AN ALTERNATIVE MODEL TO UNITED STATES BAR EXAMINATIONS: THE SOUTH AFRICAN EXPERIENCE IN LICENSING ATTORNEYS

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INTRODUCTION

This article examines how attorneys are licensed in South Africa to see if the system used there can provide guidance to jurisdictions in the United States that are considering proposals to reduce or eliminate the importance of bar examinations and to replace them with practical training requirements. The analysis set out here is supplemented by a companion article that provides a picture of the South African system through a first hand account by Ms. Thuli Mhlungu, who was educated and sought admission to the bar during the last years of apartheid and the early years of the new democratic regime.1

Examining the situation in South Africa makes particular sense because it is a country that: (1) has always required some form of practical training prior to admission as an attorney; (2) expanded the way to fulfill the practical training requirement ten years ago to include a key alternative being considered here – community service apprenticeships; and (3) suffers from similar societal problems as the U.S. such as under-representation of people of color within the legal profession and inadequate resources to provide access to justice for indigent persons.

An analysis of the South African experience must begin with a description of its legal system, the racial composition of its bar, and the various ways it allows law graduates to meet the practical training requirement. In contrast to the unified system in the U.S., South Africa follows the British system of a divided bar between attorneys and advocates. The former who constitute approximately eighty-seven percent of the profession2 represent clients in all aspects of legal practice including trials in the lower courts. Advocates, who are “briefed” by attorneys usually, appear before the Supreme...
and Constitutional Courts. However, the functions of the divided bar are gradually merging.3

Under-representation of people of color exists in both countries4 but is more pronounced in South Africa which is only nine years removed from the end of apartheid. Thus, about eighty-five percent of the legal profession in South Africa is white5 although this is rapidly changing, in a county in which eighty-five percent of the population is Black.6

With regard to the practical training requirement, it had always been true in South Africa that law school graduates had to complete two full years of “articles of clerkship” (An apprenticeship to an experienced practicing attorney) before being admitted to the profession.7 Then in 1993, the last year of the transition period leading to the election of Nelson Mandela as President, additional methods were created to fulfill this requirement. Most germane to this article are the exemptions to the two-year requirement that allows admission upon the completion “to the satisfaction of... [the appropriate provincial law society] of a four-month course at an approved practical training school and one year of community service; or two years of community service.8 For the post-apartheid government, these provisions are crucial because they provide Black law graduates with a method to satisfy the practical experience requirement other than the extremely rare occurrence of securing articles in white law firms. The post-apartheid government was presented with a second pressing need to expand the community service option after both the Interim Constitution9 (1993) and the final Constitution10 (1996) provided that indigent criminal defendants had the right to counsel “if their rights would otherwise be substantially deprived”.11 This created a crisis in the government-funded legal aid system since there was a 709% increase in demand for indigent representation in the 1990’s, primarily in criminal cases.12

Thus, although South Africa has a divided bar, its racial history plus its utilization of community service apprenticeships as one way to satisfy admission as an attorney

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3 The Right of Appearance in Courts Act No. 62 of 1995 provides that attorneys with three years experience may apply for the right of appearance in the Supreme and Constitutional Courts.
5 MCQUOID-MASON, supra note 1 at S120.
6 In mid-year 2003, the population for South Africa is estimated to be 46.4 million. Africans are in the majority (nearly 36.9 million). These estimates have been derived using Census dated reported in 2003.
7 Attorneys Act 53 of 1979 (1979) (S.Afr.).
8 Attorneys Amendment Act 115 of 1993, Sec 2.
11 Id. s. 35
12 MCQUOID-MASON, supra Note 4 at S120.
make it a particularly appropriate case study for jurisdictions in the U.S. who are contemplating making a change to their system of admission to the bar. This is so because state bar examiners here are generally trying to meet the same three objectives as the South African system: providing law graduates with an opportunity to learn practical legal skills that are minimally covered in most legal education; improving access to the profession for members of previously disadvantaged groups; and expanding access to justice for the indigent.

The remainder of this article examines key issues jurisdictions in the U.S. will face if they try to institute a parallel system here. Foremost among these is consideration of the degree to which each of the benefits sought in South Africa -- better prepared lawyers, increased access to the profession, and expanded legal services to the indigent -- are obtainable here. The analysis relies upon Ms. Mhlungu’s story, which is particularly instructive because it includes a vivid description of what has and has not worked in both the original system of two years of articles in a firm that she personally experienced, and the new system of community apprenticeships that she helps administer in her position as Deputy Director of the University of Natal Campus Law Clinic.13 The recommendations and conclusions at the end of the article recognize that while the decision must be left to each jurisdiction, it is hoped that they will think creatively and experiment with different ways to achieve the potential benefits of a revised system of admission to the bar.

**SOUTH AFRICAN COMMUNITY SERVICE APPRENTICESHIP: A POSSIBLE MODEL FOR THE UNITED STATES?**

The primary critique of the United States system for bar admission is that it does not require applicants to receive any practical training before being permitted to practice law.14 This contrasts sharply with the medical model that requires medical school graduates to serve as interns and often residents at a teaching hospital before being allowed to practice medicine on their own. More specifically, bar examinations in the United States, which other than a character review are the sole requirement for becoming a lawyer in most jurisdictions, have been criticized on three grounds: they fail to test the skills needed to practice law,15 do not focus on the full spectrum of legal knowledge which has a limiting effect on law school curriculum,16 and exclude a disproportionate percentage of minority law graduates from becoming members of the bar.17 As a result

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13 Again footnote Thuli’s article
14 At most United States law schools, students are not required to take any skills or clinical courses focusing on how to effectively represent clients.
16 This concern is based on the belief that law students choose their courses in part based on what will be tested on the bar, thus often neglecting courses designed to teach practical skills required or courses related to social justice issues such as environmental law, poverty law or civil rights. See Joan Howarth, Teaching in the Shadow of the Bar, 31 UNIV SAN FRAN L REV 927 (1997).
17 A six-year study indicates that first-time bar examination pass rates in the U.S. are 92% for white, 61% for African Americans, 66% for Native Americans, 75% for Latino/Latina and 81% for Asian Americans. In addition, a larger percentage of African-American applicants who failed on the first attempt did not
of these concerns, pilot projects to test alternatives to the bar examinations are being explored in several jurisdictions.\(^{18}\)

The South African system of public service apprenticeships described in part one provides an alternative route to bar admission that at least at first glance meets each of these criticisms of bar exams in the U.S. In addition, since these apprentice attorneys do provide public service, they help meet one of societies other pressing needs of providing greater access to justice for indigent clients. On the other hand, as was so well described above, the model used in South Africa has serious potential pitfalls in its implementation, primarily in the varying quality of training provided to the candidate attorneys.\(^{19}\) Also, such a system has the potential to replicate the effects of racism and sexism found elsewhere in society and requires extensive resources to pay for both the apprentices and their supervisors.

This part will consider each of the major benefits of replacing the U.S. bar examinations with a public service internship requirement and also the potential problems such a change must solve. At the end are recommendations for the type of research and experimentation that should be undertaken to find solutions to these problems.

**Education and Training**

There is a type of circular connection, even a classic chicken and egg question, between the bar examination and the predominant mode of education in most law schools. Thus the former normally tests for what is currently taught in law schools, i.e., substantive law, legal analysis, and legal ethics, and law school curriculum emphasizes those subjects that are tested in the bar examination. Admittedly, many law schools do now offer a wider variety of subjects, including some in practical skills, but it is normally left to each student whether they will enroll in skills courses or clinical opportunities.

The MacCrate Report and other studies argue that U.S. law graduates do not have the skills and training to represent clients upon graduation from law school.\(^{20}\) Some of the biggest gaps pointed out in that report are a lack of basic lawyering skills, including legal research, writing, drafting, client interviewing, counseling, negotiation, and trial skills. These studies have been used to encourage changes in law school curriculum to provide more skills training and an increase in clinical legal education opportunities.

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\(^{18}\) For a description of the New York project see Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COL. L. REV 1696 (2002). For information on Arizona’s Community Legal Access Bar Alternative (CLARA proposal, see [www.law.arizona.edu/depts/claba/](http://www.law.arizona.edu/depts/claba/)).

\(^{19}\) There has been very little written about the training of candidate attorneys in South Africa and it is therefore particularly helpful to have Ms. Mhlungu’s perspective on her own clerkship experience as well as her experience in training candidate attorneys doing community service at the University of Natal law Clinic in preparation for admission to the bar.

Legal educators, however, are undecided about whether it should be their responsibility to include practical lawyering skills as part of the standard curriculum or whether they should continue to rely on “on the job training” to complete that task. One factor favoring proponents of the present system is that many law graduates never practice law. They also, I believe incorrectly, follow a model that assumes that law firms will train their new associates with the skills they need for legal practice.

Comparing legal education in South Africa to that in the U.S., the similarities are striking. While there are differences in the advocacy system described in the introduction and there is a much heavier reliance on the case method of teaching in the U.S.,\(^\text{21}\) nevertheless both have English common law roots and both emphasize substantive knowledge over practical legal skills. As Ms. Mhlungu states, “when I graduated from law school I was unprepared to practice law.” As the MacCrate report recognizes, the same is true of U.S. law graduates. Therefore, a major benefit of a post-graduate internship (or clerkship) as opposed to the bar examination, is it will teach the practical skills needed to enter the profession. While there may be fear that by substituting such a requirement for the bar exam, jurisdictions will not thereby be assured that applicants have the substantive knowledge needed to be a practicing attorney, that assurance should come from the fact that law schools had already tested to make sure this knowledge was obtained through their courses. Indeed, the common expectation when I took the bar exam was that we all would forget what we had crammed into our heads for the exam the next day. If we needed to know a particular area of substantive law, we would simply do the necessary research. The difference between the two systems now is that South Africa recognizes in its clerkship requirement, that what is needed for admission to the bar is the learning of skills not required for law school graduation but needed for practice as an attorney.\(^\text{22}\)

South Africa has also recognized that many of the skills needed for legal practice can be taught in the classroom as well as through clerkships. For this reason, South Africa has established the Practical Training Schools, described in part two, so that law graduates can spend four months full-time at a school before beginning their apprenticeships, thus decreasing by one year the amount of time spent as a candidate attorney. As Ms. Mhlungu points out, however, the Practical Training Skills course may fail to accomplish its goals because the curriculum is often taught through traditional classroom methods.

In the United States we have discovered in our law school clinics that it is more effective to integrate classroom work with a clinical experience. Law students, whether participating in an in-house clinic or an externship with a legal office, will participate in a seminar usually taken contemporaneously. The seminar will have readings, usually a

\(^{21}\) The case method requires law students to read appellate court cases to be able to discuss them in class.

\(^{22}\) The South African model does not do away entirely with a bar examination. A four part examination is still required for admission to the bar. However, these four parts are focused on knowledge needed for law practice, rather than the knowledge of legal rules, and the exam may be taken in parts while doing community service. Therefore, the South African bar applicants are being taught what they need to know for the bar exam through their practical experience and there is less chance that they will give up on the profession if they fail a portion of the exam and have to retake it.
journal requirement, and sometimes an examination, and will focus on ethical, substantive and skill issues in the student’s legal practice and have students reflect on their experiences and draw lessons from them. It may be useful to incorporate a classroom component in U.S. apprenticeship alternatives to the bar examination, in which an attorney-professor will monitor the effectiveness of the internships and build on the knowledge learned on the job through discussion and reflection on the experience. The Arizona and New York pilot project proposals incorporate some classroom components.

**Access to the Profession**

Another major reason for considering alternatives to the United States bar examinations has been studies that show that disproportionate numbers of African-American and Latino law graduates fail the exam thus creating a formidable obstacle to their access to the profession.  

Historically in South Africa, as part one describes, the exclusion of qualified Black candidates from the profession was achieved primarily through the clerkship requirement. Thus, few Black law graduates ever became attorneys because of their inability to find articles in the white firms that constituted all but a fraction of the legal profession there. In part for this reason, the amendments to the Attorneys Act 53 of 1993 established the alternative route to admission of graduation from a four month Practical Training School and a one-year clerkship of community service or two years of community service. The reasoning was that many more Black attorneys would be able to satisfy the community service requirement through campus law clinics, Legal Aid Board justice centers and public interest law firms than through articles with private firms. This in fact seems to be working in South Africa, and thus there is reason to believe it will have a similar effect here.

To make such an alternative work in this country, various concerns will have to be addressed. For example, the method for choosing those who participate in this program and the compensation provided to them will have to be done in a manner that does not exclude prospective attorneys based on race or wealth. Wealth is a factor because law graduates with high debt might not be able to spend a year at a low-paid clerkship (the Arizona model) or three months with no pay (the New York model). Indeed, law graduates in the United States and South Africa who are either overloaded with debt upon graduation and/or feel the pressure of providing resources to their extended family, are under great pressure to take the highest paying jobs possible, often those at large corporate firms. Yet these are the students who may most need such an alternative because low income and part-time law graduates usually work part or full-time during law school and therefore have no, or only limited opportunity, to participate in a law school clinical program. Race becomes a factor because it is likely that a higher percentage of minority law graduates will be in the lower-income group. It therefore will be necessary to compensate interns adequately and either partially forgive law

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23 Supra Note 50.
24 There still seems to be a problem for black law graduates who still want to do articles in private law firms.
25 While I have no data on the debt of law graduates by race, there is significant data on the higher poverty levels among black and Hispanic people in the U.S. population.
school debt as a result of their community service or at least suspend payments and the accumulation of interest during that period. In that way, participants will at least be in no worse financial shape than when they graduated from law school.

A second issue concerns how private law firms will view job applicants who have completed a public service internship as an alternative to a bar examination. If some applicants can still take the bar and therefore be available more quickly, they may be more desirable to firms. Also, it is unclear how corporate firms and corporation law departments will view applicants who have worked in a public interest setting. The result could be the segregation in terms of future employment by following of law graduates who choose different ways to obtain admission. The solution may be to make community service mandatory similar to the requirement to serve as an intern for medical school graduates.

As Ms. Mhlugu points out, in South Africa with its Black dominated government and its growing Black economic elite, there are financial and legal considerations, such as access to government contracts that put pressure on South African firms to employ Black law graduates, including those with public interest backgrounds. The same financial incentives do not exist in the U.S., and there are no employment equity requirements here equivalent to those in effect in South Africa. There also are no requirements that private law firms provide pro bono or community service. The result is that careful consideration and further study are necessary to insure that a community service alternative for admission to the bar actually does increase representation of people of color in the profession.

A third issue in the United States that requires further thought is what would happen to attorneys who have been admitted in one jurisdiction and then want to move and practice in another state. In South Africa, attorneys moving from one province to another, each with their own law societies, are granted reciprocity in admission to the local provincial bar. In the United States currently most states give reciprocity to attorneys moving from another state or ask them to take a limited bar examination focusing on the state courts and procedure of the new jurisdiction. U.S. attorneys admitted to the bar through an apprenticeship route would have the skills to practice in other states and should be given reciprocity. Similarly to the present system, a state could ask the attorney to take a limited examination on state courts and procedure.

Access to Justice

A third area of benefit brought about by the public service clerkships in South Africa is the improvement in the access to justice for disadvantaged members of society. This has been achieved in two ways. First the new system has increased the number of attorneys who are exposed to poverty law and development needs and who are educated as to how provide representation on these issues. Indeed, a large number of candidate attorneys trained in public interest law firms in South Africa, continue to work in legal aid and public interest law after their admission to the bar.

Likewise, providing an

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26 Programs to forgive law school debt for attorneys in public interest practice already exist in some law schools and with some public interest law entities. (cite references).

27 "Approximately 45% of LRC graduates have entered into careers focusing on public interest, working for public interest law organizations, human rights groups, government agencies, and even the judiciary. The rate at which our graduates chose cases in some fields of public interest law exceeds that of other
alternative to the bar examination through public service internships will expose more U.S. law graduates to the needs and problems of people who are poor. It will also allow these graduates to explore whether they want to pursue public interest careers after admission to the bar or take on pro bono cases in private practice settings.

Second, because in both the U.S and South Africa there are many more indigent people in need of legal representation than there are free lawyers to represent them, a system of community internships will greatly increase the legal resources available to this segment of society. The result would be the creation of more equality in the legal system and the reduction of cynicism and hopelessness amongst this class of people. The major obstacle to this result is funding.

In South Africa the Legal Aid budget has grown from 35.2 million Rand in 1991-1992 to 312 million Rand in 2001-2002. The move away from the judicare system to a staff attorney model in providing free legal services has meant the creation of many new legal aid justice centers and the hiring of experienced attorneys who can act as principals to candidate attorneys. The University Law Clinics have also received major funding from foreign donors to provide free legal services and train law students and candidate attorneys. Nevertheless, even with these new sources, the legal system in South Africa is still straining to adequately fund the community internships.

At present in the U.S., there are woefully inadequate resources available to provide civil legal services to the poor. Creation of a public interest internship program will greatly reduce the person power problem but will require considerable additional funding since we can not expect the existing human and capital resources of legal aid and public defender programs to absorb the vast number of new interns.

**Other Problems Revealed by the South African System**

The benefits of a postgraduate clerkship system described above argue convincingly for the adoption of a similar system in the U.S. despite all the obstacles that will have to be overcome. The South African experience demonstrates, however, that the system of internships must be carefully regulated to insure that its objectives are met. While one can argue as to how well passage of a bar examination indicates that a law graduate is ready to practice law, that does not diminish the fact that under the system being promoted here, jurisdictions will be relying on experienced attorneys to provide that assurance.

There are several requirements in South Africa to try to insure that the training of candidate attorneys is of a high quality. The first is that attorneys must have practiced for three years to be qualified to act as principals for candidate attorneys. Second, South

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28 Comparable program in South Africa. lrc website.

29 Insert reference to legal needs studies.


30 While there are more funds for criminal representation for indigent defendants, since there is a Constitutional Right to counsel, many states have started to charge defendants a fee for representation by a public defender. In Minnesota, for instance, this fee varies from $50 to $200 depending on the type of case.

31 As previously noted, South Africa does require candidate attorneys to also pass a four paper bar examination in order to practice. The Attorney’s Admission Examination, however, tests only the practical aspects of legal practice. For instance Paper 4 tests Attorney’s bookkeeping and Paper 3 tests professional ethics. Law Society of South Africa, The Attorney’s Admission Examination (2003 Issue).
Africa requires principals and candidate attorneys to sign a Contract of Clerkship\(^{32}\) setting forth the duties and responsibilities of both parties including the legal skills that must be taught. And third, a principal may only have three candidate attorneys articling with him at one time in order to provide for adequate time for supervision\(^{33}\).

The main problems in the South African system are in its implementation rather than its concept. This was graphically portrayed in Ms. Mhlungu’s account of her experience when she describes how in her first clerkship, she had to learn basic lawyering skills through trial and error with almost no supervision. The result was that she felt inadequate to do complicated litigation and instead sought to learn how to do transactional work. In her second clerkship experience, Ms. Mhlungu received regular feedback on her work but felt devalued as a person. This resulted in her loss of confidence and made her less able to perform at her best. In sum, her experience shows that in addition to Black attorneys being denied access to certain clerkships, there are problems with principals not fulfilling the terms of the clerkship contracts.\(^{34}\) Supervision requires skill, interest and a large commitment of time by each principal, and as Ms. Mhlungu indicates, the quality of supervision differs greatly depending on the principal responsible.

What is missing in the South African system is systematic monitoring of the clerkship system by the law societies who have the responsibility for the admission of attorneys to the bar. The result there is that the system is open to problems of racism, sexism and poor supervision with candidate attorneys in some cases being exploited as low-cost labor without receiving proper training. Creative solutions will have to devised here to avoid similar results. The establishment of law centers at universities described in the next section may be one excellent alternative.

**Proposed Alternative for the United States**

This section will propose a model to address most of the concerns raised above: assurance that newly admitted attorneys have practical skills; assurance that the profession does not exclude applicants based on race or wealth; assurance that job applicants who complete public service internships are not disfavored by the private and corporate bar; provision of adequate funding for representation of the indigent; and provision of adequate supervision to public service interns.

The alternative is to replicate the one currently being used in the medical profession by creating “teaching law schools” to oversee mandatory legal internships similar to the way teaching hospitals oversee medical interns. The practical training could either be provided in house or through supervised externships or a combination of the two but either case, everyone would receive it. Further, by making the program mandatory for all, you would eliminate any bias in favor of those who did not complete public service internships. And, as suggested earlier, race and wealth discrimination would not be an issue if there were debt forgiveness or at least suspension of debt accumulation.

Perhaps the biggest obstacle would be finding the financial resources to support such a system but some creative possibilities exist. Government is one likely source of

\(^{32}\) See page __

\(^{33}\) However, in community service clerkships, a principal may supervise up to ten candidate attorneys.

\(^{34}\) See page ___
revenue and funding university law centers may be more politically palatable than increasing the funding for the controversial Legal Services Corporation. Restrictions on the type of representation that can be provided would likely accompany the provision of government funds, however, so it should not be the only source. One obvious possibility is to tap into the traditional fundraising sources of the Universities that house these centers. A more creative idea is to devise a way to get the private bar to contribute to the costs of these centers under the rationale that they will be providing some of the training that was traditionally done by law firms and corporate law departments.

As for insuring the quality of the supervision, In house training would be conducted by attorneys specifically educated and trained to be supervisors much like the faculties at our teaching hospitals. Further, the supervision of interns who work off site in either public interest of private bar settings would be overseen by university staff following the pattern of current externship programs. Thus if problems arise with particular supervisors, the intern would not be left to her own devices as was the case of Ms. Mhlungu, but instead would have someone to intervene on her behalf to help correct the situation.

**RECOMMENDATIONS AND CONCLUSIONS**

There is a growing recognition in the United States that bar examinations need to be eliminated or changed because they do not test what is needed to practice law, have an unfair impact on the admission of minority attorneys to the bar, and limit the types of courses law students take while in school. This article has explored one alternative for replacing the examinations, similar to the South African community service apprenticeship, which has the advantage of insuring that before being admitted to the bar, new attorneys have practical education in the skills and knowledge necessary to represent clients and also an awareness of access to justice problems.

The author hopes that in the next five years, each state will begin at least one pilot project to test an alternative method for bar admission. A model suggested here is to create programs through the expansion of law school civil and criminal clinics so that aspiring attorneys will be trained while representing indigent people in need of legal services. Other public interest law firms, the courts, or private firms, where candidate attorneys work on pro bono cases, can be additional sites for pilot projects. The key is to insure that the supervising attorneys, responsible for the training of the aspiring lawyers, have the time and skills to do this job well.

The final advantage to a public service alternative to the bar examination is the recognition that the United States, similarly to South Africa, faces a justice crisis and needs more attorneys who are trained and will contribute to providing legal representation to those who cannot afford representation. Each state in implementing a community service alternative to the bar examination, increases legal services for the poor and fulfils this important responsibility of the bar.