

Does the Multistate Bar Exam Validly Measure Attorney Competence?

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I. INTRODUCTION

The year is 2020 and chaos reigns.¹ The year began with wildfires destroying millions of acres across Australia and proceeded to the worst viral pandemic in history.² By December, more than 63 million people worldwide had contracted COVID-19, a respiratory virus, and 1.47 million had died.³ Shutdowns designed to stop the virus's spread spawned business closures, job losses, and economic hardship.⁴ In the United States, the callous murder of George Floyd prompted months of protests and a long overdue reckoning with racial injustice.⁵ A hotly contested presidential race, combined with the incumbent's refusal to concede, heaped still more anxiety on the public.⁶

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¹ Joseph Curl, *From Impeachment, to Pandemic, to Riots, Wildfires and Killer Hornets, 2020 is Proving to be a Doozy*, WASH. TIMES (June 2, 2020), <https://www.washingtontimes.com/news/2020/jun/2/from-impeachment-to-pandemic-to-riots-wildfires-an/> [<https://perma.cc/YQ7Z-KLY8>].

² *Id.*

³ COVID-19 Coronavirus Pandemic, WORLDOMETER, <https://www.worldometers.info/coronavirus/> [<https://perma.cc/FDU6-J2W2>].

⁴ Griff Witte, *Time to Shut Down Again? As Coronavirus Cases Surge, a Growing Chorus Makes the Case*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/national/time-to-shut-down-again-as-coronavirus-cases-surge-a-growing-chorus-makes-the-case/2020/07/09/f0f0a950-c21b-11ea-9fdd-b7ac6b051dc8_story.html [<https://perma.cc/FS4W-ZYJ3>].

⁵ See Colleen Long, Kat Stafford, & R.J. Rico, *Summer of Protest: Chance for Change, but Obstacles Exposed*, AP NEWS (Sept. 6, 2020), <https://apnews.com/article/9035ecdfc58d5dba755185666ac0ed6d> [<https://perma.cc/7HGB-MCX6>].

⁶ See Sophie Bethune, *2020 Presidential Election a Source of Significant Stress for More Americans than 2016 Presidential Race*, AM. PSYCHOL. ASS'N (Oct. 7, 2020),

The law school Class of 2020 graduated into this chaotic, uncertain world. Bar examiners added to their anxiety by issuing conflicting, poorly reasoned announcements.⁷ Exams were scheduled and then cancelled after studying began, sometimes within days of the exam.⁸ Seats were limited, and graduates from out-of-state schools were told to find seats in other states.⁹ Early attempts to administer exams remotely failed.¹⁰ Some graduates deferred taking the exam, overwhelmed by illness, family responsibilities, the lack of quiet places to study, unwillingness to risk their health during an in-person administration, or concerns about the workability of an online exam.¹¹

These disruptions raised questions about the worth of the bar exam. Is the exam a valid measure of attorney competence? Should bar examiners have forced candidates to risk their health to take the exam in person—or to undergo the uncertainties of a remotely administered, online exam? Would other alternatives, such as a diploma privilege, successful completion of a period of supervised practice, or a modified exam, have sufficed to identify minimally

<https://www.apa.org/news/press/releases/2020/10/election-stress> [https://perma.cc/ZD7N-HNY8]; see also Maura Judkis, *Democratic Voters are Still Waiting to Unclench*, WASH. POST (Nov. 20, 2020), https://www.washingtonpost.com/lifestyle/style/trump-defeat-post-election-anxiety/2020/11/13/3fd7bc6c-244f-11eb-8672-c281c7a2c96e_story.html [https://perma.cc/VH6B-CP7W].

⁷ See Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. (forthcoming 2020) [hereinafter *Epic Fail*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657379 [https://perma.cc/6QVH-QAE9]; e.g., *Bar Modifications During COVID-19: 50-State Resources*, JUSTIA (last updated Oct. 2020), <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/> [https://perma.cc/Z8DP-CDAJ].

⁸ *Epic Fail*, *supra* note 7; see *All Announcements*, TEX. BD. L. EXAMINERS, <https://ble.texas.gov/allnews.action> [https://perma.cc/DPF4-7E69] (announcing July/September exam options in a June 2, 2020 court order only to cancel the July exam on July 3, 2020); see also *Florida Board of Bar Examiners Postpones August 2020 Bar Exam*, FLA. SUP. CT. (Aug. 17, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News> [https://perma.cc/87EL-LP34] (stating that the Florida Board of Bar Examiners postponed August bar exam to October only a few days prior to planned administration).

⁹ See Paul Caron, *New York Will Give Priority to Graduates From New York's 15 Law Schools for Limited Spots to Take September Bar Exam*, TAXPROF BLOG (May 1, 2020), https://taxprof.typepad.com/taxprof_blog/2020/05/new-york-will-give-priority-to-new-york-law-school-graduates-for-limited-spots-to-take-september-bar.html [https://perma.cc/Z8DP-CDAJ] (NYBOLE's April 30, 2020 update quoted in detail. NYBOLE subsequently removed July/Sept./Oct. bar application updates from official page.); see also JUSTIA, *supra* note 7.

¹⁰ Colin Lecher, *Remote Exam Software is Crashing When the Stakes are the Highest*, MARKUP (Oct. 13, 2020), <https://themarkup.org/coronavirus/2020/10/13/remote-exam-software-failures-privacy> [https://perma.cc/U3TJ-ZMAA]; Jason Kelley, *Bar Applicants Deserve Better than a Remotely Proctored "Barpocalypse"*, ELEC. FRONTIER FOUND. (Oct. 9, 2020), <https://www.eff.org/deeplinks/2020/10/bar-applicants-deserve-better-proctored-barpocalypse> [https://perma.cc/N4FE-4R74].

¹¹ Many students took this route without publicly announcing their intentions due to public perception. I personally know at least five students who deferred for these reasons.

competent candidates? A few states embraced alternatives like these, and others have appointed groups to explore the current exam's validity.¹²

Remarkably, none of the bar exams administered today have been validated. That is, we lack sound evidence that the exams measure the knowledge and skills that new lawyers actually need to practice law.¹³ Nor have states used careful methods to set the passing scores for their exams.¹⁴ Over the last two years, several teams of researchers have finally started to gather information about those central issues.¹⁵ That research may point the way to a more valid, evidence-based bar exam.

This short article complements that research by offering evidence that a major portion of most bar exams, the Multistate Bar Exam (MBE), is *invalid*. The exam, in other words, does not measure the knowledge and skills that lawyers use in practice. On the contrary, it is an artificial barrier to practice—one that harms the public by failing to screen for the knowledge and skills that clients need from their attorneys. The exam is particularly harmful because it

¹² See *Epic Fail*, *supra* note 7; see also JUSTIA, *supra* note 7.

¹³ Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 374–75 (2002) (“The NCBE contends that the MBE accurately measures ‘baseline content knowledge important to all lawyers.’ If the exam actually does measure critical baseline content, presumably that ‘knowledge’ should be retained long after the exam is administered. Thus, perhaps a more accurate study of content validity would be to ask the professors and lawyers engaged in the NCBE study to retake the MBE and see how well they know the content tested. One might suspect that few would volunteer for this kind of study because the reality is that most lawyers forget relatively quickly most of the rules they memorized in order to pass the bar exam. Thus, to the extent the bar claims that it tests minimum competence by testing for baseline knowledge of the substantive law, it operates on the faulty premise that memorization of the law in order to pass the bar exam equates to knowledge of the law.”); see Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1 (2019).

¹⁴ See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 30–31, 83 (Oct. 2020) [hereinafter 12 BUILDING BLOCKS], available at https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar_pre_print.pdf [https://perma.cc/PG5R-ATQH] (arguing that states poorly define minimum competence, which in turn means scores are arbitrary distinctions without appropriate standards); see also Mitchel Winick et al., *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, ACCESSLEX INST. RES. PAPER, (Oct. 15, 2020), available at <https://ssrn.com/abstract=3707812> [https://perma.cc/X3GS-AGRS].

¹⁵ See, e.g., 12 BUILDING BLOCKS, *supra* note 14; NAT'L CONF. BAR EXAMINERS TESTING TASK FORCE, PHASE 2 REPORT: 2019 PRACTICE ANALYSIS (Mar. 2020), <https://testingtaskforce.org/research/phase-2-report/> [https://perma.cc/RD62-466J]; STATE BAR OF CAL. CAPA WORKING GRP., THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM (May 11, 2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> [https://perma.cc/ADJ4-UMFE]; Winick et al., *supra* note 14.

disproportionately fails nonwhite candidates, without evidence that it is a valid measure of minimum competence.¹⁶

The first part of this article describes the MBE and the study I conducted of its validity. Part II provides the results of the study, and Part III explains the implication of these results.

II. MBE STUDY DESCRIPTION

The National Conference of Bar Examiners (NCBE) develops the MBE, licenses it to states, scores the exam, and provides score reports back to each state.¹⁷ The exam consists of 200 multiple choice questions, administered in two sessions of three hours apiece.¹⁸ The exam is closed book, requiring candidates to memorize legal principles from seven broad subject areas.¹⁹ These principles do not reflect the law of any one state; instead, they draw upon federal rules and “general principles” of law.²⁰

This multiple-choice exam is a fundamental component of 49 states’ bar exams.²¹ For many of those states, including all Uniform Bar Exam²² states, the MBE accounts for fifty percent of the final score.²³ In addition, most states scale scores from other portions of the exam to MBE scores in their state.²⁴ This means that statewide scores on the MBE determine how many candidates from

¹⁶Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2001); see Winick et al., *supra* note 14.

¹⁷*About NCBE*, NCBE, <https://www.ncbex.org/about/> [https://perma.cc/GA4J-TTJ].

¹⁸See *Preparing for the MBE*, NCBE, <https://www.ncbex.org/exams/mbe/preparing/> [https://perma.cc/H5VB-NC39].

¹⁹*Id.*

²⁰*Id.*

²¹NCBE, *COMPREHENSIVE GUIDE TO BAR EXAM ADMISSIONS 2020 18–30* (Judith A. Gundersen & Claire J. Guback eds., 2020) [hereinafter *COMPREHENSIVE GUIDE*], available at https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [https://perma.cc/929L-6SU5].

²²The Uniform Bar Exam (UBE) is an examination drafted by the National Conference of Bar Examiners. The exam includes two Multistate Performance Tests (MPT), six Multistate Essays (MEE), and the MBE. Individual states administer the exam and grade student responses. The scores earned in an UBE state may be immediately transferred to other UBE states for admission if the score satisfies the minimum score in the subsequent jurisdiction. See NCBE, *UNDERSTANDING THE UNIFORM BAR EXAMINATION* (July 2017), available at <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [https://perma.cc/929L-6SU5].

²³See *COMPREHENSIVE GUIDE*, *supra* note 21.

²⁴Susan M. Case, *Demystifying Scaling to the MBE: How’d You Do That?*, 74 BAR EXAM’R 45, 45–46 (May 2005); Joanne E. Kane & Andrew A. Mroch, *Testing Basics: What You Cannot Afford Not to Know*, 86 BAR EXAM’R 32 (Sept. 2017), available at <https://thebarexaminer.org/article/general-principles/the-testing-column-testing-basics-what-you-cannot-afford-not-to-know-2/> [https://perma.cc/4TKA-EQUK]; Griggs, *supra* note 13, at 26–29.

a particular exam administration will the pass the exam. The MBE, in other words, is a critical component of the licensing system.²⁵

MBE critics have long maintained that the exam forces candidates to memorize hundreds of legal principles that they promptly forget after completing the test.²⁶ In practice, critics continue, new lawyers rely upon statutes, cases, treatises, and other sources to ascertain points of law; they do not rely upon memory until they develop deep familiarity with a practice area.²⁷

To test this criticism, I recruited sixteen practicing attorneys to take a simulated MBE. If the MBE tests application of fundamental legal principles that every attorney should know, then practicing attorneys should be able to pass the exam with little or no preparation.

NCBE, which creates the actual MBE, was unwilling to provide sufficient support for this experiment. The organization was willing to license their online practice questions to me and noted that these questions would be “like” an actual exam,²⁸ but NCBE was not willing to provide a score, score report, or scaling information for participants in this research.²⁹ Nor would they relate performance on these practice questions to performance on the actual MBE.³⁰

Instead, I obtained realistic questions for this research from BARBRI, the leading post-graduation bar review provider in the country.³¹ BARBRI offers simulated MBE exams every bar exam cycle, and their team correlates scores on their simulated exams to actual bar passage. After every real-world exam, BARBRI analyzes their simulated exam to improve its effectiveness. The BARBRI questions thus emulate the style, difficulty, and topic coverage of the actual MBE with great verisimilitude. As a director of academic achievement, responsible for helping graduates pass the bar exam, I have found that the BARBRI simulated MBE predicts performance on the real-world MBE with remarkable accuracy.

²⁵ See COMPREHENSIVE GUIDE, *supra* note 21.

²⁶ Andrea A. Curcio et al., *Society of American Law Teachers Statement on the Bar*, 52 J. LEGAL EDUC. 446 (2002); Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 UMKC L. REV. 565, 567–68 (2015); Curcio, *supra* note 13, at 374.

²⁷ See Bratman, *supra* note 26, at 568–69; 12 BUILDING BLOCKS, *supra* note 15, at 30–31, 83.

²⁸ E-mail from Derek Binkley, Senior Develop/Analyst, NCBE, to Steven Foster, Dir. of Acad. Achievement and Instructor of L., Okla. City Univ. Sch. of L. (Sept. 16, 2014, 08:20 CST) (on file with author); E-mail from Brad Gilbert, Couns. and Manager of Hum. Rel., NCBE, to Steven Foster, Dir. of Acad. Achievement and Instructor of L., Okla. City Univ. Sch. of L. (Sept. 16, 2014, 11:53 CST) (on file with author).

²⁹ See Email from Brad Gilbert, *supra* note 28.

³⁰ See *id.*; see also *NCBE Study Aids Store: MBE—Multistate Bar Exam*, NCBE, <https://store.ncbex.org/mbe/?sort=alphaasc&limit=100&mode=4> [<https://perma.cc/4MSW-YTUE>] (providing a disclaimer for each set of practice MBE questions and “Simulated” MBEs that performance on the questions provided “is not intended to predict raw or scaled scores on the real MBE, or your actual testing experience on the real MBE”).

³¹ See BARBRI, <https://barbri.com> [<https://perma.cc/7H5P-4ULM>] (noting that BARBRI has prepared over 1.3 million people worldwide for bar exams).

States administer the MBE in two three-hour sessions, with 100 questions in each session. For this research, I determined that a single three-hour session would be sufficient to test the validity of the MBE. NCBE itself offered a “half MBE” of just 100 questions as part of its remotely administered bar exam in October 2020.³² I thus obtained a set of one-hundred simulated MBE questions from BARBRI. I used that same set of questions throughout the study.

Recruiting participants proved difficult because practicing attorneys were both busy and reluctant to relive one of the worst days of their lives. Nor was I able to offer any compensation for participation in the study. I identified participants through a convenience sample that included Oklahoma attorneys listed in *Super Lawyers*,³³ former students and classmates, colleagues of those classmates, and chance acquaintances. Seventeen licensed lawyers initially agreed to participate, and sixteen completed the study. All of the participants had passed the Oklahoma bar exam at a prior date and had completed the MBE at that time.

Each participant took the simulated exam during one of three administrations. Each administration replicated actual testing conditions as closely as possible. Participants had three hours to answer the 100 questions, the same timing as the actual MBE. Exams were given in quiet rooms, and participants were not allowed to bring any materials into the room. Questions were packaged similarly to MBE questions, and participants used scantron sheets to record their answers.

Participants identified themselves with anonymous numbers on the scantron sheets. After each administration, BARBRI graded the exams and returned a score report with the anonymous numbers. The results were then combined with employment information provided by each participant on a separate form when volunteering. All participants provided informed consent and the Oklahoma City University’s Institutional Review Board approved the study.³⁴

³² *July 2020 Bar Exam: Jurisdiction Information*, NCBE (last updated Sept. 24, 2020), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/> [<https://perma.cc/JY3T-A6L5>].

³³ SUPER LAWYERS, <https://superlawyers.com> [<https://perma.cc/Y78D-4V8Y>]. *Super Lawyers* was a print based magazine that identified the best lawyers and rising star young lawyers in each large city. The database and recognition is primarily online now. “*Super Lawyers* selects attorneys using a patented multiphase selection process. Peer nominations and evaluations are combined with independent research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis. The objective is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel. Since *Super Lawyers* is intended to be used as an aid in selecting a lawyer, we limit the lawyer ratings to those who can be hired and retained by the public.” *Selection Process*, SUPER LAWYERS, https://www.superlawyers.com/about/selection_process.html [<https://perma.cc/Y6M3-7ERT>].

³⁴ Okla. City Univ. Institutional Rev. B., Approval No. SF021115 (Feb. 11, 2015) (on file with author).

III. RESULTS

Scores on the MBE are scaled for each administration, and states set passing scores based on those scaled scores.³⁵ Because NCBE was unwilling to cooperate with this research, I could not calculate scaled scores for the participants in the study. Instead, Table 1 reports the raw number of correct answers for each study participant. Since the simulated exam consisted of 100 questions, the raw score is identical to the percentage of correct answers.

Table 1: Percentage Correct on Simulated MBE

Participant	Percentage Correct
1	48
2	35
3	36
4	43
5	50
6	47
7	52
8	31
9	26
10	31
11	52
12	42
13	31
14	31
15	29
16	41

As the table indicates, scores ranged from a low of twenty-six percent to a high (shared by two participants) of fifty-two percent. Even at first glance, these are sobering results. If practicing attorneys correctly answer only one-quarter to one-half of the questions on a simulated MBE, does the test really measure minimum competence? Random guessing on this exam, which offers four choices for every question, should produce a score of twenty-five percent.

But how do these results compare to passing scores on the actual bar exam? Is a raw score of twenty-six percent—or even fifty-two percent—sufficient to pass the exam? Analyses by BARBRI suggest that the answer is a firm “no.” Passing scores vary from state to state, but the largest number of states embrace

³⁵ See COMPREHENSIVE GUIDE, *supra* note 21.

a passing score of 135.³⁶ Would a raw score of fifty-two percent on the MBE suffice to reach that benchmark?

The question is complicated, because most states combine MBE scores with scores on other parts of the exam to determine an overall passing score. A candidate with a very low score on the MBE, in other words, might still pass the exam by performing superbly on other, parts of the exam.³⁷ NCBE, moreover, scales MBE scores after each administration; states set their passing scores based on those scaled scores rather than raw percentages. NCBE, finally, does not disclose its scaling formula.

BARBRI, however, has considerable experience correlating raw scores on their simulated MBE to passing grades on the actual MBE. As noted above, moreover, MBE scores determine the overall number of candidates who pass the bar exam for each administration. With BARBRI's help, therefore, I was able to determine how many of the study participants would have earned a passing score of 135 on the simulated exam.

The answer is: not one. BARBRI's team estimates that a total of at least fifty-five percent correct answers is necessary to produce a scaled score of 135; sixty percent would be more certain.³⁸ None of the study participants reached that mark. No one even came close. The two highest scores were fifty-two percent, and just one other participant reached fifty percent. Eight of the participants scored less than forty percent correct, which means that half of the participants fell more than twenty points short of a certain passing score.

Years of practice experience showed a significant relationship to results on the simulated exam, but not the relationship one would expect if the exam measured competence. As Table 2 shows, experienced lawyers tended to fare worse on the exam than more junior ones. Indeed, scores on the simulated MBE showed a statistically significant *negative* correlation ($-.625$, $p < .01$) to years in practice.³⁹ If the MBE measures competencies that deepen with practice, then we would expect senior lawyers to outperform junior ones.

Table 2: Years in Practice and Test Scores

Year of Practice	Number of Takers	Average Score	Amount Who Passed
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³⁶ See COMPREHENSIVE GUIDE, *supra* note 21, at 36–37.

³⁷ *Id.* at 28 (noting that most states complement the MBE with a set of short essay questions and/or a longer performance test).

³⁸ E-mail from Mike Sims, President, BARBRI, to Steven Foster, Dir. of Acad. Achievement and Instructor of L., Okla. City Univ. Sch. of L. (Nov. 5, 2020, 11:32 CST) (on file with author). Mr. Sims and his team analyzed NCBE results to determine what examinee percentile scored a 135 on the MBE. They then looked at four years of BARBRI simulated MBE data to determine the equivalent student percentile on their test. Fifty-five percent was the lowest possible number of questions correct to produce results similar to the NCBE. Sixty percent correct would pass every BARBRI administration.

³⁹ For this analysis, I used each participant's actual years in practice.

15 or more	5	30%	0
10-14	0	0	0
5-9	5	43%	0
0-4	6	43%	0

The contrary results, with junior lawyers outperforming more senior ones, suggests that the MBE is—as critics have maintained—a memorization exercise. New attorneys retain some of the material they have memorized for a few years but lose that memory over time. Further support for this interpretation comes from the fact that two of the three highest scores on the simulated exam came from participants with one year or less of experience. Those subjects were closest to the actual MBE and most likely to recall material they had memorized for the exam.

An alternative explanation for these results is that attorneys specialize as they become more senior, remembering material in their practice area and forgetting legal principles in other fields of law. To test this hypothesis, I asked each participant to identify their primary area of practice. I then matched those practice areas to one or more MBE subjects. I matched civil litigation, for example, to both Civil Procedure and Evidence. Criminal prosecution or defense was matched with both Criminal Law and Evidence. Table 3 shows the practice areas and matched subjects for each participant.

Table 3: Practice Areas Matched to MBE Subjects

Participant	Practice Area	Subject Area #1	Subject Area #2
1	Litigation	Civil Procedure	Evidence
2	Criminal Law	Criminal Law	Evidence
3	Litigation	Civil Procedure	Evidence
4	Tax, Contracts, Property	Contracts	Property
5	Litigation, Criminal Law	Civil Procedure ⁴⁰	Evidence
6	Litigation, Contracts, Property	Civil Procedure	Evidence
7	Litigation	Civil Procedure	Evidence
8	Criminal Law	Criminal Law	Evidence
9	Criminal Law, Litigation	Criminal Law ⁴¹	Civil Procedure

⁴⁰ Participant 5 designated litigation and criminal law as practice areas. I treated this participant as a civil litigator because they had less than a year of experience and worked at a civil litigation firm.

⁴¹ Participant 9 designated criminal law and litigation as practice areas. I matched the participant to criminal law first because they worked the majority of their career in criminal law.

10	Criminal Law	Criminal Law	Evidence
11	Criminal Law	Criminal Law	Evidence
12	Criminal Law	Criminal Law	Evidence
13	Criminal Law	Criminal Law	Evidence
14	Other		
15	Criminal Law	Criminal Law	Evidence
16	Criminal Law	Criminal Law	Evidence

I then calculated passing scores for each participant within their practice-matched subject areas. This matching improved results, but only slightly. Five participants scored at least fifty-five percent correct on questions limited to one of their practice areas. One litigator scored that well on both Civil Procedure and Evidence questions.

The remaining participants (two-thirds of the 15 who identified matching practice areas) failed all subjects matched to their practice area. Prosecutors and criminal defense lawyers fared the worst: no one who identified criminal law as a primary practice area passed the criminal law questions on the exam—although two of them did pass the evidence questions on the exam.

These subject-matched results are constrained by the fact that the simulation included only 14–15 questions within each subject. The scores, therefore, are less reliable than those reported for the full 100-question exam. Still, if the questions on the MBE represent basic principles of law, specialists should be able to obtain a high score on any 14–15 questions tested in their subject. That did not happen in this simulation.

In a final test of the results, I looked at performance on practice-matched questions by years of practice. As Table 4 shows, junior attorneys continued to outperform more senior ones, even when results were limited to questions matched to the lawyer's practice area. Senior attorneys, furthermore, did not perform much better on questions matched to their practice area than they did on the full exam.

Years of Practice	Number of Takers	Average Score in Primary Area of Practice	Amount Who Passed
15 or more	5	34%	1
10-14	0	0	0
5-9	5	51%	3
0-4	6	40%	1

The most junior attorneys also scored about as well on practice-matched questions as they did on the exam as a whole. The attorneys with five to nine years of practice experience, notably, performed better on questions matched to their practice area than they did on the exam as a whole. The number of

participants in that category is too small to draw any firm conclusions from improvement, but the finding deserves further study. Importantly, however, even these attorneys did not—on average—obtain a passing score in their primary area of practice.

Licensed attorneys, in sum, consistently failed the simulated MBE administered in this study. Experienced attorneys fared worse than junior ones, and most attorneys failed even questions limited to their primary practice areas. The Multistate Bar Exam does not appear to measure the knowledge and skills that attorneys actually use in practice.

IV. DISCUSSION

The results of this study are striking. If the MBE assesses basic knowledge and skills that new lawyers need to serve clients with minimum competence, why can't licensed attorneys obtain high scores—or even passing ones—on the exam?

Several limiting features of the study might explain these results. Only sixteen lawyers participated, and I used a simulated exam rather than an actual one. Participants did not study for the exam, and they may not have taken the simulated exam as seriously as candidates take the actual exam. I could only, finally, approximate scaled passing scores with the information provided by BARBRI.

These limits, however, do not seem to adequately explain the dismal performances of subjects taking the simulated exam. As explained above, BARBRI's simulated exams are routinely tested and updated to reflect the actual exam experience. And if the MBE tests application of fundamental legal principles to hypothetical fact patterns, as NCBE claims, then any practicing lawyer should be able to pass the exam without serious motivation or study.

The poor performances in this study suggest that critics of the MBE are correct: the exam requires short-term memorization of principles that are quickly forgotten. As such, the exam is more a test of economic advantage—the ability to devote ten weeks to unpaid memorization of legal principles—than of minimum competence to practice law.

The results of this study accord with several other studies of the bar exam or lawyering competence. During the 1970's, two different studies of lawyering competence showed that practicing lawyers rarely relied on memorized principles in their work.⁴² In both studies, memorization ranked last among skills and knowledge areas that lawyers considered essential to their practice.⁴³ In one of these studies, almost a third of lawyers marked memorization of legal

⁴² Deedra Benthall-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 KY. L.J. 373, 384 (1974); Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321, 324–26 (1973).

⁴³ Benthall-Nietzel, *supra* note 42, at 384; Schwartz, *supra* note 42, at 324–26.

concepts as “not useful” in their practice; just five percent thought that memorization was essential.⁴⁴

More recently, a nationwide study of new lawyers and their supervisors found that new lawyers rarely—if ever—rely on legal principles memorized while studying for the bar exam.⁴⁵ Lawyers considered memorization “‘a bad way to practice law’ or even ‘malpractice.’”⁴⁶ New lawyers, they agreed, needed familiarity with basic concepts and the ability to find more specific rules, but they should not rely upon memory until they developed significant hands-on experience in a practice area.

More research needs to be done to probe the validity of the MBE. State courts or the NCBE, for example, could recruit larger groups of licensed lawyers to take simulated MBE exams. More extensive studies might prove, disprove, or provide more insight into the results reached in this study. Given the paucity of research validating the bar exam, however, the current research raises questions that cannot be ignored. The bar exam erects a major hurdle to law graduates wanting to enter the profession, and it imposes particularly harsh results on graduates of color. If practicing attorneys cannot readily pass this exam, then is it really a test of minimum competence?

V. CONCLUSION

Disruption and stress reigned during 2020, but it may also prove to be a year of renewal. If the chaos of the last year forces us to examine our assumptions, then the challenges may yield progress. The legal profession has an obligation to prevent incompetent practitioners from harming clients, but it has an equally weighty responsibility to assure that its test of minimum competence validly measures the knowledge and skills that new lawyers need to serve those clients. The research reported here suggests that we are falling short of that goal.

⁴⁴ Schwartz, *supra* note 42, at 326.

⁴⁵ 12 BUILDING BLOCKS, *supra* note 14, at 83.

⁴⁶ *Id.* at 30.