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THE OVER-EDUCATION OF AMERICAN LAWYERS: AN
ECONOMIC AND ETHICAL ANALYSIS OF THE
REQUIREMENTS FOR PRACTICING LAW IN THE
UNITED STATES

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INTRODUCTION

A man went to a brain store to get some brain to complete a study. He sees a sign remarking on the quality of professional brain offered at this particular brain store. He begins to question the butcher about the cost of these brains.

Man: "How much does it cost for engineer brain?"

Butcher: "Three dollars an ounce."

Man: "How much does it cost for programmer brain?"

Butcher: "Four dollars an ounce."

Man: "How much for lawyer brain?"

Butcher: "\$1,000 an ounce."

Man: "Why is lawyer brain so much more?"

Butcher: "Do you know how many lawyers we had to kill to get one ounce of brain?"¹

Lawyer jokes are too numerous to list. Websites abound with jokes describing how lawyers are incompetent, money-hungry, or unethical.² These jokes stem from the American public's image of lawyers as "greedy, manipulative, and corrupt."³ Consequently, it may seem absurd to posit that American lawyers are overeducated. However, a careful look at the requirements to becoming a lawyer in the United States and their justifica-

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¹ Lawyer Jokes and Cartoons, Lawyer Jokes, <http://www.lawyer-jokes.us/modules/mylinks/viewcat.php?cid=3> (last visited Feb. 1, 2007).

² See, e.g., Lawyer Jokes and Cartoons, <http://www.lawyer-jokes.us/>; Law Laughs, <http://www.lawlaughs.com/>; AhaJokes.com, http://www.ahajokes.com/lawyer_jokes.html (last visited Feb. 1, 2007).

³ A.B.A. Sec. of Litig., *Public Perceptions of Lawyers: Consumer Research Findings* (April 2002), available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>; see also Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805, 809 (1998) ("When, in 1991, a national sample was asked to volunteer 'what profession or type of worker do you trust the least,' lawyers were far and away the most frequent response. Almost as many (23%) spontaneously volunteered lawyers as the next two categories (car salesman, 13%, politicians, 11%) combined."); Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 53 (1999).

tions, or lack thereof, supports the argument that American lawyers spend too much time in school trying to become a lawyer.

Consider what a prospective lawyer must endure before he or she is allowed to practice. State supreme courts govern the regulation of lawyers in all fifty states.⁴ As legal ethicist Deborah Rhode explains, “most states now require graduation from an accredited law school, passage of a demanding bar exam, and proof of good moral character” in order to practice law.⁵ Furthermore, admission to an accredited law school generally requires a bachelor’s degree from a four-year college or university.⁶ In short, in order to practice law in the United States, one generally must earn a bachelor’s degree from a four-year college or university, graduate from an accredited law school, pass a demanding bar examination, and prove a record of good moral character to a state bar association.

These requirements are straightforward, and virtually every prospective and practicing attorney is aware of them. However, attorneys rarely critically analyze the rationale behind the rigorous training required of American lawyers.

In Part I of this Article, I will examine the justifications for requiring a college degree in order to attend an accredited law school and critique these justifications from economic and ethical perspectives. Part II will do the same for the law school prerequisite, and Parts III and IV will consider the bar examination and moral character prerequisites to practicing law in most states. I will conclude with several policy recommendations.

⁴ See Conrad S. Ciccotello et. al, *Will Consult for Food!: Rethinking Barriers to Professional Entry in the Informational Age*, 40 AM. BUS. L.J. 905, 918 (2003); ABA Sec. Leg. Educ. & Admis. to the B., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 116 (ABA 1992) (“[J]udicial regulation of all lawyers is a principle firmly established today in every state. Today the highest courts of the several states are the gatekeepers to the profession both as to competency and as to character and fitness.”); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 462 & n.7 (1996) (stating that “the oversight of lawyers has been predominantly a judicial function”).

⁵ DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 150 (2000). However, exceptions to the rule mandating graduation from an accredited law school exist. Several states have laws that allow graduates from an unaccredited law school to sit for the bar examination, but other states tend not to reciprocate. See A.B.A., *Permitted Means of Legal Study*, available at <http://www.abanet.org/legaled/publications/compguide2006/chart3.pdf>.

⁶ Christopher T. Cunniffé, *The Case for the Alternative Third Year Program*, 61 ALB. L. REV. 85, 93 (1997); RICHARD L. ABEL, *AMERICAN LAWYERS* 49 (1989).

I. THE COLLEGE DEGREE PREREQUISITE

In 1895, Harvard instituted a requirement that applicants to its Law School possess a college degree.⁷ In 1916, the University of Pennsylvania followed suit, and five years later the law schools of Stanford, Columbia, and Yale added the college degree prerequisite.⁸ Slowly over the next two decades, other law schools began to adopt the precedent set by these elite law schools, and by the 1930s, most law schools required that their applicants have college degrees.⁹ Today, most accredited law schools require applicants to have a college degree, and as most states require graduation from an accredited law school to practice law, this creates a bachelor's degree requirement for American lawyers.¹⁰

It is difficult to understand why law schools are so uniformly adamant that applicants undertake such a costly prerequisite. The College Board projected the average annual cost of education at a private four-year college to be \$21,235 for the 2005-06 school year, and \$5,491 at a public four-year college.¹¹ It usually takes four years to earn a bachelor's degree in the United States, and so American law schools require their applicants to spend between \$20,000 to \$80,000 to satisfy the college degree requirement.¹²

These costs, which are prohibitive to many, could be justified by sufficiently compelling benefits. However, as discussed below, the purported benefits of this prerequisite to practicing law do not justify imposing such a high cost on prospective lawyers and on society.

A. *Justifications for the College Degree Requirement*

The three main justifications for the college degree prerequisite to applying to law school are that having a degree (1) allows students to mature, (2) provides training on basic research and writing skills, and (3) increases students' specialized knowledge on topics related to legal education, which

⁷ Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 N. ENG. L. REV. 251, 268 (2005).

⁸ *Id.* at 268-9.

⁹ *Id.* at 269.

¹⁰ See *supra* notes 5-6 and accompanying text.

¹¹ The College Board, 2005-2006 College Costs, <http://www.collegeboard.com/student/pay/add-it-up/4494.html> (on file with author).

¹² This is a conservative estimate because it takes many college students more than four years to earn their bachelors degrees.

can foster intellectual diversity and a higher level of discourse in law school classrooms.¹³ These three justifications will be critically examined in turn.¹⁴

As a society, we wish to have mature lawyers who are psychologically and socially capable of representing their clients in the best manner possible.¹⁵ However, law students do not necessarily need a college degree to be sufficiently mature to effectively advocate for their clients. There are many ways in which individuals can mature psychologically and socially without attending a four-year college. These include employment, community college, church, and volunteer work. Furthermore, there is no evidence that attending a four-year college has any causal relationship to the maturity of American adults. Finally, if the four-year college degree is simply being used as a proxy for age—by assuming that an 18-year-old American is not mature enough to attend law school and become a lawyer at age 21—the college degree requirement unjustly excludes older individuals who did not attend college and younger individuals who are sufficiently mature to attend law school.

¹³ See Toni M. Fine, *Do Best Pedagogical Practices in Legal Education Include a Curriculum That Integrates Theory, Skill, and Doctrine?*, 1 J. ASS'N LEGAL WRITING DIRECTORS 66, 79 (2002); *c.f.* Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003) (stating that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse peoples, cultures, ideas and viewpoints”).

¹⁴ It is important to note at the outset that the criticisms that I have compiled against the barriers to entry into the legal profession, namely the college and law school requirements, does not mean that all attorneys in a world without such barriers to entry will not go to college or law school. In fact, I am certain that many lawyers would still go to college and law school even if college and law school were not required to practice law in the United States. The important point to note is that, hopefully, the socially optimal amount of lawyers will attend college and law school in a world without college and law school being required to practice law. If the legal services market demands that prospective attorneys go to college and law school, then attorneys should and will attend such institutions. However, this does not mean that society should require prospective attorneys to overcome these barriers to entry into the American legal profession without sufficient justification, and it has been shown that there is indeed a question as to the sufficiency of the justification of the aforementioned barriers to entry into the American legal profession.

¹⁵ See, e.g., California B. Assoc., *The State Bar of California: What Does it Do? How Does it Work?* (Jan. 2006), available at <http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf> (explaining that one of the goals of the California Bar Association is to “assure that the public is protected and served by attorneys and other legal service providers that meet the highest standards of competence and ethics”); New York St. B. Assoc., *Mission Statement* (Jan. 2006), available at http://www.nysba.org/Template.cfm?Section=About_NYSBA (stating that one of the purposes of the New York Bar Association is to “elevate the standard of integrity, honor, professional skill and courtesy in the legal profession . . . in the interest of the legal profession and of the public and to uphold and defend the Constitution of the United State and the Constitution of the State of New York”); District of Columbia B. Assoc., *About the Bar*, http://www.dcbbar.org/for_the_public/who_we_are/about.cfm.

International experience also discounts the maturity argument. Students in Germany, for example, begin the study of law at the age of 19.¹⁶ American high school graduates, based upon comparative reading comprehension examinations, are no less prepared to begin the study of law than their German counterparts.¹⁷

Lawyers also need to have basic research and writing skills to be effective advocates for their clients.¹⁸ However, there is little evidence that a college degree is necessary to ensure that lawyers possess these skills. First, many high school students have the writing skills necessary for effective legal advocacy. Screening for such students by law schools could be readily accomplished with the SAT Reasoning Test (which now measures writing competency),¹⁹ an application essay, or the LSAT (which also contains a writing section).²⁰ Second, law schools can and do supplement students' prior research and writing experience with legal research and writing courses.²¹ Third, prospective law students could readily and more efficiently obtain the necessary writing skills on their own—through self-study, writing classes or tutoring—and these writing skills could be tested through the screening mechanisms discussed above. These mechanisms would readily dispel any doubts about the research and writing competency of high school graduates with respect to law school admission.

Society also has an interest in lawyers having a broad understanding of a variety of academic disciplines with which to analyze current legal practices and policies and effectively represent clients in legal matters.²² But requiring a four-year college degree may not significantly increase the

¹⁶ See Philip Leith, *Legal Education in Germany: Becoming a Lawyer, Judge, and a Professor*, 4 WEB J. OF CURRENT LEGAL ISSUES (1995), <http://webjcli.ncl.ac.uk/articles4/leith4.html>; Stefan Koroith, *Legal Education in Germany Today*, 24 WISC. INT'L L. J. 85, 90 (2006).

¹⁷ A comprehensive reading comprehension study performed by the Organisation for Economic Co-operation and Development in 2003 found no statistically significant difference between the reading comprehension levels of German and American 15-year-olds. Organisation for Economic Co-operation and Development (Programme for International Student Assessment), *Learning for Tomorrow's World: First Results from PISA 2003 273* (2003), available at <http://www.pisa.oecd.org/dataoecd/1/60/34002216.pdf>.

¹⁸ See Fine, *supra* note 13 and accompanying text.

¹⁹ See The College Board, *The Writing Section*, <http://www.collegeboard.com/student/testing/sat/about/sat/writing.html> (last visited Feb. 1, 2007).

²⁰ See Law School Admissions Council, *The Official LSAT Sample PrepTest*, Form 7LSS33 (Oct. 1996), available at <http://www.lsac.org/pdfs/2005-2006/LSAT-test-new.pdf>.

²¹ See, e.g., Stanford Law School, *First Year Curriculum*, http://www.law.stanford.edu/program/courses/#1st_year_curriculum (last visited Feb. 1, 2007); Columbia Law School, *First Year Courses: Foundation Curriculum*, http://www.law.columbia.edu/jd_applicants/curriculum/1 (last visited Feb. 1, 2007); New York University School of Law, *Writing Requirements*, <http://www.law.nyu.edu/depts/ac/services/degrees/jd/writing/index.html> (last visited Feb. 1, 2007).

²² See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

level of discourse in law school classrooms. First, most of the subject matter that undergraduates study, from English to mechanical engineering, will rarely be used or drawn upon in law school. The major disciplines used in the analysis of legal doctrine and policy are a broad array of the social sciences, including but not limited to economics, political science, history and psychology.²³ Most students attending law school have little if any background in most, if not all of these subjects.²⁴

Second, law schools could add basic materials in these subject areas to their curricula in order to foster elevated discourse in the classroom.²⁵ At least one school already does this for economics.²⁶ Furthermore, as Alex Johnson, Jr. notes, “law students at elite schools obtain a fairly diverse, well-rounded education that not only teaches them to think like lawyers, but also teaches them about academic disciplines they failed to encounter in their undergraduate or postgraduate education.”²⁷ In other words, the answer to the shortcomings of many law schools in not providing their students with the requisite background knowledge to adequately critique legal doctrine and policy is not to require prospective law students to spend significant amounts of money obtaining undergraduate degrees in subjects that provide surplus, often irrelevant education to that necessary to become an effective attorney.

Third, jettisoning the four-year college degree requirement would not prevent law schools from attracting students with specialized knowledge, whether learned through self-study or experience. In contrast, today’s college degree requirement discriminates against those who have such knowledge but not a college degree.

Finally, most areas of practice do not require an ability to critique existing legal doctrine beyond what can be learned in law school.²⁸ Thus, most

²³ See Fine, *supra* note 13.

²⁴ In fact, according to the Law School Admissions Council “students are admitted to law school from almost every academic discipline.” L. Sch. Admissions Council, *Official Guide to ABA-Approved Law Schools: Preparing for Law School* (2006), available at <http://officialguide.lsac.org/ref/cgi-bin/ref.asp?Topic=Preparing&Section=0>. It can be readily discerned that undergraduate students who graduate with one or more undergraduate degrees have little, if any, background in most, if not all, of the broad array of social science disciplines drawn upon in critically analyzing legal doctrine and policy in law school.

²⁵ These skills could also be learned from private-sector providers of pre-legal education in a more comprehensive, efficient manner than currently provided by American colleges and universities.

²⁶ George Mason University School of Law, Fall 2006 General Law Program & J. D. Requirements, <http://www.law.gmu.edu/academics/currJD-req.php> (last visited Feb. 1, 2007).

²⁷ Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1251 (1991).

²⁸ Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 358-59 (2004) (arguing that “[r]equiring broad-based legal training in three years of law school and an intensive bar exam makes less sense as the practitioner’s activities become narrower and more routine”).

lawyers do not need this ability in order to be effective advocates for their clients.

Some further argue that a college education makes individuals well-rounded citizens, a non-economic, social benefit in and of itself.²⁹ However, this broad statement is not applicable when considering whether we should require American lawyers to go to college. That argument cannot reasonably be restricted to lawyers, as that non-economic, social benefit applies to all individuals in society regardless of profession, and is therefore beyond the scope of legal training and education requirements.

B. *The Economics of the College Degree Requirement*

Beyond the weakness of the arguments mustered to support the college degree requirement, significant economic and ethical considerations that argue against the requirement. The economic arguments against the college degree requirement are addressed here, and the ethical arguments are addressed in the next subpart.

The average cost of a four-year college education at a private school is about \$80,000, and the average cost of a four-year college education at a public school is about \$20,000.³⁰ Assuming for the sake of argument that half of all law students attended private four-year colleges and half attended public four-year colleges, the present-value expense to society of requiring America's one million lawyers to have college degrees³¹ is over \$56 billion.³² This significant cost requires a compelling justification.

But the costs do not end there. The \$56 billion estimate does not include the opportunity costs that America's one million lawyers forewent in order to get bachelors degrees. These students could have earned other benefits, both monetary and non-monetary, rather than spend their time and energy in college, particularly as 18 to 22-year-olds are in their prime

²⁹ See, e.g., Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Non-Revenue Sports?*, 14 MARQ. SPORTS L. REV. 65, 72 n.37 (2003) (acknowledging the argument that "a college education generates 'positive externalities' or benefits to third parties. For example, a better-informed society makes for better government"); see also Linda C. McClain, *The Constitution and the Good Society: The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617, 1654 (2001) (noting that the development of competent citizens and the inculcation of fundamental values are some of the social benefits of a public education).

³⁰ See *supra* note 12 and accompanying text.

³¹ Memorandum from Tracy Moxly, Market Research Department, *American Bar Association, on National Lawyer Population Trends (June 16, 2006)*, available at <http://www.abanet.org/barserv/lawyerpopulation98-03.pdf> (finding that there were approximately 1,058,662 lawyers in the United States in 2003).

³² This assumes graduation in four years.

working years. In short, mandating college degrees for lawyers not only increases the cost of becoming a lawyer, but also prevents them from doing something to more productively benefit society for the four years that they attend college.

Some of the great cost of the college degree prerequisite is shouldered by taxpayers, who pay to subsidize the college education of those who go on to be lawyers. These subsidies come in the form of property tax breaks and research funding for educational institutions and tax credits, federal and state loan subsidies, and federal and state grants to college students. The federal education tax credit program provided about \$2 billion in subsidies to taxpayers with incomes below \$40,000 in 2002, and state need-based grants totaled almost \$3.5 billion, while state non-need based aid totaled over \$1 billion.³³ In 2002, Pell Grants to students totaled \$11.3 billion, and federal direct and consolidated loans totaled over \$40 billion.³⁴ According to the National Center for Educational Statistics (“NCES”), 46.1% of college students receive federal loans or grants, and 15.6% of college students receive state loans or grants.³⁵ While only some of this money goes to educate law students and college students who end up going to law school, it is still quite large.

In addition to taxpayers, consumers of legal services pay for some of the costs of American lawyers’ undergraduate educations. The cost of college is a barrier to entry to the legal profession, dissuading some prospective lawyers from attending law school and becoming attorneys. With fewer attorneys, the price for legal services will inherently rise. Taken as a whole, these factors impose a deadweight loss on American society, providing American consumers of legal services fewer attorneys at higher prices.

C. *The Ethical Issues Surrounding the College Degree Requirement*

The requirement that law school applicants attend college gives rise to three important ethical issues. First, the college degree prerequisite prevents many poor and disadvantaged applicants from becoming lawyers. The sig-

³³ SANDY BAUM, THE COLLEGE BOARD: NATIONAL DIALOGUE ON STUDENT FINANCIAL AID, THE FINANCIAL AID PARTNERSHIP: STRENGTHENING THE FEDERAL GOVERNMENT’S LEADERSHIP ROLE 3 (2003), <http://www.collegenext.org/Files%20and%20Images/Report3.pdf>.

³⁴ United States Department of Education, FISCAL YEAR 2004 BUDGET SUMMARY AND BACKGROUND INFORMATION (2003), <http://www.ed.gov/about/overview/budget/budget04/summary/ed-lite-section2d.html> (noting that in 2003 there was \$62.3 billion in federal student aid available to American college students).

³⁵ National Center for Education Statistics, Percentage of Undergraduates Receiving Selected Types of Financial Aid from Federal, State, or Institutional Sources: 2003-04, http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=795.

nificant expense of college makes it difficult for residents of poor or disadvantaged communities to achieve the economic and social returns that come with a law degree.³⁶ Although financial aid is a significant factor in helping poor or disadvantaged students attend college, college tuition costs still impose a significant economic burden. Abolishing the college degree prerequisite for law school admission would still allow poor and disadvantaged students to attend college if they deemed it worthwhile.

Second, the college degree requirement deters many prospective public interest attorneys from entering the profession due to the substantial costs of college and the relatively low wages that public interest lawyers generally receive.

Third, it is not ethical to require prospective lawyers to attend four years of college and earn a bachelor's degree when there is no proof that this education enhances their law school experience or makes them better advocates.³⁷ The fact that lawyers have been required to obtain college degrees for over seventy years does not ameliorate the ethical problems with the college degree prerequisite to becoming a lawyer.

Finally, the college degree requirement unfairly discriminates against people who possess the writing skills and academic background sufficient to enter law school but have not graduated from college. Requiring such individuals to pay for and attend four years of college to obtain a bachelor's degree is definitely inefficient and perhaps immoral.

Overall, the three primary justifications for the college degree prerequisite to becoming a lawyer in the United States are open to significant criticism and are insufficient to outweigh the economic and ethical concerns arising from such a requirement.

II. THE LAW SCHOOL PREREQUISITE

Harvard College established the first American law school with a university affiliation in 1779.³⁸ Yale followed suit in 1826, and by 1870, thirty-one law schools had been established.³⁹ As more law schools were created, a group of lawyers got together and decided to form the American Bar As-

³⁶ Many law schools in the early twentieth century resisted requiring applicants to possess college degrees because "such requirement would exclude many who are abundantly qualified to pursue the study of law and become practitioners, [but] who cannot afford to spend the time and money required to complete [college] before beginning their professional study." Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 802 (2004).

³⁷ See *supra* notes 23-28 and accompanying text.

³⁸ Moline, *supra* note 36, at 797.

³⁹ *Id.* at 797-800.

sociation (“ABA”) in 1878.⁴⁰ The ABA’s primary purpose was to regulate the practice of law in the United States.⁴¹ Nevertheless, until 1923, no state required any lawyer to have graduated from law school.⁴² Individuals could become lawyers by clerking for a certain period of time and then sitting for the state’s bar examination.⁴³ However, due to lobbying efforts by the ABA during the Great Depression, by 1935, nine states required graduation from an ABA-approved law school in order to sit for the state’s bar examination, and twenty-three states had imposed this requirement by 1938.⁴⁴ Today, almost all states require graduation from an accredited law school in order to sit for the state bar examination.⁴⁵

Again, mandating law school graduation requires a compelling justification due to the significant cost of attending law school. According to John A. Sebert, the average tuition at private law schools in 2003 was \$25,584.⁴⁶ The average tuition for public law schools was \$20,171 for non-residents and \$10,820 for residents.⁴⁷ Assuming graduation from law school in three years, the average cost of a law degree for a private law student in 2003 was approximately \$76,752; for a non-resident public law student, \$60,513; and for a resident public law student, \$32,460. This great expense requires a compelling justification.

A. *Justifications for the Law School Requirement*

There are four main justifications for requiring lawyers to graduate from law school before taking the state bar examination. First, many lawyers and legal scholars contend that law school teaches students to “think

⁴⁰ A.B.A., History of the American Bar Association, <http://www.abanet.org/about/history.html> (last visited Feb 1, 2007).

⁴¹ *Id.*; see also Ciccotello et al., *supra* note 4, at 919.

⁴² ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 99 (1983).

⁴³ George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL’Y 637, 640 (2003).

⁴⁴ ABEL, *supra* note 6, at 55.

⁴⁵ COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 10-13 (2005), <http://www.abanet.org/legaled/publications/compguide/compguide.html> [hereinafter COMPREHENSIVE GUIDE]. The exception, noted in *supra* note 5, is that several states allow graduates from non-accredited law schools to sit for the state bar examination, but other states tend not to reciprocate.

⁴⁶ John A. Sebert, *Cost and Financing of Legal Education*, 35 SYLLABUS (A.B.A. Sec. of Leg. Educ. and Admissions to the B.), No. 2, Feb. 2004; see also Cunniffe, *supra* note 6, at 98-102.

⁴⁷ Sebert, *supra* note 46.

like a lawyer.”⁴⁸ As Benjamin Barton notes, law schools teach lawyers a “specialized bundle of thought processes and heuristics” that allow them to “learn[] the operative facts, discern[] the law, and apply[] one to the other,” which they can sell on the market to individuals in need of legal assistance.⁴⁹ Law schools, the argument goes, help teach lawyers these skills through the Socratic method, reading cases, writing briefs, writing legal memoranda, and taking law school examinations with hypothetical fact-patterns that require law students to apply an abundance of case law in a particular subject to a new set of facts.

These skills are imperative to effective advocacy in the American legal system. But law school may not be the most efficient and most effective way of teaching lawyers these skills.⁵⁰ Law firms, for example, could develop training methods to teach their employees the socially optimal quantity and content of the skills currently taught by law schools.⁵¹ Private markets for courses teaching these skills would develop if these skills were desired by legal employers in the absence of the law school requirement to practicing law. Such courses would more effectively provide the socially optimal quantity and content of these skills due to the market forces certain to be imposed on firms providing such legal education services.⁵² In short, it is not obvious that law schools are the cheapest and most effective places to teach prospective attorneys the “specialized bundle of thought processes

⁴⁸ Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1196-98 (2003); D. Don Welch, “What’s Going on?” in *the Law School Curriculum*, 41 HOUS. L. REV. 1607, 1607-08 (2005).

⁴⁹ Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 453 (2005).

⁵⁰ See Richard Posner, *Let Employers Insist if Three Years of Law School is Necessary*, S.F. DAILY J. Dec. 15, 1999, at A4 (arguing that the market should decide whether two years of law school is more efficient than three).

⁵¹ In fact, most law firms pride themselves on providing their attorneys with exemplary legal training. See, e.g., Cravath, Swaine & Moore LLP, Training, <http://www.cravath.com> (follow “Information about Careers: Law Students” hyperlink; then follow “Cravath System” hyperlink; then follow “Training” hyperlink from the dropdown menu under “Cravath System”) (last visited Jan. 23, 2007) (boasting “training programs that are practical, substantive and designed to prepare and support our associates”); Simpson Thatcher & Bartlett LLP, Training, http://www.simpsonthatcher.com/GL_training.htm (last visited Jan. 23, 2007) (noting that “[t]he professional development of our lawyers is essential to the [f]irm’s survival and growth, and we place enormous emphasis on attorney training” and that “[n]ew lawyers receive immediate ‘hands-on’ experience – the most important training ground – and participate in formal training programs organized by each department”). It is not difficult to imagine such law firms developing more in-house legal training or outsourcing such training to private firms to overcome the absence of a law school education from incoming associates.

⁵² These courses would almost certainly be much shorter and cheaper than the three years of law school currently endured by prospective lawyers.

and heuristics” that are imperative to effective advocacy in the United States.

Second, many argue that law school is needed to teach prospective attorneys the basic legal principles and doctrines of the American legal system.⁵³ Law schools, through teaching law students the primary legal courses such as constitutional law, torts, contracts, and criminal law as well as more advanced courses, give students a basic understanding of the law that prepares them for their professional responsibilities upon graduation.

But again, law school may not be the most efficient or effective means teaching law. Law students recognize this. Before taking the bar examination, most law students enroll in preparatory courses, such as BarBri and PMBR, in order to learn material tested on the state bar examination and to review material already taught in law school.⁵⁴ Also, most law school graduates are not adequately prepared to practice in any particular area, and require substantial additional training in order to effectively represent clients by themselves.⁵⁵

Furthermore, as discussed below, attorneys probably do not need to know the basic legal doctrines in all of the subjects taught in law school in order to be effective advocates.⁵⁶ A transactional attorney closing an acquisition of a public corporation will be little helped by having memorized the requirements for a prima facie case of conversion of property, and a criminal defense attorney will never be required to know the nuances of the rule against perpetuities. And if law school was eliminated as a requirement to practice law in the United States, attorneys could research the relevant legal

⁵³ A.B.A., 2006-2007 STANDARDS FOR APPROVAL OF LAW SCHOOLS VII (2006), available at http://www.abanet.org/legaled/standards/20062007standardswebcontent/b.preamble_20061005145904.pdf (requiring accredited law schools to “receive basic [legal] education that develops . . . [an] understanding of the basic principles of public and private law”).

⁵⁴ See BarBri Bar Review, *About BAR/BRI*, http://www.barbri.com/app.aspx?cmd=go_about (boasting that over 1,000,000 law students have used its course to help pass state bar examinations; PMBR, *Why Take PMBR?*, <http://www.pmbri.com/about/whytake.html> (last visited Feb. 1, 2007) (reporting that 30,000 law students each year supplement their bar exam studying with PMBR).

⁵⁵ George Neff Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15, 34 (1977) (stating that graduation from law school does not guarantee a minimal level of competency to effectively practice law); see also *supra* note 51.

⁵⁶ Ribstein, *supra* note 28, at 356 (noting that “it is not clear that three years of broad law school training in law and policy . . . should be required for a license” and that “law schools do not teach the skills that are important to representing many clients, while teaching skills that are irrelevant to what most lawyers do”). A broad understanding of many legal issue areas may make a better attorney and aid in critical examination of legal doctrine. However, other areas of law can be and often are learned on the job, and the critical examination of legal doctrine is more often the job of academics and policymakers, not lawyers. See also Ronald M. Pipkin, *Legal Education: The Consumers' Perspective*, 1976 AM. B. FOUND. RES. J. 1161, 1171 (1976) (finding that law students generally do not believe that law school helps them prepare for the practice of law).

doctrines and learn on the job, as most attorneys do when presented with novel or arcane legal issues. In short, it is difficult to argue that the benefits of three years of law school justify its significant economic cost.

Third, many argue that law schools promote legal scholarship, which is a public good that would otherwise be under-produced relative to its socially optimal level.⁵⁷ Nevertheless, the fact that legal scholarship is a public good does not promote the argument that such legal scholarship should be provided in law schools. Given the substantial inefficiencies of law school illustrated above, it is not difficult to imagine alternative methods of producing legal scholarship that are more efficient and focused than that currently provided by contemporary American law schools. For example, the government could require licensed attorneys to contribute a fixed sum annually, which would be used to pay full-time legal scholars and sponsor writing competitions tailored towards identified areas of need in legal scholarship. Furthermore, such programs could be supplemented by private donations that are currently provided by law school graduates to their law schools. Finally, it is unlikely that the elimination of the law school requirement will terminate the existence of law schools; legal scholarship would almost certainly continue to be produced by law professors employed by the law schools still in existence following an elimination of the law school requirement to practice law in the United States. In other words, the fact that legal scholarship is a public good does not substantiate requiring graduation from law school as a prerequisite to practicing law.

Fourth, another argument posited in favor of requiring law schools for practicing attorneys is that the grading systems of law schools serve as a signaling mechanism for legal employers to distinguish applicants.⁵⁸ The fact that law schools can serve as an effective signal of applicant quality is an insufficient justification to require prospective attorneys to spend tens or even sometimes hundreds of thousands of dollars. Again, it is not difficult to imagine alternative signals for legal employers that are more efficient and focused than that currently provided by contemporary American law schools. For example, SAT and LSAT scores, undergraduate academic records, scored bar examinations tailored to specific areas of law and other examinations developed by the private market for legal employers (as well as tests administered by legal employers themselves) would surely be more

⁵⁷ Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 417-18 (1998); see also Paul L. Caron & Rafael Gely, Book Review Essay, *What Law Schools Can Learn From Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1516-17 (2004); Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 143 (2006).

⁵⁸ See Korobkin, *supra* note 57, at 408; see also William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L. J. 163, 193 (2006); Johnson, *supra* note 27 at 1246.

efficient and narrowly tailored signaling mechanisms than those currently provided by American law schools. In short, the fact that law schools provide a signal to legal employers is insufficient justification to impose the substantial cost of law school on prospective attorneys.

B. *The Economics of the Law School Requirement*

Beyond the weak arguments that support the law school requirement, significant economic and ethical considerations argue against it. Several of these arguments have been presented in subparts I-B and I-C of this Article, concerning the bachelor's degree requirement, and will be discussed only briefly here.

The average cost of law school tuition for three years of law school ranges from about \$32,460 to \$76,752.⁵⁹ Assuming for the sake of argument that half of all law students attended private law schools and half attended public law schools as residents, requiring America's approximately one million lawyers⁶⁰ to obtain law school degrees would cost over \$57 billion at today's prices. This is a steep cost to impose on lawyers and, by extension, consumers of legal services, and it is not clear that it is justified.

That figure does not include the opportunity costs, imposed on lawyers and society, of attending law school. Law students could engage in a multitude of activities rather than attend law school. These activities could include working, vacationing, and performing community service.

Consumers of legal services foot some of the bill for the law school requirement. The cost of law school is a barrier to entry to the legal profession, dissuading many prospective lawyers from becoming attorneys. With fewer lawyers, legal services are more expensive than they would otherwise be. Taken as a whole, these factors once again impose a deadweight loss on society focused upon consumers of legal services.

Finally, as described in Section I-B above, American taxpayers also foot the bill of the law school requirement through the enormous sums that taxpayers pay to fund federal and state loan programs, grant programs, and tax breaks that subsidize legal education.⁶¹

⁵⁹ See *supra* note 47 and accompanying text.

⁶⁰ See *supra* note 31.

⁶¹ See *supra* notes 33-34 and accompanying text.

C. *The Ethical Issues Surrounding the Law School Requirement*

The ethical considerations to which the law school requirement gives rise are identical to those delineated in subpart I-C with respect to the college degree requirement, and so are discussed only briefly here.

First, the law school requirement prevents many individuals from lower income families from attending law school and hence becoming lawyers. From a societal standpoint, this is unethical because it unnecessarily prevents members of society from entering a profession based upon happenstance of birth or financial circumstance. Second, the law school requirement deters many prospective public interest attorneys from entering the profession due to the high costs of law school and the low income of public interest lawyers. Third, it does not seem ethical to require individuals to spend three years of their lives studying and paying for law school when it has not been shown that the economic costs of law school are outweighed by its benefits. Such a great cost to an individual, in terms of money and years, requires more justification than has been demonstrated. Finally, law schools discriminate against prospective attorneys who test poorly, which has almost nothing to do with most forms of legal practice. Prohibiting prospective attorneys who test poorly from practicing law is unethical, especially given the fact that there is substantial evidence that law school is inadequately tailored towards teaching law students what they need to know when they enter the legal profession.

Therefore, the two primary justifications for law school prerequisite to becoming a lawyer in the United States, teaching students to “think like a lawyer” and the basic legal doctrines of the American legal system, are open to significant criticism and are insufficient to outweigh the economic and ethical considerations that arise from the requirement.

III. THE BAR EXAMINATION PREREQUISITE

State supreme courts govern the regulation of lawyers in all fifty states.⁶² In almost every state, lawyers must take and pass a state bar examination before being admitted into the state bar association and practicing law in the state.⁶³ Generally, law school graduates must pass the bar examination of the state in which they intend to practice.⁶⁴ According to the

⁶² See *supra* note 4.

⁶³ See *supra* note 5 and accompanying text.

⁶⁴ The District of Columbia, on the other hand, permits bar applicants to “waive into” the District of Columbia Bar Association by (1) demonstrating admission into the Bar Association of one of states and a sufficient score on the Multistate Bar Examination (“MBE”) and the Multistate Professional

American Bar Association, seventeen states require experienced, licensed attorneys from other states to retake some or all of the state bar examination in order to gain admission to the state bar association.⁶⁵ Other states allow attorneys from other states to “waive into” the state bar association upon demonstration of a sufficient bar examination score or demonstration of good standing in the state bar association for a period of time, generally five to seven years.⁶⁶

According to the National Conference of Bar Examiners, the nationwide pass rate for first-time test-takers was 76% in 2005.⁶⁷ Thirty-one states had first-time passage rates of 80% or above.⁶⁸ Research shows that 96% of bar candidates eventually pass the examination and go on to practice law.⁶⁹ Although these passage rates seem high, it should be noted that prospective attorneys spend an enormous amount of time and money on studying for these examinations.⁷⁰

The bar examination was not always this way. Through the 1920s, bar examinations were “casual, local, and undemanding.”⁷¹ Over the next few decades, as the ABA grew in clout and began to effectively regulate the field of law for the benefit of existing lawyers, state bar examinations became more rigid and difficult, and passage rates steadily declined to the rates observed today.⁷² The bar examination’s evolution may not have been for the better.

Responsibility Examination (“MPRE”) or (2) demonstrating membership in a state Bar Association for a period of five years in good standing. See D.C. Court of Appeals Cmte. On Admissions, FAQs, <http://www.dccourts.gov/dccourts/appeals/coa/faq.jsp#12> (last visited Feb. 1, 2007).

⁶⁵ A.B.A. Sec. of Leg. Educ. & Admission to the B. & Nat’l Conf. of B. Examiners, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2005 CHART VIII: ADMISSION ON MOTION, available at <http://www.abanet.org/legaled/publications/compguide2005/chart8.pdf>.

⁶⁶ *Id.* These are just general statements regarding the bar admission requirements of the 50 states. There are numerous exceptions and unique requirements in each individual state.

⁶⁷ *Bar Admission Statistics 2005*, THE BAR EXAMINER, May 2006, at 26, available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2005stats.pdf.

⁶⁸ *Id.*

⁶⁹ Maureen Straub Kordesh, *Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test*, 30 U. MEM. L. REV. 299, 323 (2000).

⁷⁰ See *infra* notes 84-86 and accompanying text.

⁷¹ ABEL, *supra* note 6, at 62-63.

⁷² *Id.* at 64, 75.

A. *Justifications for the Bar Examination Requirement*

There are two non-monopolistic justifications given for why American attorneys are required to pass a state bar examination before being admitted into the state bar association and allowed to practice law.⁷³

First, some argue that bar examinations ensure that all practicing attorneys have a basic understanding of the law,⁷⁴ reducing the incidence of poor legal representation.⁷⁵ The state bar examinations, especially the Multistate Bar Examination (“MBE”) component of most state bar examinations,⁷⁶ tests a general understanding of basic legal doctrines in such areas as torts, criminal law, criminal procedure, civil procedure, constitutional law, and contracts.⁷⁷ General knowledge of these subjects, however, may not be necessary for, or even relevant to, effective representation. Once again, a criminal defense attorney has no need to know about the nuances of the rule against perpetuities, and a corporate attorney will gain little from a detailed understanding of family law and criminal procedure.⁷⁸ States

⁷³ Other reasons given for requiring difficult bar examinations for admission into state bar associations are to reduce “overcrowding” in the profession and to retain the status of lawyers as professionals. *See id.* at 65. Such justifications are blatantly protectionist, creating a monopoly in the legal profession and consequently diminishing consumer surplus and creating an enormous deadweight loss for society. Consequently, these monopolistic justifications for the bar examination requirement to becoming an attorney in the United States will not be analyzed in this Article.

⁷⁴ *See* Daniel R. Hansen, Note, *Do We Need The Bar Examination?: A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1212-14 (1995); Christian C. Day, *Law Schools Can Solve the Bar Pass Problem: Do the Work!*, 40 CAL. W. L. REV. 321, 324 (2003).

⁷⁵ Nat’l Con. of Bar Examiners, THE BAR EXAMINERS’ HANDBOOK 190-91 (Stuart Duhl ed., 2d ed. 1980) (stating that the bar exam serves the important goal of protecting the public from incompetent practitioners); Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 VA. L. REV. 863, 880-81 & n.39 (1981) (arguing that the bar exam helps consumers of legal advice who have no mechanism of determining whether an attorney is competent); Myrna Oliver, *Testing the Bar Exam*, CAL. LAW, June 1985, at 53 (quoting the California Committee of Bar Examiners’ main concern as expressed by its chairperson: “[O]ur paramount interest is protecting the public from people who can’t demonstrate a minimum level of skills.”).

⁷⁶ *See* A.B.A. Sec. of Leg. Educ. & Admission to the B. & Nat’l Conf. of B. Examiners, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2005, CHART V: APPLICATION DATES & MBE REQUIREMENTS (2005), available at <http://www.abanet.org/legaled/publications/compguide2005/chart5.pdf> (noting that 48 of the 50 states utilize the multistate bar examination in their respective bar examinations).

⁷⁷ *See* Nat’l Conf. of B. Examiners, Introduction, <http://www.ncbex.org/tests/mbe/mbe.htm> (last visited Feb. 1, 2007).

⁷⁸ *See supra* note 56 and accompanying text. A bar examination for different sectors of the law, each testing the legal issue areas essential to practice in its field, would be more effective and less expensive than the current, overly general bar examination.

have no compelling reason to require attorneys to have a general understanding of so many legal subjects before being admitted to practice.

Second, some argue that the bar examination requirement helps legal consumers to obtain good representation by reducing the information asymmetry between lawyers and prospective clients.⁷⁹ The argument is that the bar examination requirement permits only capable attorneys to remain in the profession, mitigating the lemon problem in the market for legal services.⁸⁰ The lemon problem dictates that only low-quality, incapable attorneys will remain in the profession when consumers cannot readily distinguish between high- and low-quality attorneys because the expected value of a high-quality attorney's services is diminished by the probability that the attorney is of low quality. Because high-quality attorneys will not enter a market in which their services are not adequately compensated, they will leave the market, and the market will be left with low-quality attorneys. The bar examination, it is argued, mitigates this problem by eliminating low-quality attorneys from the legal services market, permitting high-quality attorneys to remain in the market and receive appropriate compensation.⁸¹

Although knowing that an attorney has passed the bar examination might be useful for clients who rarely deal with the legal system, who lack independent resources for checking qualifications, or who have relatively small or routine matters that do not justify significant investigation,⁸² there are two significant negative aspects of the bar examination as a signaling mechanism that may eliminate its benefits. First, licensed attorneys may have done well on portions of the bar examination unrelated to their area of practice and still either performed poorly or were not even tested on subjects of relevance to their area of practice, reducing the utility of the bar examination to signal quality to consumers of legal services.⁸³ Second,

⁷⁹ See *supra* note 75 and accompanying text.

⁸⁰ See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). For application of the lemons market problem to professionals see Hayne E. Leland, *Minimum-Quality Standards and Licensing in Markets with Asymmetric Information*, in *Occupational Licensure* 265 (Simon Rottenberg ed., 1980); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979); Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93, 104-05 (1961); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843 (1986). With respect to the lemon problem in the market for legal services see Ribstein, *supra* note 28, at 305.

⁸¹ See *supra* note 75 and accompanying text.

⁸² See Ribstein, *supra* note 28, at 305.

⁸³ *Id.* at 310; see also Paul Reidinger, *Bar Exam Blues*, 73 A.B.A. J. 34 (1987); Society of American Law Teachers, *Statement on the Bar Exam* (July 2002), <http://www.saltlaw.org/positionbarexam.htm>; Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002).

other mechanisms, such as attorney advertising and reputation, educational certifications, etc., could be and currently are adequate to provide consumers with information—perhaps better information—about legal service providers than the bar examination.

In short, there are significant holes in the argument that the bar examination ensures that all practicing attorneys have a basic understanding of the law or that the bar examination provides much information to prospective clients. As shown below, these weak arguments are insufficient to justify the substantial costs of the bar examination requirement.

B. *The Economics of the Bar Examination Requirement*

There are a plethora of costs associated with taking a state bar examination. First, the bar examination itself is quite expensive, ranging from \$250 to \$815.⁸⁴ Assuming, for the sake of argument, that the average lawyer's bar examination fee is \$400, America's one million lawyers would have to spend \$400 million to take the bar examination at today's prices. In addition, most law students opt to take bar examination preparatory courses such as BarBri, PMBR, and The Writing Edge.⁸⁵ The prices of these courses range from \$1,695 to \$3,995.⁸⁶ Although minor in comparison to the costs of college and law school, the monetary costs of the bar examination are still substantial.

Second, as before, bar examinations exact opportunity costs on those who take them, to their detriment and society's. Generally, first-time test takers study from the end of their last semester in mid-May until the state

⁸⁴ See Supreme Court of Louisiana, Bar Examination Application, <http://www.lascba.org/publications/Application2003-04.pdf> (last visited Feb 1, 2007) (stating that the bar examination fee for Louisiana applicants is \$300 for first-time applicants); Tennessee Law Examiners, Bar Examination and Fee Schedule, <http://www.state.tn.us/lawexaminers/docs/exam&feeschedule.pdf> (last visited Feb 1, 2007) (stating that the bar examination fee for Tennessee applicants is \$300 for first-time applicants); State Bar of California, Instructions for the Application to take the July 2005 Bar Examination, http://www.calbar.ca.gov/calbar/pdfs/admissions/GBX/adm_sf_G0507_app.pdf (last visited Feb 1, 2007) (\$464); New York State Board of Law Examiners, New York State Bar Exam Handbook, <http://www.nybarexam.org/hbook.pdf> (last visited Feb. 1, 2007) (\$250); Commonwealth of Massachusetts Board of Bar Examiners, Index, <http://www.mass.gov/bbe/bbeindex.htm> (last visited Feb. 1, 2007) (\$815).

⁸⁵ In fact, BarBri claims that it prepares over 95% of all students sitting for the bar examination in any given year. See Anayat Durrani, *BAR/BRI and Kaplan Class Action*, <http://www.lawcrossing.com/article/pdf/1047.pdf> (last visited Feb 1, 2007); Bruce Buckley, *Law Students v. Barbri*, NAT'L JURIST Feb. 2006, at 18.

⁸⁶ California BarBri, BarBri Course Enrollment Sheet, http://www.barbri.com/states/pdf_enroll/ca_barenroll.pdf (last visited Feb. 1, 2007) (stating enrollment price at \$2,800); PMBR, Multistate Tutorials, <http://www.pmbri.com/courses/tutorials.html> (last visited Feb 1, 2007) (\$1,695); The Writing Edge, Information, <http://www.writingedge.com/index.html> (last visited Feb 1, 2007) (\$3,995).

bar examination in late July, a period of two-and-one-half months. Repeat test-takers and practicing attorneys attempting to become licensed to practice in another state generally work during the day and study at night, or take a period of time off of work and study for the bar examination. Rather than study for the bar examination, those preparing for the test could either work or engage in recreational activities.

Third, American consumers of legal services foot part of the bill of the cost of the bar examination. The bar examination is a barrier to entry to the legal profession, dissuading prospective lawyers or repeat test takers from taking the examination and becoming attorneys. This increases the cost of legal services and creates a deadweight loss to American society. These economic effects are similar to the economic effects of college and law school on the supply (and consequently price) of lawyers in the United States.

C. *The Ethical Issues Surrounding the Bar Examination Requirement*

The ethical issues surrounding the bar examination requirement are similar to those delineated in subparts I-C and II-C with respect to the college and law degree requirements and therefore are discussed only briefly here.

First, the bar examination requirement prevents individuals from lower income families from becoming lawyers. Second, the bar examination requirement deters prospective public interest attorneys from entering the profession. Third, it does not seem fair to require individuals to study for and take the bar examination when its value is empirically unproven and it may not accomplish the goals that its supporters claim for it. Fourth, the bar exam provides a false sense of security to consumers of legal services, providing an imprimatur that misleads consumers who rely on bar passage as a valuable signaling mechanism when the reliability of the bar examination as an effective signaling mechanism to differentiate competent from incompetent attorneys is dubious at best. Finally, as with law schools, the bar examination discriminates against prospective attorneys who test poorly, which has almost nothing to do with most forms of legal practice. Prohibiting law school graduates who test poorly from practicing law is unethical, especially given the fact that there is substantial evidence that the bar examination is a poor measure of attorney competency.

Thus, the two primary justifications for requiring American lawyers to take the state bar examination are open to numerous critiques that raise doubt as to whether the bar examination requirement is sufficiently justified to warrant the economic and ethical costs that it imposes on prospective lawyers and society.

IV. THE MORAL CHARACTER PREREQUISITE

In addition to the college degree, law school degree, and bar examination requirements, a prospective lawyer must prove to a state character and fitness committee that he or she possesses “good moral character” to gain admission to a state bar association.⁸⁷ As Marcus Ratcliff explains, “good moral character” can mean one or more of “honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, fiscal responsibility, physical ability to practice law, knowledge of the law, mental and emotional stability, and a commitment to the judicial process.”⁸⁸

The moral character requirement has been administered by state bar associations since the eighteenth century.⁸⁹ In the eighteenth century, Massachusetts required references from three ministers for prospective attorneys; Virginia required certification from a local judge; and New York and South Carolina required examination by the court to determine whether the candidate was “virtuous and of good fame” or manifested “probity, honesty and good demeanor.”⁹⁰ Similar standards remained in place through the nineteenth century, although relatively few prospective attorneys were a denied admission into state bar associations due to the moral character requirement.⁹¹ In most states, affidavits from personal references generally satisfied the admissions requirements, and such documents were easily obtained.⁹²

⁸⁷ Theresa Keeley, *Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level*, 6 U. PA. J. CONST. L. 844, 846 (2004).

⁸⁸ Marcus Ratcliff, Note, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 495 (2000) (noting also that “at least seventeen states avoid the problems involved in describing the relevant character traits that make up good character by not publishing guidelines.”).

⁸⁹ Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 497-98 (1985).

⁹⁰ G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 10 (1979); W. HAMILTON BRYSON, *LEGAL EDUCATION IN VIRGINIA: 1779-1979, A BIOGRAPHICAL APPROACH* 11 (1982); A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 247-48, 267-68 (1965).

⁹¹ Rhode, *supra* note 89, at 497. Professor Rhode notes that the only group systematically denied admission to the bar in the nineteenth century was women.

⁹² Lightner, *A More Complete Inquiry Into the Moral Character of Applicants for Admission to the Bar*, 38 REP. A.B.A. 775, 781-82 (1913) (affidavits for most common mechanism for testing character in the nineteenth century); Committee on Legal Education of the Massachusetts Bar Association, *Training for the Bar with Special Reference to the Admission Requirements in Massachusetts*, MASS. L. Q., Nov. 1929, at 18-19 (contending that the affidavit system was inadequate) [hereinafter *Mass. Comm. Rep.*].

The nineteenth century saw a tightening of the moral character requirements for the legal profession, as many of America's other professions began closing their doors to the public.⁹³ Between 1890 and 1920, states began to adopt additional entry requirements, such as probationary admissions, recommendations by the local bar, court-directed inquiries, and investigation by character committees.⁹⁴ By 1927, close to two-thirds of all states required interviews, character questionnaires, committee oversight, or related measures.⁹⁵ These requirements continued to expand and evolve, and now most states require applicants to complete character questionnaires and undergo some degree of investigation by a moral character committee.⁹⁶

Despite the fact that relatively few applicants (0.2% of all eligible applicants) are denied admission to state bar associations as a result of the moral character requirement,⁹⁷ it is still a significant cost that must be born by lawyers and society and therefore requires justification.

A. *Justifications for the Moral Character Requirement*

As Professor Deborah Rhode notes, the main justification for the moral character requirement for American attorneys is protection of the public.⁹⁸ Justice Frankfurter posited that “[f]rom a profession charged with such responsibilities [of warding off wrong and defending right] there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, through the centuries, been compendiously described as ‘moral character.’”⁹⁹ Limiting the legal profession to those of good moral charac-

⁹³ Rhode, *supra* note 89, at 499.

⁹⁴ Lightner, *supra* note 92, at 781-82.

⁹⁵ See *Mass. Comm. Rep.*, *supra* note 92, at 44-78 (summarizing state procedures).

⁹⁶ See The State Bar of California, Rules Regulating Admission to the Practice of Law in California, Rule X, Section 2, <http://www.calbar.ca.gov> (last visited Feb. 1, 2007); New York Court of Appeals, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Section 520.12, <http://www.nybarexam.org/court.htm> (last visited Feb. 1, 2007); Texas Board of Law Examiners, Rules Governing Admission to the Bar of Texas Adopted by the Supreme Court of Texas, Rule IV, <http://www.ble.state.tx.us/Rules/NewRules/ruleiv.htm> (last visited Feb. 1, 2007).

⁹⁷ Rhode, *supra* note 89, at 493-94, 516 (noting that a survey of forty-one states revealed that in 1982 only 0.2% of all eligible applicants were declined on the basis of moral fitness, a significant number of applicants have been deterred, delayed, or harassed by the moral character requirement).

⁹⁸ *Id.* at 507; see also GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 169 (photo. Reprint 1993) (5th ed. 1896) (“There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so.”).

⁹⁹ *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

ter, it is argued, shields the public and the judicial branch from potential abuses, such as misrepresentation, perjury, and bribery.¹⁰⁰

While evidence of past misconduct might predict future misconduct, there is no evidence supports this contention in the legal context. Furthermore, the moral character requirement exerts a chilling effect on current and prospective lawyers' speech. As Professor Rhode has found, "[A] third of the respondents in one law student survey reportedly had refrained from certain activities because of the impending character review. Among the activities cited were attending political rallies, signing petitions, and seeking an Army deferment on psychological grounds."¹⁰¹ Lawyers and law students make up a significant portion of America's political and economic leaders, and so their reticence on certain matters of public interest due to the moral character requirement exacts a significant cost on society. This aspect of the moral character requirement has even given rise to numerous constitutional challenges.¹⁰²

Professor Rhode also proposes a second, less frequently cited justification for the moral character requirement: upholding the status of lawyers as a profession.¹⁰³ Limiting the practice of law to those of high moral character may foster a public perception of lawyers as an honest, sincere group of professionals, countering the poor public perception of lawyers as a group and facilitating economic transactions between lawyers and consumers of legal services.¹⁰⁴ In addition, limiting membership in the state bar associa-

¹⁰⁰ Rhode, *supra* note 89, at 508-09.

¹⁰¹ *Id.* at 569.

¹⁰² The Supreme Court has upheld the moral character requirements of many states from constitutional challenges. *See, e.g., Schware*, 353 U.S. at 239 (holding that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law" in order to satisfy the Due Process Clause of the Fourteenth Amendment); *Konisberg v. State Bar of California*, 366 U.S. 36, 44 (1961) (holding that it was not unconstitutional for the State Bar of California to deny petitioner admission on the basis of his refusal to answer questions concerning his possible membership in the Communist Party); *In re Anastaplo*, 366 U.S. 82, 90 (1961) (same with respect to Illinois Bar Association); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162-63 (1971) (holding that the State Bar of New York did not violate Due Process when it required Wadmond to prove that he believes in the form of government of the United States and is loyal to such government); *but cf. Baird v. State Bar of Arizona*, 401 U.S. 1, 5 (1979) (holding that State Bar of Arizona violated petitioner's First Amendment rights by refusing to grant him admission on the sole basis of his refusal to answer questions concerning his possible membership in the Communist Party); *In re Stolar*, 401 U.S. 23, 27-28 (1971) (holding that it was unconstitutional under the First Amendment for the Ohio State Bar Association to require petitioner to answer questions delineating his membership in political organizations).

¹⁰³ Rhode, *supra* note 89, at 509.

¹⁰⁴ *See supra* note 3 and accompanying text; *see also* Rhode, *supra* note 89, at 511 n.90 (citing interviews with American Bar Association officials in which they stated that an important part of the moral character requirement was to improve the perception of lawyers in the public eye); Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements of Good Moral Character and the*

tion to those deemed to be of good moral character increases the social standing of members of the bar.¹⁰⁵

There may be some truth to the argument that a moral character examination is required to improve the public's perception of lawyers. As a result of decision-making heuristics, consumers of legal services may overstate the amount of fraudulent, immoral activities conducted by lawyers due to public opinion and the fact that fraudulent or immoral lawyers appear disproportionately on the front pages of newspapers and on television.¹⁰⁶

Given this, any effort by public policymakers to increase consumer demand for lawyers would bring consumer demand closer to its socially optimal level, decreasing deadweight loss. However, the marginal benefit of the moral character requirement in increasing consumer demand for legal services closer to its socially optimal level is unproven, and despite the moral character requirement as it currently exists, the public does not think well of lawyers.¹⁰⁷

It is doubtful that whatever benefit, if any, flows from the moral character requirement is sufficient to compensate for the costs that it imposes on American lawyers and society.

B. *The Economics of the Moral Character Requirement*

The costs of screening applicants and investigating applicants of questionable moral character are substantial.¹⁰⁸ From her interviews with fourteen state officials, Professor Rhode reports that chairpersons of bar fitness committees invested between 8 and 500 hours a year in reviewing moral character cases.¹⁰⁹ While some jurisdictions invest minimal resources in enforcing the moral character requirement, others employ the equivalent of

Role of Law Schools, 14 GEO. J. LEGAL ETHICS 839, 845 (2001) ("The entire profession must work together to resurrect the public's trust in the legal profession.").

¹⁰⁵ Rhode, *supra* note 89 at 510.

¹⁰⁶ See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000) (arguing that "the use of decision-making heuristics that simplify decision-making tasks . . . [often has] the consequence of causing actors to make decisions that violate the predictions of rational choice theory in individual circumstances"); Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 ALA. L. REV. 1, 26 (2005). As a result of such decision-making heuristics, Americans tend to focus their attention on headlines and movies such as Enron, O.J. Simpson, The Firm, A Civil Action, Buffalo Creek Disaster, Ally McBeal, and Intolerable Cruelty as opposed to the countless positive acts of attorneys and consequently overstate the untrustworthiness and immorality of American lawyers.

¹⁰⁷ See *supra* note 3 and accompanying text.

¹⁰⁸ Rhode, *supra* note 89, at 563.

¹⁰⁹ *Id.* at 513 n.96.

five full-time employees in addition to thousands of hours of volunteer effort.¹¹⁰ These resources could be better spent elsewhere or in other ways of promoting positive moral character among attorneys.

The costs to bar association applicants for the moral character requirement can be substantial as well. For example, California Bar applicants must pay \$378 in order to submit an application to be declared morally fit to practice law in the state.¹¹¹ Other states request that applicants submit a character fitness application with the National Conference of Bar Examiners (“NCBE”).¹¹² These character fitness examinations cost \$150 for law students and \$250 for attorneys.¹¹³ Assuming, for the sake of argument, that the average cost of the moral character examination is \$200 per attorney, America’s one million attorneys would have to spend over \$200 million to satisfy the moral character requirement today.

These financial costs are substantial and can have a significant impact on the supply of lawyers and thus the price of legal services. The result is a loss of producer and consumer surplus and a deadweight loss to society. These economic costs are sufficient to call into question the dubious justifications for the moral character requirement. Furthermore, many prospective attorneys may forego the study of law for fear of not passing the moral character requirement due to prior legal infractions. The possibility of investing three years in law school and passing the bar exam, but not being able to practice law due to a prior legal infraction would indeed dissuade many from becoming attorneys, further impacting the supply and price of lawyers, creating a loss of producer and consumer surplus and a deadweight loss to society.

¹¹⁰ *Id.* at 513.

¹¹¹ THE STATE BAR OF CALIFORNIA COMMITTEE OF BAR EXAMINERS, INSTRUCTION FOR APPLICATION FOR DETERMINATION OF MORAL CHARACTER AND APPLICATION FOR EXTENSION OF DETERMINATION OF MORAL CHARACTER 2 (2006), available at http://calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/sf_MC-webform-instructions.pdf.

¹¹² See, e.g., MAINE BOARD OF BAR EXAMINERS, APPLICATION PROCEDURES FOR THE MAINE BAR EXAMINERS, available at [http://www.mainebarexaminers.org/PDF Files/AppPro.pdf](http://www.mainebarexaminers.org/PDF%20Files/AppPro.pdf); COMMONWEALTH OF MASSACHUSETTS BOARD OF BAR EXAMINERS, ADMISSION ON MOTION2, available at <http://www.mass.gov/bbe/onmotionappinst.pdf>; Oklahoma Board of Bar Examiners, *Law Student Application*, http://www.okbbe.com/cl_firstyear.asp (last visited Feb. 1, 2007); Alabama State Bar, *National Conference of Bar Examiners Instructions*, <http://www.alabar.org/public/NCBEinstructions.cfm> (last visited Feb. 1, 2007).

¹¹³ NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF CHARACTER REPORT 1 (2005), available at <http://www.ncbex.org/character/Standard01.pdf>.

C. *The Ethical Issues Surrounding the Moral Character Requirement*

However, more powerful than the economic issues that arise from the moral character requirement are the ethical issues arguing against the current structure of the requirement. Three of the main ethical concerns with the moral character examination shall be described and addressed in turn.

First, is it either ethical or good public policy to prohibit individuals who have committed immoral acts in the past from entrance into a profession that is both economically and socially rewarding and that provides individuals the ability to engage in substantial public interest work? Much has been written on the morality and empirical efficacy of using past wrongs by individuals to prevent them from obtaining gainful employment, mainly in the rehabilitation versus recidivism debate.¹¹⁴ In short, while some scholars cite empirical evidence that shows the poor results from rehabilitation efforts and therefore argue that policymakers should focus on deterrence of recidivists through increased punishment of legal infractions,¹¹⁵ others argue that morality and evidence of the success rates of rehabilitation programs compels society to move towards rehabilitation of criminals.¹¹⁶ Moreover, many argue that prohibiting employment discrimination against ex-convicts is good public policy because it reduces recidivism.¹¹⁷ Refusing to give ex-convicts a clean slate after they have served

¹¹⁴ See, e.g., Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002); T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287 (1998).

¹¹⁵ See generally Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 612 (1999) (discussing historical research indicating that rehabilitation does not decrease recidivism); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (asserting that in the prison system as a whole, “[w]ith few isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”) (emphasis omitted); see also David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 13, 29 (JEFFREY FAGAN & FRANKLIN E. ZIMRING eds., 2000) (noting that “a new generation of legal scholars charged that the nation’s juvenile justice system[’s] . . . rehabilitative claims were overstated”).

¹¹⁶ See generally Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 LAW & CONTEMP. PROBS. 59 (2004) (arguing that the current penal system is overly punitive and does not sufficiently focus on rehabilitation and citing examples of successful rehabilitation programs); MALCOLM M. FEELEY, *THE PROCESS IS PUNISHMENT* (1979).

¹¹⁷ See, e.g., James R. Todd, *“It’s Not My Problem”: How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 726 (2004); Walter Scanlon, *It’s Time I Shed My Ex-Convict Status*, NEWSWEEK, Feb. 21, 2000 at 10; Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-*

their time is a questionable policy, especially with respect to the legal profession, due to its economic and social importance.

Second, as Professor Rhode notes, it is arguably unethical to hold prospective lawyers to a moral character standard that is so ambiguous.¹¹⁸ In *City of Chicago v. Morales*, the Supreme Court held that vague and ambiguous statutes are unconstitutional due to the lack of notice that they provide to citizens.¹¹⁹ Theresa Keeley argues that the moral character standards are similarly unconstitutional due to their vague and ambiguous requirements.¹²⁰ In addition to being of a questionable constitutional status, the moral character requirement is of questionable ethical status due to its ambiguity. It is readily apparent that the definition of “moral character” is unclear and provides little, if any, guidance to prospective attorneys and bar association reviewers. Third, Professor Rhode also explains that the moral character requirement implicates privacy and due process concerns.¹²¹ According to Professor Rhode, only one-fifth of states sampled applied rules of evidence or formal constraints on questions that examiners are permitted to ask.¹²² Moral character questionnaires routinely ask questions about candidates’ family, criminal, educational, employment, financial, and psychological histories.¹²³ This raises privacy concerns that mirror the constitutional privacy concerns that the Supreme Court has dealt with in the areas of contraception, procreation, family life, and public surveillance.¹²⁴ It is ethically questionable to require deep probing into the personal lives of prospective attorneys¹²⁵ without significant substantiation, which state bar associations have yet to provide.

Felon’s Employment Opportunities, 71 N.D. L. REV. 187, 187-88 (1995); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 539 (1996).

¹¹⁸ Rhode, *supra* note 89, at 571; *see also* *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957).

¹¹⁹ *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (holding that Chicago loitering statute was unconstitutionally vague because it did not provide citizens fair notice of prohibited conduct and failed to provide minimal guidelines for enforcement).

¹²⁰ Keeley, *supra* note 87.

¹²¹ Rhode, *supra* note 89, at 574.

¹²² *Id.* at 573-74.

¹²³ *Id.* at 575-83. *See also* THE STATE BAR OF CALIFORNIA COMMITTEE OF BAR EXAMINERS, INSTRUCTIONS FOR APPLICATION FOR DETERMINATION OF MORAL CHARACTER AND APPLICATION FOR EXTENSION OF DETERMINATION OF MORAL CHARACTER (2006), available at http://www.calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/adm_app_moral-character_1003.pdf.

¹²⁴ *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Fourth Amendment protections against unreasonable searches and seizures are grounded on similar values protecting the privacy rights of American citizens. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967).

¹²⁵ An example of the intrusiveness of the moral character examination is illustrated through the California Application for Determination of Moral Character, which asks whether applicants have been

Therefore, the two primary justifications for the moral character requirement to becoming a lawyer in the United States—protection of the public and increasing the public image of the legal profession, are open to significant criticism and may not outweigh the economic and ethical considerations to which they give rise.

CONCLUSION

This Article has outlined the justifications for the college degree, law school, bar examination, and moral character examination prerequisites to practicing law in the United States and the ethical and economic considerations that arise from those requirements. In short, it has been shown that it is questionable, at best, as to whether these prerequisites are reasonably tailored to achieve their imputed ends and, whether their benefits outweigh the substantial economic and ethical costs that they impose. I will conclude with several broader thoughts and policy recommendations. First, many readers may think that it is ludicrous to posit the notion that there are too many barriers to entry to the legal profession, given that there are already one million lawyers practicing in the United States.¹²⁶ Former Vice President Dan Quayle aptly summarized the popular sentiment about the quantity of lawyers in the United States: “Does America really need 70% of the world’s lawyers?”¹²⁷ Nevertheless, the notion that there are too many lawyers in the United States can be readily dispelled. The market for legal services is identical to the market for any other occupation: supply is dictated by the demand for services or products. The fact that there are over one million attorneys in the United States does not substantiate the argument that there are too many lawyers in the United States. The fact is that there

“diagnosed or treated for a medically recognized mental illness, disease or disorder that would currently interfere with [their] ability to practice law,” have been or are parties to a civil action or administrative proceeding, including divorce or bankruptcy or have been “diagnosed or treated for a chemical dependency that would currently interfere with [their] ability to practice law.” The State Bar of California Committee of Bar Examiners, *supra* note 111, at 22-23, 26.

¹²⁶ See *supra* note 31 and accompanying text.

¹²⁷ Julie Johnson, *Do We Have Too Many Lawyers?*, TIME (Aug. 26, 1991), available at <http://www.time.com/time/magazine/printout/0,8816,973684,00.html>; see also Deborah Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. L. ETHICS 989 (1998) (noting that studies show that three-quarters of Americans believe that the United States has too many lawyers and over half believe that American lawyers file too many lawsuits); Nancy McCarthy, *Pessimism for the Future*, CAL. B.J. 3 (Nov. 1994) (noting that 63% of California lawyers believe that there are too many lawyers in California); Randall Samborn, *Anti-Lawyer Attitude Up*, 15 NAT'L L.J. 49, (Aug. 9, 1993); Gary A. Hengstler, *Vox Populi*, A.B.A.J. 60, 63 (Sept. 1993).

are many Americans who desire legal services and cannot afford them.¹²⁸ Decreasing the barriers to entry to the legal profession will likely increase the number of lawyers in the United States, but it will also lower the price of legal services and provide access to legal services to Americans who previously could not afford them, increasing social utility in economic terms. Furthermore, decreasing the barriers to entry to the legal profession will lower the cost to becoming a lawyer, making it financially easier for and consequently increasing the number of prospective public interest attorneys who practice for poor and underprivileged clients.

Second, the prevalent social biases associating intelligence and education with college and law school attendance and graduation must be considered before contemplating changes to the institutional structure of the American legal education system. Consumers of legal services and legal employers may not give due weight to the intelligence and education of prospective lawyers who did not graduate from college or attend law school and so might be reluctant to hire them. Therefore, even under a reformed system that imposed fewer costs on prospective attorneys, many prospective attorneys would likely attend college and law school and pay the substantial costs in order to conform to society's biases. These results would remain until American society accepts another signaling mechanism distinguishing intelligent, educated lawyers who did not attend college or law school. Another possibility would be that lawyers who go to college and law school in such a reformed system would be paid more and sought for more difficult legal matters with higher compensation, while attorneys without such education would be relegated to more basic legal matters and compensated less for their services.

Third, I posit that holding specialized bar examinations—in fields of legal practice such as corporate law, criminal law and family law—and releasing the scores and percentiles on such examinations would be a more effective signaling mechanism for consumers of legal services, along with prior work experience, education, and trial success rate. Specialized bar examinations would more effectively demonstrate the competence of attorneys in their areas of expertise and practice than the current, overly broad bar examination.

Fourth, I posit that a more efficient and ethical method of monitoring the moral character of America's lawyers would be to transfer resources from character history examinations to compliance investigations of complaints against attorneys for ethical misconduct. This new system would not take into account past misconduct or intrude upon the privacy of prospec-

¹²⁸ Dan M. Boulware & Martha S. Dickie, *President-Elect Candidates Discuss the Issues*, 68 TEX. BAR J. 312, 313-14 (2005); see also DEBORAH L. RHODE, ACCESS TO JUSTICE 103-04 (2004); Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 FORDHAM L. REV. 927 (2004).

tive attorneys and would further deter attorney misconduct by reallocating bar association resources to focus on attorney misconduct rather than past misconduct.

Finally, the market and society will need time to adjust to such major changes in the institutional structure of American legal education. For example, social attitudes that slight attorneys who did not attend college or law school would take time to adjust, and it would be a while before the public would evaluate such attorneys based upon their personal accomplishments and examination scores. Of course, American society might still view discrimination against such attorneys as appropriate, but that is a risk that policymakers should be willing to take. At worst, legal education would change little, but at best, the efficiencies generated would be enormous.

As a result of these changes in the legal educational requirements and moral character examination, my hope is that the price of lawyers' brains¹²⁹ and services will decline to allow more Americans to gain access to legal services, and permit more prospective attorneys from realizing their career goals at a substantially lower cost.

The man went back to the brain store to get some brain to finish his study. He sees the same sign remarking on the quality of professional brain offered at the brain store. He again asks the butcher about the cost of these brains.

Man: "How much does it cost for engineer brain?"

Butcher: "Three dollars an ounce."

Man: "How much does it cost for programmer brain?"

Butcher: "Four dollars an ounce."

Man: "How much for lawyer brain?"

Butcher: "Ten dollars an ounce."

Man: "Why does the lawyer's brain still cost more than those of the engineers and programmers after the abolition of the college degree, law school, and moral requirements and the new specialized bar examinations?"

Butcher: "Do you know how much more valuable lawyers are to society than engineers and programmers?"

129 See *supra* note 1 and accompanying text.