on the MPRE tells us only that.

So why has it become a standard tool in the bar examination kit? From the late nineteenth century on, elite American lawyers have believed a law school course in legal ethics might lessen professional misconduct or exclude unethical candidates from the bar. Such demands on law schools were regularly made before World War II. From the late 1940s to the early 1970s, law schools re-imagined both the social role of lawyers and the duties owed by them to the public. This shift was made clear when legal academics substituted "professional responsibility" for "legal ethics." The latter

concerned memorization of rules; the former emphasized the lawyer's duty to exercise judgment wisely, in part to serve as leaders in society. From the 1950s to the early 1970s, law schools greatly expanded teaching of professional responsibility to meet that leadership challenge.

This came to a halt as a result of the "lawyers' scandal" of the Watergate affair of 1972–1974. The legal profession's effort to reinvigorate the public's trust in lawyers and demonstrate integrity in the profession took several paths. One path was the creation of the MPRE, which demonstrated that newly-admitted lawyers knew the rules of professional conduct.

The MPRE has been part of the bar admissions landscape since 1980. It has outlived any usefulness it once may have possessed. It provides no evidence useful to the public, or, more particularly, those members of the public who need legal services. It imposes an unnecessary and costly burden on law students. It cheapens the efforts by law schools to form their students' professional identity. Finally, it may serve to make bar candidates cynical about the whole exercise. It is time to abolish the MPRE.

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I. INTRODUCTION

In November 2023, LegalOn Technologies issued a statement declaring that artificial intelligence chatbots scored higher on a simulated version of the Multistate Professional Responsibility Examination (MPRE) than the average law student scored on the actual MPRE.[1] The Reuters story quoted the response of an unnamed spokesperson for the owner of the MPRE, the National Conference of Bar Examiners (NCBE): "The legal profession is always evolving in its use of technology, and will continue to do so," and "attorneys have a unique set of skills that AI cannot currently match."[2] The first quote is irrelevant; the second assumes that it's just a matter of time before AI "matches" and then exceeds the "unique" skill set of lawyers.[3] What the NCBE should, but does not say, is that the MPRE offers no guidance to the public, to consumers of legal services, to teachers of courses on the legal profession, to law schools, to judges, to state boards of law examiners, to lawyer disciplinary boards and commissions, and especially, to the vast majority of law students who must achieve a passing score (which varies considerably by state) on the MPRE to obtain a license to practice law, concerning any lawyer's professional behavior, or current knowledge of the disciplinary (and related) rules. The assumption that the AI chat bot's besting of the ordinary law student means something may have been ill-grounded, but LegalOn's announcement attracted significant media attention, its apparent purpose.

What such attention fails to note is the MPRE's insignificance. It does not protect future consumers of legal services from unethical behavior by future lawyers—it does not test for that. It is not used by boards of law

1. Karen Sloan, *AI Chatbot Can Pass Lawyer Ethics Exam*, REUTERS (Nov. 16, 2023, 5:03 AM), https://www.reuters.com/legal/transactional/ai-chatbot-can-pass-national-lawyer-ethics-exam-study-finds-2023-11-16/ [https://perma.cc/3ZQP-K9GM].

2. *Id.*

3. This may remind readers of IBE Deep Blue's 1997 chess victory over Garry Kasparov, world chess champion, see *Deep Blue (Chess Computer)*, CHESS TERMS, https://www.chess.com/terms/deep-blue-chess-computer [https://perma.cc/7L5X-GSZL] and Larry Greenemeier, *20 Years After Deep Blue: How AI Has Advanced Since Conquering Chess*, Scientific American (June 2, 2017), https://www.scientificamerican.com/article/20-years-after-deep-blue-how-ai-has-advanced-since-conquering-chess/ [https://perma.cc/L95B-R4JP] and Google Alpha Go's defeat of a master of the game of Go in 2017, see Cate Cadell, *Google AI Beats Chinese Master in Ancient Game of Go*, REUTERS (May 23, 2017, 4:30 AM), https://www.reuters.com/article/idUSKBN18J0PC/ [https://perma.cc/4M9A-CNLS]. The consistent message seems to be, here comes AI, there goes humanity.

examiners to place conditions on a newly admitted lawyer's license. It is not used to warn lawyer disciplinary boards that some bar applicants have failed to achieve a passing MPRE score one or more times. Nor do lawyer disciplinary boards indicate or otherwise note how the lawyer in the dock performed on the MPRE. The NCBE makes no claims that the MPRE has any relation to any post-licensure professional misconduct. At most there is some slight evidence that the MPRE, many years ago, may have had a slight effect in preventing some applicant from obtaining a license to practice law, which then had a slight effect in lessening lawyer misconduct.[4]

The examinee who passes the MPRE has not demonstrated any effective knowledge of the rules by which lawyers are subject to discipline, disqualification, or a legal malpractice lawsuit. The examinee who initially fails the MPRE has not demonstrated any ethical blindness. Failing to achieve a state's passing MPRE score provides no evidence that the examinee is more likely to engage in professional misconduct than one who passed the MPRE on the first attempt. Failing to achieve a passing score tells us only that the examinee needs to try (and pay) again. The NCBE has, since the MPRE's beginning, adamantly argued that the test should not be exclusionary; it should not keep an applicant from obtaining a license to practice law. Those who must re-take the MPRE pay a second registration fee. They may also suffer the cost of an anxiety about the MPRE or the larger bar exam, an anxiety that may be wholly misplaced. Indeed, for some, the MPRE may lead to a cynicism regarding the MPRE, the rules of professional conduct, and the licensing process.

My view is simple: if the legal profession is actually interested in promoting ethical behavior by lawyers, it should move to abolish the MPRE. In its place the American Bar Association (ABA), state supreme courts (or the state boards of law examiners), and the NCBE should jointly 1) craft a Standard for Approval of Law Schools requiring ABA-approved law schools take more seriously the ethical and professional identity formation of their students, and 2) use the development of the NCBE's NextGen bar

4. Kyle Rozema, *Does the Bar Exam Protect the Public?*, 18 J. EMPIRICAL LEGAL STUD. 801, 808 (2021); Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 180 (2022); *see also* Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 320 (2019) (discussing the relationship between the MPRE's passage rate with career discipline rates and how they compare to the bar exam), which is disputed in William Wesley Patton, *A Rebuttal to Kinsler's and Anderson and Muller's Studies on the Purported Relationship between bar Passage Rates and Attorney Discipline*, 93 ST. JOHN'S L. REV. 43 (2019).

exam, scheduled for adoption by states for graduates between 2026 and 2028, to include an assessment of an examinee's working knowledge of the lawyer's professional duties.

This essay consists of three parts: First, how did the legal profession come to require law schools teach legal ethics? I argue that law schools were heavily invested in teaching professional responsibility from the late 1960s through the early 1970s. This broad educational approach was severely channeled by the ABA's 1974 accreditation requirement. This channeling harmed the efforts of law schools to educate students about the public profession of the law. Second, how did it come to pass that the vast majority of bar applicants would have to take and pass the MPRE in addition to completing a course in legal ethics? I argue that the MPRE was an overreaction to the lawyers' scandal known as the Watergate affair and a consequence of baby boomers attending law schools in large numbers. Third, though the MPRE meets its limited, self-described purposes, why do we care about those purposes? After forty-five years, the value of the MPRE has dwindled to nearly nothing. I suggest the ABA and law schools re-orient professional responsibility requirements, work professional responsibility into the NCBE's NextGen bar examination, and abolish the MPRE. These three changes might better serve the interests of the public and the interests of practicing lawyers.

II. THE HISTORY OF TEACHING LAWYER ETHICS

A. Teaching Professional Deportment, 1836–1870

The earliest American effort to write principles or statements regarding professional deportment was published in 1836, when most aspiring lawyers "read" law in an office. David Hoffman, formerly a lecturer in law at the University of Maryland (not the current one), published the second edition of his book, *A Course of Legal Study*.[5] Most of Hoffman's *Course* consisted of lists of readings, joined by commentary. The second edition concluded with an essay on professional deportment and *Fifty Resolutions in Regard to*

5. *See generally* DAVID HOFFMAN, A COURSE OF LEGAL STUDY (Baltimore, Joseph Neal, 2d ed. 1836) [hereinafter HOFFMAN, A COURSE OF LEGAL STUDY].

Professional Deportment.[6] Hoffman intended the numerous recommended readings and commentary to be completed over the course of several years, in preparation for licensure.

The 1836 edition of Hoffman's *Course of Legal Study* failed to attract a readership. Hoffman blamed his Baltimore printer in an introduction to an 1846 reprinting of *A Course of Legal Study*.[7] The reprinted edition also failed to capture the attention of those reading law.[8] Hoffman's *Course* simply demanded too much time and study in an era in which barriers to entry to the legal profession were diminishing.[9]

A second such effort was made by Pennsylvania Judge George Sharswood, beginning in 1850. That year, Sharswood gave a series of inaugural lectures at the newly-revived Department of Law of the University of Pennsylvania.[10] Sharswood began with a talk discussing the legal profession.[11] These inaugural lectures, including his legal profession lectures, were compiled into a book, *Lectures Introductory to the Study of Law*. Two years later, Sharswood was named dean and professor of the Institutes of Law.[12] On October 2, 1854, Sharswood opened the Department's academic year with a lecture on legal ethics.[13] That same year his book assessing the ethical duties of lawyers was published as *A Compend of Lectures on the Aims and Duties of the Profession of the Law*.[14]

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6. *Id.* at 720–75; *see also* Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 593–98 (2014) [hereinafter Ariens, *Lost and Found*] (recounting history).

7. DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPORTMENT OF LAWYERS 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846); *see also* HOFFMAN, A COURSE OF LEGAL STUDY, *supra* note 5, at iii.

8. *See* Ariens, *Lost and Found*, *supra* note 6, at 603–05 ("What was worse for Hoffman's reputation was the evanescent reaction to his second edition—only two reviews were published."); MICHAEL S. ARIENS, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS 56–57 (2023) [hereinafter ARIENS, THE LAWYER'S CONSCIENCE].

9. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 7–9 (1983).

10. GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW v (T. & J.W. Johnson & Co. 1870).

11. *Id.* at 37.

12. Edwin R. Keady, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 687 (1950).

13. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW i (T. & J.W. Johnson, 1854).

14. *Id.*

In 1860, Sharswood published *An Essay on Professional Ethics*, which substantially revised his 1854 *A Compend of Lectures*.[15] The three (little changed) subsequent editions indicate Sharswood's *Essay* was commercially successful. Sharswood largely urged his readers to rely on their individual conscience to guide their professional behavior. In contrast, Hoffman directed his readers' attention to maintaining their gentlemanly honor.[16]

Whether students reading law actually read any of the five editions of *An Essay* is unknown. Apprentices desired a law license. That required them to spend some prescribed period of study in a lawyer's office.[17] However long apprentices spent in the office was likely dedicated to practical work, whether copying legal documents or reading practical guides to law. An applicant to the bar might be asked by a judge about some points of practice or to explain some aspect of legal doctrine, but oral examinations were brief and often *pro forma*. A lawyer swore an oath when admitted to the bar. The oath usually included a phrase reminding the lawyer that he was duty-bound to be equally faithful to the courts and to his clients.[18] The oath of office seems likely the nearest a lawyer came to learning one's ethical duties.

The modest thirty-one law schools in the United States in 1870 served as an alternative to apprenticeships for a modest number of law students.[19] Slowly, but insistently, law schools began to displace apprenticing as the dominant path to licensure.[20] This shift from apprenticeships to law school learning continued for the ensuing half-century. As law schools proliferated and bar admissions spiked, the profession prodded those schools to instruct students of their ethical duties.

B. Teaching Legal Ethics, 1870–1910

The United States underwent an economic and social transformation after the Civil War, which had a knock-on effect on the American legal

15. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 88.

16. *Id.* at 88.

17. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 243–48 (1921).

18. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 3 (quoting oath).

19. WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930 108 tbl. 1 (1986).

20. In the mid-nineteenth century many states began to count time law school as equivalent to required periods of study in a lawyer's office, see REED, *supra* note 17, at 247–48. This meant time was no longer a factor to be considered.

profession.[21] Particularly in the northeastern and midwestern areas of the nation, the Industrial Revolution generated tremendous swings in the economy, from booms and busts to jobs created and destroyed. It moved people from rural areas to cities, and emigrants from much of the world to the United States. The post-Civil War development of railroads throughout the nation moved goods tremendous distances, broadening the markets for such goods. Building this system of railroads required massive amounts of capital. Economic growth inevitably brought economic distress, both broadly (the Panics of 1873 and 1893) and more narrowly (corporate bankruptcies and injuries to workers in industry and railroad passengers and trainmen). These developments and others required the use of lawyers. The Industrial Revolution re-shaped the American legal profession, often in unsettling ways to those who believed themselves at its pinnacle.[22]

Elite late nineteenth century lawyers focused much of their attention on enhancing professional standards, in part responding to a perceived increase in the number of unscrupulous lawyers, known as shysters and ambulance chasers, and in part to protect their perceived status from further degradation by demanding (and wealthy) clients. One elite lawyer decried the shift in power from lawyer to client: Such a lawyer often found himself less a "counsellor" and advisor than a "servant," ordered "'to make legal that which is devious, to devise means for ends which are doubtful.'"[23]

One way to enhance such standards was for elite lawyers to band together. Two early bar associations were the Association of the Bar of the City of New York (ABCNY) (1870)[24] and the American Bar Association (ABA) (1878).[25] At the same time Christopher Columbus Langdell left New York City to begin teaching at Harvard Law School, elite New York City lawyers, disgusted by corruption in the local courts and,

21. *See generally* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR Part I (2016); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1966).

22. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 116–20.

23. *Id.* at 119–20 (quoting Wm. C. P. Breckinridge, *The Lawyer: His Influence in Creating Public Opinion*, 3 VA. ST. B. ASS'N PROC. 167–168 (1891)).

24. *See generally* GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870–1970 (1997) (recounting the history of the Association of the Bar of the City of New York's creation).

25. *See* Simeon E. Baldwin, *The Creation of the American Bar Association*, 3 A.B.A. J. 658, 695 (1917) (describing the formation of the American Bar Association). *See generally* JOHN AUSTIN MATZKO, BEST MEN OF THE BAR: THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION, 1878–1928 (2019).

more broadly, in Tammany Hall's political operation in the city, created the ABCNY.[26] The elite and national ABA was formed in 1878 in part to promote higher standards of educational attainment and stricter standards for admission to the bar.[27] The ABCNY and ABA were soon joined by newly-formed voluntary state bar associations. By the end of the nineteenth century, a voluntary bar association had been formed in nearly every state and territory.[28]

Elite lawyers in particular looked to improve educational standards applicable to applicants to the bar. The ABA announced its intentions by creating a Committee on Legal Education and Admissions to the Bar at its initial meeting.[29] One broad-based effort promoted a written bar examination to supplement (if not supplant) oral examination of candidates.[30] During the 1870s, this idea found limited success; just three states adopted a written bar examination, joining Massachusetts.[31] A second approach encouraged adoption of the diploma privilege. By the end of the 1870s, fifteen states admitted law school graduates into practice through the diploma privilege, double the previous decade.[32] That created an incentive for would-be lawyers to attend law schools. However, between 1880–1909, nearly as many states repealed the diploma privilege (10) as adopted it (11).[33]

Even so, both the number of law schools and the number of those attending law schools increased between 1870–1910. By 1890, sixty-one law schools existed, many affiliated with universities. Twenty years later, 124 law schools were operating,[34] and the number of law school students in 1910 reached 19,567, from just 1,653 forty years earlier.[35]

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26. MARTIN, *supra* note 24, at 3–15.

27. *Proceedings*, 1 ANNU. REP. A.B.A. 16, 26 (1878).

28. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 121, 319 n.82; *List of Bar Associations in the United States*, 10 ANNU. REP. A.B.A. 439, 447 (1877); *see also* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 271–78 (1953) (listing dates of creation of bar associations but noting it was "not till 1923 that there was an active State Bar Association in every State or Territory").

29. *See Proceedings*, *supra* note 27, at 16 (listing Committee as one of seven initial committees).

30. George Neff Stevens, *Diploma Privilege, Bar Examination or Open Admission: Memorandum Number 13,* 46 B. EXAMINER 15, 21 (1977).

31. *Id.*

32. *Id.* at 19.

33. *Id.*

34. HOBSON, *supra* note 19, at 108 tbl. 1.

35. *Id.*

By 1910, thirty-one of the forty-five states had adopted a written bar examination.[36] Though it had not wholly displaced the oral examination, written tests had become the predominant method of examining bar applicants. By 1917, thirty-seven jurisdictions had created a statewide examining board to evaluate applicants, from none in 1870 and just four by 1890.[37]

Another aspect of this transformation was a steep increase in the number of lawyers. In 1870, the estimated number of American lawyers was 41,786. That count nearly tripled to 113,450 by 1900, well outpacing growth in the nation's population.[38] Despite an increase in demand for legal services, financial success evaded many lawyers, particularly during and after the five-year depression known as the Panic of 1893.[39] Practical legal journals aimed at readers at the apex of the profession claimed an "overcrowding" of the profession caused some significant number of lawyers to behave as a "species of professional vermin."[40] This led to calls by the successful to encourage a purge from the profession the shyster and the "ambulance chaser," the latter term coined in 1896.[41]

In 1887, the Alabama State Bar Association (founded in 1879) adopted a code and canons of ethics.[42] It was written by Alabama lawyer Thomas Goode Jones, who proposed the Association adopt a code in 1881.[43] The fifty-seven rules/canons and seven oaths were largely based on Sharswood's *An Essay on Professional Ethics*.[44]

The Alabama Code was written for the practicing lawyer, and for any (rare) judge who might consider participating in disbarment proceedings against a lawyer charged with engaging in unethical conduct. Hoffman and Sharswood had largely written for the student of the law. The efforts in Alabama and in voluntary bar associations that followed Alabama's lead were directed elsewhere. The promulgation of a code of ethics by a

36. Stevens, *supra* note 30, at 21, 39 nn.46–49 (listing states and year).

37. REED, *supra* note 17, at 102–03.

38. Terence C. Halliday, *Six Score Years and Ten: Demographic Transitions in the American Legal Profession, 1850–1980*, 20 L. & SOC'Y REV. 53, 62 tbl. 1 (1986). Halliday notes that these numbers included semi-professionals, who were no longer counted in 1920 and later. *Id.*

39. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 121, 118.

40. *Id.* (noting attacks in 1890s).

41. *Id.* at 110, 118–19.

42. CAROL ANDREWS ET AL., GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 45 (2003) (reprinting 1887 Code).

43. *See generally Final Report of the Committee on Code of Professional Ethics*, 33 ANNU. REP. A.B.A. 567 (1908) (noting history).

44. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 114–15.

voluntary bar association was intended to educate ignorant lawyers and warn venal ones by marking some boundaries of professional behavior. The Alabama Code had little or nothing to do with teaching those who sought a license to practice law.

The ABA's interest in increasing admissions standards, and its bet on the eventual displacement of apprenticeships by law schools, led it to turn its Committee on Legal Education into the Section of Legal Education (later, the Section of Legal Education and Admissions to the Bar) in 1893.[45] An ABA "Section" possessed significant autonomy from the larger organization; it charted its own goals and met separately from the ABA.[46] Its purpose was clear: the Section's members sought to make standard the learning of law in a law school.[47] The preference (or hope) of the Section's members was for law school to be a full-time three-year course of study.[48] Such an education would increase the quality of applicants, which in theory would enhance professional standards. The Section of Legal Education also urged state authorities to require an applicant to pass a written bar examination. Finally, it promoted a centralized (that is, statewide) system admitting applicants to the bar through the auspices of the highest court of the state. These eventually became state boards of legal examiners.[49]

At its second meeting in 1894, the Section of Legal Education discussed these issues as well as an adjacent topic, the teaching of legal ethics.[50] It continued in the same vein the following year. The Section noted in its 1895 report that just six law schools taught legal ethics in some fashion (through lectures from distinguished lawyers or as a course of study), of over eighty

45. *See Transactions of the Sixteenth Annual Meeting of the American Bar Association*, 16 ANNU. REP. A.B.A. 3, 10 (1893) (amending by-laws to create Section of Legal Education).

46. MATZKO, *supra* note 25, at 53.

47. *See* Henry Wade Rogers, *Address of Henry Wade Rogers, LL.D.*, 17 ANNU. REP. A.B.A. 389, 394 (1894) (proclaiming triumph of law school model of education).

48. Edmund Wetmore, *Some of the Limitations and Requirement of Legal Education in the United States*, 17 ANNU. REP. A.B.A. 461, 471–72 (1894); John F. Dillon, *The True Professional Ideal*, 17 ANNU. REP. A.B.A. 409, 419 (1894).

49. *Proceedings of the Section on Legal Education*, 17 ANNU. REP. A.B.A. 351, 358, 360 (1894); *see* John D. Lawson, *Some Standards of Legal Education in the West*, 17 ANNU. REP. A.B.A. 423, 429–30 (1894) (urging abolition of admission by inferior courts of Missouri).

50. Wetmore, *supra* note 48, at 471–72; *Proceedings of the Section on Legal Education*, *supra* note 49, at 358.

law schools.[51] The Section made three suggestions to improve law school education, the first being "[a] specific attention to Legal Ethics."[52]

Discussion of the length of legal study in law schools in 1894 led the Section's committee to resolve the following year that the ABA approve its resolution. That resolution went nowhere, and the specific attention law schools should consider giving legal ethics also stalled. In 1897, the ABA Section of Legal Education and Admission to the Bar renewed its call: it again resolved that the ABA encourage states to require applicants to the bar complete a three-year program of legal instruction in law schools before sitting for the exam. A concomitant recommendation was that state licensing authorities allow only law school graduates to take the bar exam. The Section's report also discussed some curricular proposals. It again recommended that law schools offer some study of legal ethics to their students. The committee noted, "[a]t the present time it is believed that no systematic effort is made to place before the student of law the moral aspect of the profession whose ranks he seeks to enter."[53] This instructional failure had allegedly exacerbated sharp practices and generated a loss of integrity among lawyers.[54] The ABA, after much parliamentary wrangling, adopted the Section's resolutions.[55]

Two state bar associations, Georgia's and Virginia's, adopted the Alabama Code of Ethics by 1890. Then nothing. In 1897, Michigan adopted a code of ethics, modeled on Alabama's Code. It apparently did so as part of a deal with the state legislature, in which the latter agreed to create a Board of Law Examiners and increase standards of admission to the bar and the Association agreed to adopt an ethics code.[56] By 1905, several other bar associations had adopted a version of the Alabama Code.[57] The ABA resolved that year that a committee be created to ascertain whether to draft a

51. *Report of the Committee on Legal Education*, 18 ANNU. REP. A.B.A. 309, 318 (1895).

52. *Id.* at 323–25.

53. *Report of the Committee on Legal Education and Admission to the Bar*, 20 ANNU. REP. A.B.A. 349, 377–82 (1897).

54. *See* ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 116–20 (detailing how failed efforts did not stop "'bad men'" from entering into the legal profession).

55. *Transactions of the Twentieth Meeting of the America Bar Association*, 20 ANNU. REP. A.B.A. 3, 32–33 (1897).

56. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 121–22.

57. *Id.* at 121.

code of ethics.[58] The committee returned with a favorable opinion,[59] and the ABA adopted the proposed thirty-two canons and seven oaths in its 1908 code of professional ethics.[60]

C. Teaching Legal Ethics in Law Schools, 1910–1945

The ABA Committee on Code of Professional Ethics issued its Final Report in spring 1908.[61] In addition to crafting a set of oaths and canons for lawyers, the Committee suggested that the ABA encourage all law schools to teach a course in Professional Deportment and Legal Ethics.[62] It also suggested the ABA urge state bar admission authorities include a bar examination question on professional ethics.[63]

In response to the Committee's suggestion, "[m]any law schools promptly responded to the recommendation . . . by adding . . . a required course of study on Legal Ethics," or by adding lectures, "usually delivered by some prominent judge or member of the profession."[64] Unfortunately, a "great many law schools" did not respond to the survey.[65] The report concluded courses in legal ethics were ordinarily neither "required [n]or offered."[66] Of the 124 law schools in operation in 1910, sixty were listed as teaching a course (32) or offering lectures (28).[67]

An update was published in the Fall 1915 issue of the *American Law School Review*.[68] Information was received from eighty-one schools, two-thirds of those in existence.[69] The responding schools taught three-quarters of all law school students.[70] Among these eighty-one schools, five taught legal ethics

58. *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association*, 28 ANNU. REP. A.B.A. 3, 132 (1905).

59. *Report of the Committee on Code of Ethics*, 29 ANNU. REP. A.B.A. 600, 600–04 (1906).

60. *Final Report of the Committee on Code of Professional Ethics*, *supra* note 43, at 567, which was approved in *Transactions of the Thirty-First Annual Meeting of the American Bar Association*, 33 ANNU. REP. A.B.A. 3, 86 (1908); ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 128–34.

61. *Final Report of the Committee on Code of Professional Ethics*, *supra* note 43, at 567.

62. *Id.* at 573.

63. *Id.*

64. *Teaching Legal Ethics in Law Schools*, 2 AM. L. SCH. REV. 377, 377 (1910).

65. *Id.*

66. *Id.*

67. *Id.* at 377–8.

68. Jesse H. Bond, *Present Instruction in Professional Ethics in Law Schools*, 6 AM. L. SCH. REV. 40 (1915).

69. *Id.* at 40.

70. *Id.*

as an "organic part of a larger course" (*i.e.*, within a course such as Evidence), sixteen taught legal ethics as "merely incidental instruction," and fifty-seven taught legal ethics through lectures.[71] That left three schools that did not teach legal ethics. Religiously-affiliated schools stood out: "Denominational control, or control by the Y.M.C.A., seems to result in greater attention to professional ethics."[72]

Jesse H. Bond noted that, of the twenty-eight law schools which listed the length of time they had taught a legal ethics course, eighteen wrote that their courses had been offered for eight or fewer years.[73] Only one respondent indicated as much as a twenty-year existence.[74] Bond noted that the teaching of legal ethics coincided with the ABA's movement to create a code of professional ethics.[75]

At the annual meeting in August 1915 of the Section of Legal Education, one commenter informed the audience of the ignorance of legal ethics of several young bar applicants; they "hadn't a conception of what legal ethics meant."[76]

In addition to bemoaning the lack of knowledge of professional ethics, the Section reviewed a proposal of a committee it created to recommend Standards of Bar Admission.[77] The first proposed standard was that states should centralize bar admissions through a board of law examiners created by the state's highest appellate court. The second opposed the diploma privilege. Due to a lack of time, the Section postponed until 1916 its transmission to the ABA of the Section's request that the ABA approve these proposed Standards. At the 1916 meeting, the Section adopted a series of seventeen proposed standards. Item XII listed the subjects about which applicants to the bar should be tested. Twenty-eight were listed; one of the last noted was professional ethics.[78] ABA rules required a proposal from a Section, if within the jurisdiction of a Standing Committee of the ABA, be

71. *Id.* at 41.
72. *Id.* at 42.
73. *Id.* at 45.
74. *Id.*
75. *Id.*
76. *Proceedings of the Section of Legal Education*, 40 ANNU. REP. A.B.A. 713, 730 (1915); *see id. at* 740 (ruing lack of training of law students in legal ethics).
77. *Id.* at 72.
78. *Section on Legal Education*, 41 ANNU. REP. A.B.A. 652, 654 (1916).

evaluated by that Committee before any vote by its members.[79] The ABA had a Standing Committee on Legal Education. After some debate about the costs of delaying a vote on a nearly decade-long effort, the ABA sent the Section's proposal to the Committee with a request that it report the following year.[80]

The Committee did report, sending to the membership an altered proposal after having decided it embraced some Standards, and modified and rejected others, proposed by the Section.[81] One of the rejected Standards was the list of courses; the subjects to be tested were to be left "to the law schools and the general good sense of the Bar Examiners."[82] When the Committee's Report was the subject of member discussion, it agreed to the creation of a Council on Legal Education but again postponed action on the Standards for another year.[83] The ABA again delayed this decade-long effort the following year.[84]

During the 1910s, the Section on Legal Education, the Committee on Legal Education, and the larger ABA all pushed to make graduation from law school a requirement for eligibility to take the bar exam.[85] They urged law schools require a three-year course of study for full-time students, and a four-year course for night (that is, part-time) students. Even without any state so limiting eligibility for licensure, the educational approach soon won the day. By Fall 1920, there were well over 100 American law schools teaching 27,313 students.[86] During the 1920s, both of those numbers increased, the latter significantly so.[87]

Shortly before the ABA fruitlessly discussed proposed Standards of Bar Admission in 1917, George Costigan, author of the first casebook on legal

79. *Transactions of the Thirty-Ninth Annual Meeting of the American Bar Association*, 41 ANNU. REP. A.B.A. 5, 61 (1916).

80. *Id.* at 62. The proposed Standards were published in *Section on Legal Education,* 41 A.B.A. REP. 652, 652–55 (1916).

81. *Report of the Committee on Legal Education and Admissions to the Bar*, 40 ANNU. REP. A.B.A. 447, 448 (1917).

82. *Id.* at 462.

83. *Transactions of the Fortieth Annual Meeting of the American Bar Association*, 42 ANNU. REP. A.B.A. 5, 91 (1917).

84. *Id.* at 95.

85. *Id.* at 75 (comment by Henry Wade Rogers).

86. ALFRED ZANTZINGER REED, PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 529 (1928).

87. *Id.* at 529 (listing 162 law schools attended by 42,743 students by Fall 1925).

ethics,[88] spoke to members of the Section of Legal Education.[89] The title of his speech was *The Teaching of Legal Ethics*.[90] His charge was to write about the "best method" of teaching legal ethics.[91] Alas, this was beyond his ken, for legal ethics had been taught only sporadically, and when taught, offered in only a "brief and perfunctory way."[92] More generally, Costigan noted that, though his students volunteered to take an examination on legal ethics, their performance suggested "a very considerable ignorance . . . in regard to the very ethical matters treated" in his lectures.[93]

The ABA's continuing discussions on bar admission, and its relation to law school education and the teaching of legal ethics, were fractious. Just two years after creating a Council on Legal Education, it lessened the Council's authority, in part by de-funding it.[94] In turn, professors at schools belonging to the Association of American Law Schools (AALS) engaged in a takeover of the Section of Legal Education and Admissions to the Bar the following year. The Section's members created a Committee on Legal Education (eventually known as the Root Committee after its chair, elite New York lawyer Elihu Root) to propose legal education standards.[95] The Root Committee issued its report on legal education shortly before publication of a much wider-ranging study of legal education by Alfred Z. Reed.[96]

The Root Report reiterated many of the proposed standards debated through the latter half of the 1910s.[97] These duties "demand a high standard of morality and implicit obedience to correct standards of professional

88. GEORGE P. COSTIGAN, JR., CASES AND OTHER MATERIALS ON LEGAL ETHICS (1917).

89. George P. Costigan, Jr., *The Teaching of Legal Ethics*, 4 AM. L. SCH. REV. 290 (1917).

90. *Id.*

91. *Id.* at 290.

92. *Id.*

93. *Id.* at 291.

94. *Report of the Council on Legal Education*, 44 ANNU. REP. A.B.A. 264, 264–70 (1919); *Transactions of the Forty-Second Annual Meeting of the American Bar Association*, 44 ANNU. REP. A.B.A 19, 33–34 (1919) (urging ABA members not to approve amendments to ABA Constitution because they would worsen relations between it and AALS).

95. STEVENS, *supra* note 9, at 114–15.

96. *Id.* at 112–30.

97. *Report of the Special Committee to the Section on Legal Education and Admissions to the Bar*, 46 ANNU. REP. A.B.A. 679, 681–83 (1921); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 110–13 (1976) (discussing both reports). The Reed Report supported a breadth of law schools, which turned out lawyers who served ordinary clients. The bar, in Reed's view, was heterogeneous, and should be kept that way.

ethics."[98] Some college work (a preference of at least two years) helped prepare law school matriculants, and a three-year full-time course of law study should be required (an equivalent course of study for part-time students was recommended).[99] Additionally, students needed to demonstrate both moral character and "a sympathetic understanding of the ethics of the profession" to take the bar examination.[100]

The Root Report's discussion of this last issue began with a call to improve the character and fitness of would-be lawyers, necessary to meet the demands made upon lawyers by the public and by their clients.[101] Overall, the Root Report referred only glancingly at law schools' teaching a course in legal ethics: "The rule of ethics may be taught in the class room, but the professional spirit which gives them vitality and instils [sic] a sense of social obligation is the natural outcome of personal contact with those who possess it."[102] Professional ethics were best instilled through "intimate personal contact" with high-minded practitioners and full-time professors.[103]

Despite impassioned pleas that the standards for law schools would keep poor men out of the profession, ABA members approved the Root Report's resolutions. Though the Report itself had noted the importance of learning legal ethics, none of the resolutions referred to its transmission in law schools.[104]

ABA members continued to focus on issues of the moral character, which inevitably were connected to law school education.[105] In 1926, the ABA approved a resolution by its Committee on Professional Ethics and Grievances to ask the AALS to investigate why only some schools taught legal ethics as an elective, and whether it should instead be a course required for graduation.[106] This led to the creation by the AALS, at the ABA's request,

98. *Report of the Special Committee to the Section on Legal Education and Admissions to the Bar*, *supra* note 97, at 680.

99. *Id.* at 683.

100. *Id.* at 685.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Transactions of the Forty-Fourth Annual Meeting of the American Bar Association*, 46 ANNU. REP. A.B.A. 19, 37–47 (1921). The resolutions adopted by the ABA are printed at *id.* at 38.

105. George W. Wickersham, *The Moral Character of Candidates for the Bar*, 9 A.B.A. J. 617, 620 (1923) (quoting ABA resolution). For the most complete discussion see generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

106. *Proceedings of the Forty-Ninth Annual Meeting of the American Bar Association,* 51 ANNU. REP. A.B.A. 31, 81 (1926).

of a Special Committee on the teaching of professional ethics at its December 1926 meeting.[107]

The AALS Committee reported a year later about its meeting with its ABA counterpart in May 1927. The two committees found themselves in disagreement "as to the wisdom of compelling attendance upon law school lectures on Legal Ethics."[108] The ABA believed it necessary;[109] the AALS did not.

In 1928, the legal elite returned to the issue. Both the ABA and the AALS assessed law schools, the former for compliance with the minimal standards of the Root Report, and the latter in deciding whether to offer membership. Both believed their conception of the role and place of law schools was correct. Each urged the other to accede on whether and how legal ethics should be taught.

The ABA made no official statement of its interest in requiring a course in legal ethics at its midsummer 1928 annual meeting. However, H. W. Arant, a member of the AALS Special Committee on the Teaching of Legal Ethics, reported in December 1928 that the ABA had "the decided conviction that a course in legal ethics should be required for graduation in all law schools."[110] Arant moved that the AALS agree it was the "sense of th[e] Association that a course in legal ethics should be required for graduation in all law schools."[111] It was soundly defeated.[112]

The ABA took offense. At its 1929 meeting, its Committee on Professional Ethics and Grievances noted AALS disapproval and suggested the ABA resolve that it continue its efforts.[113] Arant spoke to the ABA on the

107. *See Minutes of the Twenty-Fourth Annual Meeting,* 1926 AALS HANDBOOK AND PROCEEDINGS 5, 80 (stating how "a special committee of three be appointed from this Association . . . to consider the question of teaching of professional ethics in law schools").

108. *Report of the Special Committee on the Teaching of Professional Ethics in Law Schools*, 1927 AALS HANDBOOK AND PROCEEDINGS 117, 121 (1927).

109. *See Report of the Standing on Professional Ethics and Grievances*, 52 ANNU. REP. A.B.A. 351, 354–56 (1927) (explaining how the ABA committee "indicate[d] the necessity for widespread consideration and discussion of the subject by the profession").

110. *Minutes of the Twenty-Sixth Annual Meeting*, 1928 AALS HANDBOOK AND PROCEEDINGS 5, 119.

111. *Id.*

112. *Id.* at 120.

113. *See Proceedings of the Fifty-Second Annual Meeting of the American Bar Association*, 54 ANNU. REP. A.B.A. 29, 112 (1929) (explaining how the AALS "did not look favorably upon that suggestion," but the ABA remained hopeful that the suggesstion would be adopted).

responsibility of the law schools in fostering an elevated profession.[114] He implored lawyers and judges to join with law schools to emphasize the important issue of moral character.[115] Elite New York lawyer Emory Buckner chided the AALS for its ostrich-like approach.[116] The valedictory address by outgoing ABA President Gurney Newlin urged the ABA to support a mandatory law school legal ethics course to enhance the profession's reputation.[117] And the Executive Committee of the ABA was overruled when the members voted to adopt a resolution in favor of a mandatory legal ethics course rather than delay its adoption by sending it to the Section of Legal Education.[118]

In 1930, the estimated number of lawyers was 160,605, up 31% from 1920.[119] Once again, a cry arose that the bar was "overcrowded."[120] The ABA created the National Conference of Bar Examiners (NCBE)[121] that year to promote efforts to raise lawyer licensing standards and thus lessen an "overcrowding" of the bar.[122]

And as the United States roared into the Great Depression, back and forth went the ABA and AALS on whether the teaching of legal ethics should be mandated. The AALS Committee on the Teaching of

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114. H. W. Arant, *Measure of Responsibility Which Should be Assumed by Law Schools*, 15 A.B.A. J. 780, 781 (1929).

115. *Id.* at 782.

116. Emory R. Buckner, *What the Bar is Doing—What More It Can Do*, 15 A.B.A. J. 775, 777 (1929).

117. Gurney E. Newlin, *Conservation of the Traditions of the Legal Profession*, 15 A.B.A. J. 729, 730 (1929).

118. *See Proceedings of the Fifty-Second Annual Meeting of the American Bar Association*, *supra* note 113, at 147 (resolving "that a compulsory course in and the teaching of professional ethics be a part of the curriculum of all law schools").

119. Halliday, *supra* note 38, at 62 tbl. 1. The American population rose by 13% during this same decade.

120. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 156 (same); *see* Philip J. Wickser, *Law Schools, Bar Examiners, and Bar Associations—Co-operation Versus Insulation*, 7 AM. L. SCH. REV. 725, 725 (1933) (noting admission of 76,858 applicants to the bar between 1922–1932, "more than half of the practi[c]ing bar"); *see also* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 413–15 & nn.345-353 (2008) [hereinafter Ariens, *Age of Axiety*] (listing claims of "overcrowding"); *cf.* Francis M. Shea, *Overcrowded: The Price of Certain Remedies*, 39 COLUM. L. REV. 191 (1939) (rejecting the argument to end overcrowding by setting quotas, and making democratic case for a wide variety of law schools).

121. *See* Michael S. Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 249 (2005) (discussing creation of NCBE).

122. Ariens, *Age of Axiety, supra* note 120, at 413–15; ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 156.

Professional Ethics reported to the AALS every year between 1929–1934, when it finally disbanded.[123] What the Committee concluded, after receiving responses to a questionnaire, and with which the ABA agreed, was that most law schools offered a legal ethics course (which might include a handful of lectures by prominent judges and/or lawyers), and many required it for graduation.[124]

As of December 1931, fifty-six of the seventy-nine (79%) members of the AALS offered "some sort of course" in legal ethics, and forty-two offered a "separate formal course."[125] Half of the fifty-six schools which offered a course required it for graduation, including thirty of the forty-two AALS members which offered a formal course.[126]

The AALS Committee then offered a comment that has always dogged professional ethics courses: One school "reports that it is difficult to get the students to take the course seriously."[127] Relatedly, several deans of law schools offering no course "have expressed doubts as to the advisability of teaching such a course, or of making it compulsory."[128]

The Committee also heard from 109 of the 116 non-AALS member schools. Ninety-three offered "some sort" of course. Eighty-seven of those ninety-three required the course for graduation—making it much more than half.[129]

In its final report (1934), the Committee concluded that "not more than ten" of the seventy-seven AALS law school members lacked a course or a

123. *Minutes of the Twenty-Seventh Annual Meeting*, 1929 AALS HANDBOOK AND PROCEEDINGS 5, 8 (1929); *Reports of Committees*, 1930 AALS HANDBOOK AND PROCEEDINGS 131, 149 (1930); *Reports of Committees*, 1931 AALS HANDBOOK AND PROCEEDINGS 132, 157 (1931) [hereinafter 1931 Reports of Committees]; *Reports of Committees*, 1932 AALS HANDBOOK AND PROCEEDINGS 130, 143 (1932); *Reports of Committees*, 1933 AALS HANDBOOK AND PROCEEDINGS 148, 160 (1933); *Reports of Committees*, 1934 AALS HANDBOOK AND PROCEEDINGS 178, 189 (1934).

124. *See* 1931 Reports of Committees, *supra* note 123, at 158–61 (summarizing results from a "comprehensive study of the teaching of Professional Ethics in American Law Schools").

125. *Id.* at 158.

126. *Id.* at 158–59.

127. *Id.* at 159.

128. *Id.*

129. *Id.* at 160. Sixty-eight non-AALS law schools offered a separate formal course in legal ethics.

lecture in legal ethics.[130] The ABA importuned bar examiners, encouraging the NCBE to suggest its members test legal ethics.[131]

In 1924, an ABA committee concluded that nearly all state bar associations had adopted the ABA code.[132] Four years earlier, the mandatory bar movement began.[133] One pillar of this movement was to require every lawyer licensed in the state become a member of the state bar association, and pay membership dues. The movement was intended in part to improve the ramshackle lawyer disciplinary operations existing (or largely not existing) in many states.[134] Further, the ABA created a committee in 1924 to supplement the Canons of Professional Ethics.[135] It did so, in significant part, due to "rapid change" in the practice of law since 1908.[136] It also did so because it found that lawyers who engaged in professional misconduct were rarely disciplined.[137]

From the late 1920s through the mid-1930s, lawyers continued to press for more intensive examinations of the moral character of applicants to the bar. The model often discussed was the "somewhat elaborate system of character examination" instituted in Pennsylvania in the late 1920s.[138] The applicant to the bar was required to find three witnesses attesting to his character plus a lawyer who had agreed to serve as preceptor to the applicant-law clerk. The applicant then answered questions from a county-based subcommittee given the task of investigating the applicant's character. For the first three years of the program's existence, beginning on the first day of 1928, 1,715 applicants were examined, and "42 were rejected and 38

130. *Reports of Committees*, 1934 AALS PROCEEDINGS 178, 189 (1934) (noting some that lacked a class taught legal ethics pervasively).

131. *Proceedings of the Fifty-Fourth Annual Meeting of the American Bar Association*, 56 ANNU. REP. A.B.A. 1, 31–32 (1931).

132. *See Report of the Committee on Professional Ethics and Grievances*, 49 ANNU. REP. A.B.A 466, 467 (1924) (noting "almost all" state bar associations had adopted 1908 Canons).

133. DAYTON DAVID MCKEAN, THE INTEGRATED BAR 21–29 (1963) (summarizing history of mandatory bar associations in the United States).

134. *Id.* at 36.

135. *Proceedings of the Forty-Seventh Annual Meeting of the American Bar Association*, 49 ANNU. REP. A.B.A 27, 48–50 (1924).

136. *See* ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 143 ("In 1922 the ABA expanded the ethics committee's jurisdiction, justified in part by the 'rapid change' in the legal profession.").

137. *Id.* at 143.

138. *See* Robert T. McCracken, *Professional Ethics and Candidates for Admission to the Bar*, 7 AM. L. SCH. REV. 281, 281 (1931) (weighing the merits of Pennsylvania's system).

withdrew their applications either upon the advice of the examining members or otherwise," about 5%.[139] The author noted that this did nothing to solve the problem of assessing the moral character of the remaining 95%. A partial solution was to require applicants to take a course in professional ethics as a law student.[140]

A 1928 probe of unethical lawyering in Philadelphia did not halt "ambulance chasing," nor did the elaborate examination of the moral character of bar applicants. The Philadelphia bar initiated two more investigations into ambulance chasing, in the mid-1930s and the early 1940s.[141]

Through most of the 1930s, the strictness of the bar examination resulted in fewer than half of nationwide applicants passing the bar exam.[142] This crippling of the supply of lawyers ended the debate on mandatory legal ethics courses. In late 1941, the United States entered World War II. Law schools quickly emptied.

In January 1937, the ABA created a Special Committee on the Economic Conditions of the Bar.[143] It was designed to protect lawyers from cutthroat competition, which it believed led lawyers to cut ethical corners. As late as 1942 the Committee warned of the ill consequences if no solution was found to the "economic problems of the bar."[144] The Special Committee dissolved in 1945, for the ABA could no longer plausibly claim lawyers needed such protection.[145]

D. Teaching Professional Responsibility, 1945–1975

The post-World War II United States was the world's only superpower. From 1945 through the 1960s, its economy grew significantly, with few setbacks. Sustained economic growth was good news for lawyers. Other good news included the rise of the administrative state, which made lawyers essential to a managed economy. The supply of lawyers, constrained between 1930–1945, was insufficient to meet demand. This created an economic surplus. The real (that is, adjusted for inflation) median income for lawyers,

139. *Id.* at 283.

140. *Id.* at 285.

141. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 161.

142. Ariens, *Age of Axiety*, *supra* note 120, at 415.

143. *Summary of Proceedings of the Second Meeting of the House of Delegates*, 62 ANNU. REP. A.B.A. 1026, 1030 (1937).

144. *Report of the Special Committee on the Economic Condition of the Bar*, 73 ANNU. REP. A.B.A. 248, 250 (1948).

145. *House of Delegates Proceedings*, 70 ANNU. REP. A.B.A. 101, 119 (1945).

expressed in 1983 dollars, increased from $25,415 in 1947 to $37,300 in 1959 to $47,638 in 1969.[146]

Post-war American lawyers were confident in the nation's future as well as their own. The perception by lawyers that their social, cultural, and economic roles were gaining in prominence both boosted lawyer self-assurance and occasioned introspection within the bar. In 1947, a study of the legal profession was created, called the *Survey of the Legal Profession*.[147] The *Survey* was a multi-year, multi-faceted study of American lawyers. Most of its studies concerned issues such as lawyer competence, income, public service, and work. When the *Survey* ended in the mid-1950s, it had published approximately 175 studies. Eleven focused on the ethics of lawyers. One study found an intriguing correlation between ethics complaints and the economy. The average annual number of ethics complaints made to the Chicago Bar Association was 375 during the 1930s. In the worst Great Depression years of 1933 and 1934, that average skyrocketed to 952. From 1942 to 1948 (during and after American involvement in World War II), the average number of annual ethics complaints fell to 174.[148] This steep decline in complaints coincided with a silence from lawyers that law schools needed to require a course in legal ethics.

A few of the eleven *Survey* legal ethics studies discussed law school efforts to teach legal ethics. These critical reports were written by academics. Professor Elliott Cheatham, the author of a casebook on legal ethics,[149] summarized the perspective of law school deans regarding how bar examiners, practicing lawyers, and law schools inculcated standards of professional behavior among law students.[150] Overall, the answer was poor. Regarding the specific role of law schools, Cheatham's first conclusion was damning:

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146. *See* Richard H. Sander & E. Douglass Williams, *Why are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC'L INQ. 431, 448 (1989) (listing median and mass lawyer incomes from 1929–1979).

147. Arthur T. Vanderbilt, *The Survey of the Legal Profession*, 72 ANNU. REP. A.B.A. 349, 349 (1947).

148. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER 258 (1954).

149. ELLIOTT E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION (1938). The second edition was published in 1955.

150. *See generally* Elliott E. Cheatham, *The Inculcation of Professional Standards and the Function of the Lawyer*, 21 TENN. L. REV. 812 (1951) (summarizing the results of Questionnaire C-1, which focused on "the inculcation of professional standards and the functions of the lawyer").

> The law schools are in general agreement on the importance of a strong sense of professional responsibility, and on the duty of the schools to aid in the development of it in their students. Dissatisfaction with the present methods used by the schools to develop this attitude is widely expressed.[151]

The "almost complete agreement" among law schools masked disarray regarding whether to teach a legal ethics course, and if so, what and how, and whether to express an opinion on why. This was Cheatham's second conclusion.[152] Agreement again reared its head that "attention should be given to professional standards," but the amount and type of attention varied so markedly that it demonstrated no agreement among schools of the subject's importance and utility.[153] The numbers, if trustworthy, indicated that fewer schools offered courses in legal ethics in 1950 than twenty years earlier.[154]

Another *Survey* report was a broad study of legal education.[155] In a chapter addressing criticisms of law school-based legal education, Albert Harno grouped particular attacks on the failure of schools to "inculcate professional standards and ideals."[156] Harno agreed with Cheatham that legal ethics training was "still in a fluid and unsolved state."[157] His wan solution seemed to be that excellent minds in the AALS were working on it, ensuring brighter days ahead.[158]

An AALS committee sent a survey on teaching legal ethics and other topics to deans of its 107 member schools in 1951.[159] This questionnaire was separate from that conducted by the *Survey*. Eighty-seven deans replied. The table created from these responses indicated only thirty-nine AALS schools (again, of eighty-seven responses) taught a separate course in legal ethics.[160] The responses suggested little agreement among AALS members about the content of the course, its length, the method of instruction, and

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151. *Id.* at 815.

152. *Id.* at 815–16.

153. *Id.*

154. *See id.* at 816 (indicating two-thirds have a course, but doubting the accuracy of this number, believing the ratio was much lower).

155. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953).

156. *Id.* at 155–60.

157. *Id.* at 195.

158. *Id.* at 195–96.

159. *See generally Report of the Committee on Cooperation with the Government with the Bar and with Other Organizations*, 1951 AALS PROCEEDINGS 248, 254–69 (1951) (detailing the results of questionnaires).

160. *Id.* at 255.

its instructor(s), whether practicing lawyers, local judges, or full-time faculty. The following year the committee successfully moved for the creation of a joint committee of the AALS and the ABA's Committee on Unauthorized Practice of Law.[161] The Joint Committee eventually created one of the signal post-War statements on the ethical duties of lawyers, largely authored by Harvard Law School Professor Lon L. Fuller.[162]

California trial court Judge Philbrick McCoy, co-author of the *Survey* book assessing the professional conduct of lawyers and judges,[163] wrote an essay in the April 1954 *American Bar Association Journal* on the "problem of teaching legal ethics."[164] He argued for lessening the study of "legal ethics" and emphasizing "professional standards." This shift, McCoy concluded, offered "senior" students a "touch of reality" about the profession.[165] McCoy's suggestion was acknowledged but not overtly followed.[166]

Though McCoy did not define what he meant by "legal ethics" and "professional standards," it appears he had adopted an emerging distinction, one to which he had contributed. A lawyer's "professional responsibility" included the lawyer's "conventional functions as [a practitioner] of the law," his duties as a citizen in a democratic state, and, as added by McCoy, the "lawyer's responsibility for leadership in public affairs."[167] In this same 1952 speech, McCoy quoted a 1934 address by Chief Justice Harlan Fiske Stone. Stone had complained about the teaching of "professional ethics," the study of the "mere formulation of rules of conduct."[168] "Legal ethics" was distinct from "professional responsibility" because the former focused on particular

161. *Report of Committee on Cooperation with the Bench and Bar*, 1952 AALS HANDBOOK AND PROCEEDINGS 120, 127–28 (1952).

162. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159–162, 1216–218 (1958), *reprinted in Professional Responsibility: A Statement*, 11 S.C. L.Q. 306, 306–20 (1959).

163. ORIE PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS (1952); *see also* Robert Kingsley, *Teaching Professional Ethics and Responsibilities: What the Law Schools are Doing*, 7 J. LEGAL EDUC. 84, 86 (1954) (Kingsley was Dean at the University of Southern California Law School shortly after McCoy began the legal ethics course that was the subject of his *ABA Journal* essay).

164. Philbrick McCoy, *The Law Student and Professional Standards: The Problem of Teaching Legal Ethics*, 40 A.B.A. J. 305, 305 (1954).

165. *Id.* at 347.

166. *See, e.g.*, Olin E. Watts, *The Bar's Responsibility to Law Students*, 51 BRIEF 27, 32–33 (1955) ("The inculcation of these standards cannot be accomplished through courses in legal ethics. Such an approach is very limited.").

167. McCoy, *supra* note 164, at 302 (initially quoting AALS committee definition and adding leadership quote).

168. *Id.* at 306.

rules, not broader issues of discretionary judgment made in light of the lawyers' duties to serve as social leaders and as informed public citizens in a democratic society.

McCoy ended his speech echoing the same impassioned plea of old: the failure to teach students their duties was "a fraud on the student, the public, the bar, and the courts."[169] But what was to be taught was new: the "professional responsibility" of the lawyer in society.

From the early 1950s to the early 1970s, academic interest exploded in teaching professional responsibility and writing about that teaching. The Committee on the Teaching of Professional Responsibility, whose 1951 creation was noted by McCoy, quickly proposed the Project on Education for Teaching Professional Responsibility and Leadership. It sought the large sum of $120,000 over five years.[170] The Committee's leader, Robert E. Mathews, wrote a couple of years later that, despite overwhelming approval by the AALS, the ABA, and other, non-legal professional organizations, the project had not been funded.[171]

After the nadir of the early 1950s, law schools re-embraced a duty to teach professional responsibility, not merely legal ethics. In 1955, the AALS created a Special Committee on Education for Professional Responsibility, a title indicating its broader scope than merely the teaching of legal ethics.[172] That Committee held a Conferences on Education of Lawyers for their Professional Responsibilities in August 1956.[173] It was financially supported by the Ford Foundation.[174] A second Conference on the topic was held in 1959.[175] Ford granted the National Legal Aid and Defender Association $800,000 in 1959 to study how to improve education in the lawyer's public

169. *Id.* at 310–11.

170. *Activities of the Association: The Association's Project on Teaching for Professional Responsibility and Leadership*, 5 J. LEGAL EDUC. 217, 217 (1952).

171. Robert E. Mathews, *The Association's Project for Training in Professional Responsibility and Leadership*, 7 J. LEGAL EDUC. 373, 374 (1954).

172. *See Report of the Special Committee on Education of Professional Responsibility*, 1956 AALS HANDBOOK AND PROCEEDINGS 111, 158–61 (1956) (noting organization of Special Committee).

173. *See generally* JULIUS STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY (1959) (compiling reports from 1956 Conference on the Education of Lawyers for Their Public Responsibilities).

174. *See Report of the Special Committee on Education of Professional Responsibility*, *supra* note 172, at 158–61 (noting organization of Special Committee).

175. THE LAW SCHOOLS LOOK AHEAD: 1959 CONFERENCE ON LEGAL EDUCATION 5–6 (Charles W. Joiner ed., 1959) (noting "the lawyer should assume the role of legal statesman as well as become an ever better legal craftsman").

role, including "exposure of law students to the problems and opportunities of professional responsibility."[176]

Similar conferences were held in the 1960s. The AALS held a Conference on Education for Professional Responsibility at the University of Chicago in 1964.[177] The Ford Foundation gave $950,000 in 1966 to the AALS to support assessment of alternate methods of teaching professional responsibility, particularly the "pervasive" method.[178] And in 1968 the Committee on Education for Professional Responsibility held another conference, also funded by the Ford Foundation.[179] This heightened interest filled law journals in the 1960s and early 1970s.[180] This interest was also on display in the significant increase in the number of schools adding professional responsibility and related topics to the curriculum.[181]

In 1957, the AALS Committee on Education for Professional Responsibility asked AALS law school deans about whether their schools taught a course in legal ethics. Of the eighty-five who responded, fifty-four replied that the school offered such a course. Nineteen others claimed their institutions offered another course, such as Legal Aid, in which ethics and

176. Douglas H. Parker, *Book Review*, 19 J. LEGAL EDUC. 228, 230 (1966).

177. *See Report on Conference on Education for Professional Responsibility*, 1965 AALS HANDBOOK AND PROCEEDINGS 217, 217–18 (1965) (discussing wide-ranging nature of Conference, which included, among other topics, discussion of breadth of definition of "professional responsibility"); *Committee on Education for Professional Responsibility: Plans for Conference*, 1964 AALS HANDBOOK AND PROCEEDINGS 157, 157 (acknowledging Ford Foundation support).

178. *Report of the Committee on Education for Professional Responsibility*, 1966 AALS HANDBOOK AND PROCEEDINGS 56, 56–58 (1966). A Council on Education in Professional Responsibility was created by the AALS to manage this grant. *See also* Parker, *supra* note 176, at 230 n.7 (detailing the Ford Foundation's funding of the program).

179. *See* EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 359–401 (Donald T. Weckstein ed. 1970) (publishing discussions at the 1968 National Conference on Education in the Professional Responsibilities of the Lawyer, held at the University of Colorado in Boulder); *see also Report of the Committee on Education in Professional Responsibility*, 1968 AALS HANDBOOK AND PROCEEDINGS 23, 29–34 (1968) (reporting on Conference).

180. *See* Jack B. Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 452 (1972) (noting the "extensive, detailed and somewhat esoteric" literature on professional responsibility and legal ethics); *Bibliography*, 41 U. COLO. L. REV. 467, 467–71 (1969) (citing books, casebooks, articles, and other sources on legal ethics); EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER, *supra* note 179, at 359–401 (printing Selected Annotated Bibliography).

181. *See* LEROY L. LAMBORN, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY: A SURVEY OF CURRENT METHODS OF INSTRUCTION IN AMERICAN LAW SCHOOLS 21–81 (1963) (listing courses in the legal profession, legal ethics, professional responsibility and related courses at each ABA-approved law school).

professional responsibility constituted a principal aspect of the course.[182] A table comprising the topics of a school's legal ethics course indicated greater agreement on the subject matter of the course.[183] A 1963 study found that about three-quarters of law schools taught a legal ethics course, and the remainder indicated the subject was taught either in other courses or pervasively.[184]

This increased attention to what was almost exclusively described as "professional responsibility" differed from earlier efforts: proponents of a course in legal ethics up until World War II believed a legal ethics course was necessary to shape (or reveal) the law student's moral character. The unveiling might limit entry into the profession of shysters and crooks. Or it might awaken the ignorant to their basic duties as lawyers.

Post-war proponents of such a course took a radically different route: they paid relatively little attention to claims of (im)moral character, even during the Second Red Scare of the late 1940s and early 1950s.[185] Instead, they argued professional responsibility training of law students was crucial because lawyers were natural leaders in American society. That leadership role demanded lawyers embrace their duties to the public as well as to their client, their duty to serve as social trustees.[186]

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182. *Report of the Committee on Education for Professional Responsibility*, 1958 AALS HANDBOOK AND PROCEEDINGS 169, 169–70 (1958).

183. *Id.* at 172–75.

184. LAMBORN, *supra* note 181, at 3. On the pervasive method at about this time, see, e.g., Stanley A. Samad, *The Pervasive Approach to Teaching Professional Responsibility*, 26 OHIO ST. L.J. 100, 100 (1965) (quoting ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 155 (1953)) (lamenting the failure of professional responsibility education in law schools).

185. There were, of course, successful efforts later in the Second Red Scare to prevent licensure of bar applicants who refused to answer questions regarding any Communist Party affiliation, see Schware v. Board of Bar Examiners, 353 U.S. 232, 243 (1957) (upholding New Mexico Supreme Court's citing "Membership in the Communist Party" as a reason to prevent licensure); Konigsberg v. State Bar of California, 353 U.S. 252, 270 (1961) (discussing a state bar's decision to equate Communist affiliations with "bad moral character"); *In re* Anastaplo, 366 U.S. 82, 96–97 (1961) (affirming the denial of licensure to an applicant who refused to answer questions about Communist affiliation).

186. *See* William J. Jameson, *Service to the Public and to the Profession: The President's Annual Address*, 40 A.B.A. J. 743, 744 (1954) (arguing in favor of the lawyer's duty to "assume leadership of public as distinguished from strictly legal questions"); Robert E. Mathews, *Legal Education and Responsible Leadership*, 4 J. LEGAL EDUC. 249, 249 (1952) ("A chief harbinger of that integrity is education and the chief channel of supply to public leadership is legal education."); Mathews, *supra* note 171, at 373 (recalling the American Bar Association's commitment to public leadership); *Activities of the Association: The Association's Project for Education on Professional Responsibility and Leadership*, *supra* note 170, at 217 (discussing the importance of training law students in "the responsibilities of citizenship"); Robert E. Mathews,

This public role explained the difference between "legal ethics" and "professional responsibility." Legal ethics was "concerned with the duties of the individual practitioner as expressed principally in the [1908] Canons of Professional Ethics."[187] Professional responsibility was concerned with "the moral obligations of the lawyer to assume in society the position of leadership for which his education has so well prepared him."[188] By 1970, one academic concluded, "It should no longer be necessary to elaborate that the term 'professional responsibility' is intended to convey a broadening of the traditional concept of 'legal ethics.'"[189] Legal ethics was the study of one's mandatory duties, colloquially, "thou-shalt-nots."[190] The lawyer's duties of professional responsibility were "enforced only by public opinion and personal pride."[191] They comprised "everything he ought to be and do in order to carry out more effectively his functions in society."[192] For academics writing at this time, leadership as a social trustee justified the importance of professional responsibility courses; law students needed training in their public responsibilities.[193]

E. Watergate and the End of an Era

The 1972–1974 Watergate scandal put in peril the legal profession's role as social trustee. On June 26, 1973, John Dean, former legal counsel to President Richard M. Nixon, testified at a hearing of the Senate Select Committee on the unfolding Watergate scandal. By then Nixon's close aides

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Professional Responsibility: Past Concern but Today's Urgency, 41 U. COLO. L. REV. 313, 317 (1969) ("We must bear constantly in mind that these responsibilities are not restricted to the conventional ethics of the lawyer–client relation, but comprise also the lawyer's larger function as a community leader and policy maker."); Edward C. King, *Some Comments on the Influence, Leadership and Obligations of Lawyers*, 51 BRIEF 68, 69 (1956) (exploring public service as a motivation of future lawyers). *See generally* Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PRO. LAW. 49 (discussing history of movement).

187. LAMBORN, *supra* note 181, at 1–2.

188. *Id.* at 2.

189. Donald T. Weckstein, *Boulder II: Why and How?*, 41 U. COLO. L. REV. 304, 306 (1969).

190. Of course, law students also needed specific training in legal ethics, see LAMBORN, *supra* note 181, at 2 ("Education in and realization of the importance of both legal ethics and professional responsibility are essential to the continued vigor of the profession.").

191. *Id.*

192. Weckstein, *supra* note 189, at 307.

193. *See, e.g.*, THE LAW SCHOOLS LOOK AHEAD: 1959 CONFERENCE ON LEGAL EDUCATION, *supra* note 175, at 5–6 (noting "the lawyer should assume the role of legal statesman as well as become an ever better legal craftsman").

John Ehrlichman and H. R. Haldeman had resigned, and Dean himself had been fired from his White House position.

Senator Herman Talmage questioned Dean about a document Dean had written. It included the names of a number of people Dean thought had committed crimes in relation to Watergate. Some of those listed had an asterisk next to their names. In his rehearsed testimony, Dean stated those marked by an asterisk were lawyers: "My first reaction was there certainly are an awful lot of lawyers involved here." The crowd laughed.[194] As later acknowledged by ABA officers and others, Watergate was a "lawyer's scandal."[195] And though lawyers helped unravel a conspiracy crafted by other lawyers, Watergate stained the reputation of the legal profession, making facile claims that lawyers were natural leaders in society.

Four months before Dean testified, the ABA adopted new Standards for Approval of Law Schools and Interpretations.[196] These Standards replaced the rudimentary standards created in 1921 in the Root Report. By February 1973, the Watergate burglars accused of breaking into the Democratic National Committee headquarters in the Watergate building in the District of Columbia had either pleaded guilty or been convicted at trial. The relation of those men to the Committee to Re-elect the President (Nixon) was then unclear. But the possibility of some connection (which was later found) made the break-in and any coverup daily news.

The Standards proposed by the Section of Legal Education and Admissions to the Bar included proposed Standard 302(a)(iii), which vaguely declared, "The law school shall offer: (iii) instruction in the duties and responsibilities of the legal profession."[197]

This modest declaration brought extensive discussion in the House of Delegates. During this discussion, an Arizona delegate, Stanford Lerch, proposed: "(iii) A course for credit required for graduation on the subject of the legal profession, covering its history and traditions, its future

194. *Watergate and Related Activities Phase I: Watergate Investigation: Hearings Before the Select Comm. on Presidential Campaign Activities of the U.S. Senate*, 93d Cong. 1053–54 (1973) (reprinting document 34–47 at 1312, about which Dean and Talmadge spoke); RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 140 (2014) (laughter).

195. *See, e.g.*, James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975) ("It was as if the profession were being accused . . . .").

196. *Proceedings of the 1973 Midyear Meeting of the House of Delegates*, 98 ANNU. REP. A.B.A. 151, 156–57 (1973) (recalling the debate of the amendment before its passage).

197. *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 98 A.B.A. REP. 351, 354 (1973).

potential, ethics, professional conduct and attorney-client relations."[198] Lerch's proposal was later amended to read, "(iii) And provide and require for all student candidates for a professional degree to provide instruction in the duties and responsibilities of the legal profession."[199]

This was the only successful amendment to the proposed Standards made in the House of Delegates. As adopted, this proposal gave law schools great flexibility. Those teaching "the duties and responsibilities" imposed on lawyers had an array of options before them; instructors could tailor their instruction to their students' particular needs.[200]

At the February 1974 ABA Midyear Meeting, the Arizona delegates offered a resolution amending the amended 1973 language of Standard 302(a)(iii): "(iii) and provide in their curricula a course for credit required for graduation on the subject of the legal profession, covering its history and traditions, its future potential, ethics, professional conduct and attorney-client relations."[201] This proposal was postponed until the August Annual Meeting. By then, Richard Nixon had resigned the presidency. However, recriminations concerning the role of lawyers in Watergate, as initially noted by Dean, led the organized bar to consider how to regain the public's trust.

The Section of Legal Education and Admissions to the Bar approved a substitute, to which it received the approbation of the Arizona delegates. The House accepted the substitute. Standard 302(a)(iii) now reads:

> 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 instruction.[202]

The Section's substitute kept mandatory instruction on the legal profession. It did not require a stand-alone course on the subject. Even so, a 1977

198. *Proceedings of the 1973 Midyear Meeting of the House of Delegates*, *supra* note 196, at 154 (quoting proposal of Stanford Lerch).

199. *Id.* at 155.

200. *Id.*

201. *Proceedings of the Annual Meeting of the House of Delegates*, 99 ANNU. REP. A.B.A. 568, 578 (1974).

202. *Report of the Section of Legal Education and Admissions to the Bar*, 99 ANNU. REP. A.B.A. 1104, 1107 (1974); *Proceedings of the Annual Meeting of the House of Delegates*, *supra* note 201, at 578.

study found 96% of ABA approved law schools fulfilled this accreditation requirement through a legal profession course;[203] the Section of Legal Education reported in 1976 that "all but one accredited law school" did so.[204] The addition of language requiring students to study the ABA Code of Professional Responsibility had a surprising (and seemingly unintended) consequence: The ABA, through its Standing Committee on Legal Ethics and Professional Responsibility, sent at no cost 80,000 copies of its Code during the first third of 1975.[205] The number of copies sent was almost exactly the number of second and third-year law students enrolled in the 1974–1975 academic year.[206]

III. THE RISE OF THE MPRE

In February 1972, the NCBE launched the Multistate Bar Examination (MBE). As initially created, the MBE tested a bar applicant's understanding of five subjects through a 200-question multiple-choice examination.[207] Nineteen jurisdictions used it that month; twenty-six jurisdictions used it in the July 1972 administration.[208] Thirty-five jurisdictions used the MBE the following year,[209] and by 1976, forty-four jurisdictions had adopted it.[210] It was an extraordinary success.

The 1976 Report to the ABA from the Section of Legal Education and Admissions to the Bar noted the many issues it was investigating. One item

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203. *See* Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 249 n.7 (citing Stuart C. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, *in* PRE-CONFERENCE MATERIALS: 1977 NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY vii (Stuart C. Goldberg ed., 1977)).

204. *Report of the Section of Legal Education and Admissions to the Bar*, 101 ANNU. REP. A.B.A. 967, 1134 (1975).

205. *Report of the Standing Committee on Legal Ethics and Professional Responsibility*, 100 ANNU. REP. A.B.A. 780, 780 (1975).

206. *See Law School Applications and Enrollment*, ABA PROFILE OF THE L. PRO. 2023, https://www.abalegalprofile.com/legaled.html [https://perma.cc/M8C8-KYV3] (charting enrollment rates rates from 1970 to 2023).

207. *See* Joe E. Covington, *The Multi-State Bar Examination Program*, 40 B. EXAMINER 90, 91 (1971) ("Examinations will cover the subject of contracts, criminal law, evidence, real property, and torts."); *see also* John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, 50 B. EXAMINER 15, 18 (1981) (stating the test be limited to five subjects); Daniel C. Blom, *The Multistate Bar Examination: A New Approach*, 44 B. EXAMINER 8, 11 (1975).

208. Joe E. Covington, *The 1972 Multistate Bar Examination*, 41 B. EXAMINER 146, 146 (1972).

209. Joe E. Covington, *The Multistate Bar Examination Program*, 42 B. EXAMINER 95, 95 (1973).

210. Joe E. Covington, *The Multistate Bar Examination—1976*, 45 B. EXAMINER 70, 70 (1976).

it discussed was that it, along with an ABA Special Committee, had asked the NCBE to survey state bar examining boards about whether they tested applicants on professional responsibility. The Section reported that the NCBE found that, of the forty-two states which responded, thirty-seven answered positively.[211] A second item mentioned in the Report was acknowledgment of correspondence from recent law school graduates "questioning whether an objective type test should be utilized to test qualification for admission to the bar . . . ."[212] These graduates believed legal reasoning was better tested in essay questions.[213] Their concern went unheeded.

The NCBE held its 1976 annual meeting in the same place and just a couple of days before the ABA's August meeting. There the NCBE created a Professional Responsibility Committee.[214] Its chair was Francis D. Morrissey. Morrissey, later known in the NCBE as the "father of the professional responsibility exam,"[215] had served as a member of the ABA's Council of the Section of Legal Education, reflecting some of the close ties between the ABA and NCBE.[216] In summer 1977, Morrissey's committee proposed the NCBE create a multiple-choice professional responsibility exam modeled on the MBE.[217] NCBE chairman Arthur Karger offered two reasons in support of this proposal.

First, there existed "national standards of ethics and professional responsibility," in the form of the 1969 ABA Code of Professional Responsibility.[218] Second, the ABA's 1974 mandate that law schools implement Standard 302(a)(iii) to maintain ABA approval meant professional

211. *Report of the Section of Legal Education and Admissions to the Bar*, 101 ANNU. REP. A.B.A. 1129, 1134 (1976).

212. *Id.* at 1130.

213. *Id.*

214. *See* Francis D. Morrissey, *Report of the Professional Responsibility Committee*, 46 B. EXAMINER 172, 172 (1977) [hereinafter Morrissey, *Report of the Professional Responsibility Committee*] (explaining how the NCBE discussed the topic of professional responsibility as a formal item on the agenda).

215. Stuart Duhl, *A Farewell to Francis D. Morrissey*, 76 B. EXAMINER 58, 59 (2007).

216. SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 96–97 (1993) (listing Morrissey's service).

217. *Proposed Multistate Professional Responsibility Examinations (MPRE)*, 46 B. EXAMINER 50, 50 (1977).

218. *Letter from the Chairman*, 46 B. EXAMINER 109, 110 (1977).

responsibility had become a "required course in the curricula of all ABA-approved law schools."[219]

Karger's justifications were underwhelming. The idea that the 1969 Code represented "national standards" was already being undermined by the ABA itself.[220] Before the August 1976 annual meetings of the NCBE, ABA, and Section of Legal Education and Admissions to the Bar, the Department of Justice had sued the ABA, alleging its 1969 Code violated the Sherman Antitrust Act.[221] The suit specifically alleged that the Code's ban on lawyer advertising, including statements on the prices of legal services, illegally restrained competition.[222] ABA President Lawrence Walsh claimed the lawsuit was "bizarre," as "each state has its own code of professional conduct."[223] The 1969 Code was simply a "model"; it was not "self-enforcing."[224] The ABA's formal answer to the DOJ antitrust complaint used the word "model" to modify "Code" four times.[225] In his presidential speech to the House of Delegates, Walsh defended the ABA: "The Association promulgates a model code of professional conduct for consideration by the appropriate state bodies that regulate the practice of law."[226] The ABA re-named its Code the Model Code of Professional Responsibility within a year.[227] After the ABA approved a less restrictive ethics rule on advertising, the DOJ dropped its antitrust case, noting that "the A.B.A. code

219. *Id.* at 109. A slightly modified justification is found in Francis D. Morrissey, *Report of Professional Responsibility Examination Committee—Moving Toward a Test of Professional Responsibility*, 47 B. EXAMINER 136, 136 (1979) [hereinafter Morrissey, *Moving Toward a Test of Professional Responsibility*].

220. For a short history, see ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 232–34, describing how the ABA's actions undermined the 1969 code.

221. *Id.* at 233; *see also Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A. J. 979, 979 (1976) (reporting on filing of antitrust lawsuit on June 25); *Association Files Answer in Civil Antitrust Suit Brought by the United States*, 62 A.B.A. J. 1179 (1976); *see also Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538, 1538 (1978) (pointing to dramatic changes by the United States Supreme Court and the ABA as the reson for dismissal).

222. *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, *supra* note 221, at 979.

223. *Id.*

224. *Id.*

225. *Association Files Answer in Civil Antitrust Suit Brought by the United States*, *supra* note 221, at 1179.

226. Lawrence E. Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976).

227. *See Model Code of Responsibility and Model Code of Judicial Conduct*, 102 ANNU. REP. A.B.A. 989, 989 (1977) (printing Model Code of Professional Responsibility and Model Code of Judicial Conduct).

clearly is no longer the central or exclusive source for rules or interpretations concerning advertising by lawyers."[228]

The second way in which the ABA undermined Karger's "national standards" argument was to declare the Code dead. In the May 1977 issue of the *ABA Journal*, Dean L. Ray Patterson concluded the 1969 Code had wrongly adopted the "fiction" that legal ethics issues were questions of ethics, not law.[229] Among its faults, the Code was "rigid and simplistic, complex and contradictory, and difficult to read."[230] The incoming ABA President appointed a Commission in August to re-evaluate the rules of professional conduct; Patterson was named the Commission's initial Reporter. Patterson's attack on the Code landed three months before the NCBE's Karger spoke in support of the MPRE project. It is initially difficult to understand why Karger concluded such an examination would test "national standards."

Karger's second justification was even less persuasive. His conclusion did not follow his premise: professional responsibility was a crucial subject; therefore, applicants to the bar must be tested on it.[231] First, most bar examiners were already testing on professional responsibility.[232] Second, a test of an applicant's knowledge was necessary only if bar examiners assessed and found wanting professional responsibility education. Testing such knowledge might also be necessary if a state's "law" on the subject was sufficiently distinctive from the ABA Code. No evidence supporting either proposition was mentioned. If nearly all law students took a course on the subject of professional responsibility, and if at least thirty-seven jurisdictions (of forty-two respondents) already tested bar applicants on professional responsibility, what problem was the NCBE attempting to solve? The real problems were discussed only indirectly.

First, the NCBE believed it was responding to the needs of its constituents. The Professional Responsibility Examination Committee noted that, though thirty-nine of forty-four jurisdictions responding to another Committee survey tested professional responsibility, "bar examiners throughout

228. *Justice Department Dismisses Antitrust Suit Against American Bar Association*, *supra* note 221, at 1540.

229. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977).

230. *Id.*

231. *Id.*

232. *See* Morrissey, *Report of the Professional Responsibility Committee*, *supra* note 214, at 173 (making the same argument).

the country were seeking a new, more effective" testing technique.[233] The Committee summarized the view of bar examiners as believing testing was "essential, but the testing technique was inadequate."[234]

Second, no one actually argued national standards of legal ethics existed. But the ABA Code of Professional Responsibility offered some rules one could readily test everywhere, just as the MBE tested "majority" common law in most of its subjects. For financial reasons, the NCBE strongly desired states request and then adopt the MPRE. The ABA Code was the only uniform set of rules on professional responsibility, and most of the states that had adopted the Code had made few, if any, major revisions. California was by far the most prominent state not to adopt a version of the 1969 Code. Even so, California became one of the first states to require its applicants pass the MPRE. California's decision to adopt the MPRE was made easier because the NCBE borrowed from it the committee members who had drafted the California Professional Responsibility Examination (PREX), a multiple-choice exam offered by it since 1975.[235] California's decision provided some comfort to any state board of bar examiners leery of a test on a code that was not law. The ABA's ongoing work replacing the 1969 Code was not mentioned in the NCBE's 1979 Report announcing the MPRE's rollout. To do so would have ruined any plausible claim that the MPRE tested national standards.

Third, Morrissey's committee asked what kind of examination bar examiners desired. The result was a two-hour multiple-choice examination, following California's lead, not an essay exam as requested in 1976 by "recent law graduates."[236] The multiple-choice format was also touted (probably correctly) as a more accurate test than essay questions used by most states. Its most important advantage was only occasionally discussed—the massive influx of baby boomers into law schools. The law school student population in 1980 was 119,501, then the largest number of

233. Francis D. Morrissey, *Report of the Multistate Professional Responsibility Examination Committee*, 48 B. EXAMINER 152, 152 (1979).

234. *Id.* at 153.

235. *Id. See* George T. Barrow, *Letter from the Chairman*, 48 B. EXAMINER 3, 3 (1980); *see also* Eugene F. Scoles, *A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination*, 59 B. EXAMINER 20, 21–22 (1990) (noting creation of California committee, which included the reporters for both the 1969 ABA Code and the 1972 Code of Judicial Conduct, and use by NCBE of committee members to craft MPRE).

236. *Report of the Section on Legal Education and Admissions to the Bar*, *supra* note 204, at 1134.

law school students ever,[237] and more than a fifty percent increase since 1970.[238]

In introducing a discussion of the Multistate Bar Examination (MBE) at a 1979 regional NCBE meeting, NCBE Chairman Trammell E. Vickery claimed the MBE had "elicited my love forever because, literally, in Georgia, this particular examination has 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."[239] State bar examiners lacked the resources to write reliable essay questions for every tested subject; they also lacked the resources to grade such questions fairly, thoroughly, and in a timely fashion. Not only were multiple-choice questions better than essays in testing the examinee's knowledge of professional responsibility, the test was certainly easier to grade.

When the NCBE decided to test bar applicant knowledge of the 1969 Code and the 1972 Model Code of Judicial Conduct,[240] the ABA had created the Commission that would draft a successor to the 1969 Code.[241] In August 1979, the Kutak Commission, named after chair Robert Kutak, sent a "Working Draft" to a select audience.[242] This Draft was attacked for its "radical" approach,[243] radical at least in the sense that a number of its proposed rules differed substantially from the Code's.

This "debate" in the larger legal profession about the specific content of rules of professional conduct had no effect on the content tested in the MPRE. The initial MPRE was given in March 1980, to examinees in six states. Despite the modest number of states involved, because California was examining a quarter of all bar applicants, the number of examinees was

237. *See Law School Applications and Enrollment*, *supra* note 206 (describing the 1980 enrollment according to the ABA's graph).

238. *See id.* (recording 78,018 students in 1970). The American population increased 11.5% during that decade.

239. Joe E. Covington, *Discussion of Multistate Bar Examination Program*, 48 B. EXAMINER 53, 53 (1979).

240. George T .Barrow, *Letter from the Chairman*, 49 B. EXAMINER 3, 3 (1980).

241. *See Report of the Commission on Evaluation of Professional Standards,* 103 ANNU. REP. A.B.A. 784, 784 (1978) (offering initial report of commission). *See generally* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689 (2016) (discussing history of Commission).

242. Ariens, *supra* note 241, at 706–09 (discussing reaction).

243. *Id.* at 706 (quoting legal ethics scholar Monroe Freedman).

substantial.[244] The MPRE consisted of fifty multiple-choice questions to be completed in two hours. Within two years, 30,920 examinees took the MPRE; twenty-three jurisdictions required bar applicants to pass it.[245] After a decade, thirty-eight jurisdictions required applicants to pass the MPRE.[246] After another decade, fifty-two jurisdictions required bar applicants to pass the MPRE.[247] At present, the state of Wisconsin and the territory of Puerto Rico are the only jurisdictions that have not adopted the MPRE.[248]

When Francis Morrissey reported the conclusions of the Committee crafting the MPRE, he indicated that the legal ethics essay questions given by state bar examiners were believed to have no effective impact on admission to the bar. Examiners, according to Morrissey's report, concluded "failure to pass these [professional responsibility] questions rarely preclude candidates from admission."[249] The negative implication of this statement was that bar examiners sought a more challenging test on professional responsibility. That's not what happened.

In a 1980 letter to members, NCBE Chairman George Barrow noted that the MPRE would be administered during months other than February and July, "so that the test will not increase pressure on [bar applicants] at bar examination time."[250] More importantly, "applicants will be permitted to take the test as many times as they need to pass it."[251]

In June 1968, the National Conference on Education in the Professional Responsibilities of the Lawyer was held in Boulder, Colorado. Its proceedings were published in 1970. Donald T. Weckstein, editor of the published proceedings, declared:

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244. *See* Barrow, *supra* note 240, at 4 (listing Minnesota, Kansas, South Carolina, Wyoming, and New Hampshire, in addition to California); John F. O'Hara, *The California Response to Criticism of the Bar Examination*, 49 B. EXAMINER 6, 6 (1980) (noting in 1979, there "were 13,091 applicants who took" the California bar, about a quarter of the nation's examinees).

245. *Multistate Professional Responsibility Examination Statistics*, 51 B. EXAMINER 28, 28–29 (1982).

246. Cynthia Board Schmeiser, *A Ten-Year Profile of the Administration of the MPRE Program*, 59 B. EXAMINER 6, 6 (1990).

247. *2000 Statistics*, 70 B. EXAMINER 6, 23 (2001).

248. *See About the MPRE*, NCBE, https://www.ncbex.org/exams/mpre/about-mpre [https://perma.cc/X7RR-UGM9] (revealing which states administer the MPRE). A bar applicant in Connecticut and New Jersey can satisfy the professional responsibility requirement by taking a course on the subject in law school instead of the MPRE. *Id.*

249. Francis D. Morrissey, *Report of the Multistate Professional Responsibility Examination Committee*, 48 B. EXAMINER 152, 153 (1979).

250. Barrow, *supra* note 240, at 4.

251. *Id.*

> [A]t least four attributes . . . are essential to the successful performance of the lawyer's professional roles: (1) competence, (2) basic honesty and decency, (3) dedication to the profession and the importance of its societal norms, and (4) knowledge of professional standards developed to help effectuate the first three elements.[252]

Regarding the last two attributes "legal education has its greatest potential."[253] Lawyers need the "desire to do the right (or professional) thing," and do so "aware of what the right (or professional) mode of behavior is—or should be."[254] Weckstein's emphasis on "awareness" was adapted in promoting the MPRE.

After the Watergate scandal, adoption by state bar examiners of the MPRE allowed the NCBE to do well and do good—it could generate a new revenue stream and serve the public. In a discussion, Morrissey declared the "voice of the people" demanded change in the legal profession; the MPRE was evidence that bar examiners had heeded that voice.[255] Morrissey believed creating the MPRE responded to the people's "concerns and reservations about our profession."[256] The easy operation of the MPRE eliminated any need to test professional responsibility in an essay.

Weckstein's "awareness" argument was explicitly embraced at NCBE's April 1980 regional meeting, held just after the MPRE's first administration. Lawyer disciplinary boards believed "many times the erring lawyer starts from a position of inadvertence."[257] Though ignorance should not have been an excuse, this assertion emphasized the utility of testing knowledge of professional responsibility. The MPRE's "formal object" was "awareness and the ability of the individual to apply ethical principles to a given fact

252. Weckstein, *supra* note 189, at 307.

253. *Id.*

254. *Id.* at 307–08.

255. *See Bar Examinations: The State of the Art*, 49 B. EXAMINER 132, 167–68 (1980) (quoting Professional Responsibility Examination Committee chairman Francis Morrissey); Joe E. Covington & Eugene L. Smith, *Multistate Professional Responsibility Examination*, 50 B. EXAMINER 21, 21–22 (1981) ("Following Watergate, public attention was strongly focused on the ethical standards of the legal profession.").

256. *Bar Examinations: The State of the Art*, *supra* note 255, at 168 (quoting Morrissey).

257. *Id.* at 164.

situation."[258] It would not keep anyone from licensure: "The purpose of the examination, however, is not exclusionary."[259]

The MPRE thus resolved the problem highlighted in the 1921 Root Report: "We know of no system of tests which can reveal the moral character of a young man just beginning the work of life. . . . Character tests in most cases would only be perfunctory, and examinations could disclose little save knowledge or ignorance upon certain specific points."[260] What the MPRE did was provide a reason to examine an applicant's "knowledge or ignorance upon certain specific points." The Morrissey committee noted on more than one occasion that "no test, no teacher, no specific tactic, however well-intentioned or however threatening, can create moral imperatives within individuals."[261] The fruitless quest for investigating the moral character of applicants to the bar was narrowly cabined.

The NCBE had a financial reason to craft and promote the MPRE. When the MPRE was first administered, NCBE Chairman David Cummins discussed the entity's substantial debt.[262] As his term ended, Cummins reported the NCBE's "very substantial budget deficit" was wiped out through a price increase for use of the MBE.[263] The quick rise to over 30,000 annual MPRE examinees offered the NCBE a new and significant revenue stream. Registration cost fifteen dollars, meaning an additional $500,000 annually in revenue by the early 1980s. Because the data were not collected, an unknown number of those taking the exam were repeaters.

IV. TWO GENERATIONS OF THE MPRE

A. Iterations

The Kutak Commission's proposed Model Rules of Professional Conduct were approved by the ABA's House of Delegates in August 1983. The

258. *Id.*

259. *Id.; see also* Morrissey, *Moving Toward a Test of Professional Responsibility*, *supra* note 219, at 137 (declaring "[t]he MPRE will not be designed to exclude applicants for admission to the bar"); Covington & Smith, *supra* note 255, at 22 ("The purpose of MPRE is not to exclude persons from the practice of law, but it is to ensure that persons admitted to the bar are prepared to cope with ethical problems in the practice of law.").

260. *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 ANNU. REP. A.B.A. 656, 683 (1921).

261. Morrissey, *Moving Toward a Test of Professional Responsibility*, *supra* note 219, at 136.

262. David C. Cummins, *Letter from the Chairman*, 50 B. EXAMINER 3, 3 (1981).

263. *Id.*

next year the NCBE stated the MPRE would alter its test so the answer was the same whether based on the Model Code or the Model Rules.[264] This was necessary to maintain the fiction that the MPRE tested "national standards." In 1997, the NCBE announced it would no longer test on the 1969 ABA Code. However, in addition to testing on the Model Rules, the MPRE would ask questions of procedure, evidence, and constitutional law, as they touched the law of lawyering.[265] These changes were implemented in 1999.

The changes in the MPRE's scope and purpose since 1999 have been few. One such change is found in its "Purpose": the MPRE tests the "candidates' knowledge and understanding of established standards related to the professional conduct of lawyers."[266] "Established standards" replaced "national standards," and the test concerned "professional conduct," successor language to "professional responsibility." The MPRE has become more time-intensive in the 21st century: it now consists of sixty questions to be completed in two hours. An unknown ten questions are "unscored pretest questions."[267] In addition to legal and judicial disciplinary rules, the examinee is also expected to know the "majority view of cases, statutes, or regulations" related to the law of lawyering.[268]

The MPRE remains a test that favors those who readily memorize rules and exceptions. It tests on a subset of professional responsibility, an important subset, but only a subset. It appears true to its original purposes; it awakens law students to the subject, but is not intended to exclude them from licensure.

Over the past forty-five years, the MPRE offered bar examiners *something* useful: the extent of the examinee's knowledge, *when taking the exam*, of the rules of the 1969 Code (then the common rules of the Code and the 1983 Model Rules, and then just the 1983 Model Rules as amended over time). Since 1999, it also tests "the law of lawyering." The NCBE has never

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264. John F. Sutton, Jr., *Testing Professional Responsibility in View of Changes in the Code*, 53 B. EXAMINER 26, 32 (1984). Sutton was the Reporter for the 1969 ABA Code of Professional Responsibility.

265. *New MPRE Test Specifications*, 66 B. EXAMINER 31, 31 (1997).

266. *See About the MPRE*, *supra* note 248 (discussing the MPRE's purpose).

267. *MPRE,* NCBE, https://www.ncbex.org/exams/mpre [perma.cc/H6P4-T7W2]. The ten pretest questions were added to the MPRE in 2005, see Beth E. Donahue, *Recent Changes in NCBE's Multiple-Choice Examination Programs*, 77 B. EXAMINER 25, 25 (2008).

268. *See Preparing for the MPRE*, NCBE, https://www.ncbex.org/exams/mpre/preparing-mpre [https://perma.cc/WPC2-9M7A] (explaining a student must go beyond the Model Code themselves in their studies).

made extravagant claims about what lessons bar examiners and examinees can take from MPRE results. It has stuck to its goal of raising "awareness" by testing "knowledge." The NCBE's implicit claim is that the knowledge examinees had to memorize stays with them for at least some time after they begin practicing law. But memory degrades quickly, so this seems unlikely.

Reviewing the first MPRE administration, John Gorfinkel reported the "mean percentage of correct answers on the March test was 77 percent."[269] Gorfinkel spearheaded California's 1975 multiple-choice Professional Responsibility Exam (PREX) and led the committee drafting the MPRE. When the NCBE's Director of Testing Joe Covington reported on the MPRE results for the first two years, he reported the "mean scores" for the March, August, and November examinees traveled in a downward direction. This meant, according to Covington, that the August test takers were not as well prepared as the March examinees, and the November examines were the "least well prepared of the three groups."[270] Maybe. It also could have meant succeeding exams were more difficult. Or it could have meant that examinees did not take the MPRE randomly. Some "better" and "worse" examinees, including those retaking the MPRE, might account for different mean scores. In reporting on the March 1980 results, Gorfinkel also said he was informed the MPRE was reliable, that is, it produced a consistent result.

The NCBE decided early on the "mean" (average, not median) score should be 100, halfway between the low of 50 and high of 150.[271] The mean score from 2019–2023 has ranged from a low of 93.4 (August 2019) to a high of 99 (March 2021), all below the presumptive average. By the early 21st century, passing scores ranged from 75–86, with 75 and 80 each required by sixteen jurisdictions.[272] As of 2021, the passing score range remains the same, though fewer jurisdictions set a passing score of 75, with more moving to 85.[273] The NCBE reports scores in 10-point increments,

269. *Bar Examinations: The State of the Art*, *supra* note 255, at 167.

270. *Multistate Professional Responsibility Examination Statistics*, *supra* note 245, at 28.

271. Susan M. Case, *The Testing Column: Standards on the MPRE*, 75 B. EXAMINER 35, 36 (2006).

272. *Id.*

273. *See The Multistate Professional Responsibility Examination (MPRE),* BAR EXAMINER, https://thebarexaminer.ncbex.org/2022-statistics/the-multistate-professional-responsibility-examination-mpre/ [https://perma.cc/BQK6-PB6A] (providing the minimum passing scores per each jurisdiction).

50–59, 60–69, and so on.[274] This makes it impossible to know exactly what percentage passed. For the 2022 examinations, the percentage of those who failed in every state (a score of 50–69) was 7.2% in March, 6.5% in August, and 7.4% in November. The percentage of those who passed in every state (a score of 90 or more) was 60.4% in March, 61.8% in August, and 64.1% in November.[275] That leaves from 28% to 32.5% scoring between 70–89, with about 54%–58% of the total scoring between 80–89. Only ten jurisdictions used a passing score in the 70s; most are lightly populated, the largest being Pennsylvania. Forty-four use a score in the 80s, including California (86), Texas (85), and New York (85), as well as many other highly populated states.

If we conservatively assume just half of the examinees scoring between 70–79 are reporting their results to jurisdictions requiring an 80 or more, another 6%–7% failed. And if we conservatively assume an even distribution of scores between 80–89, and just half of those persons are reporting to 80–86 passing score jurisdictions, another 4%–5% failed to achieve a passing score. That would mean a minimum of 19%–20% failed. Using more aggressive assumptions, the percentage of those failing to achieve a passing score would reach 30%.

Unfortunately, we don't know how many fail, nor do we know how many fail more than once. We also don't know whether any bar applicants are unable to obtain a license to practice law only due to an inability to achieve a passing MPRE score. We do know the MPRE and UBE are correlated.

In 2007, the NCBE's Director of Test, Dr. Susan M. Case, analyzed "Standards on the MPRE." Her particular concern was the varying passing scores required by the more than fifty jurisdictions that used it as of 2005. In her estimation, to obtain a scaled score of 75, an examinee had to get 48% of the questions correct. That rose to 54% to achieve a scaled score of 80. Since "typically every other scaled score point is used for a given examination," "a scaled score of 80 typically answered only two more questions correctly than did an examinee with a scaled score of 76."[276]

274. *See id.* (presenting the score distributions between the March, August, and November exams).

275. *See id.* (adding together the percentage of scores that received a 90 or above in the months of March, August, and November according to the 2022 MPRE National Score Distributions chart).

276. Case, *supra* note 271, at 36.

Case called the MPRE a "licensure" examination, "where the overriding concern is to protect the public."[277] Thus, as for "any high-stakes exam,"[278] the pass/fail point should be reviewed. The NCBE was going to start the process by creating a panel/committee to look at "standard-setting."[279] But the MPRE hadn't been created as "high-stakes" exam. And Case never explained how the MPRE protected the public. If she was implying that the MPRE kept some from licensure, and that was a good thing, she didn't explain why this was so. The committee appeared to have, at most, a slight effect in inching up minimum passing scores. Did those 20%–30% who failed each administration of the MPRE actually demonstrate some menace to the public?

Case was writing just a few years after serving as a consultant to the State Bar of California.[280] The State Bar was evaluating its passing score (79) on the MPRE. Case noted that raising the passing score to 85 would "result in an 11% decrease in test-takers' passage rates."[281] As a result of her work, California raised its passing score to 86, then and now the highest passing score in any jurisdiction.[282] Because the NCBE "does not collect [] information from the applicants" about their racial or ethnic identity, it was "unable to report the same."[283]

The California Supreme Court recently admitted it lacks any "studies regarding California attorney applicants' MPRE scores from 1980 to [2021]."[284] William Wesley Patton, who requested the nonexistent studies from the California Supreme Court, subsequently asked the NCBE to provide him with MPRE results of California test takers from 2002–2016. Its response: "NCBE does not publish or produce MPRE data on a jurisdiction basis for a multitude of reasons."[285] The reasons were not elucidated.

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277. *Id.* at 37.

278. *Id.*

279. *Id.*

280. *See* William Wesley Patton, *The Dangers of Delegating Attorney Licensing to Private and Non-Profit Corporations: The Inapplicability of Public Records Laws and Abdication of Government Protection During Health Crises*, 58 CAL. W. L. REV. 1225, 151 (2021) (discussing Susan Case's time working for the State Bar).

281. *Id.*

282. *Id.* at 152. The committee evaluating the passing score recommended increasing it to 100, which would have made the MPRE an exclusionary examination. Utah also requires an 86 on the MPRE.

283. *Id.* at 152 n.105.

284. *Id.* at 154.

285. *Id.* at 155–56.

B. Praise and Criticism

The adoption of the Model Rules of Professional Conduct in 1983 did nothing to relieve the profession's crisis of purpose. Two ABA annual meeting "presidential showcases," in 1983 and 1984, interspersed by a speech by Chief Justice Warren Burger to ABA members, all rued the decline of the lawyer's professional independence. This professionalism "crisis" led the ABA to create a Commission on Professionalism.[286] That Commission warned lawyers that a decline in professionalism would have strong negative effects. Among its brief conclusions was its criticism of the MPRE: It "can focus law students' attention away from the fact that a wide range of behavior may be acceptable, but some kinds of behavior may be more appropriate than others."[287]

In the early 1990s, Professor Deborah Rhode labeled the MPRE as replete with "ambiguous questions, choices between unsatisfying answers, and a focus on relatively obscure provisions of ethics codes."[288] Mary Daly, Bruce Green, and Russell Pearce followed Rhode, writing, "Studying for the MPRE requires a mastery of cognitive dissonance, both as to content and format. . . . Its multiple-choice format sends the misguided message that ethical dilemmas are capable of clear, correct resolution."[289]

In 1998, Professor Leslie Levin published a considered evaluation of the MPRE. Her initial conclusion: "While the MPRE has done much to bring professional responsibility rules to the attention of bar applicants, it also has unintentionally trivialized the subject because it tests hypothetical standards, its range is very limited and it covers some topics irrelevant to all but a tiny percentage of lawyers."[290]

Benjamin Barton wrote in a 2005 study of the codes of lawyer ethics and lawyer professionalism, using the MPRE as a prime example of some of the shortcomings of the codes:

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286. ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 8, at 245–52.

287. ABA Comm'n on Professionalism, *". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 267 (1986); *see also In re* Voorhees, 403 N.W.2d 738, 742 (S.D. 1987) (Henderson, J., concurring and dissenting) (criticizing the MBE and MPRE and asking, "Are the tests turning out those who are adept at 'mechanistic, buzzword oriented simplicity'? And do they reject good legal minds who have depth and insight?").

288. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 41 (1992).

289. Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 L. & CONTEMP. PROBS. 193, 195–96 (1995).

290. Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 396–97 (1998).

> The exam poses questions that are either based on esoteric rules one would only know if one memorized them or that have answers contrary to common sense. An advertisement for an MPRE study book warns students that the test makers 'set traps that can catch you even if you think you know the rules, by using tricks that make the wrong answers seem right.'[291]

Worse, "the MPRE belittles serious ethical consideration and likely encourages lawyer cynicism about legal ethics."[292]

Barton noted the "technocratic" weaknesses in using a multiple-choice exam.[293] He then claimed that, to keep the examination from being "too easy" because it tested on "settled areas of the law," the drafters looked for those "esoteric" rules. The MPRE also asked questions "where the minimum standards are not commonsense."[294] In both instances, successfully answering such questions required one to memorize these rules and exceptions. Such questions, he concluded, "invariably lead to student cynicism."[295]

Barton also noted that, though no research had been done on it, other, relevant research suggested the possibility that the MPRE was biased.[296] He also concluded, "The MPRE almost certainly further rewards those who naturally 'test well,' and punishes those who do not."[297]

Barton did find some favor with the MPRE. He suggested that one of the MPRE's "salutary purposes" was that it "probably weeds out bar applicants who know little about professional responsibility."[298] There is no footnote attached to this sentence. "Probably" seems unlikely. Like him, I'll speculate, but with a different twist. If the MPRE was weeding out some bar applicants, one would think such an impact would be noticed by bar review companies and their clients. Bar review companies still use the MPRE as a loss leader, offering MPRE prep courses for free. If failure was persistent among some part of the applicant pool, those applicants might complain about the "quality" of the MPRE prep course. That would

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291. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethics, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 459 (2005).

292. *Id.* at 457.

293. *Id.* at 458.

294. *Id.* at 459.

295. *Id.* at 460.

296. *Id.* at 463–65.

297. *Id.* at 465.

298. *Id.* at 467.

negatively affect the company's bottom line. And social media may exist just for those who have complaints about almost anything. But maybe the MPRE serves as background noise, and no one pays it attention.[299]

Even an NCBE insider acknowledged, albeit somewhat grudgingly, the obvious limitations of the MPRE, as early as 1999: It did not elicit significant information regarding the examinee's future as a lawyer. However, if "multiple forms of assessment," including the MPRE, were adopted by bar examiners, their decisions on licensure would become more reliable.[300]

In a 1999 essay pleading for a more robust education in professional responsibility, David Logan asked NCBE officials about the scores of examinees. He was informed that, "On recent tests, 80% of the examinees earned a score of 85 or above (high enough to pass in any jurisdiction), while over 90% scored 75 or above (high enough to pass in a majority of jurisdictions)."[301] Those numbers are no longer accurate. Returning to the 2022 MPRE scores, just 79%–80% scored 80 or above, a decline from that some percentage scoring 85 or above. About 92% scored 70 or above in 2022. If that equates to over 90% scoring 75 or more, that means that only 1%–1.5% scored between 70–74. Even according to the NCBE's declarations to Logan, in addition to the 10% who failed to achieve any state's passing score, somewhere between 1%–10% of those scoring between 75–84 failed.[302] Logan was reporting results when the MPRE consisted of fifty rather than the sixty questions now asked in the same amount of time, and before the NCBE expanded the topics covered by the MPRE. This may account for the apparent higher rates of failure in the 2022 administrations.

If it ever did, the MPRE no longer serves as a symbol expressing the profession's view of the importance of professional responsibility. In light of the number of lawyers involved in criminal actions in the Watergate affair,

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299. *But see* Markovic, *supra* note 4, at 168 ("[J]urisdictions already use the Multistate Professional Responsibility Exam (MPRE) and the character and fitness inquiry to screen out unethical attorneys."). I can agree with Markovic only if "character and fitness" inquiries are doing the heavy lifting.

300. Marcia Kuechenmeister, *Admission to the Bar: We've Come a Long Way*, 68 B. EXAMINER 25, 27 (1999).

301. David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023, 1031 n.37 (1999) (citing Letter from Jane Smith, Director of Testing, NCBE, to David A. Logan, Professor of Law, Wake Forest University (Nov. 17, 1998) (on file with Washington and Lee Law Review)).

302. *Cf.* Case, *supra* note 271, at 36 (noting the pass/fail standard for all three 2005 MPRE administrations ranged from 48%-60%, that is, to obtain a scaled score of 75 (lowest score required to pass) and 86 (highest score required to pass)).

there existed a felt need to demonstrate that lawyers took seriously their role as faithful servants of the law and of the public. But fewer and fewer lawyers have any memory of the Watergate scandal. The public's distrust of the legal profession remains, but it's not about atoning for the sins of lawyers enmeshed in Watergate. The MPRE is simply a test of knowing rules and exceptions of professional conduct, many of which one will never encounter.

There is some modest research that may indicate the MPRE serves as a small barrier, a barrier that reduces the licensure of lawyers who may engage in professional misconduct.[303] The relationship between the bar examination and lawyer misconduct has also been the subject of contested research; convincing evidence, so far, is lacking.[304]

The utility of the MPRE is wanting. Its pernicious effects include generating both anxiety and apathy among law students. On occasion, it generates cynicism among students, who now pay a registration fee of $160,[305] some 18%–30% of whom pay more than once. The MPRE's reason for (continued) existence is justified incoherently: the MPRE has been deemed both "essential" (according to bar examiners) and unimportant (the MPRE is not exclusionary, so can be taken as many times as necessary). This incoherence may be why examinees present such a broad emotional range in reaction to it. The failure to meet a particular state's MPRE passing score is (and has been) perceived as both disastrous and inconsequential.[306] Finally, it inevitably alters the structure of a Legal Profession or Professional Responsibility course. Teachers must acknowledge the importance of students' interest in passing the MPRE the first time in deciding what to teach.

If only the NCBE knows who scored what, is anything gained by having some examinees re-take the test? No evidence exists that success demonstrates the examinee will take this "knowledge" into practice. All we have is speculation: a passing score indicates the formerly "ignorant" or

303. *See generally* Rozema, *supra* note 4 (researching the MPRE's regulatory efficacy).

304. *Compare* Anderson IV & Muller, *supra* note 4, at 323 *with* Patton, *supra* note 4, at 44 (disputing the conclusion that a correlation exists between lower bar passage rates and lawyer misconduct).

305. *See Registering for the MPRE*, NCBE, https://www.ncbex.org/exams/mpre/registering-mpre [https://perma.cc/W6KB-SMRU] (providing information about the initial scheduling fee, a potential rescheduling fee, and a cancellation fee).

306. For an example, see this subreddit thread, throwaway_cuz_fail, *Failed the MPRE w/81–85 Needed . . . . How Screwed am I?*, REDDIT https://www.reddit.com/r/LawSchool/comments/3w3cva/failed_the_mpre_w81_85_needed_how_screwed_am_i/?rdt=50665 [https://perma.cc/NE67-WNZL].

"inadvertent" applicant to the bar has demonstrated some awareness and knowledge of "rules" (presently, the "model" rules of the 1983 Rules) and the law of lawyering. MPRE success arguably means the examinee will avoid engaging in professional misconduct. This knowledge will lead the applicant to decide to act properly, after which the lawyer will act consistently with this decision. All of this is speculative. Why knowledge of disciplinary rules that are not law (and knowledge of "general principles" and "majority" "established standards") will result in the avoidance of misconduct is unproven. No one argues that the MPRE gives comfort to the public—again, it's been fifty years since the Watergate scandal. More importantly, the public has no information about any lawyer's MPRE score, or what that means. And success on the MPRE does not equate to ethical integrity. The current MPRE serves simply as an unnecessary hurdle to admission to the bar.

C. The (Possible?) Promise of the NextGen Bar Examination

The NCBE plans to roll out the NextGen bar exam in some states in July 2026 and, if all goes well, many more in July 2027.[307] If successful, the NextGen examination will test whether each applicant possesses "a broad range of foundational lawyering skills."[308] It would serve as a significant advance from the popular but limited Uniform Bar Examination.[309] The nine-hour examination will consist of three parts, stand-alone multiple-choice questions (40%), integrated question sets (25%), and longer performance tasks (33%). The idea is that it will test an examinee's skills and knowledge. The skills will include "legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management."[310] The "fundamental legal concepts and principles" include the usual suspects, the first-year common law courses, constitutional law, evidence, and business associations.[311]

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307. *See NextGen (July 2026)*, NCBE, https://www.ncbex.org/exams/nextgen [https://perma.cc/V8G5-22HU] (stating Connecticut, Guam, Maryland, Missouri, Washington and Oregon will be the first to introduce the NextGen Bar exam).

308. *See id.* (explaining foundational concepts will be tested, including civil procedure, contract law, evidence, and other traditionally tested topics).

309. *See* UBE, https://www.ncbex.org/exams/ube [https://perma.cc/R7Z3-GZ5Y] (listing forty-two states, the District of Columbia, and the Territory of the Virgin Islands as adopting the UBE).

310. *NextGen (July 2026)*, *supra* note 307.

311. *Id.*

Although professional responsibility is not considered a "fundamental" concept or principle, the skills listed could include issues of professional conduct. The "law of lawyering" implicates client counseling, dispute resolution, investigation and analysis. It is at the core of the client relationship. The NCBE's history in promoting professional responsibility as an "essential" topic leaves one hoping its NextGen bar examination will mark an exciting advance. It could generate significant positive effects on the profession, the teaching of legal ethics, and on law students. If done right, it would teach why professional responsibility is "essential."

The NCBE should not retain the MPRE because it fears "cannibalizing" its business model. Keeping the MPRE as a stand-alone examination would be a step back in knitting together skills, knowledge, and competence.

V. CONCLUSION

The central purpose of the MPRE has always been "to measure candidates' knowledge and understanding" of the rules of professional conduct.[312] As noted nearly a century ago, proper professional conduct has very little to do with one's knowledge of legal ethics, and everything to do with one's character.[313] And character, everyone agrees, cannot be taught in a professional responsibility course, and cannot be tested on a professional responsibility examination.[314]

The MPRE is now in its forty-fifth year. The only change made to it in the past quarter-century has been to add ten more questions, all ungraded, in the same amount of time examinees were required to answer fifty questions. Increasing the degree of difficulty to achieve a passing MPRE score was not the goal of those who created and shaped the MPRE. And there's certainly no reason to make it so now.

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312. *About the MPRE*, *supra* note 248.

313. Bernard C. Gavit, *Legal Ethics and the Law Schools*, 18 A.B.A. J. 347, 347 (1932).

314. *See id.* (describing how a test or memorization of rules does not equate to the knowledge on how to function as a lawyer); George Neff Stevens, *Professional Responsibility—The Role of the Law School and the Bar*, 6 J. LEGAL EDUC. 203, 205 (1953) ("No test has yet been devised which can ascertain, in advance, the bad moral risk. Nor is there any way of telling what the response of the bad moral risk party will be to a known strict enforcement of the Canons of Professional Ethics."); John S. Bradway, *Making Ethical Lawyers—Some Practical Proposals for Achieving the Goal*, 24 GEO. L.J. 345, 350 (1936) ("Certainly the passing of a law school [legal ethics] test, whether it be of the essay or the true-false type is no indication that this student will pass the unwritten examination he must face at the hands of his professional brethren and the public. It would seem that the passing of this second examination is the sounder goal of the course.").

Sam Dash served as chief counsel to the Watergate Senate select committee. He reminisced to an audience a decade after the Watergate affair about the lessons learned from the scandal. He noted that one of his witnesses was John Dean, the former counsel to the President whose bemusement regarding the number of lawyers who committed crimes on behalf of the president led to laughter from the audience. In emphasizing the importance of instilling virtues and values in law students, Dash offered a caveat: John Dean "liked to boast he got the highest grade in ethics at Georgetown University."[315]

John Dean's "highest grade" suggests he had a deep knowledge of lawyer ethics; what he lacked was the moral character to refuse to become complicit in Watergate. For that he was convicted and disbarred.

One result of the Watergate scandal was the MPRE. Long after those events, the MPRE remains the bane of law students and professors. Its continued existence must surely be a surprise: "I suspect that 15 years from now, we may look back on today's Multistate Professional Responsibility Examination as we look back upon the Articles of Confederation—a useful, important, intermediate step to get us from where we were to where we have to go."[316] Dean Norman Redlich wrote this in 1981. We do have to go there, but we won't as long as the MPRE exists.

Abolish the MPRE.

315. Lynne Reaves, *Ethics in Action: Two Recall Watergate Lessons*, 70 A.B.A. J. 35, 35 (1984).

316. Norman Redlich, *Testing for Professional Responsibility*, 50 B. EXAMINER 18, 21 (1981).