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Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege

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ARTICLES

Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege

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Abstract

The bar examination has long loomed over legal education. Although many states formerly admitted law school graduates into legal practice via the diploma privilege, Wisconsin is the only state that recognizes the privilege today. The bar exam is so central to the attorney admissions process that all but a handful of jurisdictions required it amidst a pandemic that turned bar exam administration into a life-or-death matter.

In this Article, I analyze the diploma privilege from a historical and empirical perspective. Whereas courts and regulators maintain that bar exams screen out incompetent practitioners, the legal profession formerly placed little emphasis on bar exams and viewed them as superfluous for graduates of accredited law schools. The organized bar turned against the diploma privilege as the legal profession began to diversify, and some states abolished the diploma privilege specifically to block Black law students from the profession. The notion that bar exams ensure a base level of competence is a relatively recent construct.

A few studies have suggested that attorneys who struggle on the bar exam are more likely to commit misconduct. However, drawing on cross-state attorney complaint and charge data as well as Wisconsin attorney disciplinary cases, I demonstrate that the bar exam requirement has no effect on attorney misconduct. The complaint rate against Wisconsin attorneys is similar to that of other jurisdictions, and Wisconsin attorneys are charged with misconduct less often than attorneys in most other states. Moreover, the rate of public discipline against Wisconsin attorneys who were admitted via the diploma privilege is the same as that of Wisconsin attorneys admitted via bar exams.

Bar exams as currently constituted do little to advance public protection. A carefully drafted and enacted diploma privilege would comply with the Constitution's

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Dormant Commerce Clause and would incentivize law schools to better prepare students for practice. States also have more direct means to address attorney misconduct than relying on ex ante measures such as bar exams.

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INTRODUCTION

Perhaps no rite of passage is as reviled as the bar examination. Every year, tens of thousands of freshly minted law school graduates pour into convention centers and lecture halls to begin a two- or three-day ordeal that has little relation to any task that they will perform in legal practice. Most will pass on their first attempts. Others on subsequent attempts. However, for a small minority, the bar exam will prove to be an insurmountable barrier.[1]

U.S. bar exams date to the post-colonial period when lawyers were subjected to few educational requirements.[2] Early iterations of bar exams were "brief,

1. *See* Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 16–17 (2010). *See generally* Linda F. Wightman, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 31 (1998) (estimating that only five percent of graduates from ABA-accredited law schools sit for the bar exam and never pass it). Including graduates of non-ABA accredited law schools leads to higher estimates. *Id.* at 14.

2. RICHARD ABEL, AMERICAN LAWYERS 51–52 (1989); *see, e.g.*, Daniel Hansen, *Do We Need the Bar Exam? A Critical Evaluation of the Justifications for the Bar Exam and Proposed Alternatives*, 45 CASE W. RSRV. L. REV. 1191, 1194 (1995).

perfunctory, and oral."[3] Abraham Lincoln once administered an Illinois candidate's bar exam while drawing a bath.[4] Aspiring lawyers could avoid the bar exam entirely by clerking in a law office.[5]

The bar exam is no longer an informal affair. The National Conference of Bar Examiners (NCBE) produces a three-part written exam consisting of the multistate bar exam (MBE), the multistate essay exam (MEE), and the multistate performance test (MPT).[6] The Uniform Bar Exam (UBE), which has been adopted by thirty-six states, is a compilation of these exams.[7] All jurisdictions except for Louisiana require at least the MBE.[8]

Aspiring lawyers must also generally complete four years of college and graduate from an American Bar Association (ABA)-accredited law school to sit for the bar exam.[9] Although thirty-two states and the District of Columbia formerly admitted graduates of certain law schools into practice without bar exams,[10] Wisconsin is the only state that currently recognizes the "diploma privilege."[11]

Despite jurisdictions' longstanding embrace of bar exams, critics have long questioned their utility.[12] Since the content of bar exams overlaps with what has been taught in law school, they are arguably a useless extra expense.[13] Bar exams also test general legal knowledge in an era of rampant attorney specialization[14] and place inordinate emphasis on speed and memorization, skills upon which attorneys should rarely rely in practice.[15] Many core lawyer functions such as oral

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3. ABEL, *supra* note 2, at 5.

4. Hansen, *supra* note 2, at 1196 (citation omitted).

5. *Id*. at 1194–95.

6. Marsha Griggs, *Building A Better Bar Exam*, 7 TEX. A&M L. REV. 1, 14–15 (2019).

7. *Id*. at 3.

8. *Id*. at 14.

9. Benjamin Hoorn 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); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 359 (1996).

10. Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Wegner, *Diploma Privilege, and the Constitution*, 73 S.M.U. L. REV. F. 168, 170 (2020); *see* Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39 (1974).

11. For an excellent discussion of Wisconsin's program, see Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645 (2000). New Hampshire recently created an exception for the small number of attorneys who complete the Daniel Webster program at the University of New Hampshire School of Law. *See also* Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934–35 (2021).

12. *See* Ben Bratman, *Improving the Performance of the Performance Test: The Key to Meaningful Bar Exam Reform*, 83 U.M.K.C. L. REV. 565, 565 (2015) (noting critiques of bar exam as "useless" and a "waste of time"). *See generally* Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 77–79 (2007) (summarizing main critiques).

13. Carol Goforth, *Why the Bar Exam Fails to Raise the Bar*, 32 OHIO N.U. L. REV. 47, 50 (2015) (citation omitted); *see* Hansen, *supra* note 2, at 1206.

14. *See* Trujillo, *supra* note 12, at 80; *see also* Goforth, *supra* note 13, at 50.

15. *See* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 1038 (2004) (questioning connection between rapid analysis and attorney competence as tested on the bar exam). *See generally* Trujillo, *supra* note 12, at

communication, counseling, and negotiation are ignored entirely.[16] Moreover, although attorney admission is state-by-state, bar exams either do not test state laws and procedures or give them short shrift.[17] As a recent task force of the New York Bar Association concluded: "[T]he adoption of the UBE has had the … consequence of rendering applicants less, not more, equipped to meet the challenges of practicing law in New York."[18]

Bar exams are also major obstacles to diversifying the legal profession. Black, Hispanic, and Asian test takers have historically failed bar exams at higher rates than white takers, partly explaining why the legal profession remains white-dominated.[19] Commentators have argued that, were bar exams subject to Title VII scrutiny, they would be struck down because of their unproven validity and disparate impact on minority groups.[20] Although courts have consistently rejected constitutional challenges to jurisdictions' use of bar exams, they have voiced concerns about arbitrary grading and unscientific selections of "cut scores," the scores that candidates need to pass their exams.[21] Because bar exams are challenging without ensuring that candidates are prepared to represent actual clients, commentators have charged that their primary purpose is to limit competition in the legal field and protect (predominately white) incumbents.[22] Past leaders of the legal profession have acknowledged as much.[23]

78–79 ("A good lawyer does not rely solely on memory. Rather, she relies on legal research, and may be subject to sanctions or malpractice claims if she attempts to rely solely on memory.").

16. *See, e.g.*, Goforth, *supra* note 13, at 65; Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1710 (2001).

17. Thirty-six states have adopted the Uniform Bar Exam that does not test state law. *See* Griggs, *supra* note 6, at 3; *see also* Trujillo, *supra* note 12, at 80 ("A state's bar exam cannot possibly measure a lawyer's minimal competence to understand and use legal rules of that state if that state's legal rules are not addressed on the test itself.").

18. N.Y. ST. BAR ASS'N, REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE NEW YORK BAR EXAM 2 (2020), https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-the-New-York-Bar-Exam-April-2020.pdf [https://perma.cc/4G34-BXTF].

19. *See, e.g.*, Milan Markovic & Gabriele Plickert, *The Paradox of Minority Attorney Satisfaction*, 60 INT'L REV. L. & ECON. 1, 1 (2019); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 712–13 (2004).

20. *See* Howarth, *supra* note 11, at 934.

21. Richardson v. McFadden, 540 F.2d 744, 749–51 (4th Cir. 1976); Tyler v. Vickery, 517 F.2d 1089, 1106 (5th Cir. 1975) (Adams, J., dissenting).

22. *See, e.g.*, Barton, *supra* note 9, at 446; George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 110 (2003); *see also* Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL'Y REV. 379 (2013) ("Almost all would agree that the individual state bar exams act as a severe impediment to certain members of underrepresented minority groups becoming practicing attorneys.").

23. *See* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 556 (2004); Shepherd, *supra* note 22, at 5 ("The reason that many state bar officials provided for decreasing the pass rate was to eliminate "overcrowding" in the profession – that is, to reduce competition [from minority attorneys] for existing lawyers.").

Scholars have proposed many improvements to bar exams,[24] and the NCBE continues to evaluate how to best assess the knowledge and skills required of practicing attorneys.[25] While these efforts are worthwhile, and the bar exam could certainly be improved upon, the reality is that no exam will ever be able to reflect the myriad of functions that attorneys perform and the full range of capacities that they should ideally possess.[26] As a result, the chief argument for bar exams since their inception has not been that they assess lawyerly acumen and skill, but that they screen out incompetent practitioners.[27] As the Eleventh Circuit has expressed: "[A] state . . . adopts a rebuttable presumption of incompetence . . . [and] then essentially adopts [it] as fact as to those individuals who fail the examination."[28]

Even the disruption caused by the COVID-19 pandemic failed to loosen the bar exam's grip on the attorney admission process. Most states held in-person bar exams in 2020, with some states requiring test-takers to sign liability waivers.[29] Other states held online bar exams marred by technological and security challenges.[30] Four states followed in Wisconsin's footsteps and embraced a limited diploma privilege in 2020, which they terminated in 2021.[31] Jurisdictions appear

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24. *See, e.g.*, Bratman, *supra* note 12, at 565–66; Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 364, 364–365 (2002).

25. *See* NCBE, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 at 5–6 (2020), https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf [https://perma.cc/7MZZ-REBR] [hereinafter NCBE] (detailing efforts to validate and update the bar exam).

26. *See* N.Y. ST. BAR ASS'N, *supra* note 18, at 2; *see also* Barton, *supra* note 9, at 446 ("It is difficult . . . to mandate one course of study or one exam that will successfully guarantee any set level of competence.").

27. *See, e.g.*, Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 J. LEGAL PRO. 67, 67 (2008) ("The primary purpose of the bar exam is to ensure the minimum competence of persons admitted to the practice of law."); Michael S. Ariens, *The NCBE's Wrong-Headed Response to the COVID-19 Pandemic* 3 (Apr. 28, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751 [https://perma.cc/L8YU-PG4K] ("The story the NCBE tells is that it serves as a backstop preventing the admission of incompetent bar applicants."); *cf.* Curcio, *supra* note 24, at 366 (describing the notion that the bar exams screens for competence as a "pretense").

28. Jones v. Bd. Of Comm'rs, 737 F.2d 996, 999 (11th Cir. 1984).

29. *See* Stephanie Francis Ward, *Two States Introduce COVID-19 Waivers for July Bar Exams*, AM. BAR ASS'N J. (June 2, 2020), https://www.abajournal.com/web/article/liability-waivers-may-not-mean-much-but-two-states-include-them-for-july-in-person-bar-exam [https://perma.cc/5UY7-B5P8].

30. For a general account of the technological challenges and disruptions during the July administration, see Karen Sloan, *First Online Bar Exam Marred by Tech Problems*, LAW.COM (July 28, 2020), https://www.law.com/2020/07/28/first-online-bar-exam-marred-by-tech-problems/ [https://perma.cc/ZAG7-ZRCP]; Stephanie Francis Ward & Lyle Moran, *Thousands of California Bar Exam Takers Have Video Files Flagged for Review*, AM. BAR ASS'N J. (Dec. 18, 2020), https://www.abajournal.com/web/article/thousands-of-california-bar-exam-takers-have-video-files-flagged-for-review [https://perma.cc/6B8P-LM7Q].

31. *See July 2020 Bar Exam: Jurisdiction Information*, NCBE, https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/ [https://perma.cc/K99X-3SBZ] (last updated Sept. 24, 2020); *see also* Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege Are Going Back to Bar Exam Admissions*, AM. BAR ASS'N J. (Dec. 10, 2020), https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions [https://perma.cc/F5JC-3QE6] (noting that all four states that recognized an emergency diploma privilege, plus the District of Columbia, plan to proceed with bar exams in July 2021).

to have been swayed by the NCBE's argument that, notwithstanding the COVID-19 threat, bar exams are needed to serve as a "final check" on law school graduates.[32] For example, in rejecting the diploma privilege for 2020 graduates seeking admission in Nevada, the state's supreme court reasoned that the privilege would fail to "adequately protect the public against practitioners who have not established minimal competence."[33]

Surprisingly, few studies have assessed whether bar exams do in fact protect the public.[34] One study of the Tennessee bar and another of the Connecticut bar observed that lawyers who failed bar exams are more likely to go on to have disciplinary records.[35] Professors Anderson and Muller's recent study of California lawyers similarly finds a negative correlation between bar exam scores and attorney discipline.[36] But even assuming that the utility of bar exams should be measured via attorney misconduct rates, this literature raises more questions than answers. How can one's performance on the bar exam, usually taken at the beginning of one's legal career, predict misconduct years into the future? Could the relationship between the bar exam and discipline be explained by other factors, such as differences in practice settings? In addition, most attorney discipline is also unrelated to competence,[37] and jurisdictions already use the Multistate Professional Responsibility Exam (MPRE) and the character and fitness inquiry to screen out unethical attorneys.[38]

In this Article, I scrutinize the bar exam's public protection rationale from both a historical and empirical perspective. Although bar exams are now viewed as tests of minimal competence, prominent lawyers and law schools originally

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32. *See* NCBE, *supra* note 25, at 3.

33. Order Approving Modified July 2020 Nevada Bar Examination at 2, (Nev. May 20, 2020), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F252 [https://perma.cc/CML2-BN93].

34. *See* Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 931 (2001); *see also* ST. BAR CAL., AMENDED COVER LETTER TO THE FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM 2 (2017) ("No clear measure or definition for public protection in the context of a licensing exam has been established.").

35. Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883, 885 (2017); Leslie C. Levin, Christine Zozula & Peter Siegelman, *A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline*, LSAC (Mar. 15, 2013), https://www.lsac.org/data-research/research/study-relationship-between-bar-admissions-data-and-subsequent-lawyer [https://perma.cc/97RX-GYQK].

36. Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 307 (2019).

37. *See generally* Levin, Zozula & Siegelman, *supra* note 35, at 14 (reporting that only 4% of violations in Connecticut involve the duty of competence).

38. Of course, the MPRE and character and fitness inquiry have their own drawbacks. *See, e.g.*, Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 397 (1998) (suggesting that the MPRE contributes to the trivialization of ethics and tests rules that are irrelevant to most practitioners); Carol M. Langford, *Barbarians at the Bar: Regulations of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1195 (2008) (noting inherent indeterminacy and subjectivity in state bars' assessments of "moral character"). However, they are at least designed with ethical conduct in mind and there is evidence that they affect misconduct rates. *See infra* Part IV.

advocated for written bar exams because they feared overcrowding in the legal profession and were especially concerned with the prospect of immigrants and minority groups benefitting from the diploma privilege.[39] While legal education has changed and the profession is, at least nominally, far more committed to diversity, the bar exam has never been more of a fixture of the attorney admissions landscape; this is despite the dearth of evidence indicating that it improves lawyer training or advances public protection. Jurisdictions can reconsider bar exams as the sole means of entry into the legal profession and reconstitute the diploma privilege without jeopardizing the public.

In Part I, I provide a brief history of the diploma privilege and bar exams. States abrogated the diploma privilege to stunt the growth of new law schools that generally had less rigorous admission criteria and predominately served immigrants and racial minorities.[40] Bar exams were never intended to culminate lawyers' educations, and some jurisdictions only began to require them to avoid extending the diploma privilege to Black law students.

I examine the contemporary public protection justification for the bar exam in Part II, including recent studies that find a correlation between the bar exam and ethical misconduct. Candidates' performance in law schools is highly predictive of bar passage and passing the bar exam is largely a matter of persistence because most states do not limit attempts.[41] There may be a relationship between bar exam performance and discipline, but this does not signify that the bar exam requirement has a direct effect on discipline. The legal profession is highly stratified, and the correlation between bar exam performance and misconduct is likely attributable to lawyers' differential practice settings, which are based, in large part, on their academic records.

I argue in Part III that if the bar exam were to have a significant impact on attorney misconduct, one would expect more complaints and discipline against attorneys in states that recognize the diploma privilege. But Wisconsin is an average state in terms of complaints against attorneys and better-than-average in terms of charges filed. While these cross-state comparisons are not definitive, I also demonstrate using Wisconsin disciplinary decisions that the rate of public discipline against Wisconsin attorneys who were admitted via the diploma privilege is also no higher than that of Wisconsin attorneys who qualified via bar exams.[42]

Lastly, in Part IV I consider how the diploma privilege can be adapted to the modern era. To survive constitutional challenge, states should structure the diploma privilege to incentivize law schools to prepare students for practice in

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39. *See infra* Part I; Goldman, *supra* note 10, at 41.

40. *See* Hansen, *supra* note 2, at 1201–02; ABEL, *supra* note 2, at 62 ("[T]he profession opposed the privilege because it surrendered control over supply to the academy and increased the flood of new entrants.").

41. The national record for bar exam attempts is held by Maxcy D. Filer, who passed on his forty-eighth attempt. *See* Kinsler, *supra* note 35, at 883; *see also* ABEL, *supra* note 2, at 72 ("[T]he persistent always have a good chance of ultimate success.").

42. *See infra* Part III(B).

local legal markets and not to protect in-state institutions. Reintroducing the diploma privilege would also allow jurisdictions to shift resources from bar administration to the improvement of ethics training and discipline. The bar exam has long outlived its purpose and is incompatible with a dynamic and diversified legal profession.

I. BAR EXAMS AND THE RISE AND FALL OF THE DIPLOMA PRIVILEGE

For much of American history, lawyers were largely unregulated.[43] Virtually any white man could practice law, and many lawyers had not even completed high school.[44] The development of the bar exam and diploma privilege must be understood in the context of lawyers' efforts to professionalize attorney admissions and make the practice of law more akin to medicine.[45]

During the 1800s, legal education was in its infancy.[46] The apprenticeship was the dominant mode of admission into the legal profession.[47] The relatively few law schools that existed graduated small numbers of lawyers.[48] For example, Harvard Law School, founded in 1817, enrolled an average of nine students per year during its first thirty years.[49] Only twenty percent of practicing attorneys in 1891 had attended law schools.[50] A key part of the professionalization project was to shift from an apprenticeship-based model of attorney admission to an education-based model. The legal profession decided to associate with law schools and universities to standardize training and to attain greater status.[51]

But law schools continued to suffer from low enrollments because the bar exam was not a meaningful barrier to entry.[52] To gain admission, applicants to the bar merely had to sit through six or seven minutes of a local judge's cursory questioning.[53] Standards were nonexistent:

> Until 1885 what semblance there was of a "law exam" varied as the number of judges who administered them. No uniform standard by which to measure an applicant's learning or ability existed and naturally the ideas of the circuit judges as to what was "sufficient learning in the law" varied greatly.[54]

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43. Barton, *supra* note 9, at 429; *see* ABEL, *supra* note 2, at 6.
44. *See* ABEL, *supra* note 2, at 63, 72.
45. *See id.* at 41.
46. *See* Goldman, *supra* note 10, at 39; ABEL, *supra* note 2, at 42.
47. ABEL, *supra* note 2, at 40.
48. *See id.*; Hansen, *supra* note 2, at 1198.
49. ABEL, *supra* note 2, at 42.
50. *See id.* at 41.
51. *See* Richard Abel, *The Rise of Professionalism*, 6 BRIT. J. L. & SOC'Y. 82, 87 (1979); Hansen, *supra* note 2, at 1998.
52. *See generally* Goldman, *supra* note 10, at 39 ("[I]f, as was usually the case, the exam did not amount to anything, applicants could pass it without attending [law] school.").
53. *See* ABEL, *supra* note 2, at 62–63; *see also* Hansen, *supra* note 2, at 1196 (describing bar exams as "inadequate because courts neither had the time nor the skills to administer a professional exam").
54. *See* Richard A. Stack Jr., *Attorneys: Admission Upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 118 (1975).

One judge's testing of an Illinois candidate—a former butcher—consisted of questions about brandy, Blackstone, and the authorship of Shakespeare's works.[55]

To increase interest in legal education, law schools sought and obtained legislative enactments to allow their graduates to practice without taking bar exams.[56] Virginia enacted the first diploma privilege in 1842 for graduates of William and Mary and the University of Virginia.[57] The privilege was introduced thereafter in Louisiana, Mississippi, Georgia, New York, Tennessee, Michigan, and Wisconsin.[58] At the diploma privilege's zenith, sixteen jurisdictions admitted law school graduates via the privilege,[59] with most states bestowing the privilege only on graduates of in-state law schools.[60] Thirty-two states recognized the privilege at some juncture.[61]

The governmental imprimatur of the diploma privilege boosted law schools' popularity and made them viable alternatives to apprenticeships.[62] However, only after states began to replace informal, oral exams with written bar exams did enrollments in law schools—and particularly ones that were afforded the diploma privilege—soar.[63] By the early 1900s, most attorneys had attended law schools, and apprenticeships were an ancillary means of admission.[64]

Rather than conferring greater status and prestige, the shift to an education-based model of attorney admissions had the unintended consequence of democratizing the legal profession because law schools had minimal admission criteria.[65] New law schools proliferated, many of which held classes in the evenings and served working class, immigrant, and minority communities.[66] The organized bar was contemptuous of these evening law schools, claiming that they were

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55. Robert Sprecher, *Admission to Law in Illinois*, 46 ILL. L. REV. 811, 817 (1952).

56. Goldman, *supra* note 10, at 39.

57. *Id.*

58. *Id.* at 40.

59. *See* ABEL, *supra* note 2, at 62; William D. Mallard Jr., *Bar Admission and the Diploma Privilege*, 1 CUMB. L. REV. 98, 101 (1970).

60. Goldman, *supra* note 10, at 40. Texas was a prominent exception, affording the privileges to graduates of all ABA-accredited law schools. *Id.* at 42.

61. *See* Angelos *et al.*, *supra* note 10, at 170; Moran, *supra* note 11, at 646.

62. *See* ABEL, *supra* note 2, at 39; *see also* Robert B. Stevens, *Law Schools and Legal Education, 1879–1979: Lectures in Honor of 100 Years of Valparaiso Law School*, 14 VAL. U. L. REV. 179 (1980) (noting that the diploma privilege stamped a law school with state approval).

63. *See, e.g.*, ABEL, *supra* note 2, at 43 (noting effect of privilege on the University of Wisconsin Law School); *see also* Wallace E. Jr. Sturgis, *Abolition of the Diploma Privilege*, 4 U. FLA. L. REV. 370, 376 (1951) (attributing forty-two percent growth in enrollments in Florida law schools during the 1950s to the diploma privilege).

64. ABEL, *supra* note 2, at 52.

65. *See id.* at 49–50; Hansen, *supra* note 2, at 1200–01.

66. *See* ABEL, *supra* note 2, at 53; *see also* Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890–1940*, 55 J. LEGAL EDUC. 208, 208–09 (2005) (describing rapid growth of the student bodies of part-time law schools vis-a-vis more prestigious university-affiliated law schools).

"irredeemably low-grade" and responsible for "overcrowding" in the profession.[67] The white protestant leadership of the bar had little in common with the graduates of these upstart law schools and feared that their influx undermined the legal profession's "American ideals" and "professional spirit."[68]

The organized bar embarked on a multipronged strategy to shut down evening law schools. They lobbied states to require law schools to tighten admission criteria and to admit only students with college educations and eventually to restrict the practice of law to graduates of ABA-approved law schools.[69] But a crucial first step in this campaign was the elimination of the diploma privilege.[70] Bar leaders—and even some law schools that benefited from the privilege—argued that it was a matter of time before states would extend the privilege to graduates of evening law schools, allegedly jeopardizing the quality of the practicing bar.[71] They intimated that virtually anyone could organize a law school and obtain students by advertising the diploma privilege.[72] For example, in 1932, the Dean of the University of Pennsylvania School of Law opined that, "[i]t would be most unfortunate if any Tom, Dick, or Harry . . . could start a law school and grind out graduates who would forthwith be admitted into the practice of law without further test of fitness."[73] Two evening law schools did ultimately benefit from the diploma privilege for a short period of time.[74]

The ABA first condemned the diploma privilege in 1921 and the Association of American Law Schools (AALS) followed suit a few years later.[75] Whereas fifteen states recognized the diploma privilege in 1949, only five states recognized it by 1970: Mississippi, Montana, South Dakota, West Virginia, and Wisconsin.[76] All of these states, save Wisconsin, abolished the privilege in the 1980s.[77]

Some jurisdictions that abolished the diploma privilege expressly sought to limit the access of "socially undesirable elements" to the legal profession.[78] Alabama had granted the privilege to graduates of the University of Alabama

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67. Alfred Z. Reed, *Legal Education, 1925-1928*, 6 AM. L. SCH. REV. 765, 776 (1930); Finnegan, *supra* note 66, at 229; *see also* Mark E. Steiner, *The Secret History of Proprietary Legal Education: The Case of the Houston Law School, 1919-1945*, 47 J. LEGAL EDUC. 341, 359 (1997) (noting that concerns about overcrowding were rooted in economic protectionism as well as the fear that overcrowding leads to more unethical conduct).

68. Shepherd, *supra* note 22, at 111; Stevens, *supra* note 62, at 199.

69. *See* Shepherd, *supra* note 22, at 111; Abel, *supra* note 2, at 72; Finnegan, *supra* note 66, at 212.

70. *See* R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935–1975*, 109 AM. J. EDUC. 320, 330 (2001); *see also* Reed, *supra* note 67, at 774 (bemoaning the popularity of the "so-called diploma privilege").

71. *See* Mallard Jr., *supra* note 59, at 104; Goldman, *supra* note 10, at 41.

72. *See* Sprecher, *supra* note 55, at 842.

73. Herbert F. Goodrich, *Law Schools and Bar Examiners*, 18 AM. BAR ASS'N J. 101, 101 (1932).

74. Finnegan, *supra* note 66, at 227.

75. Goldman, *supra* note 10, at 41 (citation omitted).

76. *See* Kyle Rozema, *Does the Bar Exam Protect the Public*, 18 J. EMPIRICAL LEGAL STUD. 801, 808 (2021).

77. *Id*. at 802.

78. Baker, *supra* note 70, at 330.

Law School through the 1950s.[79] However, after the United States Supreme Court ruled that states were required to provide equal legal educational opportunities to white and Black students, the University of Alabama still refused to enroll Black students in its law school.[80] Instead, Alabama paid to send Black students out-of-state.[81] When they returned as law school graduates, they had to sit for the bar exam because they had not graduated from an in-state law school.[82] Alabama moved quickly to abolish the diploma privilege in 1961 when a second accredited law school moved to the state.[83]

Other southern states also changed their positions on the privilege to block law school graduates from the legal profession.[84] South Carolina formed a separate law school for Black law students in 1947 instead of integrating the University of South Carolina School of Law.[85] Immediately before the law school graduated its first class in 1950, South Carolina abolished its diploma privilege.[86] The Speaker of the South Carolina Senate was unequivocal: the purpose of the new bar exam requirement was to "bar Negroes and some undesirable whites."[87] Florida similarly abrogated its diploma privilege after establishing the Florida A&M University School of Law to serve Black students in 1949.[88]

Since the opposition to the diploma privilege has been rooted historically in protectionism and racism, there is reason to be skeptical of states' decisions to mandate bar exams. But the history is also relevant because there is scant evidence that the bar exam was ever intended as a test of "minimal competence."[89] Indeed, bar leaders were skeptical of the bar exam's value.[90] As the Dean of Duke University Law School wrote in 1939:

> The raising of educational requirements in most states to comply with the standards set by the American Bar Association has undoubtedly brought a better quality of applicant to the bar exams but that the bar exams have done much to encourage a better legal education in law schools is doubtful.[91]

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79. *See id.*

80. *See* Missouri *ex rel* Gaines v. Canada, 305 U.S. 337, 352 (1938).

81. Baker, *supra* note 70, at 330.

82. *See id.*; *see also Ex parte* Banks, 48 So. 2d 35, 36 (Ala. 1950) (holding that Black law school graduates were not entitled to the diploma privilege even though they did not have the option of attending the University of Alabama).

83. *See* SOLOMON SEAY, JR., JIM CROW AND ME: STORIES FROM MY LIFE AS A CIVIL RIGHTS LAWYER 11 (2008).

84. *See* Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past*, 12 T. MARSHALL L. REV. 415, 430 (1986).

85. Baker, *supra* note 70, at 330–31.

86. *Id.* at 331.

87. *Id.*

88. Rachel L. Gregory, *Florida's Bar Exam: Ensuring Racial Disparity, Not Competence*, 18 GEO. J. LEGAL ETHICS 771, 773 (2005) (citation omitted).

89. *See* Stack Jr., *supra* note 54, at 122.

90. *Id.* at 121–22.

91. *Id.* at 122.

His Northwestern University School of Law counterpart similarly opined at the time that bar exams lacked "great professional significance."[92]

The organized bar also regarded bar exams as superfluous for graduates of ABA-accredited law schools.[93] These law schools generally had tighter admission standards than their unaccredited counterparts, and bar leaders reasoned that graduates of the former would have little trouble with bar exams.[94] As explained by the AALS President in 1938, accredited law schools nevertheless had no choice but to oppose the privilege because they feared that it would not be limited to "good law schools."[95]

Ultimately, the organized bar prevailed in its campaign against unaccredited law schools. In 1935, only nine jurisdictions required graduation from an ABA-accredited law school; by 1979, that number rose to forty-six.[96] Attendance in unaccredited law schools has since fallen precipitously, and few such law schools exist outside of California.[97] Whereas lawyers once had little formal education, most lawyers now must complete four years of college and three years at an ABA-accredited law school prior to sitting for the bar exam.[98] Competition for admission to law school is "intense,"[99] and the ABA prohibits law schools from taking chances on students who do not "appear capable of satisfactorily completing its program of legal education and being admitted to the bar."[100]

Although law schools are heavily regulated and barely resemble those of yesteryear, the bar exam has never been more of a fixture of the attorney admissions landscape. The organized bar's continuing fear of "overcrowding" and competition undoubtedly play a role. But these concerns hardly justify the maintenance of bar exams as barriers to professional entry. The next Part examines the bar exam's public protection rationale and the evidence offered in support thereof.

II. BAR EXAMS AND ATTORNEY MISCONDUCT

When the organized bar began to advocate for bar exams and against the diploma privilege, it did not explicitly focus on public protection. The ABA's 1921 condemnation of the diploma privilege only stated that "every candidate

92. *Id.*

93. *See, e.g.*, Stack Jr., *supra* note 54, at 121; Herschell Whitfield Arant, *A Survey of Legal Education in the South*, 15 TENN. L. REV. 179, 183 (1938); Goodrich, *supra* note 73, at 101 ("In case of institutions whose high reputation has become established through years of competent performance, there would be little or no danger to the profession if their graduates were to be admitted to the bar without further examination.").

94. *See* Goodrich, *supra* note 73, at 101.

95. Arant, *supra* note 93, at 183.

96. ABEL, *supra* note 2, at 55.

97. *See id.* at 56. California separately regulates law schools that are not accredited by the ABA and requires candidates from these law schools to take a separate bar exam after completing their first years of law school. *See* Steven R. Smith, *Gresham's Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 179–81 (2008).

98. ABEL, *supra* note 2, at 5.

99. *Id.*

100. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS R. 501(b) (2019–2020).

should be subjected to an exam by public authority to determine his fitness."[101] Subsequent ABA statements focused on the inconsistent standards among law schools and the desirability of objective third-party assessments of attorney competence.[102] The NCBE expounded on these themes in a 2020 white paper:

> Diploma privilege in effect removes the public protection function vested in the courts and places it with the law schools, but with no independent, vetted, objective, or consistent final check on whether graduates are in fact competent to provide legal services. The public, and certainly legal employers, rely on passage of the bar exam as a reliable indicator of whether graduates are ready to begin practice.[103]

Thus, the main arguments for bar exams are that they protect the public by separating competent practitioners from incompetent ones[104] and that law schools cannot be trusted to attest as to their graduates' competence.[105]

Courts have generally accepted that bar exams guarantee some level of attorney competence.[106] Whether they are a "reliable indicator" is more contentious. Lawyers take bar exams at the beginning of their careers; any effect on their competence or general fitness to practice would presumably fade over time.[107] The State Bar of California recently acknowledged as part of a study of the bar exam that "the definition of minimum competence is inherently non-quantitative."[108]

Moreover, the competence measured by bar exams—substantive legal knowledge and the ability to rapidly identify legal issues on a closed-book exam—relates only tangentially to the lawyer's duty of competence, which requires "adequate preparation" and "inquiry into and analysis of the factual and legal elements of [a client's] problem."[109] Indeed, in practice, lawyers can establish the requisite competence to handle a matter through "necessary study" and

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101. Hansen, *supra* note 2, at 1201 (citation omitted).

102. *See id*. at 1201–02.

103. NCBE, *supra* note 25, at 3.

104. *See* Rozema, *supra* note 76, at 819 ("One way a bar passage requirement could protect the public is by preventing some law school graduates who are more prone to misconduct from practicing law.").

105. *See* Hansen, *supra* note 2, at 1201–02; Rozema, *supra* note 76, at 819.

106. *See, e.g*., Jones v. Bd. of Comm'rs, 737 F.2d 996, 1001 (11th Cir. 1984); Osborne v. Texas, No. A-13-CV-528-LY, 2013 WL 5556210, at *4 (W.D. Tex. Oct. 8, 2013) ("[R]equiring candidates to pass the bar exam prior to admitting them to practice law is rationally related to the state's legitimate goal of assuring a competent bar.").

107. Professor Abel has observed that the rules for the bar exam are "regurgitated and quickly forgotten." ABEL, *supra* note 2, at 214. For an argument that experienced lawyers should be made to sit for bar exams, see David Adam Friedman, *Do We Need a Bar Exam . . . For Experienced Lawyers?*, 12 U.C. IRVINE L. REV. (forthcoming 2022).

108. ST. BAR CAL., FINAL REPORT ON THE CALIFORNIA BAR EXAM STANDARD STUDY 43 (2017), https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf [https://perma.cc/UA86-XH7F].

109. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2018) [hereinafter MODEL RULES]; *see also* Trujillo, *supra* note 12, at 80 ("[T]he bar exam does nothing to address current problems with incompetence in the legal profession.").

association with a lawyer of "established competence."[110] To encourage greater competence among the practicing bar, jurisdictions should focus less on lawyers' general legal knowledge at the beginning of their careers and more on lawyers keeping up to date with changes in the law and not dabbling outside of their core fields.[111]

To the extent that the bar exam does ensure some base level of "minimal competence," its function is largely duplicative of the legal education requirement. Numerous empirical studies have documented the strong correlation between law school grades and performance on bar exams.[112] The correlation is even stronger after scaling grade point averages to adjust for law school selectivity. Using this method, a New York State study of bar exam performance found that law school grades have a 68% correlation with performance on the bar exam.[113] There is also a nearly perfect relationship between a law school class' mean bar exam scaled score and its mean LSAT score.[114] Consequently, as the NCBE itself has conceded, bar exams convey little about candidates' "competence" that has not already been conveyed by the time they sit for exams.[115] The Fourth Circuit opined on this point in a decision that ultimately upheld states' use of bar exams:

> If the only demonstration of [the bar exam's relationship to legal practice] is that it has a positive relationship to training course performance–e.g., law school–then why does not training school performance itself demonstrate that the applicant is fit to practice his profession? It is certainly clear that nothing correlates better with training school performance than training school performance itself. An applicant for the Bar who has graduated from an accredited law school arguably may be said to stand before the Examiners armed with

110. MODEL RULES R. 1.1 cmt. 2.

111. *See* Friedman, *supra* note 107, at 20–21.

112. *See, e.g.*, Amy N. Farley, Christopher M. Swoboda, Joel Chanvisanuruk, Keanen M, McKinley, Alicia Boards & Courtney Gilday, *A Deeper Look at Bar Success: The Relationship Between Law Student Success, Academic Performance, and Student Characteristics*, 16 J. EMPIRICAL L. STUD. 605, 622 (2019); Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 758 (2017) ("Published studies unanimously find that the strongest indicator of a law school graduate's success on the bar exam-even more than LSAT score-is cumulative performance in law school."); Wightman, *supra* note 1, at 35 (noting that both adjusted and unadjusted law school GPA are predictive of bar passage).

113. MICHAEL KANE, ANDREW MROCH, DOUGLAS RIPKEY & SUSAN CASE, IMPACT OF THE INCREASE IN THE PASSING SCORE ON THE NEW YORK BAR EXAM 126 (2006), https://www.nybarexam.org/press/ncberep.pdf [https://perma.cc/W9TK-J63A]. This correlation is almost as strong as the correlation between different sections of the bar exam. *See id.* at 73.

114. Rosin, *supra* note 27, at 74–75 (A candidate's performance on the LSAT also moderately correlates with bar exam performance); Austin *et al.*, *supra* note 112, at 757.

115. "[T]here is no question that UGPAs, LSAT scores, law school grades, and MPRE scores are each helpful in identifying students at risk for failing the bar exam." Susan M. Case, *The Testing Column: Identifying and Helping At-Risk Students*, 80 BAR EXAMINER 30, 31 (2011). Using law school grades as a predictor of bar exam performance, researchers were able to identify seventy-eight percent of the students who would fail the bar exam at the University of Cincinnati College of Law on their first attempts. *See* Farley *et al.*, *supra* note 112, at 624.

> law school grades demonstrating that he possesses sufficient job-related skills. Why, then, any bar exam at all?[116]

The bar exams' public protection rationale also ignores that aspiring lawyers may take the exams more than once.[117] Defenders of bar exams occasionally use low pass rates on specific exam administrations as evidence that bar exams are effective screening tools but overlook high overall pass rates.[118] Among 2017 graduates of ABA-accredited law schools, nearly ninety percent passed a bar exam within two years of graduation.[119] The true overall pass rate of the class of 2017 is likely higher because some candidates undoubtedly passed subsequently.[120] An earlier study of over 23,000 graduates of ABA-accredited law schools estimated the overall pass rate to be ninety-five percent.[121]

Only a few jurisdictions place limits on bar exam attempts, meaning that candidates' persistence and resources are often as important as their "competence." Bar preparation is incredibly costly.[122] All things being equal, individuals from lower socioeconomic backgrounds are more likely to become never-passers even though their first-time pass rates are equivalent to those of more privileged peers.[123] Oft-observed racial differences in pass rates can partly be explicated by the lower likelihood that minority candidates will sit for bar exams more than once.[124] Having to work or take care of dependents reduces one's odds of passing the bar exam as well.[125]

Finally, lack of competence is not a major cause of attorney misconduct. Professor Levin's study of Connecticut's disciplinary system found that four percent of cases pertain to competence.[126] The most common violations involved

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116. Richardson v. McFadden, 540 F.2d 744, 752 (4th Cir. 1976).

117. Most jurisdictions do not limit attempts. *See generally* Kinsler, *supra* note 35, at 900–01 (noting that thirty-two states have no limits and only seven have hard limits).

118. *See* Mark Hansen, *Bar Fight*, 101 AM. BAR ASS'N J. 48, 48–49 (2016) (noting organized bar's concerns about falling bar passage pass rates).

119. *See* Press Release, ABA, ABA Section of Legal Education releases comprehensive report on bar passage data (Feb. 18, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/aba-section-of-legal-education-releases-comprehensive-report-on-/ [https://perma.cc/7CAD-NE2T].

120. In California, eighteen percent of applicants pass on their fourth attempts or later. *See* Yakowitz, *supra* note 1, at 12 (citation omitted).

121. *See* Wightman, *supra* note 1, at viii.

122. A committee of the Iowa Bar estimated the total cost from graduation to admission to the bar to be $29,000. *See* Grant Rodgers, *Justices Ask: Eliminate Bar Exam?*, DES MOINES REG. (Aug. 27, 2014), https://www.desmoinesregister.com/story/news/2014/08/28/bar-exam-hearing/14717163/ [https://perma.cc/5LF8-DY5F].

123. Yakowitz, *supra* note 1, at 24.

124. *See* Wightman, *supra* note 1, at 56 (reporting that approximately two percent of white examinees failed their first attempt at the bar and did not attempt it again compared to five percent of Hispanic and nearly eleven percent of Black examinees).

125. Aaron N. Taylor, Jason M. Scott & Joshua Jackson, *It's Not Where You Start, It's How You Finish: Predicting Law School and Bar Success*, ACCESSLEX INST. RES. PAPER NO. 21-03 at 21 (Apr. 21, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827402 [https://perma.cc/X54H-VEUM].

126. Levin *et al*., *supra* note 35, at 14.

communication, diligence, safekeeping of client property, fees, and conflicts of interest.[127] If the goal of licensing is to screen out potential ethical violators and not merely assure an amorphous sense of "minimal competence," the MPRE, designed to "measure examinees' knowledge and understanding of established standards related to the professional conduct of lawyers,"[128] is presumably more suited to the task. When jurisdictions introduced written bar exams, there were no common ethical standards on which to test attorneys, and jurisdictions began to administer the MPRE only in 1980.[129]

Of course, bar exams probably do screen out some unqualified individuals who gain admission to, and graduate from, ABA-accredited law schools. Although discipline rates are underinclusive of attorney misconduct,[130] several studies have noted a relationship between the bar exam and attorney discipline. For example, Professor Kinsler has shown that Tennessee lawyers who passed bar exams on their second attempts are twice as likely to be disciplined than attorneys who passed on their first attempts.[131] Professor Levin similarly reports higher rates of discipline among Connecticut attorneys who failed on their first attempts.[132] Lastly, in a recent study of California attorneys, Professors Anderson and Muller use law school admissions data to assess the relationship between bar exam scores and attorney discipline and contend that lowering California's minimum pass score would lead to an increase in misconduct.[133]

Although these studies demonstrate a link between the bar exam and attorney discipline and provide the only real evidence that bar exams protect the public, their findings are limited in two key respects. First, candidates who never pass bar exams are different from candidates who pass on subsequent attempts; in particular, they are more likely to be racial minorities and of lower socioeconomic status.[134] It cannot be assumed that law school graduates who never become attorneys—perhaps because they cannot afford to take bar exams more than once or to take time off work to study—would commit misconduct at the same rates as their peers who do have the time and resources and pass on later attempts. Second, none of the preceding studies show that bar exams *have an independent*

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127. *Id*.

128. Anderson IV & Muller, *supra* note 36, at 320 (citation omitted).

129. *See* Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1299 (2003); *see also* Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics -II: The Modern Era,* 15 GEO. J. LEGAL ETHICS 205, 217–18 (2002) (describing the development of the ABA Model Code of Professional Responsibility).

130. As Professor Martyn observed thirty years ago, "[l]awyer self-regulation misleads the public to the extent that it purports to be a sufficient guarantor of lawyer competence. Client complaints received by bar grievance committees are sifted through the profession's moral screen." Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar*, 69 GEO. L.J. 705, 713 (1981); *see also* Levin, *infra* note 162, at 4–6 (noting improvement in disciplinary systems but extensive use of non-public sanctions).

131. *See* Kinsler, *supra* note 35, at 897.

132. Levin *et al*., *supra* note 35, at 21.

133. *See* Anderson IV & Muller, *supra* note 36, at 314–15.

134. *See* Yakowitz, *supra* note 1, at 23–24.

effect on attorney discipline. This qualification is crucial because performance on the bar exam is correlated with a whole host of factors, including entering credentials, law school grades, and MPRE score.[135] The bar exam may appear to affect discipline when it is in fact these other factors that drive differences in misconduct rates.

Anderson and Muller are careful to note in their study of California lawyers that the bar exam's effect on attorney misconduct may not be causal.[136] Because of limitations in their dataset, they also estimated bar exam scores via the law schools that lawyers attended.[137] The Levin study of Connecticut lawyers conversely accessed lawyers' grades, law schools, LSAT scores, and bar passage history and found that only grades and rank of law school had independent effects on discipline rates.[138] In other words, performance on bar exams is predictive of bar passage because it is correlated with factors that lead to differences in employment outcomes.[139] Levin and her co-authors write:

> Law graduates who do well in law school and graduate from top tier schools are more likely to go to large firms; lawyers who graduate from lower tier schools are more likely to work in solo and small firm practice. Solo and small firm lawyers are more likely to be disciplined, and lawyers in such settings are often disciplined for relatively low-level acts of omission (e.g., neglect of client matters, failure to return phone calls) that may be due to inadequate office support.[140]

Practice area may potentially play a role as well; graduates of lower-ranked schools tend to work in smaller firms but also in fields such as family law and criminal law that draw the most disciplinary complaints.[141] In Texas, for example,

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135. For entering credentials and law school grades, see Kane *et al*., *supra* note 113. For the correlation between MPRE and MBE scores, see Case, *supra* note 115, at 31 (identifying a 0.58 correlation).

136. *See* Anderson IV & Muller, *supra* note 36, at 320.

137. To find a link between bar exam performance and misconduct, the authors used California law schools' LSAT scores as proxies for their graduates' bar exam scores. *See id*. at 313–14.

138. *See* Levin *et al*., *supra* note 35, at 26.

139. Anderson IV and Muller consider this point although their dataset did not allow them to test it. *See* Anderson IV & Muller, *supra* note 36, at 320-21. *See also* Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 878 (2006) ("By the measures of practice setting and income, graduates of local law schools are entering a different sphere of the profession from graduates of elite schools."); 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/4KES-YAWM] (noting that over ninety percent of discipline is against solo and small firm practitioners).

140. Levin *et al*., *supra* note 35, at 39.

141. *See generally* Kyle Rozema, Lawyer Misconduct in America 14 (Jan. 2, 2020) (unpublished manuscript), https://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper%202.%20Kyle%20Rozema.Lawyer%20Misconduct%20in%20America.pdf [https://perma.cc/M7SW-4PL8] [hereinafter Lawyer Misconduct] (reporting that attorneys who work in family law, bankruptcy, criminal law, and tort law have a misconduct rate that is six times that of other attorneys); *see also* Jonakait, *supra* note 139, at 904 (suggesting that graduates from lower-ranked law schools will predominately focus on matters involving personal plight).

half of disciplinary complaints in 2018-2019 involved criminal law, family law, and personal injury.[142]

A new study by Professor Rozema provides the first proof that bar exams might directly affect discipline rates. The Rozema study examines public discipline in four small states in the years before and after their decisions to eliminate the diploma privilege.[143] He finds that the overall sanction rate would have risen from 3.9 percent to 5.1 percent in the jurisdictions within twenty-five years if they had not instituted bar exams.[144] Rozema takes no position on whether this minor effect on discipline justifies restricting the supply of attorneys via the bar exam requirement.[145] But even if a small reduction in sanction rates justifies the maintenance of bar exams, the states in question instituted other changes to their admissions procedures at the same time that they eliminated the privilege: all four states adopted the MPRE, and one of the states also tightened its character and fitness process.[146]

Rozema acknowledges that his study captures the "effects of the package of licensing changes" and not those of the bar exam specifically.[147] But these other changes may be more consequential than the bar exam. Indeed, Rozema observes that differences in misconduct rates between attorneys who took bar exams and attorneys who did not emerged after twenty-three years of practice.[148] If the bar exam were to have a causal role, then its effect should manifest closer to the time that lawyers sat for their exams. Another, larger study conducted by Rozema points to the central role of the MPRE in deterring attorney misconduct; he estimates that jurisdictions' adoption of the MPRE lowered misconduct rates by twenty percent.[149] Even if this figure overestimates the MPRE's impact somewhat, it should not be surprising that ethical misconduct dropped after jurisdictions began to test attorneys on their ethical responsibilities.

In the next Part, I focus on the effects of Wisconsin's diploma privilege. As set out below, in Wisconsin, graduates of the two in-state law schools do not have to sit for the state's bar exam whereas graduates of other law schools do.[150] If bar

142. ST. BAR TEX., ANNUAL REPORT 2018–2019 at 20 (2019), https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55296 [https://perma.cc/GQM5-C445].

143. Rozema, *supra* note 76, at 802.

144. *See id.* at 828.

145. *See generally id.* at 804.

146. *See id.* at 804.

147. *Id.* at 812.

148. *Id.* at 816.

149. Lawyer Misconduct, *supra* note 141, at 4; *see also* Frank Fagan, *Reducing Ethical Misconduct of Attorneys with Mandatory Ethics Training: A Dynamic Panel Approach*, 15 REV. L. & ECON. 10 (2019), https://doi.org/10.1515/rle-2017-0049 [https://perma.cc/4J3H-D5PY] ("[M]andatory continuing legal education in ethics is negatively and significantly linked with charges filed against attorneys for ethical misconduct . . . .").

150. Wisconsin also does not use the MPRE although some candidates likely take the test to gain admission in other states. *See Wisconsin*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/jurisdiction-information/jurisdiction/wi [https://perma.cc/2CZV-EDRL] (last visited Jan. 1, 2022).

exams protect the public by screening out attorneys who are likely to engage in misconduct, as some commentators have alleged, one would expect to see either higher rates of complaints or charges against Wisconsin attorneys, most of whom did not sit for bar exams. I then separately explore differences in discipline rates among Wisconsin attorneys based on whether they gained admission via the diploma privilege or via bar exams.

III. DISCIPLINARY DATA

In this Part, I draw on two distinct sources of information: state-level complaint and charge data from the annual Survey on Lawyer Discipline Systems (SOLD), and Wisconsin disciplinary decisions involving attorneys who were admitted via the diploma privilege versus bar exams. I find no evidence that the bar exam has a direct effect on misconduct using these measures.

A. CROSS-STATE DISCIPLINARY DATA

In every state, attorneys are subject to discipline when they commit misconduct.[151] Although procedures differ, a client or colleague usually initiates the disciplinary process by filing a complaint with the state's disciplinary agency.[152] Disciplinary counsel review and investigate complaints and bring charges against attorneys when probable cause exists to believe that they have violated their ethical obligations.[153] Lawyers face a range of potential sanctions from private reprimands to public censure, suspension, and disbarment.[154] Although some commentators have castigated attorney discipline as too protective of attorneys,[155] most jurisdictions have professionalized disciplinary systems and subject them to significant oversight.[156]

To compare Wisconsin to other states, I rely on the annual SOLD conducted by the ABA's Center for Professional Responsibility. SOLD collects information from disciplinary authorities regarding complaints filed, number of lawyers

151. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS § 5 (2000).

152. *See id.*

153. *See, e.g.*, Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988-2002*, 28 NOVA L. REV. 669, 681–82 (2004); Jennifer Gerarda Brown & Liana G. T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 300 (2012).

154. *See* Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1184 (1988) ("Available sanctions typically include a letter of caution, private reprimand, public censure, suspension, or disbarment.").

155. *See, e.g.*, Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 958, 980 (1991); Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069, 1097 (1992).

156. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1166–67 (2009) ("[S]tates [have begun] to treat the discipline of lawyers as a significant enterprise. State supreme courts took control of the disciplinary process in almost all of the states. Enforcement resources increased. Disciplinary prosecution offices were reorganized and bolstered.").

charged, as well as sanctions levied. I use both the number of complaints and lawyers charged from 2015 through 2017 as proxies for attorney misconduct.[157]

I use complaints and charges instead of sanctions for two main reasons. First, even the most professional and determined regulator can investigate and successfully prosecute only a fraction of cases of alleged attorney misconduct.[158] Thus, public sanctions are a poor proxy for misconduct, and most empirical studies of professional misconduct focus on complaints for this reason.[159] Considering charges in addition to complaints also takes into account that some complaints filed against attorneys may be frivolous and not offer any evidence of misconduct.[160] The second reason is jurisdictions vary in their disciplinary procedures and the penalties they impose. For example, some states issue private reprimands and place attorneys on probation whereas others do not.[161] A few jurisdictions also have diversion programs when the misconduct at issue is on account of substance abuse.[162] Attorneys who participate in these programs are typically not disciplined, potentially skewing discipline rates.

Of course, neither complaints nor charges filed are perfect measures of attorney misconduct. Because of information asymmetries between attorneys and clients, many clients are unaware when their attorneys commit misconduct.[163] The process of filing a complaint against an attorney differs by the jurisdiction, and clients and lawyers may vary in their knowledge and trust of formal disciplinary mechanisms. Disciplinary authorities too may differ in their inclinations to investigate complaints and pursue formal charges.[164] Nevertheless, if the bar exam

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157. Focusing on a three-year period accounts for possibility of randomness in a given year.

158. *See also* Rozema, *supra* note 76, at 806 (observing that eighty-seven percent of disciplinary complaints are dismissed prior to a hearing).

159. Lawyer Misconduct, *supra* note 141, at 1. It should be noted that while complaints and sanctions are better proxies for misconduct than sanctions, in many situations, clients will be unaware that they are injured. *See generally* Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033, 2036 (2017) ("Due to the nature of the attorney-client relationship . . . injured persons may be completely unaware that the attorney has engaged in misconduct. From the outset of the representation, most inexperienced users of legal services largely lack information to judge their lawyers' conduct.").

160. Even accounts critical of attorney discipline acknowledge that most complaints are meritless. *See* David O. Weber, *Still in Good Standing - The Crisis in Attorney Discipline*, 73 AM. BAR ASS'N J. 58, 61–62 (1987) (noting that most complaints are "unjustified" or "fall into the category of my lawyer was rude to me").

161. Florida and Illinois are among the states that do not issue private sanctions. *See* AM. BAR ASS'N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 2018 at 17, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf [https://perma.cc/MK25-YM4P] (last visited Feb. 3, 2022). Texas and Virginia are among the states that do not provide for probation. *Id*. at 24.

162. *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 28–29 (1998) [hereinafter *Emperor's Clothes*] (describing growth of nonpunitive diversion programs); *see also* Matthew J. Madalo, *Ethics Year in Review*, 42 SANTA CLARA L. REV. 1291 (2002) (ascribing lower costs to California's attorney diversion program in comparison to prosecution and punishment).

163. Fortney, *supra* note 159, at 2036.

164. *See* Anderson IV & Muller, *supra* note 36, at 321 ("Cross- state comparisons may have little value due to disparities in state bar disciplinary procedures, enforcement, and priorities.").

does protect the public by screening out attorneys who are likely to commit misconduct, we would expect to see more complaints and charges against Wisconsin attorneys than attorneys in other jurisdictions.[165]

Table 1 sets out the total number of complaints filed in the jurisdictions that participated in SOLD from 2015–2017. I excluded jurisdictions that did not provide information for all three of these years. The complaint rate reflects the average number of yearly complaints per hundred attorneys.

Table 1: Complaints by State

State	Total Complaints (2015–2017)	Yearly Complaint Rate (per 100 attorneys)
Alabama	3,669	8.9
Alaska	586	6.3
Arizona	9,917	17.8
Arkansas	1,998	7.3
Colorado	10,531	13.3
Delaware	478	4.2
Florida	18,200	7.0
Georgia	8,315	7.2
Hawai'i	941	6.5
Idaho	1,040	6.8
Illinois	16,248	7.2
Indiana	4,637	8.3
Iowa	2,771	9.6
Kansas	2,191	6.5
Kentucky	3,414	6.2

165. Notwithstanding the limitations of the SOLD dataset, some empirical work has regressed the effects of bar exam difficulty on complaint rates and other measures of misconduct. Michael B. Frisby, Sam C. Erman & Victor D. Quintanilla, *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores* 40 (U.S.C. Legal Stud. Working Paper, Paper NO. 21-17, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstractid=3793272 [https://perma.cc/Q9WH-QTCM].

State	Total Complaints (2015–2017)	Yearly Complaint Rate (per 100 attorneys)
Louisiana	8,651	13.0
Maine	683	4.3
Maryland	5,974	5.0
Michigan	6,351	5.1
Minnesota	3,535	4.4
Mississippi	1,462	5.4
Missouri	5,548	6.3
Nebraska	1,245	6.0
New Jersey	10,800	4.8
New Mexico	1,958	9.2
North Carolina	4,011	4.7
North Dakota	526	5.8
Ohio	10,626	8.0
Oklahoma	3,806	7.1
Oregon	3,478	7.6
Pennsylvania	11,625	5.9
Rhode Island	1,019	6.4
Tennessee	3,842	5.7
Texas	22,959	7.7
Utah	2,443	8.7
Vermont	496	6.1
Virginia	9,812	10.4
Washington	6,342	6.7

State	Total Complaints (2015–2017)	Yearly Complaint Rate (per 100 attorneys)
West Virginia	1,781	8.7
Wisconsin	5,605	7.4
Wyoming	441	5.1
Average		7.3

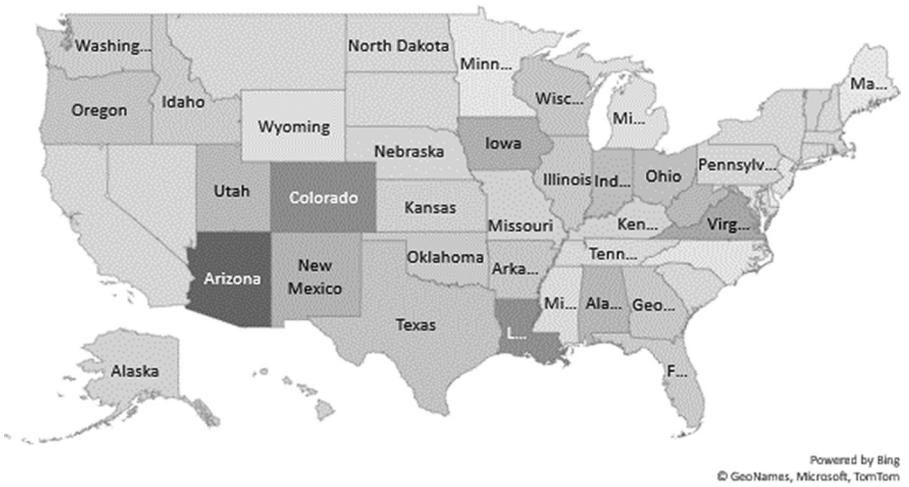
As Table 1 shows, complaint rates vary considerably across the United States. Arizona has the highest yearly complaint rate (17.8) and Delaware the lowest (4.2). Wisconsin's complaint rate (7.4) is nearly identical to the jurisdictional average (7.3) despite its maintenance of the diploma privilege.

The SOLD data also provides some evidence that there is no general relationship between complaint rates and jurisdictions' attorney admissions policies. Wisconsin offers the diploma privilege and has an average complaint rate. Delaware and Louisiana require all attorneys, regardless of experience, to pass bar exams,[166] but the former state has the lowest complaint rate and the latter the highest. Nor is there an apparent relationship between bar exam difficulty and misconduct. Colorado and Oregon have high minimum bar exam pass scores but above-average complaint rates whereas Minnesota and North Dakota have low pass scores and below-average complaint rates.[167] Figure 1 illustrates differences in complaint rates using a heat map, with darker colors indicating higher rates of complaints.

166. Over forty jurisdictions offer some admission by motion, which is generally available to attorneys who have been practicing for five or more years. *See* Abigail L. DeBlasis, *Another Tile in the "Jurisdictional Mosaic" of Lawyer Regulation: Modifying Admission by Motion Rules to Meet the Needs of the 21st Century Lawyer*, 38 N. ILL. U. L. REV. 205, 214–15 (2018). For a complete list of jurisdictions and their stances on admission upon motion, see NCBE, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, https://reports.ncbex.org/comp-guide/charts/chart-15/ [https://perma.cc/BSB5-2PGE] (last visited Feb. 4, 2022).

167. *See Minimum Passing UBE Score by Jurisdiction*, NCBE, http://www.ncbex.org/exams/ube/score-portability/minimum-scores/ [https://perma.cc/ZE7D-ZK6T] (last visited Feb. 4, 2022).

FIGURE 1: Differences in Complaint Rates



SOLD also collects information on the number of lawyers charged by jurisdiction. Table 2 sets out the total charges per state from 2015 through 2017 and the yearly charge rate per hundred attorneys over this time period.

Table 2: Charges by State

State	Total Charges (2015–2017)	Yearly Charge Rate (per 100 attorneys)
Alabama	201	0.49
Alaska	17	0.18
Arizona	256	0.46
Arkansas	146	0.53
Colorado	153	0.19
Delaware	44	0.39
Florida	846	0.33
Georgia	349	0.30
Hawai'i	31	0.21

State	Total Charges (2015–2017)	Yearly Charge Rate (per 100 attorneys)
Idaho	107	0.70
Indiana	142	0.26
Iowa	42	0.15
Kansas	81	0.24
Kentucky	157	0.28
Louisiana	386	0.58
Maine	74	0.46
Maryland	255	0.21
Michigan	372	0.30
Minnesota	105	0.13
Mississippi	64	0.23
Missouri	128	0.15
Nebraska	109	0.52
New Jersey	612	0.27
New Mexico	67	0.32
North Carolina	174	0.20
North Dakota	16	0.18
Ohio	220	0.17
Oklahoma	54	0.10
Oregon	235	0.52
Pennsylvania	642	0.33
Rhode Island	42	0.26
Tennessee	407	0.61

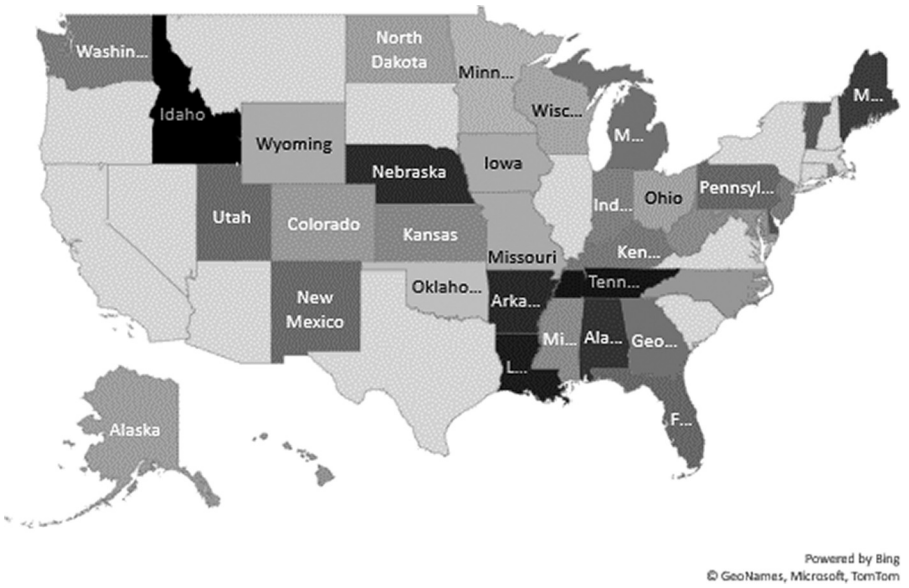
State	Total Charges (2015–2017)	Yearly Charge Rate (per 100 attorneys)
Utah	91	0.32
Vermont	30	0.37
Washington	252	0.27
West Virginia	47	0.23
Wisconsin	118	0.16
Wyoming	13	0.15
Average		0.31

As Table 2 reflects, disciplinary authorities charge few attorneys per year. The average charge rate per 100 attorneys across jurisdictions is 0.31. Wisconsin's charge rate per 100 attorneys is a mere 0.16. Only five of the thirty-eight jurisdictions in the dataset have lower charge rates.

Table 2 also does not suggest a particular relationship between bar difficulty and attorney charge rates. The state with the highest charge rate (Idaho) requires a high minimum score for bar passage; the state with the lowest charge rate (Oklahoma) has a low minimum bar passage score.[168] Differences in jurisdictional charge rates are illustrated in figure 2, with darker colors indicating higher charge rates.

168. *See id.*

FIGURE 2: Differences in Charge Rates



Thus, neither complaint nor charge data support the notion that bar exams curb attorney misconduct. Wisconsin is an average jurisdiction in terms of complaints filed against attorneys and better-than-average in terms of the number of attorneys charged with misconduct.

I do not claim that these comparisons prove that bar exams have no role in public protection. As noted, a variety of factors, some endogenous to disciplinary systems themselves, could affect complaint and charge rates. It is also conceivable that Wisconsin's complaint and charge rates would be even lower if it required all attorneys to pass bar exams. However, the absence of cross-state data that bar exams reduce complaints and discipline suggests that other factors are far more impactful. Further research—with full access to the disciplinary data—could identify these factors.

To examine the effects of bar exams on discipline more directly, the next section uses a separate dataset to compare the discipline rates of Wisconsin attorneys who gained admission via the diploma privilege by attending either in-state law school versus those who gained admission via bar exams. If bar exams protect the public, then attorneys who qualified via the diploma privilege should be overrepresented in public discipline.

B. WISCONSIN DISCIPLINARY DECISIONS

The Wisconsin Court System's Office of Lawyer Regulation maintains a database of disciplinary decisions that is accessible to the public.[169] I reviewed all public disciplinary decisions from 2005 to 2019 and cross-referenced these decisions with the disciplined attorneys' registrations from the Wisconsin State Bar website. Between these sources, I was able to create a dataset of disciplined attorneys that included their admission dates, law school graduation dates, law school alma maters, misconduct committed, sanctions imposed, and the counties in which they currently practice. Out-of-state attorneys were identified by their states of practice. I excluded attorneys whose registration information could not be located.

There were 666 disciplinary decisions in the final dataset, the vast majority of which involved in-state attorneys (81.4%). Especially notable in the dataset was the preponderance of male attorneys (84.1%) and repeat offenders (17%). The average attorney was admitted to practice in 1988 and had been practicing for over 23.5 years at the time that he was disciplined, providing further evidence that public discipline tends to be focused on older, more experienced attorneys.[170] As expected, few disciplinary decisions involved violations of competence (12.9%), with most of these decisions also addressing other violations.

Wisconsin attorneys admitted via the diploma privilege should have higher discipline rates than attorneys admitted via bar exams if bar exams protect the public. Since the percentage of active Wisconsin attorneys who qualified via the diploma privilege by attending either Marquette or Wisconsin Law Schools is 62.9%, one would expect to see a significantly higher percentage of diploma privilege attorneys among the disciplined attorney group.

Table 3 sets out the number of disciplinary cases involving attorneys admitted via the diploma privilege and attorneys who were admitted via bar exams. For the disciplined attorney group, I included results both with and without out-of-state attorneys. Although the disciplined attorneys currently practicing out-of-state may have been based in Wisconsin at the time that they were disciplined, their inclusion within the disciplined attorney group might undermine the comparison with the bar's current membership.

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169. *See Lawyer Status and History*, WISCONSIN COURT SYSTEM, https://lawyerhistory.wicourts.gov/ [https://perma.cc/P8EP-A2EL] (last visited Feb. 4, 2022).

170. *See, e.g.*, Rozema, *supra* note 76, at 20; Anderson IV & Muller, *supra* note 36, at 314; *see also* Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 833–34 (2004) (describing as "counterintuitive" the notion that older attorneys would have more discipline problems).

Table 3: Wisconsin Discipline and the Diploma Privilege

	In- State Attorneys	Disciplinary Cases (2005–2019)	Disciplinary Cases (excl. out-of-state)
Diploma Privilege Cohort	8028	413	347
Total	12,757	666	542
Percent	62.9	62.0	64.0

As Table 3 indicates, attorneys who qualified via the diploma privilege compose 62.9% of the active, in-state bar membership and are responsible for 62% of disciplinary cases. I used a chi-square test to measure the difference between these values. The chi-square test is a statistical technique commonly used to compare expected to actual values in categorical data.[171] This analysis reveals that the representation of diploma privilege attorneys among the general bar membership is not significantly different than their representation in the disciplined attorney group ($p > 0.1$). Excluding the cases involving out-of-state attorneys does not change the results ($p > 0.1$). Thus, it appears that attorneys admitted via the diploma privilege commit misconduct at the same rate as attorneys who qualify via bar exams. Because the diploma privilege cohort is not overrepresented in Wisconsin disciplinary cases, I find no evidence that the bar exam affects attorney misconduct.

Previous research has suggested that factors such as experience, gender, and practice setting can affect misconduct rates.[172] To assess whether differences between the diploma privilege and bar exam cohorts are confounding the bar exam's effects, I compared the backgrounds of a random sample of fifty Wisconsin attorneys who qualified via the diploma privilege to a random sample of Wisconsin attorneys who qualified via bar exams.

This comparison did not reveal any notable differences between the two cohorts. The diploma privilege cohort has slightly less practice experience (median law school graduation year of 1998.5 versus 1996) but has a higher representation of men (60% compared to 54%). Private practitioners make up most of each sample (74% of the diploma privilege cohort and 72% of the bar exam cohort). Few attorneys in either group worked for large law firms (18% for the diploma privilege cohort and 10% for the bar exam cohort). Therefore, differences between the two groups are unlikely to account for the similarity in discipline

171. Hatamyar & Simmons, *supra* note 170, at 799.

172. *See generally* Lawyer Misconduct, *supra* note 141, at 6 (noting "old age, incorporated law practice, male, law practice in rural areas, solo and small law practice, and trust account authority" have been found to correlate with misconduct in the empirical literature).

rates. Future research, with full access to Wisconsin lawyer information and disciplinary data, would be able to identify the main drivers of discipline.

One obvious limitation to the above analysis is that it is focused only on Wisconsin. Wisconsin is not a UBE state and maintains a low bar exam pass score.[173] Wisconsin also has a close-knit legal market that is dominated by small firms: 92% of Wisconsin law firms consists of five or fewer lawyers, and the majority of these are solo firms.[174] Most important of all, Wisconsin's law schools are held in high regard by the state's lawyers.[175] As Professor Moran has observed, this last factor may explain why the privilege has survived in Wisconsin but not in other states.[176]

It is conceivable that, consistent with the empirical research analyzed in Part II, states with a greater number of law schools and more stratified legal markets would see an increase in misconduct were they to adopt the diploma privilege. However, many states are analogous to Wisconsin in that they have relatively small legal markets and one or two in-state law schools. As set out below, larger states may also choose to limit the privilege to only graduates of certain law schools.

IV. A TWENTY-FIRST CENTURY DIPLOMA PRIVILEGE?

Historically, most states extended the diploma privilege to graduates of in-state law schools without mandating completion of a specific course of study.[177] This Part examines how the diploma privilege should be adapted to the modern era while addressing the worry that law schools cannot be trusted to graduate only qualified attorneys.

A. RECONSTITUTING THE DIPLOMA PRIVILEGE

Having shown that the diploma privilege has not caused higher discipline rates in Wisconsin, I next turn to the question of design. One commentator has described Wisconsin's privilege as "the most restrictive diploma privilege statute ever written,"[178] but its actual requirements are minimal; the rule does not even

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173. *See Wisconsin Jurisdiction Information*, NCBE, https://www.ncbex.org/jurisdiction-information/jurisdiction/wi [https://perma.cc/6T4N-VUUS] (last visited Feb. 4, 2022).

174. *See* ST. BAR WIS., MEMBER STATISTICS, https://www.wisbar.org/aboutus/overview/pages/member-statistics.aspx [https://perma.cc/QX3Q-CEQE] (last visited Feb. 4, 2022).

175. *See* Moran, *supra* note 11 at 655; *see also* Stack Jr., *supra* note 54, at 123 (noting that the maintenance of the diploma privilege in Wisconsin "voice[s] confidence in the state's two law schools").

176. *See* Moran, *supra* note 11, at 655; *see also* Derek T. Muller, *Do State Bar Licensing Authorities Distrust Law Schools?*, EXCESS OF DEMOCRACY (July 22, 2019), https://excessofdemocracy.com/blog/2019/7/do-state-bar-licensing-authorities-distrust-law-schools [https://perma.cc/86GY-LDFT] (suggesting that jurisdictions that resemble Wisconsin and have a "community of trust" between the bar and in-state law schools should consider the diploma privilege).

177. *See* Goldman, *supra* note 10, at 40, 42.

178. *Id*. at 42.

require study of Wisconsin law.[179] Wisconsin's statute reads in full:

> An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:
>
> (1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.
>
> (2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.
>
> (a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.
>
> (b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics, and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.
>
> (c) Law school certification of subject matter content of curricular offerings. Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the

179. None of the four states that have adopted an emergency diploma privilege have imposed curricular requirements; they have also not specifically limited the privilege to in-state law schools. For a discussion of the various emergency diploma privilege approaches, see Derek T. Muller, *Disaggregating the Debate Over the Bar Exam and Diploma Privilege*, EXCESS OF DEMOCRACY (July 10, 2020), https://excessofdemocracy.com/blog/2020/7/disaggregating-the-debate-over-the-bar-exam-and-diploma-privilege [https://perma.cc/ZBJ9-N33U].

> law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of time devoted in each course to the subject matter of the areas of law specified in this rule.[180]

Since the mandatory and elective courses set out in the Wisconsin Rule are staples of law school curricula, most law school graduates would probably be able to meet its requirements.[181] But the privilege is only available to graduates of Marquette and Wisconsin Law Schools.

The constitutionality of diploma privilege statutes focusing on in-state law schools is unclear. Courts have dismissed challenges to diploma privilege statutes and rules based on the Equal Protection and Privileges and Immunities clauses,[182] but have been more sympathetic to challenges based on the Dormant Commerce Clause.[183] For example, in *Wiesmueller v. Kosobucki*, a plaintiff sued to invalidate Wisconsin's diploma privilege statute on the ground that it impermissibly burdened interstate commerce.[184] Wisconsin ultimately settled the suit. Yet, Judge Posner's Seventh Circuit opinion remanding the case evinced skepticism that a state's decision to extend the privilege only to in-state law schools could satisfy rational basis review:

> For suppose—a supposition not only consistent with but actually suggested by the scanty record that the plaintiffs were not allowed to amplify—that Wisconsin law is no greater part of the curriculum of the Marquette and Madison law schools than it is of the law schools of Harvard, Yale, Columbia, Virginia, the University of Texas, Notre Dame, the University of Chicago, the University of Oklahoma, and the University of Northern Illinois . . . That would suggest that the diploma privilege creates an arbitrary distinction between graduates of the two Wisconsin law schools and graduates of other accredited law schools. And it is a distinction that burdens interstate commerce. Law school applicants who intend to practice law in Wisconsin have an incentive to attend one of the Wisconsin law schools even if, were it not for the diploma privilege, they would much prefer to attend law school in another state.[185]

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180. WIS. CT. R. 40.03.

181. *See also* Moran, *supra* note 11, at 648-49 ("[T]he diploma privilege directly enforces what the bar exam indirectly enforces: that students take certain courses.").

182. *See, e.g.*, Shenfield v. Prather, 387 F. Supp. 676, 686 (N.D. Miss. 1974) (holding that Mississippi's diploma privilege does not burden the right to travel); Huffman v. Mont. Sup. Ct., 372 F. Supp. 1175, 1177 (D. Mont. 1974) *aff'd mem.*, 419 U.S. 955 (1974) (holding that Montana's diploma privilege did not infringe upon any fundamental right and that graduates of out-of-state law schools are not a suspect class for purposes of equal protection doctrine).

183. Two excellent student notes have explored this topic in depth. *See* Daniel B. Nora, Note, *On Wisconsin: The Viability of Diploma Privilege Regulations under Dormant Commerce Clause Review*, 37 J. COLL. & U.L. 447 (2011); Paul C. Huddle, Comment, *Raising the Bar: How the Seventh Circuit Nearly Struck Down the Diploma Privilege Under the Dormant Commerce Clause*, 5 SEVENTH CIR. REV. 38 (2009).

184. Wiesmueller v. Kosobucki, 571 F. 3d 699 (7th Cir. 2009).

185. *Id.* at 704.

Future caselaw may be even less favorable to states that seek to favor in-state institutions.[186]

To avoid constitutional challenge, states could limit the privilege to public law schools.[187] States are generally permitted to favor their own institutions at the expense of out-of-state competitors under the "market participant" exception to the Dormant Commerce Clause.[188] Judge Posner raised this possibility specifically in *Wiesmueller*.[189] Fourteen states have public law schools and no private law schools.[190] However, this option is probably unrealistic for other states.[191]

Another possibility would be for states to expressly require the study of their laws and procedures. A district court upheld Mississippi's old diploma privilege statute, reasoning that in-state graduates are more likely to know Mississippi law and are more ready to practice in the state.[192] Recent advocacy has also centered on this option.[193]

Tying the diploma privilege to the study of state-specific laws and procedures accords with the Constitution but would also potentially spur needed legal education reform. Currently, legal education is characterized by its homogeneity, with the vast majority of law schools partaking in a "one size fits all" model.[194] Some degree of uniformity is undoubtedly desirable to ensure a baseline level of training for attorneys. But law schools may be failing to prepare graduates for the settings in which they are likely to practice.[195]

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186. A group of legal education scholars has persuasively argued that Wisconsin's diploma privilege statute substantially burdens interstate commerce and – contrary Judge Posner's position – should be subjected to strict scrutiny. Angelos *et al*., *supra* note 10, at 181 (arguing for a higher standard of review than rational basis).

187. *See Wiesmueller*, 571 F.3d at 706–07; Angelos *et al*., *supra* note 10, at 179. The exception was ultimately not available in Wiesmueller because Marquette is a private law school. *Wiesmueller*, 571 F.3d at 707.

188. *See* Angelos *et al*., *supra* note 10, at 179; *see also* David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 SEATTLE U. L. REV. 543, 543 (2006) ("According to the market participant doctrine, however, the state does not violate the dormant Commerce Clause by favoring its own citizens and companies when it buys or sells goods or services.").

189. *Wiesmueller*, 571 F.3d at 707.

190. *Id.*

191. *See generally* Angelos *et al*., *supra* note 10, at 179 (describing a privilege conferred only to public law schools as "politically unpopular and perhaps unwise as a matter of policy").

192. *See* Shenfield v. Prather, 387 F. Supp. 676, 687 (N.D. Miss. 1974) ("[I]t is quite improbable that courses offered at law schools outside the state provide the close correlation to Mississippi law and practice and the state bar exam which the University of Mississippi's curriculum possesses.").

193. Angelos *et al*., *supra* note 10, at 168.

194. Lauren Carasik, *Renaissance or Retrenchment: Legal Education at A Crossroads*, 44 IND. L. REV. 735, 769–70 (2011) (citation omitted).

195. *Id*. at 770. As Professor Barton observed some time ago:

> Perhaps the most damning evidence of the efficacy of the bar exam, however, is a consideration of the skills of the newest members of the bar. Query what legal tasks, if any, we could guarantee that a lawyer could perform on the day she receives her letter of bar admittance. Without further training or experience, most would shudder to imagine this newly minted lawyer immediately trying a case, or drafting a complex contract.

Barton, *supra* note 9, at 445.

State laws and procedures govern the vast majority of transactions and legal disputes.[196] Largely due to bar exams, law schools focus on uniform codes and principles of common law that may be inapplicable in the jurisdictions in which they are located.[197] The UBE tests the "law of nowhere" and jurisdictions that have adopted it have seen interest in state law courses plummet.[198] If the diploma privilege were tied to curricula, law schools would no longer treat state laws and procedures as afterthoughts. Even students who intend to specialize in fields that are controlled by federal law would be better served if their foundational courses covered the laws that are applicable in their jurisdiction as opposed to general codes and principles.[199]

To survive constitutional scrutiny, a diploma privilege statute would also not need to mandate that law schools interject state law into every course in order for their graduates to qualify for the privilege.[200] The most effective way to infuse more state law into law school curricula would be to expand opportunities for law students to represent members of their local communities.[201] The bar exam has historically been an obstacle to the expansion of experiential courses.[202] New Hampshire maintains a limited experiential pathway to licensure, and Oregon is currently considering creating a two-year program that would serve as an

196. *See* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 252 (2018) ("To ignore state civil courts is to ignore ninety-nine percent of the cases in our civil justice system."); *see also* Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L. J. 941, 945 (2014) ("Until the early twentieth century, almost all law schools primarily focused on training lawyers for local markets . . . What became the dominant twentieth-century law school model rejected most of these characteristics.").

197. The UBE in particular "eliminates any and all state law content and tests only rules from uniform codes and generally accepted principles of common law." Griggs, *supra* note 6, at 2.

198. *See* N.Y. ST. BAR ASS'N, *supra* note 18, at 30, 32 (citations omitted).

199. *See* Griggs, *supra* note 6, at 19; *see also id*. at 62 ("[T]he UBE incentivizes New York law schools to alter their curricula to teach to the UBE, and it incentivizes students to study those principles that help them pass the UBE. Concerns about actual law practice are more distant.").

200. One commentator has suggested that merely offering some courses on state law and hiring professors admitted in the jurisdiction may be sufficient to demonstrate sufficient locality under *Wiesmueller*. *See* Wiesmueller v. Kosobucki, 571 F. 3d 699, 699 (7th Cir. 2009); *see also* Huddle, *supra* note 183, at 58.

201. Angelos *et al*., *supra* note 10, at 184:

> Based on the numerous ways in which students in a state's law schools acquire knowledge of and skills connected to state-based practice, and the extent to which judges and practitioners in the state become familiar with the students and the legal education offered by the state's schools, in-state schools have means of demonstrating a new lawyer's competence to practice in that state that out-of-state schools lack.

See Huddle, *supra* note 183, at 57 (noting that clinical and skills courses often require study of state law).

202. Students, rightly or wrongly, perceive that clinical courses are a distraction from courses that will be tested on bar exams. The NCBE has fed into this notion by alleging that the increased popularity of clinical courses partly explains falling bar passage numbers. *See* Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623, 625–26 (2019) (questioning this alleged correlation).

alternative to the bar exam.[203] The virtue of these programs is that they require graduates to demonstrate that they can complete core legal tasks effectively before they are permitted to provide legal services directly to the public.[204]

Jurisdictions could also require that candidates seeking to benefit from the diploma privilege focus on subjects that are integral to their economies and legal markets. For example, immigration is a major practice area in many states but tends to feature low-quality representation.[205] No law school in the country requires the subject, and no jurisdictions test it on a bar exam. An attorney can open an immigration practice upon passing the bar exam without having had any exposure to immigration law.[206] A state could require that candidates seeking to benefit from the diploma privilege not only successfully complete courses that are staples of present curricula but also courses such as immigration law that may be regionally significant. Other subjects of regional importance include oil and gas law, Native-American law, and admiralty. Jurisdictions with few large firms may well wish to mandate a course in law practice management.[207] The ABA *qua* regulator could exercise its authority to ensure that law schools still cover core subjects and do not overcorrect and become parochial.

Preparing lawyers for in-state practice may appear antiquated because of increasing lawyer mobility. However, as an empirical matter, most law school graduates practice primarily in the states in which their law schools are located.[208] Moreover, while most law schools would feel compelled to offer curricula that could satisfy the diploma privilege, some law schools may choose not to do so, reasoning that their students are more interested in national or international

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203. *See* OR. ST. BD. BAR EXAM'RS, RECOMMENDATION OF THE ALTERNATIVES TO THE BAR EXAM TASK FORCE 7–11 (2021), https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf [https://perma.cc/5TZ8-VYF6].

204. *Id*. at 9.

205. *See* Benjamin Edwards & Brian L. Frye, *It's Hard Out There For An Immigrant; Lemon Lawyers Make It Harder*, THE HILL (July 19, 2018), https://thehill.com/opinion/immigration/369702-its-hard-out-there-for-an-immigrant-lemon-lawyers-make-it-harder [https://perma.cc/B55K-YR9X] (summarizing empirical research); *see also* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 320 (2011) (reporting from a survey of federal judges that the quality of representation is lowest in immigration and family law cases).

206. Unsurprisingly, immigration lawyers often turn to formal and informal networks for guidance, including assistance with ethical issues. *See generally* Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. SAINT. THOMAS L.J. 194, 205 (2011) [hereinafter *Specialty Bars*].

207. Such a course may help lawyers avoid common ethical pitfalls related to management. *See generally* R. Lisle Baker, *Enhancing Professional Competence and Legal Excellence Through Teaching Law Practice Management*, 40 J. LEGAL EDUC. 375, 379 (1990) ("Focusing on how legal services are delivered also allows students to realize that ethical conduct is something that can be enhanced by good management practice.").

208. A study of graduates from Minnesota law schools found that seventy-nine percent reside in Minnesota in the years after graduation. *See* Paul W. Mattessich & Cheryl W. Heilman, *Career Paths of Minnesota Law School Graduates: Does Gender Make a Difference*, 9 LAW & INEQUALITY 59, 64 (1991); William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1403 (2009) (concluding, based on a study of lateral moves by corporate attorneys, that "[a]lthough large corporate law firms ostensibly compete on a national or international scale, the competition for lawyers plays out in a very localized way.").

practice. Prospective law students would be able to select the education that most accords with their interests and career plans. However, as long as jurisdictions treat bar exams as the sole pathway to licensure, there is little prospect of real innovation and experimentation in legal education.[209]

B. POLICING LAW SCHOOLS

Although states can draft diploma privilege statutes to avoid constitutional challenge and to meet the needs of their local legal markets, some state bars may oppose the diploma privilege because they are trepidatious about the absence of a "final check" on law school graduates in the form of bar exams.[210] As noted, Wisconsin lawyers generally hold a positive view of the state's law schools, partly explaining the success of its diploma privilege.[211] In jurisdictions with more law schools, practicing attorneys are likely to maintain that, without a final check, law schools will admit and graduate unqualified students.

The ABA's control over the law school accreditation process was intended to assuage these fears.[212] Nevertheless, some critics have charged that the ABA has functioned like a "paper tiger" since it entered into a consent decree over antitrust allegations twenty-five years ago.[213] In 2016, the Department of Education was sufficiently concerned about the ABA's lax enforcement of legal education standards that it threatened to suspend the ABA's accreditation power.[214] The ABA responded by tightening its standards and disaccrediting several law schools.[215] The prospect of ABA enforcement constrains law schools from admitting and graduating unqualified individuals, with or without bar exams.

Moreover, states need not defer to the ABA on law school accreditation. Until the middle part of the twentieth century, the ABA's accrediting decisions had little impact on attorney licensing,[216] and a few states continue to accredit law

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209. *See, e.g.*, Arewa *et al*., *supra* note 196, at 946–48 (tracing the development of the case method as the predominant form of law school instruction); Milan Markovic, *The Law Professor Pipeline*, 92 TEMPLE L. REV. 813, 831 (2020) ("To this day, the predominant form of law school instruction is the case method that Christopher Columbus Langdell created at Harvard Law School."); Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1712 (2008) ("Law school programs are, in fact, highly homogeneous. The program at most law schools today, at its core, follows the model and content originally developed at Harvard in the 1870s . . .").

210. NCBE, *supra* note 25, at 3.

211. *See* Moran, *supra* note 11, at 655; Stack Jr., *supra* note 54, at 123.

212. *See* Shepherd, *supra* note 22, at 106; Barton, *supra* note 9, at 433 ("[C]onsumer protection, relies upon two faulty assumptions: that the legal market is swamped by information asymmetry, and that substandard lawyers can cause irremediable harms to clients.").

213. *See* James S. Heller & Simon F. Zagata, *Back to the Future: ABA Law School Accreditation in the 21st Century and America's First Law School's Battle to Survive in the 1970s*, 111 LAW LIBR. J. 509, 515, 518 (2019). For a critique of the ABA-DOJ consent decree, see Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1487–90 (2011).

214. *See* Heller & Zagata, *supra* note 213, at 516–17.

215. *Id*. at 517.

216. *See* Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. UNIV. L.Q. 1035, 1041 (2001).

schools.[217] Jurisdictions that have misgivings about the ABA's enforcement of its standards can, consistent with the antitrust laws, refuse to admit graduates from certain ABA-accredited law schools.[218]

In the alternative, a state could extend the diploma privilege to graduates of select law schools (private or public) but not to others. Utah and Oregon followed this approach in adopting a temporary diploma privilege, since terminated, in response to the COVID-19 pandemic.[219] Just as states can require law schools to meet curricular benchmarks, they can impose admissions or employment criteria as well.[220] Any such decision might be regarded as elitist and exclusionary but would at least remove an entry barrier for some prospective lawyers.[221] As noted, for most law students, the bar exam is an expensive formality; the socioeconomically disadvantaged are overrepresented among never-passers.[222]

Jurisdictions could also mandate that aspiring attorneys achieve a certain level of academic performance to qualify for the privilege. If jurisdictions were to implement the policies, law students would be incentivized to excel in law school for all three years.[223] Jurisdictions could consider law schools' selectivity and their grading curves in delineating cutoffs.[224] This option may be especially appealing to states with a high number of law schools.

A final option would be for jurisdictions to place more emphasis on the MPRE rather than seeking to limit the diploma privilege to graduates of select ABA-

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217. California alone accredits twenty-three such law schools. *See Law Schools in California Accredited by the State Bar's Committee of Bar Examiners*, ST. BAR CAL., https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools#cals [https://perma.cc/4M6M-2K57]. The law school that spurred the consent decree between the ABA and DOJ is the Massachusetts School of Law. *See* Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1038–39 (3d Cir.1997).

218. *See generally* Lao, *supra* note 216, at 1060 (discussing the concept of state action immunity under the antitrust laws in the context of law schools).

219. *See* Derek T. Muller, *Three Curiosities of Oregon's Diploma Privilege for the 2020 Bar Exam*, EXCESS OF DEMOCRACY, (June 30, 2020), https://excessofdemocracy.com/blog/2020/6/three-curiosities-of-oregons-diploma-privilege-rule-for-the-2020-bar-exam [https://perma.cc/94GJ-KQ5Z].

220. The Department of Education formerly used "gainful employment" to determine whether to extent student aid funding for non-degree programs at not-for-profit or public universities and all degree programs at for-profit universities. *See* Anne Xu, *Better Information for Better Regulation: How Experimentalism Can Improve the Gainful Employment Rule*, 48 COLUM. J.L. & SOC. PROBS. 57, 68–69 (2014).

221. The decision would likely accord with the Fourteenth Amendment. *See, e.g.*, Nordgren v. Hafter, 789 F.2d 334, 339 (5th Cir. 1986); Moore v. Sup. Ct. of South Carolina, 447 F. Supp. 527, (D.S.C. 1977) ("The Supreme Court has as much right to impose the law school requirement on practicing attorneys as it does to impose it on those who are not attorneys.").

222. *See supra* Part II.

223. As Professors Gulati, Sander, and Sockloskie have summarized: "Students routinely complain about the vapidity of the final year of law school . . . And scores of scholars, judges, and practitioners have written withering critiques of law school, usually focusing on the latter half of school and usually suggesting fairly fundamental changes." Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Exam of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 236 (2001).

224. As set out fully in Part II, law school selectivity and law school grades are highly predictive of bar passage. *See supra* Part II.

accredited law schools. As noted in Part II, the MPRE is a relatively recent addition to the attorney admission landscape and is specifically designed to test knowledge of prevailing ethical standards. Familiarity with these standards does not ensure ethical conduct, but it is usually a necessary condition.[225] Thus, the MPRE, unlike the bar exam, is relevant to all attorneys regardless of practice area:

> The law of lawyering affects everything that a lawyer does from the first day of practice to the last. Viewed in practical terms, this body of law is more important to lawyers than any other subject matter in the law curriculum. Many law graduates never deal with much of the legal doctrine that they learned as part of the required curriculum . . . but every law graduate who practices law needs to know the basic elements of the law of lawyering.[226]

The MPRE is also a short test for which candidates do not need to engage in months of expensive and intensive study.[227] Although MPRE scores and bar exam scores are correlated,[228] the latter exam is probably more apt to screen out attorneys who do not have the time and resources to familiarize themselves with all subjects within its purview.[229]

Unfortunately, states have undermined the MPRE by setting low minimum pass scores. Depending on the jurisdiction, a lawyer or aspiring lawyer can pass by answering between forty-eight and sixty percent of the questions correctly.[230] Consequently, many attorneys find themselves ignorant of their professional obligations once in practice and decry violations as "hyper-technical."[231] Upon passing the MPRE, many jurisdictions effectively leave attorneys on their own to navigate ethical dilemmas, leading them to rely on peers and informal networks.[232]

If states were to adopt the diploma privilege, they could also shift resources from bar exam administration to ethics training and discipline. The administration of bar exams imposes significant costs on both jurisdictions and test-takers;

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225. *Compare* Philip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 244 (1968) ("It is nothing new that even sacrosanct ethical and legal standards may bear little relation to actual behavior.") *with* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 159 (1996) ("Understanding [the rules of lawyering] is a prerequisite to the moral reasoning and moral choice that flow from legal rules that confer discretion upon the lawyer.").

226. Cramton & Koniak, *supra* note 225, at 158–59.

227. *See generally* Curcio, *supra* note 24, at 391 (noting that bar preparation courses cost nearly $3,000 dollars and that candidates with families have less time to study).

228. Case, *supra* note 115, at 31.

229. *See generally* Yakowitz, *supra* note 1, at 24 (demonstrating correlation between socioeconomic status and bar exam passage).

230. Susan M. Case, *The Testing Column: Standards on the MPRE*, 75 BAR EXAMINER 35, 36 (2006).

231. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 373 (2004).

232. Specialty bars are one site of ethics socialization. *See Specialty Bars*, *supra* note 206, at 210.

the NCBE earns nearly twenty-five million dollars a year from bar exams.[233] Most states comparatively underinvest in *ex post* mechanisms of regulating attorney conduct. For example, attorney discipline budgets range from $433,226 in Montana to $17,419,290 in Illinois, relatively paltry sums considering the potential magnitude of attorney misconduct.[234]

This failure to invest in *ex post* licensing mechanisms also extends to attorneys' ethics training. Although most states require attorneys to engage in continuing legal education (CLE), ethics training is only a small part. An attorney can usually satisfy the ethics requirement via one hour of coursework, and some states have no ethics requirement at all.[235] Ethics training may be particularly valuable to attorneys who work in small firms and practice in high-risk practice areas and settings.[236]

Whether CLEs raise the quality of lawyering is unclear.[237] However, Professor Fagan has recently offered evidence that CLEs focused on ethics can reduce misconduct.[238] Exploring variations in states' changes to ethics CLE requirements, Fagan demonstrates that increasing the ethics requirement by one credit reduces attorney discipline by ten percent.[239] Although the study was based on a relatively small pool of attorneys, it stands to reason that yearly ethics training will have more of an impact on practicing attorneys than courses and exams taken at the beginning of their careers.

The bar exam has provided regulators with a false sense of security and disincentivized innovation in legal education. By reconsidering their use of bar exams, jurisdictions can refocus on the core issue: ensuring that lawyers receive the education and training needed to serve the public competently and ethically.

CONCLUSION

In this Article, I have shown that states can reintroduce the diploma privilege without undermining public protection. While the bar exam is viewed today as a crucial check on individual attorneys, it claimed a hold on the attorney admission

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233. *National Conference of Bar Examiners Tax Filings by Year (2020)*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/362472009 [https://perma.cc/245J-RQ4J] (last visited Feb. 3, 2022).

234. AM. BAR ASS'N, 2018 SURVEY ON LAWYER DISCIPLINE SYSTEMS at 40-41 (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf [https://perma.cc/ENN5-BPFB] (last visited Feb. 3, 2022).

235. *See* Fagan, *supra* note 149, at 6, 15–16.

236. *See also* Anderson & Muller, *supra* note 36, at 321 (suggesting that targeted interventions may be needed for these groups).

237. *See, e.g.*, Randall T. Shepard, *The "L" in "CLE" Stands for "Legal"*, 40 VAL. L. REV. 311, 312 (2006); Mary Frances Edwards, *Mandatory CLE: Shield or Sham?*, 3 J. PROF. LEGAL EDUC. 27, 31 (1985); *see also* Colleen G. Segall, *Ethics in Mandatory CLE: An Overlooked Means for Improving the Standard of the Profession*, 6 J. PRO. LEGAL EDUC. 22, 33 (1988) ("With some re-organisation, greater regulation, the inclusion of specialist and compulsory ethics units, MCLE could play an extremely important role in increasing the effectiveness and thereby the public image of the legal profession.").

238. Fagan, *supra* note 149, at 14.

239. *Id.*

process only in the latter half of the twentieth century. The organized bar embraced the bar exam to eliminate perceived overcrowding in the legal profession that it attributed to law schools enrolling immigrants and racial minorities. Some jurisdictions mandated bar exams just as the first classes of Black law school graduates were poised to benefit from the diploma privilege. The bar exam was never intended as a capstone to legal education, and it has led law schools to focus disproportionately on teaching general legal principles and not training lawyers for actual practice.

The continuing reliance on bar exams could be excused if there were evidence that bar exams protect the public. Studies conducted heretofore fall short of establishing that performance on the bar exam has a direct effect on attorney discipline. Data from Wisconsin, the one state that currently maintains the diploma privilege, demonstrate that attorneys who qualify via the diploma privilege are no more or less likely to commit misconduct than other attorneys. If jurisdictions are retaining bar exams because they are genuinely concerned about the potential for increased misconduct, they have more direct means of addressing this problem, including raising MPRE minimum pass scores, expanding continuing legal education focused on ethics, and investing in disciplinary mechanisms.

Contemporary attorney admissions barely resemble those of yesteryear, but bar exams persist. Neither tradition nor fear of increased attorney misconduct should dissuade jurisdictions from reconstituting the diploma privilege.