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## How Should We License Lawyers?

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# HOW SHOULD WE LICENSE LAWYERS?

Cassandra Burke Robertson\*

## INTRODUCTION

During the summer of 2020, anger and frustration about lawyer licensing practices boiled over.<sup>1</sup> The bar exam had always imposed economic and psychological burdens on test takers, but the rise of a pandemic added an additional hazard: exposure to a dangerous virus. Some states continued the in-person traditional exam despite the health risks, but others experimented with different licensing options, including online proctored exams, online take-home exams, supervised practice, and even diploma privilege.<sup>2</sup> Examinees struggled to keep up with states' late-changing requirements, and technological glitches added yet another degree of difficulty.<sup>3</sup>

The conversations—and frustrations—arising from states' shifting exam policies laid bare the lack of a coherent rationale for this traditional entry

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1. Valerie Strauss, *Why This Pandemic Is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams> [https://perma.cc/WUE8-XF57]. See generally Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action* (Ohio State Univ. Moritz Coll. of L., Legal Stud. Working Paper No. 537, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3559060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559060) [https://perma.cc/9MVZ-6WZA] (outlining options for licensing in lieu of an in-person exam).

2. *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (Jan. 2021), <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources> [https://perma.cc/6NCX-GNUE].

3. *DP4A Co-founders Speak on Diploma Privilege and the Future of the Bar Exam*, UNITED FOR DIPLOMA PRIVILEGE (July 13, 2020), <http://www.unitedfordiplomaprivilege.org/2020/07/13/dp4a-co-founders-speak-on-diploma-privilege-and-the-future-of-the-bar-exam> [https://perma.cc/Z865-G8F2]. Diploma privilege allows new lawyers to be admitted to practice in a state upon graduation from a qualifying program of legal education. See Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 646 (explaining that during the “heyday” of diploma privilege, “practices fell into three general categories: (1) universal diploma privilege, in which the state admitted anyone who had a diploma from any U.S. law school; (2) statewide diploma privilege, in which a graduate of any school within the state was admitted to practice in that state; and (3) state university diploma privilege, in which only graduates of the state’s law school were permitted to practice without further examination”).

point into the legal profession. The costs of the bar exam are heavy.<sup>4</sup> The test is expensive for states to administer and it also poses a significant hurdle for recent graduates, who generally must find the time and money to study for months before they can obtain or begin full-time work.<sup>5</sup> Applicants without financial resources face significant disadvantages, often struggling to support themselves while they study.<sup>6</sup> The bar exam also carries with it a troubling history of racial and economic exclusionism that the states have never adequately addressed.<sup>7</sup>

Nor do any significant benefits offset the heavy costs of requiring applicants to pass the bar exam.<sup>8</sup> The skills that the bar exam tests—largely memorization and regurgitation of esoteric legal rules—bear little resemblance to the daily work of lawyers, regardless of the practice setting.<sup>9</sup> The law tested on the exam is sometimes so narrowly state specific that it is of limited utility in law practices that increasingly span state and even national borders.<sup>10</sup> States moving toward bar exam uniformity overcome that hurdle but create a new problem: the “law” they test may be based on general principles that are not actually the governing law of any particular jurisdiction.<sup>11</sup> Given these weaknesses, it is unsurprising to see mounting evidence that the bar exam offers little predictive value about lawyers’ abilities to serve their future clients.<sup>12</sup>

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4. See *infra* Part II.A.

5. See *infra* Part II.A. For example, in Texas these administrative costs are funded solely by licensing fees. In 2015, a report from the Texas Board of Law Examiners stated that the agency spent over \$1.7 million a year to administer the bar exam, separate and apart from the costs of general agency administration and character and fitness review. TEX. BD. OF L. EXAM’RS, SELF-EVALUATION REPORT TO THE SUNSET ADVISORY COMMISSION 20 (2015), [https://www.sunset.texas.gov/public/uploads/files/reports/Law%20Examiners%20Self%20Evaluation%20Report\\_0.pdf](https://www.sunset.texas.gov/public/uploads/files/reports/Law%20Examiners%20Self%20Evaluation%20Report_0.pdf) [<https://perma.cc/WKA9-6769>].

6. See *infra* Part II.A.

7. See *infra* Part I.B.

8. See *infra* Part II.C.

9. See Andrea A. Curcio et al., *How to Build a Better Bar Exam*, N.Y. ST. BAR ASS’N J., Sept. 2018, at 37, 38 (criticizing the bar exam’s reliance on the “unproductive memorization of so many detailed rules of law”); Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 456 (2019) (“Law professors typically advise students not to rely on memorization, but rather to always check current case-law, statutory, and regulatory requirements in order to serve their clients competently. Bar exams fail to recognize this basic principle of lawyer competence and instead ask applicants to rely on their memories to address the range of subjects and questions posed.”).

10. See Austen L. Parrish, *Dean’s Perspective: The Bar Exam*, RES GESTAE (Ind. State Bar Ass’n, Indianapolis, Ind.), Apr. 2020, at 10, 19 (recommending that Indiana adopt the Uniform Bar Examination in order to eliminate artificial barriers discouraging lawyers’ and law students’ entry into the state and arguing that bar exams are not a good way to “learn the intricacies of local law”).

11. See Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PRO. LAW., no. 2, 2014, at 43, 47 (explaining that “the ‘correct answer’ to a question may require a candidate to apply legal doctrine that is not the law and may have never been the law in the state in which the candidate is sitting for the bar examination”).

12. See Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 933 (2020) (“[S]erious criticism of bar exams on both grounds—questionable validity and racially disproportionate impact—

One day, the pandemic will end. When it does, we should build on the momentum arising out of the frustrations relating to the bar exam to create a more effective licensing system. Small changes to the format or subjects covered on the bar exam do not go far enough.<sup>13</sup> Creating a licensing regime focused on protecting clients requires reevaluating licensing from the ground up and abandoning the idea of one-size-fits-all licensing practices.

What would a licensing regime designed around client protection look like? This Article proposes that it would include a narrower but more active judicial role. A one-size-fits-all exam would no longer control entry into the profession. The state judiciary would not be the gatekeeper for the entire legal profession; instead, its licensing role would focus on those attorneys who represent individual clients in court and those who manage client funds. But for this subset of lawyers, state judges should take a larger and more active role in overseeing the transition from student to advocate and should require greater practice readiness that goes beyond mere entry-level minimum competence.

The legal profession has the capability to adopt licensing programs that vary by practice area and setting, create less of a burden on recent graduates, and do a better job of protecting the most vulnerable clients. We should move to a system of specialized licenses that better reflect the diversity of twenty-first-century law practice.

#### I. THE HISTORY OF LAWYER LICENSING

Both judicial authority over admission to the practice of law and judicial examination of entry-level competence date back well over a century. In the early days of the United States, both legal education and lawyer licensing were far less formalized. State legislators determined the general qualifications to practice law, and the courts themselves decided whether to admit individuals practicing before them.<sup>14</sup> This practice started to change in the late nineteenth century, as “state supreme courts began to claim an inherent judicial authority to regulate the practice of law as an outgrowth of the constitutional separation of powers between the legislative and judicial

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is widespread and persistent.”); Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS (Ass’n of Am. L. Schs., Washington, D.C.), Spring 2017, at 11, 11, [https://www.aals.org/wp-content/uploads/2017/05/AALSnews\\_spring17-v9.pdf](https://www.aals.org/wp-content/uploads/2017/05/AALSnews_spring17-v9.pdf) [<https://perma.cc/9RJ8-EHUR>] (“[G]rowing evidence suggests that our exam is invalid: the knowledge and skills tested by the exam vary too greatly from the ones clients require from their lawyers.”).

13. See, e.g., Diksha Jain, *NCBE Approves Task Force’s Recommendation, Major Changes to Be Introduced to the Bar Exam*, JD J. (Jan. 30, 2021), <https://www.jdjournal.com/2021/01/30/ncbe-approves-task-forces-recommendations-major-changes-to-be-introduced-to-the-bar-exam> [<https://perma.cc/66U5-28AX>] (noting that proposed changes to the Uniform Bar Exam would include greater testing of “foundational skills” but would remain “a single-event, summative exam. . . . conducted at or near the point of licensure”).

14. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1172 (2003).

branches.”<sup>15</sup> The state high courts consolidated authority to both determine the theoretical qualifications for practice and admit individuals into the practice of law.

A. *The Origin of Judicial Power to Determine Competency*

An early dispute in Illinois highlighted this shift. In 1897, the Illinois Supreme Court passed a rule requiring three years of law study (rather than the usual two) and further required passage of a bar exam before admission to practice.<sup>16</sup> Controversially, the court applied these requirements even to law students who had already started their studies and expected to practice immediately upon completion of their two years of study.<sup>17</sup>

The affected students lobbied the Illinois legislature for an exemption<sup>18</sup> and set off something of a power struggle between the branches of government. The legislature passed a resolution in early 1898, which expressed the legislature’s view that the requirement should be imposed only on students who began their studies after the adoption of the heightened requirements.<sup>19</sup> When the court “remained obdurate”<sup>20</sup> on the requirement, noting that it had adopted the new standard to protect the public and not the students, the legislature then passed a law providing that any applicants who began their studies when the former requirements were in place “shall be admitted” to practice.<sup>21</sup>

Ultimately, however, the judiciary won the power struggle in Illinois. When the graduates applied for admission to the bar based on their two-year diploma, the Illinois Supreme Court denied their admission on constitutional grounds.<sup>22</sup> The court held that “the legislature, in its enactment, overlooked the restraint imposed by the constitution and assumed the exercise of a power properly belonging to the courts.”<sup>23</sup> Two judges dissented and explained that under their view, the legislature’s action to set qualifications for attorneys “as a class” was a valid exercise of its police power that neither infringed on judicial power nor usurped it.<sup>24</sup> That view, however, did not prevail. One of the attorneys who had argued against the applicants’ admission later summarized the court’s action in a law review article, writing that “[i]n the United States courts . . . the act of admission is judicial. Since attorneys are officers and members of the courts, the Legislature cannot deprive the courts of discretion as to whom they shall admit.”<sup>25</sup>

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15. *Id.* at 1173.

16. Blewett Lee, *The Constitutional Power of the Courts over Admission to the Bar*, 13 HARV. L. REV. 233, 233 (1899).

17. *Id.* at 233.

18. *Id.*

19. *Id.*

20. *Id.* at 234.

21. *Id.* at 235.

22. *See generally In re Day*, 54 N.E. 646 (Ill. 1899).

23. *Id.* at 648.

24. *Id.* at 657 (Phillips, J., dissenting).

25. Lee, *supra* note 16, at 240.

*B. Protectionist and Exclusionary Practices*

Although tension remained between the judicial and legislative powers to regulate the practice of law, state judicial branches took a primary role in determining how to license lawyers. Overseeing bar admission, however, was a major undertaking. As a result, the state supreme courts largely delegated this work to bar associations or similar entities composed of attorneys.<sup>26</sup> This, in turn, prompted two significant developments.

First, the attorneys exercising this power defined the practice of law very broadly to include activities that extended well beyond the judicial sphere and “stretch[ed] to incorporate effectively everything done by lawyers: legal advice, drafting, negotiation, representation, and support in dispute resolution processes.”<sup>27</sup> Second, the bar associations often applied a view of “sheer protectionism” in adopting licensing regulations.<sup>28</sup> The protectionist impulse was part of a national trend, as states began adopting occupational licensing for many professions at that time. Between 1880 and 1930, states implemented licensing requirements for “architects, attorneys, barbers, beauticians, dentists, engineers, nurses, physicians, plumbers, teachers, and veterinarians.”<sup>29</sup>

When states adopted more stringent regulations for entry into the profession during the early part of the twentieth century, they applied an overtly exclusionary rationale that discriminated on both racial and socioeconomic grounds.<sup>30</sup> At that time, the country was undergoing a period of significant immigration, with more people coming from eastern and southern Europe, in contrast to prior waves from western and northern Europe.<sup>31</sup> The “upper bar,” largely consisting of better-off white men, resented the activities of the “entrepreneurial bar” made up of “immigrants and minorities that had to struggle for business.”<sup>32</sup> Raising barriers to entry was part of “an implied (and sometimes blatant) effort to bar immigrants, Jews, and blacks from joining the profession.”<sup>33</sup>

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26. Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1204 (2016).

27. *Id.*

28. *Id.* at 1194; see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 61 (1981).

29. Marc T. Law & Sukko Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIST. 723, 732 (2005).

30. Barton, *supra* note 14, at 1194–95.

31. See, e.g., Jagdeep S. Bhandari, *International Migration and Trade: A Multi-disciplinary Synthesis*, 6 RICH. J. GLOBAL L. & BUS. 113, 137 n.76 (2006) (“The literacy test requirement (passed by Congress in 1917, over President Wilson’s veto) was meant to slow down immigration from [sic] Eastern and Southern Europe.”); Stephen M. Feldman, *Missing the Point of the Past (and the Present) of Free Expression*, 89 TEMP. L. REV. ONLINE 55, 60 (2017) (explaining that by the late nineteenth century, “a large percentage of immigrants [were] coming from eastern and southern Europe (rather than from western and northern Europe, as in the past)”).

32. Barton, *supra* note 14, at 1194.

33. *Id.*

Bar leaders worked through institutions to limit admission to practice. The American Bar Association (ABA) and the Association of American Law Schools “stood arm-in-arm against their common enemy: night law schools and the immigrants who crowded into them.”<sup>34</sup> They worked together to push for more stringent educational requirements:

The inferior quality of the bar was blamed upon easy access; the denial of justice to the poor, in turn, was blamed upon an inferior bar. To elitists, in practice or in the professoriat, the remedy was obvious: the quality of the bar and the quality of legal services would improve only if professional access was restricted.<sup>35</sup>

In 1931, the National Conference of Bar Examiners (NCBE) was created with a “founding purpose” to protect against the “overcrowding” of the bar.<sup>36</sup> Those pushing for higher hurdles to admission did not see any conflict between improving the quality of professional services and increasing the exclusivity of the profession. In their view, restricting entry into the profession to those already in positions of privilege necessarily improved the quality of services offered.<sup>37</sup>

Some states were up front about their exclusionary goals in adopting examination requirements. South Carolina, for example, allowed for diploma privilege for the first half of the twentieth century.<sup>38</sup> But when Black students began to graduate from law schools, the state adopted a bar exam requirement that a South Carolina lawmaker expressly stated was intended to “bar Negroes and some undesirable whites” from the practice of law.<sup>39</sup> Much like the “literacy tests” adopted to restrict voting rights,<sup>40</sup> the exam served its purpose: from 1950 to 1973, “only 15 percent of the African Americans passed the bar exam in South Carolina, compared to 90 percent of the whites.”<sup>41</sup> Mississippi followed a similar pattern and, after allowing diploma privilege until 1960, required examination in later years.<sup>42</sup>

The exclusionary trend was a national problem not limited to the southern states. In 1912, the ABA admitted three new members without realizing they were Black. One of the three, William Lewis, was then an assistant attorney

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34. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 110 (1977).

35. *Id.* at 116.

36. Michael Ariens, *The NCBE’s Wrong-Headed Response to the COVID-19 Pandemic* 1 (Apr. 28, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3587751> [<https://perma.cc/LY5R-7ZTH>]; see also *Editorial*, 1 *BAR EXAM’R* 211, 211 (1932) (“The present situation emphasizes the overcrowded condition of the bar.”).

37. AUERBACH, *supra* note 34, at 110 (explaining that the connection between quality and exclusivity appeared obvious to those in favor of increased licensing restrictions).

38. R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935–1975*, 109 *AM. J. EDUC.* 320, 331 (2001).

39. *Id.*

40. See *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (“In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race.”).

41. Baker, *supra* note 38, at 331.

42. *Id.*

general of the United States and a graduate of Harvard Law School.<sup>43</sup> When the ABA leadership learned that “[t]hree persons of the colored race were elected to membership in this Association without knowledge upon the part of those electing them that they were of that race,” it passed a resolution providing that “it has never been contemplated that members of the colored race should become members of this Association.”<sup>44</sup> Two years later, the ABA toned down that resolution to avoid “disturb[ing] the pleasant relations that have hitherto existed” in the organization.<sup>45</sup> It eliminated the explicit racial restriction and instead required that all nominations for membership be accompanied by a notation of the applicant’s race and sex.<sup>46</sup> The revised resolution may have appeared more genteel by no longer “saying the quiet part loud,”<sup>47</sup> but the effect was the same: it would be nearly four more decades before the organization would admit another Black lawyer.<sup>48</sup>

## II. THE UNEVEN COSTS AND BENEFITS OF LAWYER LICENSING

State supreme courts continue to exercise the power to determine the requirements for entry into the legal profession. Today, the defense of entry requirements, including the bar exam, rests on a public protection argument: that the bar exam is needed to ensure that lawyers meet a standard of minimum competence to protect clients from incompetent or unethical practices.<sup>49</sup> The states and bar associations have affirmatively disavowed the racist and exclusionary practices of the past. The ABA and the Association of American Law Schools have explicitly adopted diversity and inclusion in the legal profession as key values, and state licensing entities have also enacted programs to increase pathways for lawyers from underrepresented groups.<sup>50</sup> Nevertheless, the effects of earlier exclusionary policies remain. Even today, the NCBE admits that “differences in average performance on the bar exam tend to be observed across racial/ethnic groups,” though it

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43. John Payton, *Democracy and Diversity*, 35 PEPP. L. REV. 569, 570 (2008) (“[I]t did not occur to the ABA that a Harvard Law graduate could be a Black person.”).

44. *Resolution on Status of Certain Members*, 35 A.B.A. REP. 12, 12–13 (1912).

45. *Proceedings of American Bar Association*, 37 A.B.A. REP. 5, 62 (1914).

46. *Id.*; see also Payton, *supra* note 43, at 571.

47. Clare C. H., *A New ‘Simpson-ism’ for the Trump Era*, MEDIUM (Aug. 10, 2020), <https://medium.com/fan-fare/a-new-simpson-ism-for-the-trump-era-c0dbf929223b> [<https://perma.cc/3YNP-Z5BT>].

48. *ABA Timeline*, AM. BAR ASS’N., <https://www.americanbar.org/about-the-aba/timeline> [<https://perma.cc/FZE4-W2R7>] (last visited Jan. 27, 2021) (noting that it would not be until 1950 that the organization admitted another Black lawyer).

49. Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 307 (2019) (“We present data suggesting that lowering the bar exam passing score will likely increase the amount of malpractice, misconduct, and discipline among lawyers.”).

50. See *ABA Mission & Goals*, AM. BAR ASS’N., <https://www.americanbar.org/about-the-aba/aba-mission-goals> [<https://perma.cc/7Z9L-KE7W>] (last visited Jan. 27, 2021); *Membership & Core Values*, ASS’N OF AM L. SCHS., <https://www.aals.org/about/membership> [<https://perma.cc/WZ6M-CUMS>] (last visited Jan. 27, 2021).



attributes these differences to the educational pipeline at earlier stages, rather than to the exam itself.<sup>51</sup>

The bar exam has improved over time. In recent years, the states have taken some steps to better align bar entry requirements with the needs of a practicing lawyer. States have attempted to make the bar exam better reflect actual practice readiness, especially by adding a performance test that focuses on the skills of legal analysis and writing.<sup>52</sup> And after facing lawsuits from both the federal government and from applicants to the bar, the states have also narrowed the character and fitness process to focus more closely on matters tied to client representation.<sup>53</sup>

Even with these changes, the modern path into the legal profession still looks like the path carved out by the midcentury reformers who sought to erect barriers to entry. In most states, lawyer licensing carries three primary requirements: graduation from law school (in most states, from a school accredited by the ABA), demonstrating character and fitness suitable for the legal profession, and passing a multiday bar exam that covers a variety of legal subjects and relies heavily on memorization.<sup>54</sup> Weighing the costs and benefits of current-day licensing regimes requires examining the public-protection benefits of lawyer licensing in light of the exclusionary hurdles they pose to entrants and the administrative costs they create for states.

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51. NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 1, 6 (2020), <https://www.ncbex.org/pdfviewer/?file=%2Fdmtdocument%2F239> [<https://perma.cc/QXK6-5ADQ>].

52. Sabrina DeFabritiis & Kathleen Elliott Vinson, *Under Pressure: How Incorporating Time-Pressured Performance Tests Prepares Students for the Bar Exam and Practice*, 122 W. VA. L. REV. 107, 117–18 (2019) (“The [Multistate Performance Test], first administered in 1997, was designed to measure an applicant’s ability to use fundamental lawyering skills by requiring the applicant to complete a task that a new lawyer should be able to perform.”).

53. See, e.g., *Applicants v. Tex. State Bd. of L. Exam'rs*, No. A 93 CA 740, 1994 WL 923404, at \*2 (W.D. Tex. Oct. 11, 1994) (“The questions formulated by the Board to seek information about an applicant’s mental health history have been substantially revised since 1992 in efforts to comply with the [Americans with Disabilities Act.]”); Michelina Lucia, *Trial by Surprise: When Character and Fitness Investigations Violate the ADA and Create Dangerous Lawyers*, 38 LAW & INEQ. 205, 222 (2020) (“Along with individuals suing over allegedly violative questions, the [U.S. Department of Justice] has also brought cases when it believes a board of law examiners is violating the [Americans with Disabilities Act.]”). See generally Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., C.R. Div., U.S. Dep’t of Just., to Honorable Bernette J. Johnson, Chief Just. of Louisiana Sup. Ct., Elizabeth S. Schell, Exec. Dir., Louisiana Sup. Ct. Comm. on Bar Admissions & Charles B. Plattsmier, Chief Disciplinary Couns., Louisiana Att’y Disciplinary Bd. (Feb. 5, 2014), <https://www.ada.gov/louisiana-bar-lof.pdf> [<https://perma.cc/2GFL-372Q>]; Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., C.R. Div., U.S. Dep’t of Just., to Karen L. Richards, Exec. Dir., Vermont Hum. Rts. Comm’n (Jan. 21, 2014), <http://www.bazelon.org/wp-content/uploads/2017/03/2.5.14-DOJ-Letter-on-Bar-Admissions.pdf> [<https://perma.cc/MHP8-ANQQ>].

54. Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 431 (2001) (“[T]here are extensive educational requirements, including three or more years of pre-legal education, and graduation from an ABA accredited law school. The bar exam and accompanying character and fitness reviews have also expanded in scope and content.”); *id.* at 445 n.57 (“The bar exam also only measures a certain, relatively small, group of attorney skills. Some students might even argue the skills it measures are memorizing and regurgitating information.”).

*A. The Costs of Entry*

The bar exam imposes significant costs. Under the current system, Professor Deborah Merritt estimates that those costs amount to roughly \$750 million a year among first-time takers.<sup>55</sup> Current licensing requirements—especially the bar exam—create a substantial hurdle to entry that disproportionately burdens the applicants who would most diversify the legal profession. Preparing for the bar exam is both time-consuming and expensive. Applicants spend months studying for the exam after they graduate from law school. Typically, exam preparation requires at least three months of forgone income as students study the recommended eight to ten hours a day. The period without earnings may last several months longer, as graduates often do not receive their scores until late fall, and many employers will not hire graduates until after they *pass* the bar, not just take it.<sup>56</sup> Exam fees often cost several hundred dollars, and bar preparation classes, virtually required in order to pass, cost thousands of dollars.<sup>57</sup> Students without family resources or a large law firm footing the bill must often take out significant bar study loans on top of the student debt they may already carry from undergraduate and law school.

For the small population of students who accept positions in large law firms, and for students from families with substantial financial resources, the bar exam is a surmountable hurdle. For students without such resources, it may be insurmountable. Students without substantial family wealth may simply not be able to spend months without income, yet working while studying for the bar makes it harder to complete the work necessary to pass.<sup>58</sup> Given the racial wealth gap in the United States, these difficulties place a

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55. Deborah J. Merritt, *Reflections of a Bar Exam Skeptic*, LAW SCH. CAFE (May 26, 2017), <https://www.lawschoolcafe.org/2017/05/26/reflections-of-a-bar-exam-skeptic> [<https://perma.cc/L7K6-URMS>].

56. *Id.* (“At the median annual salary of \$65,000 for new law graduates, those ten weeks of bar study cost an applicant \$12,500 in foregone income.”); see also Julie Merow, *Why a Delayed Bar Exam Is a Financial and Legal Disaster*, AM. BAR ASS’N FOR L. STUDENTS: STUDENT LAW. (Apr. 10, 2020), <https://abaforlawstudents.com/2020/04/10/why-a-delayed-bar-exam-is-a-financial-and-legal-disaster> [<https://perma.cc/7F62-FFRJ>] (“[I]t is recommended that test takers study at least 600 hours in order to pass on the first attempt. This study demand cannot be met if graduates are working full-time while prepping for the bar.”).

57. Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1735 n.144 (2002) (“There is something both sad and ironic about the fact that law graduates spend three years of their lives, and often amass debt in excess of \$100,000, but are told (generally correctly) that they cannot gain entry to the profession—that is, pass a bar examination—without taking an expensive postgraduate prep course that does not teach them how to lawyer but rather how to take the test successfully.”).

58. T. LaBossiere, *Working During the Bar Exam?: Start Studying Yesterday*, RIPS L. LIBR. BLOG (Sept. 4, 2018), <https://ripslawlibrarian.wordpress.com/2018/09/04/working-during-the-bar-exam-start-studying-yesterday> [<https://perma.cc/XJ5J-37ZN>] (“[I]f a bar prepper is working anywhere upwards of 25 hours a week—about 5 hours per day—and topping off with an additional 8–10 hours of dedicated study, even at the minimum total of 13 hours a day, a prepper will more than likely feel strained and overworked, consequently minimizing his or her work efficiency and retention when approaching daily bar prep tasks.”).

disproportionate burden on students from underrepresented minority groups.<sup>59</sup>

On top of creating barriers to racial and socioeconomic diversity, the bar exam also hampers gender diversity. Although adopting the Uniform Bar Examination has facilitated multistate licensing, licensing is still handled at the state level and multistate licensing may require taking more than one bar exam. It is common for women lawyers to take time off from professional work; 42 percent of women attorneys leave professional life for a period of time (not counting maternity leave), and the average time away from work is three years.<sup>60</sup> By contrast, only 30 percent of women in business, and 21 percent of women in medicine, take time off and when they do, they take only an average of two years as opposed to three.<sup>61</sup> Approximately a quarter of women lawyers leave work for six to nine years.<sup>62</sup> When lawyers return to the workforce after taking time away, they often find it difficult to return to law firms, where the partner track narrows over time and the returning lawyer does not fit well within the traditional hierarchy.<sup>63</sup> Approximately 73 percent of women returning to work report difficulty finding professional employment.<sup>64</sup> Women are also more likely than men to move to a new state for a spouse's employment.<sup>65</sup> The combination of time away from practice and likelihood of moving make it challenging for women to reenter the legal profession, and the licensing requirements in a new state add to that burden. As a result, many women attorneys return to work outside the law, and even those who stay in the legal profession find that burdensome licensure requirements delay their career progress.<sup>66</sup>

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59. See generally MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).

60. Ellen Rosen, *Finding a Way back to the Law*, N.Y. TIMES (May 26, 2006), <https://www.nytimes.com/2006/05/26/business/finding-a-way-back-to-the-law.html> [<https://perma.cc/4D9W-LJKS>].

61. *Id.*

62. *Id.*

63. *About the OnRamp Fellowship: The Problem*, ONRAMP FELLOWSHIP, <http://onrampfellowship.com/about> [<https://perma.cc/K5LA-RK35>] (last visited Jan. 27, 2021) (“Since organizations usually hire and advance experienced professionals based on seniority and tenure, it’s difficult for a returning lawyer and her potential employer to know where she fits into the traditional structure upon re-entry. And, in most law firms, it is virtually impossible for an experienced lawyer to re-engineer her practice because of the rigid billable rate structure that is typically tied to years of experience.”).

64. *Id.*

65. Dina ElBoghdady, *Why Couples Move for a Man’s Job, but Not a Woman’s*, WASH. POST (Nov. 28, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/28/why-couples-move-for-a-mans-job-but-not-a-womans> [<https://perma.cc/8SS8-CMU9>].

66. See Hilary Moore, *I Am a Woman Who Left the Law*, ABA J. (Oct. 2, 2018, 6:02 AM CDT), [https://www.abajournal.com/voice/article/I\\_am\\_a\\_woman\\_who\\_left\\_the\\_law](https://www.abajournal.com/voice/article/I_am_a_woman_who_left_the_law) [<https://perma.cc/X2HR-ZCJX>] (“Thanks to licensure barriers, my career advanced sluggishly, delayed by short-notice moves, studying for exams, waiting for results and finding new employment time after time.”).

*B. Preparation for Practice?*

What do the states get for that \$750 million? Certainly not an accurate picture of whether applicants are prepared for practice. From the time that bar exams began, courts recognized that success on the exam did not always equate to true preparation for practice. In 1924, the Chicago Bar Association even brought an action to disbar attorney Lewis Baker, who ran a ten-week session of “quiz classes” intended to help law school graduates “cram” for the bar exam.<sup>67</sup> The Illinois Supreme Court ultimately held that Lewis’s conduct was not unprofessional enough to warrant taking away his license to practice, but the court did express concern that the “cramming” led to a higher pass rate based on “purely a feat of memory.”<sup>68</sup> The court found that Lewis’s work “result[ed] in his students passing the examinations without regard to the question whether they are or are not fitted by experience, training, and study to be admitted to the bar, and largely on the applicant’s ability temporarily to memorize, verbatim, questions and answers given him by the respondent” and concluded that “[t]his results in a lowering of the standard of admission to the bar.”<sup>69</sup> Although he escaped formal discipline, the court appeared to view the problem as one created by Lewis’s efforts rather than an inherent problem with the bar exam itself.

The criticism that the bar relies heavily on memorization rather than true preparation for practice is even stronger today. A modern lawyer would be much better served by developing skills to sort through and prioritize the ever-present deluge of information at our fingertips, rather than memorizing the elements of negotiability for a check or the common-law definition of burglary. As Professor Merritt has noted, the exam “ignores entirely” important skills, such as “interviewing, fact gathering, counseling, and negotiating” or electronic legal research.<sup>70</sup>

The subjects most often tested on the bar exam also rely on an outdated conception of legal practice. Perhaps a general practitioner of the last century may have needed a thorough grounding in torts, contracts, criminal law, and commercial law. But most practice today is far more specialized. Professor David Wilkins has pointed out that a uniform regulatory structure fails to meet modern needs, as it assumes “that a single enforcement structure will be appropriate for all lawyers in all contexts.”<sup>71</sup> In fact, “[t]his unitary vision . . . fails to account for the diversity in both the structure of the legal marketplace and society’s expectations of the profession.”<sup>72</sup> In a world of limited resources, trying to impose a unified regulatory structure on “all lawyers in all contexts” creates massive inefficiencies by imposing

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67. *People ex rel. Chi. Bar Ass’n v. Baker*, 142 N.E. 554 (Ill. 1924).

68. *Id.* at 557–58.

69. *Id.* at 558.

70. *Id.*; Merritt, *supra* note 55. The NCBE has announced plans to include some of these skills in a new version of the Uniform Bar Examination that is currently under development. See Jain, *supra* note 13.

71. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 887 (1992).

72. *Id.*

regulatory burdens in some contexts without offsetting benefits and simultaneously, leaving insufficient resources to offer meaningful client protection in other contexts.<sup>73</sup>

Bar examiners have recognized some of these limitations. Joseph R. Julin, previously the director of testing, research, and development for the NCBE, explained in 1987 that the modern bar exam attempts to test for “minimum competence,” which roughly translates into the ability to gain competence through practice, rather than existing readiness for practice:

When I talk about competency that we are seeking to identify, I don't think it is competency that is practiced on a given day. I think the competency we are talking about is seeking to identify whether the individual who is being subjected to the measurement process has the educational foundation which will enable that individual to become competent to handle matters committed to him or her or the ability to recognize that developing required competence would necessarily be at a prohibitive cost or beyond an individual's ability.<sup>74</sup>

Today, the NCBE describes the goal of the bar exam in a similar way, stating that it “has confidence that the current exam is a valid measure of minimum competence for entry-level practice.”<sup>75</sup> The bar exam aspires to measure only “competence to begin practice,” not readiness to represent clients in particular legal matters.<sup>76</sup>

### C. Public Protection

The bar exam is an extraordinarily expensive way to measure whether graduates possess the ability to become competent to practice. Would abandoning the exam create a risk to the public? Of the thirty-four states that historically allowed for diploma privilege, Wisconsin is the only one that has continued to do so—and no flood of unqualified attorneys has taken over that state.<sup>77</sup> Wisconsin's law schools are also relatively well regarded and the state requires a core curriculum.<sup>78</sup>

Over a century ago, the Illinois Supreme Court justified a bar exam requirement by pointing to the growth of new law schools, stating that without the bar exam there would be “only a step from the diploma mill to the bar.”<sup>79</sup> The NCBE echoed this position in 2020, arguing that a bar exam is necessary to protect against the admission of individuals unqualified to practice law because there has been a “decline in the credentials” of students

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73. *See id.* (“[T]he question to be asked is not who should regulate lawyers, but rather how should policymakers coordinate the various resources at their disposal to increase the likelihood that all segments of society can benefit from a competent and independent legal profession.”).

74. Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, N.Y. ST. BAR J., July/Aug. 1991, at 34, 38.

75. NAT'L CONF. OF BAR EXAM'RS, *supra* note 51, at 6.

76. *Id.* at 4.

77. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 64–65 (2019).

78. *Id.*

79. *In re Day*, 54 N.E. 646, 653 (Ill. 1899).

admitted to law schools in recent years and schools are “student-centric” institutions that want to see “*all* their graduates authorized to practice law.”<sup>80</sup> Assuming that this is true, is it necessarily a problem?

Professors Robert Anderson and Derek Muller conducted an extensive review of the data on bar exam passage and later disciplinary actions.<sup>81</sup> Their research showed that there is a small but significant correlation between lower bar exam scores and later rates of disciplinary action.<sup>82</sup> At the same time, however, their findings revealed low overall rates of discipline, so that even a higher rate of discipline among some still corresponded to a low absolute number of cases.<sup>83</sup> And, as they point out and as other scholars have suggested, there can be confounding variables, such as practice setting, that better predict later discipline.<sup>84</sup> But their study revealed one very intriguing fact: “[t]here is virtually no discipline in the first ten years of practice.”<sup>85</sup>

Why are attorneys almost never disciplined in their first decade of practice? It is not because they are more knowledgeable than more experienced attorneys, and there is no reason to think they are more ethical. It is much more likely that practice setting is driving this impact: entry-level attorneys are unlikely to be practicing in settings where they have primary responsibility to vulnerable clients.<sup>86</sup>

This explanation fits with an understanding of agency theory, which posits that professional regulation is intended to substitute for the principal’s monitoring of its agent when the principal lacks the specialized knowledge necessary to effectively evaluate the agent’s work.<sup>87</sup> Occupational licensing can provide a level of trust that is “especially necessary where consumers are vulnerable because of asymmetries in information, capacity, or power, or if failure to competently provide a service can have particularly dire consequences.”<sup>88</sup>

In modern law practice, not all clients are created equal. Some clients, such as government agencies and multinational corporations, are highly capable of looking out for their own legal interests and thus do not need to rely on government licensing to tell them whether an attorney is sufficiently

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80. NAT’L CONF. OF BAR EXAM’RS, *supra* note 51, at 7.

81. *See generally* Anderson & Muller, *supra* note 49.

82. *Id.* at 310 (“We find support for the assertion that attorneys with lower bar exam performance are more likely to be disciplined and disbarred than those with higher performance.”).

83. *Id.* at 312–13.

84. *See generally* William Wesley Patton, *A Rebuttal to Kinsler’s and to Anderson and Muller’s Studies on the Purported Relationship Between Bar Passage Rates and Attorney Discipline*, 93 ST. JOHN’S L. REV. 43 (2019); Deborah J. Merritt, *Bar Exam Scores and Lawyer Discipline*, LAW SCH. CAFE (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline> [<https://perma.cc/WG8K-7MBG>].

85. Anderson & Muller, *supra* note 49, at 313.

86. *See* Merritt, *supra* note 84 (noting that “[l]awyers in solo practice and small firms receive over 90% of disciplinary sanctions”).

87. *See* Barton, *supra* note 54, at 465–66; Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 144 (2011).

88. Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1936 (2018).

qualified.<sup>89</sup> In fact, some research suggests that such organizational clients are better at monitoring lawyers' conduct than licensing entities.<sup>90</sup> Corporate clients effectively monitor external law firms, and law firms likewise "develop internal controls to curb misconduct that stems from individual-lawyer opportunism."<sup>91</sup>

On the other hand, more vulnerable clients include individuals facing life-changing legal events: people going through divorce or custody proceedings, people facing criminal charges, and people in need of immigration assistance. These clients are least able to monitor for attorney quality, they interact with the legal system only rarely—usually when they are facing a serious problem—and need an attorney precisely because they "do not possess sufficient information to make an informed decision about their respective legal rights or the extent of their obligations."<sup>92</sup> These clients are more likely to rely on professional licensing as an indication of competence.<sup>93</sup>

When it comes to attorneys in their first decade of practice, however, these vulnerable clients are be unable to rely on passage of a bar exam as an indication of practice readiness. After all, the bar exam does not even try to evaluate such readiness. Regardless, the low rates of discipline for attorneys in these years suggests that it may not matter.<sup>94</sup> This low discipline rate indicates that more senior attorneys, either in law firms or in other organizational settings, play a much more significant role in evaluating junior attorneys' practice readiness. Less than 2 percent of newly licensed lawyers go into solo practice, so the vast majority of newly licensed lawyers will have an employer supervising and evaluating their work.<sup>95</sup> Indeed, a much higher fraction of new graduates—close to 18 percent—seek employment outside the law, either in "J.D. Advantage" positions or in other professional

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89. See Dana Remus, *Hemispheres Apart: A Profession Connected*, 82 FORDHAM L. REV. 2665, 2681 (2014) (noting the need "to increase competency and access in the personal-services hemisphere and independence in the corporate hemisphere"); David B. Wilkins, *Team of Rivals?: Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2075 (2010) (explaining that elite lawyers tend to be more deferential to their clients); Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 190 (2008) (describing how "corporate and other sophisticated clients," especially those with in-house counsel, will be able to ask the questions that help them accurately identify lawyers with reputations for the specific characteristics they desire).

90. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2604 (2012) ("External regulators cannot effectively monitor the behavior of individual lawyers or law firms, but corporate clients can. Not only can clients, especially in-house counsel, monitor lawyer conduct directly and indirectly, they have the leverage to direct and to manage particular behavior.").

91. Geoffrey C. Hazard Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 608 (2002).

92. Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2769 (2014).

93. See *id.* (arguing that regulation is needed to protect this sector because "a free-market system for legal services would provide these consumers a false sense of security").

94. See *supra* notes 81–85 and accompanying text.

95. James G. Leipold & Judith N. Collins, *The Entry-Level Employment Market for New Law School Graduates 10 Years After the Great Recession*, BAR EXAM'R, Winter 2017–18, at 8, 10–16.

settings.<sup>96</sup> To the extent that clients need protection from incompetent or unprepared lawyers, the bar exam's evaluation of "entry-level competence" is unlikely to be of much help.<sup>97</sup>

### III. REFRAMING THE JUDICIAL ROLE IN LAWYER LICENSING

Current state licensing practices impose a cost on both states and applicants that is disproportionate to any public protection offered by the exam. What would a licensing regime designed for client protection look like? This Article proposes a more narrowly targeted role for judicial evaluation of attorney competence that has two parts. First, the judiciary should cease trying to evaluate entry-level competence into the profession, as it creates little, if any, public benefit but imposes a heavy burden on new entrants. Second, the judiciary should take a more active role in evaluating attorney competence in areas where clients are most vulnerable: court proceedings involving individual litigants and management of client funds.

#### A. *Diploma Privilege with Limited Practice*

As an entry-level hurdle, the bar exam should go. States should return to recognizing diploma privilege but with limitations. Specifically, the bar exam's test of entry-level minimum competence is not needed when employers can do a better job of monitoring, evaluating, and developing new lawyers' skills. Very few new graduates go immediately into solo practice and with good reason: competence is a progression, and students are rarely prepared to take on the role of lead counsel right after law school. But for the vast majority of graduates who go work for law firms, for the government, or go in-house in corporations, the bar exam offers little value. When students work in government agencies or as in-house counsel in corporations, their clients are also their employers—and their employers can assess both their own legal needs and the abilities of their employees.<sup>98</sup> In law firms, the situation may be different—the lawyer in those firms may be offering representation to clients less able to effectively make these judgments. Even in such a setting, however, the possibility of vicarious liability for a junior attorney's errors will create an incentive for firms to supervise the attorney's work and to ensure that the attorney is not asked to take on more than the attorney can handle.<sup>99</sup>

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96. *Id.*

97. See Debra Moss Curtis, "They're Digging in the Wrong Place": *How Learning Outcomes Can Improve Bar Exams and Ensure Practice Ready Attorneys*, 10 ELON L. REV. 239, 250 (2018) ("[A]nyone who has studied for this exam knows two truths: (1) much of the knowledge doesn't stay with people after the exam, and (2) even if it does, the law changes and lawyers must constantly keep up with it (a skill not measured on the exam itself).").

98. See *supra* Part II.

99. Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1727 (1998) ("A public interest rationale for some form of mandatory vicarious liability is that it increases monitoring beyond what lawyers otherwise would do in the absence of a mandatory rule.").



A limited diploma privilege would allow for supervised practice, whether in a law firm, government agency, corporation, or other supervised setting. This would lessen the burden on new graduates and on lawyers moving to a new state by allowing them to pursue employment opportunities without the expense and delay occasioned by the bar exam. Judicial evaluation of competence would wait until later in their career—when the risk to vulnerable clients is higher.

It would be impossible to rank each and every potential client on a vulnerability index. But it is possible—and indeed, not terribly difficult—to identify certain contexts within the practice of law that increase the likelihood of client vulnerability. The first would be courtroom appearances—that is, representing clients in criminal proceedings, civil litigation, probate, or other matters. The second would be transactional practice outside the courtroom that requires a lawyer to handle client funds, including accepting settlements on behalf of a client, accepting payment for legal services, or serving as an escrow officer in a real estate transaction. Lawyers in these two contexts—those who make court appearances or who handle client funds—have significant power to shape their clients' success or failure.

There is no significant public benefit, however, in licensing lawyers who neither practice in court nor handle client funds. These lawyers may practice in-house in a corporation or other organization. They may work in a state agency. They may even work in a law firm. In large law firms, for example, junior attorneys rarely appear in court and almost never handle client funds. But these practice settings share one common feature: in each case, the attorney has an employer supervising the attorney's practice. This employer will likely be far more able to assess the lawyer's competence and oversee the quality of the lawyer's work than would any bar examiner or licensing entity.

Allowing diploma privilege for attorneys who practice in organizations and do not appear in court or handle client funds frees up significant resources. It also opens significant employment opportunities to law school graduates without the cost and delay that comes from taking the bar, and it likewise frees the states from expending the time and money required to assess the competence of these graduates. Diploma privilege should be an easy call for attorneys who practice in these low-risk settings.<sup>100</sup>

#### *B. More Active Judicial Evaluation of Competence When Clients Are More Vulnerable*

If the states no longer needed to manage a \$750 million testing program to establish entry-level competence, then significant resources would be freed up to establish new means of evaluating attorneys in settings where monitoring attorney competence is difficult. By more narrowly targeting

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100. Ilya Somin, *The Case for Replacing the Bar Exam with "Diploma Privilege,"* REASON: THE VOLOKH CONSPIRACY (July 29, 2020, 3:47 PM), <https://reason.com/2020/07/29/the-case-for-replacing-the-bar-exam-with-diploma-privilege> [<https://perma.cc/MS5F-REFS>].

judicial attention and state resources, such evaluations could move beyond traditional written tests and encompass practice-based evaluations and judicial observation.<sup>101</sup> Such an undertaking would be infeasible if applied to the profession as a whole.<sup>102</sup> But if contextualized within different practices and deployed carefully in targeted areas of client vulnerability, such specialized testing could offer significant client protection. Such a practice could also build on existing resources. In eighteen states, the infrastructure to certify lawyers as specialists in practice areas such as criminal law, family law, and appellate law already exists.<sup>103</sup> Private organizations also engage in specialized certification, and some administrative entities do so as well.<sup>104</sup>

What are the points of client vulnerability where such evaluation would offer the most benefit? Sociologists of legal practice have long categorized law practice in two hemispheres: one that represents individuals and one that represents organizations.<sup>105</sup> In recent years, Professor Bill Henderson showed that the “PeopleLaw sector” has shrunk to significantly less than a third of the total dollars spent on lawyers in the United States.<sup>106</sup> Practice areas in the “PeopleLaw” sphere include “personal injury, family law, criminal defense and trusts-and-estates work.”<sup>107</sup>

Evaluating competence in the PeopleLaw sector offers a much better fit for judicial expertise. The judiciary’s broad grip on lawyer licensing has always been tenuous, especially when the judiciary controlled entry requirements for lawyers who never set foot in a courtroom or engaged in litigation-related practice; such regulation fits better within the legislature’s police power.<sup>108</sup> But judges are very well equipped to determine whether lawyers practicing in their courtrooms have shown competence to engage in a particular component of legal practice. What would a lawyer need to demonstrate in order to show readiness to litigate a divorce case? To defend

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101. For one discussion of what the mechanics of later-career certification might look like, see Bruce A. Green, *The Flood of U.S. Lawyers: Natural Fluctuation or Professional Climate Change?*, 19 INT’L J. LEGAL PRO. 193, 201–03 (2012).

102. *Id.* at 203.

103. See *Sources of Certification*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/standing-committee-on-specialization/resources/resources\\_for\\_lawyers/sources\\_of\\_certification](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standing-committee-on-specialization/resources/resources_for_lawyers/sources_of_certification) [https://perma.cc/PQ7C-TWQ2] (last visited Jan. 27, 2021).

104. See Barbara Allison Clayton, Comment, *Are We Our Brother’s Keepers?: A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH. ADMIN. L.J. 115, 138 (2007) (“[F]ederal agencies, namely the Patent Commission and Interstate Commerce Commission, have had success with requiring nonlawyers who wish to practice administrative law take exams and become certified.”).

105. JACK P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

106. WILLIAM D. HENDERSON, LEGAL MARKET LANDSCAPE REPORT 13 (2018), reprinted in Memorandum from Randall Difuntorum, Program Manager, Pro. Competence, State Bar of Cal., to Members, Bd. of Trs., State Bar of Cal. (July 19, 2018), <https://taxprof.typepad.com/files/henderson.pdf> [https://perma.cc/MA2M-N7W2].

107. *Id.* at 12.

108. See Lee, *supra* note 16, at 241–42 (discussing the basis of legislative and judicial authority to regulate admission to practice a profession).

a criminal proceeding? To charge a retainer and handle client fees? Judges are in a good position both to create the procedures to measure such specialized competencies and to evaluate them.

Limiting the competency evaluation just to courtroom practice would probably not go far enough, as it leaves out significant nonlitigation practices, even in the PeopleLaw sector: the creation of wills and trusts, debt settlement, and the negotiation of legal disputes outside a courtroom. What all of these nonlitigation matters have in common, however, is the handling of client funds—both in taking payment from the client and in receiving funds in a legal settlement on the client's behalf or as part of a probate arrangement. This is an area of significant client vulnerability and frequent discipline. Violations of trust fund rules, including both commingling of funds and the misappropriation of funds held in trust, “account for about fourteen percent of all disbarments and about eight percent of all suspensions nationally.”<sup>109</sup> In at least one state, trust fund improprieties led to more than half of all disciplinary violations over the course of several decades.<sup>110</sup> Handling of client funds should be treated as a practice area of its own. Attorneys could and should be tested specifically on the rules for handling client funds before they are authorized to set up client trust accounts, and states should continue to engage in audits of client trust accounts, both on notification of overdrafts and at both periodic and random intervals.<sup>111</sup>

Thus, in place of the current cumbersome and ineffective bar exam, the judicial branch could instead engage in more targeted evaluation later in an attorney's career that focuses on the areas where clients are especially vulnerable. Offering such specialized evaluation would better protect clients by aligning much more closely the skills tested to actual practice. It may also build on judicial experience and the desire to improve courtroom practice. Finally, it would also provide a more stable on-ramp into the profession, as lawyers would no longer need to devote three months to climbing a single large ladder in order to enter the legal profession. Instead, lawyers could gain experience in supervised practice and prove their competence for a lead counsel (or solo counsel) role when they are ready. Although entry-level attorneys rarely go into solo practice, it is even possible that the requisite supervised practice and demonstration of competence could be established through law school clinics. For lawyers who want to change career directions later, legal aid clinics might offer supervised practice opportunities to those who have graduated. The PeopleLaw sector, after all, contains far more people who need legal representation than people who can afford to pay for it. Law schools, the judiciary, and legal aid agencies would all have an interest in working together to promote competent and effective

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109. Philip F. Downey, *Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275, 276 (1988).

110. David E. Johnson, *Lawyer, Thou Shall Not Steal*, 36 RUTGERS L. REV. 454, 456 (1984) (“Since 1948, 53% of all final public discipline meted out to attorneys by the Supreme Court of New Jersey has involved lawyers who have stolen or engaged in other financial improprieties.” (footnote omitted)).

111. *Cf. id.* at 534 (arguing that periodic audits would improve detection of irregularities).

representation that goes beyond the “entry level minimum competence” the bar examiners currently work so hard to measure.

#### CONCLUSION

There is a new momentum and willingness to think about major changes in the regulatory structure of the legal profession. Arizona and Utah are experimenting with opening the practice of law to outside investment in an effort to expand the number of people able to afford legal services.<sup>112</sup> The COVID-19 pandemic has encouraged states to consider new methods of licensing on an emergency basis—and some have expressed a willingness to consider more permanent changes.<sup>113</sup> We should build on this momentum to abandon the parts of the lawyer licensing system that create burdens far outweighing any protection they might offer the public. Focusing on the practice areas where public protection is most needed creates space for a more specialized licensure system that goes beyond minimum competence.

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112. Arthur J. Lachman & Jan L. Jacobowitz, *Arizona and Utah Jumpstart Legal Regulatory Reform*, LAW PRAC. TODAY (Nov. 13, 2020), <https://www.lawpracticetoday.org/article/arizona-utah-jumpstart-legal-regulatory-reform> [<https://perma.cc/K9WT-MURX>].

113. Letter from J. Brett Busby, Liaison to the Bd. of L. Exam’rs, to Tex. L. Sch. Deans 1 (Aug. 28, 2020), [https://www.txcourts.gov/media/1449651/deans\\_letter\\_082820.pdf](https://www.txcourts.gov/media/1449651/deans_letter_082820.pdf) [<https://perma.cc/25SW-HKYR>] (“The Court also remains interested in considering alternative paths to licensure, both as necessary in response to the pandemic and in the long term. In fact, the Court began a partnership with the ABA Commission on the Future of Legal Education late last year to explore possible alternatives.”).