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## The Layers Justice Corps: A Licensing Pathway to Enhance Access to Justice

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## ARTICLE

# THE LAWYERS JUSTICE CORPS: A LICENSING PATHWAY TO ENHANCE ACCESS TO JUSTICE

EILEEN KAUFMAN\*

### I. INTRODUCTION

The idea for establishing a Lawyers Justice Corps emerged out of efforts to solve a problem: how to license lawyers at a time when COVID-19 had expanded the need for new lawyers while also making an in-person bar exam dangerous, if not impossible. We—the Collaboratory on Legal Education and Licensing for Practice<sup>1</sup>—proposed the Lawyers Justice Corps to provide a different and better way of certifying minimum competence for new attorneys while at the same time helping to create a new generation of lawyers equipped to address a wide range of social justice, racial justice, and criminal justice issues. When implemented, the Lawyers Justice Corps will accomplish two critical and related goals: enhancing access to justice and creating an effective and equitable method of licensing lawyers.

This essay begins by outlining the general contours of the Lawyers Justice Corps. It then explains how the Corps will enhance access to justice for the many underserved clients in our society. In a third section, the essay describes the racial injustice perpetuated by the traditional bar exam, as well as the exam's failure to adequately measure lawyer competence. A final section shows how the Lawyers Justice Corps would provide a licensing path that both trains for and better assesses competencies required for law practice. The essay concludes that the time is ripe for multiple alternative licensing paths, including the Lawyers Justice Corps.

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1. The proposal discussed in this essay was developed by the Collaboratory on Legal Education and Licensing for Practice, a group of scholars who have long studied and written about the bar exam, licensing, and legal education. We came together at the very beginning of the pandemic to brainstorm and offer suggestions for how jurisdictions could continue to license lawyers in the face of the COVID-19 pandemic. One of those suggestions was the Lawyers Justice Corps, which remains a critical supplement to licensing and provision of legal services.

## II. THE LAWYERS JUSTICE CORPS

The Lawyers Justice Corps would consist of a cadre of entry-level lawyers choosing to serve underrepresented individuals and communities. Participation in the Corps would be open to recent law school graduates who obtain law-related jobs with organizations serving those individuals and communities. Members of the Corps would commit to working for their organizations for at least a full year. After six months of supervised practice, Corps members certified by their supervisors would then be licensed without taking a bar exam, although they would have to satisfy their state's other licensing requirements, such as passing the Multistate Professional Responsibility Exam (MPRE) and satisfying character and fitness review.

Each state would specify the organizations that qualify for this special licensing path. Some states have experience making such designations: New York, for example, has an approved list of "legal services providers" that it uses for its Pro Bono Scholars program, which permits students to take the bar exam in February of their last year of law school followed by 12 weeks performing pro bono service for the poor in a legal services office.<sup>2</sup> Other states could develop their own lists. Current regulations allowing designation of organizations to supervise student interns (so-called student practice rules) would offer a model, although a Lawyers Justice Corps should focus specifically on organizations providing lawyers for underserved populations, whether serving individual clients or broader community goals, such as combatting racism and other forms of oppression. For example, organizations implementing restorative justice approaches, rather than criminalization, or ones designing eviction-prevention initiatives could qualify.

Qualifying organizations would hire recent graduates using their usual hiring practices and criteria.<sup>3</sup> Participants would begin work shortly after graduation and, for the first six months of their one-year commitment, would practice under supervised practice or internship rules that many states have already adopted.<sup>4</sup> During those first six months, participants would document their work and meet regularly with a supervisor for feed-

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2. N.Y. CTS., PRO BONO SCHOLARS PROGRAM: PROGRAM GUIDE 1 (2014), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/ProBono-Scholars-Program-Guide-2014.pdf>.

3. Law school career services' offices would maintain lists of qualifying organizations. Indeed, many law schools now have a career counselor or center devoted to identifying public service opportunities for students. Equal Justice Works, a national organization that matches law graduates to public service programs, might also assist in developing placements for graduates anxious to participate in the Lawyers Justice Corps.

4. See, e.g., *Temporary Practice Authorization Program*, N.Y. CTS. (July 16, 2020), <https://ad4.nycourts.gov/press/notices/5f10b057104c1f7dbcf4c172>; UTAH SUP. CT., ORDER FOR TEMPORARY AMENDMENTS TO BAR ADMISSION PROCEDURES DURING COVID-19 OUTBREAK 4–8 (2020); Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207 (2015) (surveying and analyzing student practice rules).

back. Supervisors will have a strong self-interest in supervising their Corps members closely, both to protect the organization's clients and because the Corps member literally will practice on the supervisor's license.

If the participant performs competently and in accordance with the state's rules of professional conduct, the supervisor will certify the participant to the bar examiners at the end of that six-month period.<sup>5</sup> Self-interest, once again, will ensure that supervisors certify only competent employees as ready for bar admission: the certified lawyers will continue serving that supervisor's clients for at least another six months. If states want a double-check on supervisor decisions, however, they could hire "graders" to review the participant's portfolio of work, much as they hire graders to read answers to traditional bar exam essays.

At least to start, salaries for Justice Corps members would come from the organizations that hire them. Most organizations hire entry-level lawyers each year; they would simply invite these new hires to choose to participate in the Justice Corps licensing pathway. Participants would receive the same salary that the organization pays to others with their level of experience and licensing status.<sup>6</sup>

Over time, however, the Lawyers Justice Corps might inspire funding for additional positions. Law schools might fund new positions to serve their communities and support graduates interested in public service work. Foundations might also provide funds to enhance access to justice for the most vulnerable members of society while providing a more equitable licensing alternative. Funding could also flow from governmental initiatives, including the current federal infrastructure bill and ongoing efforts to create a "civil Gideon" program that would guarantee a right to counsel for civil proceedings involving housing, health care, and other basic human needs.<sup>7</sup>

### III. ACCESS TO JUSTICE

The need for lawyers working to represent the poor and vulnerable has never been greater.<sup>8</sup> Even before the pandemic, an astounding 80 percent of the legal needs of the poor were going unmet.<sup>9</sup> That translates into millions of low-income individuals being denied legal assistance in matters regard-

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5. The Collaboratory contemplates preparing templates that can be used to evaluate the participant's performance of a variety of professional skills. "Train the trainer" materials may also be developed to help supervisors participating in the program.

6. Some organizations hire unlicensed law graduates as "law clerks," paying them law student wages until they are licensed. Organizations could follow this practice with Justice Corps members, and then raise their salaries to entry-level lawyer salaries after bar admission.

7. See, e.g., H.R. Res. 960, 116th Cong. (2020).

8. See Lyle Moran, *The High Demand for Lawyers Amid the Coronavirus Pandemic*, Am. Bar. Ass'n J. (Mar. 17, 2020, 11:27 AM), <https://www.abajournal.com/web/article/lawyers-and-law-firms-say-they-are-inundated-with-coronavirus-related-queries>.

9. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Sept. 12, 2021).

ing child support, child abuse, domestic violence, foreclosures, and evictions.<sup>10</sup> The pandemic has dramatically worsened this already unacceptable justice gap by generating unprecedented numbers of business closures, job losses, food and housing insecurities, and health care crises.<sup>11</sup> Individuals and families are suffering lost income, diminished savings, and increased needs to care for their children and elderly members; they have fewer resources than ever to purchase legal assistance.<sup>12</sup> Lawyers are essential to assist these clients with questions related to employment loss, loans, health care, insurance disputes, disability benefits, family stresses, and civil rights.

At the same time, our society is facing a long overdue reckoning with racial injustice. Lawyers are needed to challenge racist practices, design new initiatives, and help communities overcome persistent bias. While laws alone cannot solve the persistent and deep-seated problems endemic to our society, enforcing the laws we have and working for legal change is critical to progress, and lawyers are essential to every such effort.

The Lawyers Justice Corps would put recent graduates to work addressing a wide range of such problems. Instead of spending three months and thousands of dollars preparing for and taking the traditional bar exam, these graduates would begin work shortly after graduation and help address the legal problems facing underserved and vulnerable populations, as well as the societal issues challenging our communities. In 2019, almost 2,400 law school graduates took jobs with public interest employers.<sup>13</sup> If all those graduates had participated in a Lawyers Justice Corps, serving clients immediately rather than studying for the bar exam, they would have provided up to 7,200 months—or 600 years—of additional services to poor and disadvantaged clients.

In addition to serving these immediate needs, this new cadre of social justice lawyers would help imbue the profession with an ethos consistent with Rule 6.1 of the Model Rules of Professional Responsibility, which states: “Every lawyer has a professional responsibility to provide legal ser-

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10. *Id.*

11. *See, e.g.,* Mathieu Despard et al., *COVID-19 Job and Income Loss Leading to More Hunger and Financial Hardship*, BROOKINGS: UP FRONT (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/covid-19-job-and-income-loss-leading-to-more-hunger-and-financial-hardship>.

12. *Id.*

13. NAT'L ASS'N FOR LAW PLACEMENT, CLASS OF 2019 NATIONAL SUMMARY REPORT (2020), <https://www.nalp.org/uploads/Classof2019NationalSummaryReport.pdf> (reporting 2,387 graduates in public interest positions). The “public interest” positions in this table include jobs with legal aid offices, other organizations providing civil services to low-income clients, public defenders, and some other nonprofit agencies. *See* NAT'L ASS'N FOR LAW PLACEMENT, JOBS & JDS EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES—CLASS OF 2019, at 159 (2020). Some of these organizations may not address underserved populations, but most of them do. In addition, some of the jobs that NALP characterizes as “government” jobs may fall within the parameters of the Lawyers Justice Corps.

VICES to those unable to pay.”<sup>14</sup> Establishing a Lawyers Justice Corps would demonstrate our profession’s commitment to this objective, encourage Corps members to consider a lifetime of service to the disadvantaged, and prepare those members to offer high-quality pro bono services if they pursue other opportunities after completing their Corps service. The Lawyers Justice Corps, in sum, would expand access to justice, develop a commitment to such access in more lawyers, and facilitate career pathways for lawyers committed to full-time social justice work.

#### IV. LICENSING

Participants in the Lawyers Justice Corps would be licensed after six months of supervised practice, rather than after taking and passing the traditional bar examination. This alternative licensing pathway is important for two related reasons: it provides a more responsible and realistic measure of minimum competence to practice law, and it responds to the institutional racism endemic to the traditional bar exam.

The racial injustice of the bar exam, both as designed and as implemented, reflects a long and unfortunate history of exclusion by the legal profession. The bar exam was originally adopted and designed to keep the profession elite and was later deployed to keep out minorities and other so-called “undesirables” at a time when the expansion of law schools admitting lower income and immigrant applicants threatened to make the profession more inclusive.<sup>15</sup> The history of the American Bar Association is also rife with overt efforts to limit minorities from access to the profession.<sup>16</sup> A particularly blatant example arose in 1912 when the ABA inadvertently allowed three black men to become members. When the “mistake” was discovered, the ABA passed a resolution stating, “That, as it has never been contemplated that members of the colored race should become members of this association, the several local councils are directed that, if at any time any of them shall recommend a person of the colored race for membership, they shall accompany the recommendation with a statement of the fact that he is of such a race.”<sup>17</sup> It wasn’t until 1943 that the ABA resolved not to condition membership upon race, but it took another twenty years for the ABA to formally change its official policy and admit attorneys without consideration of race or religion.<sup>18</sup>

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14. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS’N 2019).

15. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); See R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935-1975*, 109 AM. J. EDUC. 320, 330-31 (2001); See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003).

16. J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table”*, 71 FORDHAM L. REV. 1257, 1274 (2003).

17. *Id.* at n.86.

18. *Id.* at 1275.

No one disputes that the bar examination itself has disparate outcomes.<sup>19</sup> A study conducted by Linda Wightman for the Law School Admissions Council in 1998 documented the disparity, showing eventual pass rates of 77.6 percent for Black candidates, 79.7 percent for Puerto Rican candidates, 82.2 percent for Native American candidates, 88.4 percent for Mexican American candidates, 89.0 percent for Hispanic candidates, 91.9 percent for Asian candidates, and 96.7 percent for White candidates.<sup>20</sup> Two recent studies—one in New York and another in California—demonstrate continuing disparate impact in outcomes.<sup>21</sup>

The effect of that disparate outcome is exacerbated by the selection of passing scores (also called cut scores), which has been shown to have an exclusionary impact on applicants of color.<sup>22</sup> The California study looked at more than 85,000 examinees who sat for 21 administrations of the California bar from 2009–2018.<sup>23</sup> That approach enabled the results to include “never-passers” over a longitudinal period. The study concluded that “maintaining a high cut score . . . result[s] in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites.”<sup>24</sup> The study pointed out that when a state chooses its cut score, it is choosing the profession’s racial and ethnic makeup.<sup>25</sup> Let’s be clear what that means—if California had selected a lower cut score, it would have a significantly increased number of minority lawyers practicing in the state today.<sup>26</sup>

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19. See, e.g., Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem and Affirmative Action is Not the Answer*, 24 STAN. L. & POL’Y REV. 379, 405 (2013) (“Almost all would agree that the individual state bar examinations act as a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys”); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 381–83, 508–10 (2004) (discussing studies showing white applicants’ bar passage rates were 30 percent higher than black applicants’ bar passage rates).

20. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 32 tbl.10 (1998).

21. See RESEARCH DEP’T, NAT’L CONF. OF BAR EXAMINERS, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK 149 tbl.4.2.16 (2019); *id.* at 166 tbl.4.2.24; *California Bar Exam Statistics*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics> (last visited Apr. 23, 2020). Many states do not collect data on race and ethnicity, but the consistent pattern of disparate outcomes across test administrations makes it likely the same results would be found in each state.

22. Mitchel L. Winick, Victor D. Quintanilla, Sam Erman, Christina Chong-Nakatsuchi & Michael Frisby, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, SSRN 2 (Oct. 15, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3707812](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707812).

23. *Id.*

24. *Id.*

25. See *id.* at 3.

26. In July 2020, California reduced its score from 1440 (the second highest in the nation) to 1390. Alex Andonovska, *California Permanently Lowers Bar Exam Score, Sets Online Exam for October*, JD JOURNAL (July 23, 2020), <https://www.jdjournal.com/2020/07/23/california-permanently-lowers-bar-exam-score-sets-online-exam-for-october>.

The disparate racial impact of the bar exam is consistent with the results of many other standardized, high stakes exams. The work of Catherine Reinis Lucey and Aaron Saguil documents the problem in the context of the MCAT, which plays a large role in medical school admissions.<sup>27</sup> That work attributes the difference in scores on the MCAT to differences in opportunities, not aptitude.<sup>28</sup> They point to “the widespread consequences of structural racism on economic success, educational opportunity, and bias in the educational environment.”<sup>29</sup>

If the examination and the choice of cut score were shown to be sufficiently connected to public protection—if it ensured actual competence of new attorneys and reduced the occurrence of ethical violations—the disparate impact might be tolerable, but in fact the bar examination provides neither a reliable measure of competence nor does it correlate with disciplinary actions. The California study documented that a lower cut score (like the score required in Minnesota) does not increase the likelihood of ethical complaints.<sup>30</sup> What makes the disparate racial impact of the bar exam even more unacceptable is that the exam does not fulfill its alleged purpose—to measure competence to practice law. There are a host of defects that have been identified in the current bar exam.

First, the bar exam fails to measure the full range of skills lawyers need. Bar examiners acknowledge this but have long claimed that those “other” skills cannot be measured by a cost-effective examination process.<sup>31</sup> But the NCBE has recently announced that it is designing a next generation bar exam that will indeed test skills such as legal research, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management.<sup>32</sup> While that is a welcome development, the testing of skills is still to be done using methods such as multiple-choice questions that test knowledge about skills more than application of the skills themselves. Moreover, the NCBE predicts that it will take between four and five years to prepare the new exam, presumably leaving the traditional bar exam in place in the interim. In sharp contrast, the Lawyers Justice Corps offers an immediate boots-on-the-ground

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27. Catherine Reinis Lucey & Aaron Saguil, *The Consequences of Structural Racism on MCAT Scores and Medical School Admissions: The Past is Prologue*, 95 ACAD. MED. 351, 351 (2020).

28. *Id.*

29. *Id.*

30. Winick, *supra* note 22, at 29.

31. NAT'L CONF. OF BAR EXAMINERS, RESPONSE BY NCBE TO THE NYSBA TASK FORCE REPORT 3–4 (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F275>.

32. NAT'L CONF. OF BAR EXAMINERS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF BAR EXAMINATION 4 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf>.



approach focused on applying skills as well as knowledge as soon as the participant graduates from law school.<sup>33</sup>

Second, the bar exam rewards speededness and memorization, neither of which is desirable in practice. Speededness refers to standardized tests with time limits that keep substantial numbers of examinees from fully considering all test items.<sup>34</sup> Unless speed of responding is something that is meant to be tested, speededness threatens the validity of test scores as a measure of competence.<sup>35</sup> We do not want newly admitted lawyers—or any lawyers—to race through their assignments. Nor do we want lawyers to rely on memory instead of verifying answers. Studies consistently demonstrate that memorization has little importance in law practice.<sup>36</sup>

Third, even when the bar exam purports to test knowledge, critical analysis, and issue spotting, it does so mostly in a non-contextual, highly artificial way, bearing no resemblance to how problems arise in actual practice.<sup>37</sup> The only, but limited, exception is the Multistate Performance Test, which at least asks applicants to read relevant material, then analyze a problem and write a discussion or argument, something lawyers do regularly.

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33. Indeed, this 4-5 year period during which the NCBE will develop its NEXTGen bar exam is an ideal time for jurisdictions to experiment with multiple alternative licensing plans, such as a clinical pathway, see Claudia Angelos, Andrea A. Curcio, Marsha Griggs & Deborah Jones Merritt, *Clinical Education – A Safe and Sure Pathway to Law Licensure*, BLOOMBERG L. (Jul. 8, 2020, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-clinical-education-a-safe-and-sure-pathway-to-law-licensure>; or other supervised practice pathways, see Deborah Jones Merritt, Marsha Griggs & Patricia Salkin, *Courts Should Look to 3 Bar Exam Alternatives During Crisis*, LAW360 (Apr. 23, 2020, 4:04 PM), <https://www.law360.com/articles/1266791/courts-should-look-to-3-bar-exam-alternatives-during-crisis>; *Utah State Bar Diploma Privilege Resources*, UTAH DIPLOMA PRIVILEGE, <https://utahdiplomaprivilege.org> (last visited Sept. 12, 2021); or a version of New Hampshire's acclaimed Daniel Webster program, where students take a rigorous law school-based program in which they are trained in and perform the full range of lawyering skills and are assessed by bar examiners and professors, see *Daniel Webster Scholar Honors Program*, UNIV. OF N.H., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> (last visited Sept. 12, 2021).

34. Ying Lu & Stephen G. Sireci, *Validity Issues in Test Speededness*, 26 EDUC. MEASUREMENT: ISSUES & PRAC. 29, 29 (2007).

35. *Id.*

36. See DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 24–25 (2020) (members of focus groups agreed that memorization was “a bad way to practice law” or “malpractice”); Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE L. REV. 321, 325 tbl.4 (1973) (only 4% of surveyed lawyers reported that memorization of legal concepts was essential to their practice); Deedra Benthall-Nietzel, *An Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education*, 63 KY. L.J. 373, 384 tbl.8 (1974) (lawyers placed “memorizing legal concepts” last on a list of 30 knowledge areas and skills needed for their practice). As lawyers gain experience, they may rely more extensively on memory. MERRITT & CORNETT, *supra*. That “experience-based memory,” however, plays no role in the work of entry-level lawyers. Raw memorization of legal principles, these studies confirm, is not part of the minimum competence needed for law practice. On the contrary, it can lead to mistakes.

37. Eileen Kaufman, Andi Curcio, & Carol Chomsky, *A Better Bar Exam – Look to Upper Canada?*, L. SCH. CAFE (July 25, 2017), <https://www.lawschoolcafe.org/author/eileen-kaufman-andi-curcio-and-carol-chomsky/>.

But even that portion of the exam suffers from speededness, rewarding work done too rapidly compared to normal legal work.

Fourth, the existence of this deficient bar exam inappropriately drives a host of decisions within law schools, including who gets admitted (only those with a track record of high scores on standardized tests), what gets taught (a focus on subjects heavily tested on the bar exam), and how we assess (increased use of multiple-choice exams). In jurisdictions that have adopted the Uniform Bar Exam, the result is that schools are offering fewer and fewer courses on state and local law, and instead preparing students for an exam that tests the “law of nowhere.”<sup>38</sup>

The flaws of the bar exam reinforce the value of alternative licensing through a Lawyers Justice Corps. Why waste months studying for an exam that fails to measure the range of competencies lawyers need when those months could (and should) be spent working with clients to prevent evictions, access public benefits, challenge conditions of confinement, and address the escalating legal needs resulting from the pandemic?<sup>39</sup>

It is more than merely a matter of wasted time. Bar preparation occurs at a time when many debt-ridden law graduates are literally going hungry because they cannot or should not work while studying for the bar exam. They have ceased receiving student loan payments to live on and must begin repaying those loans while earning no income. Getting graduates to work through a Lawyers Justice Corps would help them survive financially. And if they stay in such work for a decade after graduation, they would be eligible for public service loan forgiveness!

## V. A BETTER MEASURE OF MINIMUM COMPETENCE

The Lawyers Justice Corps will assess new lawyers based on six months of daily practice of what lawyers actually do, rather than on two days of standardized testing of knowledge divorced from the realities of legal practice—knowledge that will be quickly forgotten. Graduates pursu-

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38. N.Y. STATE BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE NEW YORK BAR EXAMINATION 59–61 (2020), <https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-the-New-York-Bar-Examination-April-2020.pdf>.

39. A recent example of students using the time they would have spent preparing for the bar exam to address issues of racial justice occurred in Oregon, which temporarily granted diploma privilege to 2020 law graduates. A group of twenty law graduates used the freed-up study time to examine jury selection rules. They established a racial justice task force that extensively studied Oregon's jury selection rules. Ultimately, they authored a forty-page report calling for an overhaul of the state's jury selection rules. Dean Brian R. Gallini of Willamette University College of Law observed that “the group relied on skills that are more relevant to the practice of law than the ability to memorize information and pass a multiple-choice test – skills such as legal research, critical thinking, attention to detail, debate, and collaboration. This project offers early and arguably incontrovertible evidence that there are better ways than the current version of the bar exam to measure minimum competency for purposes of admission into the legal profession.” Brian R. Gallini, *Rethinking the Bar Exam for Good*, BLOOMBERG L. (Apr. 27, 2021, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/rethinking-the-bar-exam-for-good>.

ing this licensing path will receive regular feedback and assessment as they serve clients. This pathway ensures a rigorous, real-world test of lawyer competence.<sup>40</sup>

This type of licensing, based on real-world practice, is consistent with a recent groundbreaking research project entitled “Building a Better Bar: The Twelve Building Blocks of Minimum Competence.”<sup>41</sup> This national project, sponsored by the Institute for the Advancement of the American Legal System (IAALS), with Ohio State University Professor Deborah Merritt acting as the principal investigator, identified the skills and knowledge that distinguish minimally competent lawyers from individuals who lack that competence. It is impossible to determine whether a licensing system is effective without first defining minimum competence, a goal that the NCBE has not yet reached.

To construct a definition of minimum competence, the IAALS researchers gathered information on what new lawyers did in their first year of practice; on what they needed to know; and on what skills were required. A diverse research team conducted fifty focus groups in eighteen different areas of the country; those groups included two hundred new and supervisory attorneys from varied practice settings. From this data, the researchers developed an empirically based definition of minimum competence that consists of twelve interlocking components, which they called building blocks:

The ability to act professionally and in accordance with the rules of professional conduct:

- An understanding of legal processes and sources of law;
- An understanding of threshold concepts in many subjects;
- The ability to interpret legal materials;
- The ability to interact effectively with clients;
- The ability to identify legal issues;
- The ability to conduct research;
- The ability to communicate as a lawyer;
- The ability to see the “big picture” of client matters;
- The ability to manage a law-related workload responsibly;
- The ability to cope with the stresses of legal practice; and
- The ability to pursue self-directed learning.<sup>42</sup>

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40. See Claudia Angelos, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence>.

41. *Building a Better Bar: Capturing Minimum Competence*, IAALS, <https://iaals.du.edu/projects/building-better-bar-capturing-minimum-competence> (last visited Sept. 9, 2021).

42. MERRITT & CORNETT, *supra* note 36, at 3.

The researchers then considered how licensing authorities could best assess these competencies. Their report offers ten recommendations for designing a just licensing system that effectively measures lawyer competence. Those recommendations include:

- eliminating exclusive reliance on written exams because those exams test only about one-half of the competencies new lawyers need;
- limiting the use of multiple-choice tests because they are inconsistent with the cognitive skills that lawyers use in practice;
- replacing essay questions with performance tests that allow for assessment of the candidate's understanding of legal processes and sources of law, ability to interpret legal materials, and other building blocks;
- substituting open-book written exams for closed-book exams to better replicate the type of recall, research, and rules application that lawyers use in the real world;
- providing more time to answer written questions because new lawyers should work carefully, taking time to check and reflect;
- requiring candidates to complete courses on client interaction, negotiation, and the lawyer's role as a public citizen having special responsibility for the quality of justice; and
- requiring candidates to complete closely supervised clinical work before graduation.<sup>43</sup>

Notably, this evidence-based report suggests that *all* candidates for bar admission should complete supervised clinical work before obtaining a license. That type of work, the researchers concluded, is the only way to develop and assess several of the building blocks that new lawyers need to display minimum competence.<sup>44</sup> The Lawyers Justice Corps builds on that recommendation by creating a licensing path that consists of six months of closely supervised practice.<sup>45</sup> The Corps also incorporates the suggestion that candidates for bar admission should study the “lawyer’s role as a public citizen having special responsibility for the quality of justice.”<sup>46</sup> Corps members will not just study that responsibility—they will live it.

The *Building a Better Bar* report offers a path-breaking blueprint for jurisdictions to follow in order to create a licensing system truly linked to

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43. MERRITT & CORNETT, *supra* note 36, at 71–77.

44. MERRITT & CORNETT, *supra* note 36, at 75–76.

45. The *Building a Better Bar* report expresses some concern about the quality of supervision offered in some workplaces; the authors note that law school clinics may offer closer supervision for new lawyers. MERRITT & CORNETT, *supra* note 36, at 67–68. The Collaboratory, however, is designing templates and “train the trainer” materials to address these concerns. States creating a Lawyers Justice Corps pathway to licensure, moreover, could make participation in a law school clinic a prerequisite for admission to the Corps. This would assure that candidates develop the foundational skills needed to benefit from supervision and feedback in practice.

46. MERRITT & CORNETT, *supra* note 36, at 75.

the competencies required in practice. The report's recommendations also offer the possibility of reducing the racial exclusion perpetuated by the current bar exam. The current exam disadvantages candidates of color through its time demands, expense, and the effects of stereotype threat. A licensing path that allows candidates to prove their competence while serving real clients is less likely to impose disproportionate racial barriers. On the contrary, this licensing path may illuminate the many talents that candidates of color and others with less privileged and traditional backgrounds bring to the profession.<sup>47</sup>

## VI. CONCLUSION

A Lawyers Justice Corps as a means of licensing is fully consistent with the insights provided by *Building a Better Bar Exam*. It substitutes actual practice for the far more artificial written exam that only attempts to replicate the work of actual practicing lawyers. The Lawyers Justice Corps is a true performance test that doesn't require extrapolating from written answers to hypotheticals in order to assess whether the candidate can competently do the actual job that lawyering requires.

In addition to serving as a more effective way to assess minimum competence, the Lawyers Justice Corps would also play a part in addressing inequality by supporting new lawyers working with organizations that serve underrepresented clients and populations in urgent matters regarding basic human needs, while avoiding the institutional racism of the bar exam by providing an alternative pathway to licensure.

While the Lawyers Justice Corps might start as a small pilot in states willing to embrace innovation, it could prove critically important as a permanent alternative licensing option. A model program created in one state could be replicated elsewhere and would provide a more accurate way to license new lawyers that would serve the public while playing a key role in dismantling the status quo.

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47. Cf. Brad N. Greenwood, Rachel R. Hardeman, Laura Huang & Aaron Sojourner, *Physician–Patient Racial Concordance and Disparities in Birthing Mortality for Newborns*, 117 *PROC. NAT'L ACAD. SCI.* 21194, 21195 (2020) (finding that Black physicians are more effective than White physicians in reducing mortality rate among Black newborns).