

Do We Need a Bar Exam . . . For Experienced Lawyers?

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The fierce determination to require a bar exam during the COVID-19 pandemic left quite an impression on new lawyers entering the profession. State bars and state supreme courts made their position clear: the bar exam provides a screening function necessary to safeguard the public. Many disagreed.

Even a cursory look at attorney discipline reveals that the lawyers who get into disciplinary trouble are not mostly new lawyers. The lawyers who get into trouble tend to be more experienced lawyers, who have not had any formal or objective tests of their ability to function since their original bar exam pass. The only check on their performance is discipline after harm has been done.

Regulators deem the bar exam and character and fitness as necessary tests at the entry gate to the profession. As I contend in this Article, however, evidence supports regular administration of these tests throughout lawyer careers, not just at the beginning. I challenge the profession to consider whether the entirety of the current regime for assuring lawyer competency and quality can be improved to serve the public.

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Introduction	1162
I. How and When Do Lawyers Inflict Harm on Clients?	1165
A. Infliction of Incompetence and Neglect	1168
B. Which Conduct Failures Lead to Discipline and When?	1171
1. What Are the Attorney Conduct Failures?	1172
2. When Do Attorney Conduct Failures Occur?	1173
II. Can Conduct Problems Be Predicted or Otherwise Screened?	1177
A. Character and Fitness Indicators	1177
B. Malpractice “Markers”	1182
III. License-Retention Exam as Quality Indicator	1185
A. Deficiencies of Lawyer Advertising Information	1186
B. Deficiencies of Third-Party Information	1188
C. Other Challenges for Clients in Assessing Lawyers	1192
IV. Proposals for Improving Bar Screening	1194
A. Current System for Lawyer Screening	1195
B. “Minimum Competence”: A Standard for All Lawyers or Just New Lawyers?	1199
C. A Program for Regular Lawyer Examination	1202
1. Proposal for New Regulatory Regime	1203
2. Potential Downsides of New Regime	1204
3. Rebalancing the System	1206
Conclusion	1207

INTRODUCTION

Lawyers are entrusted to protect the legal interests of the American people and are called upon for everything from the mundane to the extraordinary, from fender benders to murders. Could you imagine a campaign to allow doctors or commercial pilots or engineers to skip their licensing exams and begin operating or flying or building bridges? It’s not a good idea for those professions, and it’s certainly not a good idea for recent law school graduates.

—Judge Zel M. Fischer, Supreme Court of Missouri¹

Judge Fischer presented this thought exercise not in the formal context of a 2020 diploma privilege hearing or administrative ruling but from within the confines of a National Conference of Bar Examiners (NCBE) press release.² As state bars prepared to administer the October 2020 remote bar exam, the NCBE commissioned a professional poll enabling them to boast that “Americans

1. *National Survey Finds Support for Bar Exam*, NAT’L CONF. BAR EXAM’RS (Sept. 30, 2020), <https://www.ncbex.org/news/national-survey-bar-exam/> [<https://perma.cc/5DBX-XATJ>]. Judge Zel M. Fischer is a judge on the Supreme Court of Missouri but spoke on his own behalf. *Id.*

2. *See id.*

overwhelmingly support [a] bar exam requirement’ for attorney licensure.³ The poll revealed strong mainstream public endorsement for an in-person bar exam, despite the ongoing COVID-19 pandemic.⁴ The released poll did not survey whether respondents had familiarity with the contents of the bar exam, but the public apparently values the concept.

The NCBE could have asked follow-up questions. Would the public overwhelmingly support requiring regular reexamination of *all* lawyers to ensure that current lawyer licensure reflects a recent measure of competency? Would state supreme courts, state bars, and rank-and-file lawyers commit to accept public opinion on that dimension and implement measures accordingly?

Though no polling exists on this particular question, one might guess that lawyer reexamination would find some support. Lawyers famously remain unsympathetic figures.⁵ Thus, using public opinion as guidance might yield some rather uncomfortable answers for the profession. Gallup’s polling consistently shows that the public perceives nurses, engineers, and medical doctors as *far more* honest and ethical than lawyers.⁶ The traditional bar exam and character and fitness screens have apparently not fostered public trust, something which the NCBE implicitly values given their demonstrated concern with public opinion.

Would the public support a regulatory safety regime for regulating *all* lawyers that resembles the regime for commercial pilots? Perhaps the legal profession should take Judge Fischer’s challenge to maintain standards for competence more seriously, pushing beyond his case for preserving the entry-level bar exam, even during a pandemic. Why focus only on measuring the competence of *new* lawyers? After all, the aviation sector does not focus on measuring the competence of only *new* pilots.⁷ Why not find a measured way to ensure that every lawyer at every level of experience can practice law capably and with minimized risk of inflicting harm? The data show that lawyers tend to confront disciplinary problems later in their career, not earlier, yet for some reason the profession focuses heavily on screening new lawyers.⁸

3. *Id.* In the spirit of disclosure, I supported the Oregon law school deans’ petition to the Oregon Supreme Court that advocated for 2020 diploma privilege and signed a letter accordingly.

4. In their poll, 60% of the general public supported administering an in-person bar exam during COVID-19, and an additional 19% supported an online alternative. *Id.* Only 6% supported an option that looked like diploma privilege. *Id.* Fifteen percent answered, “don’t know.” *Id.*

5. This negative seems to have been etched into the modern profession for decades. See Albert P. Blaustein, *What Do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations*, 38 A.B.A. J. 39, 39 (1952) (concluding that the results of a 1952 public image survey were “not pleasant reading for members of a profession that produced leaders like Coke, Marshall, Webster, Lincoln[,] and Hughes”).

6. See R.J. Reinhart, *Nurses Continue to Rate Highest in Honesty, Ethics*, GALLUP (Jan. 6, 2020), <https://news.gallup.com/poll/274673/nurses-continue-rate-highest-honesty-ethics.aspx> [<https://perma.cc/S8YC-D2J6>].

7. See *infra* Section IV.B.

8. See *infra* Section I.B.

Tightening regulation of the whole herd of practicing attorneys would immediately create protections for all clients if regulators deployed effective rescreeing or reexamination mechanisms. In contrast, changing any approach with the entry-level bar would take years to ripple through the system. Nonetheless, entry level is where the NCBE continues to invest resources, just recently adopting task force recommendations to launch a new bar exam design.⁹ As one bar exam critic put it, state regulators are “in the business of licensing professionals . . . [W]e’ve seen diploma privilege work for years and we’ve seen lawyers pass the bar exam and run massive client frauds. A robust reevaluation of licensure should dominate professional discussions for the next few years.”¹⁰ I recommend rethinking the entire chain of the licensure admission and retention process.

In this Article, I explore whether regular standardized testing of practicing lawyers and renewed character and fitness examinations should serve as mechanisms for protecting consumers. One response might be that standardized tests are problematic gatekeeping and quality control mechanisms and that allowing them to metastasize further into the profession will do more social harm than good. Many scholars have recently assessed the problems of the entry-level bar exam, and I do not attempt to duplicate or supplement their substantial contributions here.¹¹

The ultimate question, however, is whether testing at the entry level or throughout legal careers passes cost-benefit muster.¹² It would be difficult to accept that there are benefits from an entry-level bar exam but no benefits from a regularly administered exam for practicing attorneys. Nonetheless, the architecture of the current system reflects exactly that.

The stakes of assuring the competency of established members of the bar are unquestionably high. Judge Fischer’s observation that lawyers are “called upon for everything from the mundane to the extraordinary, from fender benders to

9. NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations, NAT’L CONF. BAR EXAM’RS (Jan. 28, 2021), <https://www.ncbex.org/news/ncbe-bot-vote-approves-ttf-recommendations/> [https://perma.cc/MT2H-BD2Z].

10. Joe Patrice, *State Retreats From Diploma Privilege Policy Despite EVERYTHING WORSE NOW!*, ABOVE THE LAW (Feb. 2, 2021, 1:13 PM), <https://abovethelaw.com/2021/02/state-retreats-from-diploma-privilege-policy-despite-everything-worse-now/> [https://perma.cc/Z4BB-WSGB].

11. See generally DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADV. OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (2020) (“The unfortunate reality is that, although the bar exam has existed for more than a century, there has never been an agreed-upon, evidence-based definition of minimum competence.”); Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1 (2020) (offering alternative paths to measuring competence and questioning the legitimacy of the institutional structure of bar admission in the wake of the COVID-19 bar administration); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931 (2020) (exploring “licensing mechanisms that can reduce any disparate impact in who we permit to enter our profession, and who we exclude”).

12. See Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 322–23 (2019) (“wading into the cost-benefit debate” about bar exam cutoff scores but raising issues generally applicable to the costs and benefits of requiring an exam).

murders”¹³ applies more to experienced lawyers than the newly minted. Few new law school graduates are likely to try murder cases; to close sophisticated real estate, financial, or business transactions; to offer sophisticated tax advice; or to probate a complicated estate.¹⁴

Since the institution of the bar exam, the legal profession has raised barriers to entry¹⁵ while enabling those who have passed through to stay in practice for decades—literally until death or expulsion for a disciplinary violation. Such arrangements of tradition warrant scrutiny. Perhaps consideration of this core question can also compel a new look at both the entry-level bar exam and character and fitness tests in their entirety, inspiring challenges to the assumptions that underlie the well-established professional self-regulatory regime. In other words, if reexamination of the entire body of practicing lawyers feels inappropriate, too high stakes, or unhelpful to the public, then similar questions should be asked about the entire entry-level gatekeeping system.

In Part I, I discuss how lawyers inflict harm and when they inflict it. Attorney disciplinary cases tend to emerge later in the course of careers, and most malpractice and discipline emanate from later-emerging failures of competence and neglect. Part II shows that opportunities for proactive measures to prevent misconduct and malpractice occur beyond the initial screens for character and fitness and the entry-level bar exam. I argue that regular administration of those screens would provide more contemporaneous assessments of the risks that individual lawyers will commit ethical violations or engage in malpractice. I discuss another significant and related problem in Part III. Consumers confront a difficult challenge when assessing the quality and value of legal services, especially the competence of lawyers. Testing recertification can show that the lawyer has at least met the minimum requirements to hold a license and may also convey other useful content to clients about competencies in certain areas. Part IV contends that ongoing testing protects and serves the public at least as much as the entry-level bar exam, if not more. I offer specific retesting options for the legal profession to consider, along with their potential downsides. I conclude by challenging the profession to reexamine the entirety of its gatekeeping and self-regulation.

I. HOW AND WHEN DO LAWYERS INFLICT HARM ON CLIENTS?

During the COVID-19 pandemic, the determination of almost every state authority to administer the bar exam revealed the legal community’s strong faith

13. NAT’L CONF. BAR EXAM’RS, *supra* note 1.

14. One survey shows that the necessary “foundations” for early practice involve development of professionalism and like qualities, not skills, indicating that skills and substantive responsibilities come later. ALLI GERKMAN & LOGAN CORNETT, INST. FOR THE ADV. OF THE AM. LEGAL SYS., FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 26–27 (2016).

15. *See generally* Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36 (1974).

and reliance on an entry-level standardized test to provide the final proactive screening work for the profession.¹⁶ Stepping back, however, we find that only a small slice of practicing lawyers in the United States are new lawyers, who have had their “competency” assessed recently. Lawyers in their first three years of practice represent less than 10% of the total lawyer population.¹⁷ Brand new lawyers, in their first year of practice, represent only 3% of the total.¹⁸

The evidence shows, however, that new lawyers are not the professionals perpetrating the most and the deepest harm.¹⁹ Thus, the question remains: should the profession also assure the quality and competency of services for the other 90–97% of lawyers, the experienced lawyers? Today, state bars primarily use formal mechanisms to protect the public from incompetent lawyering only after an ethical violation and take almost no proactive measures.²⁰

Beyond the initial bar-exam screening, what should concern the profession when it comes to protecting the public? Analyses show that lawyers ride off the rails due to two “primary causes . . . non-diligence, and incompetence.”²¹ Lawyers of long-standing careers, decades past their passage of the bar exam, unfortunately are often at the center of sad and frightening stories about lawyer incompetence. Is the beginning of a legal career the only appropriate juncture for preventing such ills? Or is regular, later intervention more important?

Professor Jeffrey Kinsler suggests that the bar exam, as a point of entry, is an appropriate juncture for preventing ills, concluding that those who fail the exam and retake it successfully will be more likely to present future disciplinary cases.²²

16. Even the COVID-19 diploma privilege states have already reverted to require traditional bar exam administration. See Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege Are Going Back to Bar Exam Admissions*, A.B.A. J. (Dec. 10, 2020, 3:16 PM), <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions> [<https://perma.cc/T7NJ-AQE4>].

17. There were approximately 1.3 million active lawyers in the United States in 2020. *ABA National Lawyer Population Survey: Historical Trend in Total National Lawyer Population (1878–2021)*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf [https://web.archive.org/web/20220326222512/https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf] (last updated 2021). Approximately 100,000 people have graduated from ABA accredited law schools over the past three years. See *Statistics: Employment Data (Classes of 2018-2020)*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/statistics/ [https://web.archive.org/web/20210420200334/https://www.americanbar.org/groups/legal_education/resources/statistics/] (last visited Apr. 20, 2021) [hereinafter *ABA Employment Data*].

18. Approximately 34 thousand people graduated from ABA law schools in 2019. See *ABA Employment Data*, *supra* note 17.

19. See *infra* Sections I.B–C.

20. For an illustration, consider the example of Dennis Hawver, *infra* Section I.A.

21. Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN’S L. REV. 883, 885 (2017).

22. *Id.* at 884–93.

With bluntness and not without subsequent challenge,²³ he contends that “the primary causes of bar exam failure are ‘poor study habits, weak academic skill development, or low intellectual functioning’ Thus, it is reasonable to assume that lawyers who fail the bar exam are more likely to be disciplined as attorneys.”²⁴ Kinsler makes these claims without directly acknowledging that in order to even sit for a bar exam a person must have hurdled both a bachelor’s degree and a law degree.

However, Kinsler’s assertions raise as many questions as they purport to answer. First, if the profession wants to get serious about understanding what drives lawyer misconduct or leads to demonstrations of incompetence, more effort should be put into place to collect data about it. For a profession that has professed confidence in a psychometrically validated test and character and fitness screening system, the underlying data availability is surprisingly lacking.²⁵

Indeed, a study of state-level practices over a decade ago revealed inconsistency in recording, tracking, and reporting such statistics, with some states performing more transparently than others.²⁶ The author of that study was compelled to reach out by phone to interview bar officials in several states to gather data and impressions about attorney discipline.²⁷ More recently, Professors Robert Anderson and Derek Muller encountered similar challenges in nailing down “precise estimates of the impact of changing the passing score” for the California Bar Exam.²⁸ Though confident in their findings “that lowering the bar exam passing score will increase the amount of attorney discipline in California,” they warn that “[t]he only way to make precise estimates of the impact of changing the passing score is for state bar licensing authorities to use internal records on bar examination scores and discipline outcomes to determine the likely fallout.”²⁹

Nevertheless, some ideas appear through this fog about what types of discipline emerge and when. Again, discipline tends to surface later in careers. This would mean that the initial bar exam and character and fitness screen, combined with the minimal licensure maintenance requirements, may not alone serve as the best tools for harm prevention.

23. For a rejoinder challenging Kinsler’s conclusions, see William Wesley Patton, *A Rebuttal to Kinsler’s and to Anderson and Muller’s Studies on the Purported Relationship Between Bar Passage Rates and Attorney Discipline*, 93 ST. JOHN’S L. REV. 43, 44–68 (2019).

24. Kinsler, *supra* note 21.

25. See Anderson & Muller, *supra* note 12, at 319–20.

26. Stephen E. Schemenauer, Comment, *What We’ve Got Here . . . Is a Failure . . . To Communicate: A Statistical Analysis of the Nation’s Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 645–52 (2007).

27. *Id.* at 665–81.

28. Anderson & Muller, *supra* note 12, at 319.

29. *Id.* Though Anderson and Muller express confidence in their results that link a lower bar cutoff score in California to rates of long-term discipline, they note that using individualized data to set the score would be “especially important” for any analysis that might lead to a change in the passing score, “because discipline does not manifest until many years after bar admission.” *Id.*

In Section I.A. I begin the discussion where Kinsler does: examining situations where lawyers inflict harm on clients through “incompetence” and “neglect.” I present two stark examples of troubled, experienced lawyers to illustrate the types of harm that the profession could mitigate with ongoing monitoring mechanisms. I follow up on these narratives in Section I.B. by examining various aspects of character and fitness and attorney-discipline data. Section I.C. looks closely at risk factors for malpractice, as distinct from ethical violations, drawing upon a recent study by Professor Nancy Rapoport and Joseph Tiano. Taken together, looking at how and when lawyers fall down may point toward the optimal points for intervention.

A. Infliction of Incompetence and Neglect

For a vivid case of incompetence, consider the example of Dennis Hawver, a longtime Kansas attorney who was disbarred by the Kansas Supreme Court in 2014.³⁰ Though some aspects of Hawver’s case are colorful, there is little humor to find in it when considering the stakes, the welfare of clients, and the well-being of lawyers. Some lawyers may for decades appear to have the ability to practice competently, but at some point they lose their entire sense of judgment, stepping into areas distant from their expertise. Even after gross misconduct, the system can take a long time to prevent them from inflicting harm.

In 2005, as a defense attorney in a capital murder trial, Hawver showed what disciplinary authorities described as “inexplicable incompetence.”³¹ Despite a stipulation that his client had previously been convicted of a felony, Hawver repeatedly mentioned to the jury that his client had committed voluntary manslaughter, emphasizing that his client was “‘a professional drug dealer’ and a ‘shooter of people.’”³² Hawver also did not present available alibi evidence.³³ In his closing arguments during the penalty phase of the trial, Hawver told jurors that “the killer should be executed,” and the jurors, apparently deeming his client “the killer,” so sentenced.³⁴ Ultimately, after Hawver’s grave disservice, the courts eventually overturned the conviction.³⁵

Yet, even after this spectacular debacle, Hawver continued to carry his license until his disbarment nine years later. At his disbarment hearing, Hawver advocated

30. Bryan Lowry, *Kansas Supreme Court Disbars Defense Attorney Dennis Hawver for ‘Inexplicable Incompetence,’* WICHITA EAGLE (Nov. 14, 2014, 2:04 PM), <https://www.kansas.com/news/local/crime/article3933257.html> [<https://perma.cc/J7CY-M2E2>].

31. *In re Hawver*, 339 P.3d 573, 597 (Kan. 2014).

32. *Id.* at 577.

33. *Id.*

34. *Id.* at 578. According to a news account, Hawver may have been trying to inspire the jury to blame someone else for the crime, but this turned out to be a blunder. Tim Carpenter, *Ozawkie Lawyer Dennis Hawver Disbarred for Work on Cheatham Death Penalty Case*, TOPEKA CAP.-J. (Nov. 14, 2014, 8:26 AM), <https://www.cjonline.com/article/20141114/NEWS/311149753> [<https://perma.cc/F2QJ-5K7G>].

35. *In re Hawver*, 339 P.3d at 583.

for himself in the erratic manner he advocated for his client at that capital murder trial. Hawver dressed up as Thomas Jefferson, wig and all. He shouted, “I am incompetent!” as he pounded the lectern.³⁶ The court agreed with Hawver’s self-assessment. Hawver had been practicing for nearly thirty years at the time of the trial, and, ultimately, forty years at the time of this disciplinary proceeding, having been admitted to practice in 1975.³⁷ Of note, he had previously been found in a separate matter to have violated Kansas Rule of Professional Conduct 1.1 (competence) and accordingly “participated in the [Kansas] attorney diversion program” in 2003.³⁸ Ultimately, almost a full decade passed after this capital murder trial before Hawver was removed from practice.³⁹

This meant that until Hawver’s disciplinary hearing, which followed upon an ineffective assistance of counsel hearing, the Kansas Bar apparently had deemed him fit to serve the public. This fitness was presumably based on his 1975 bar admission, his full compliance with an earlier diversionary program for other conduct, and compliance with other basic administrative requirements. Hawver’s continued good standing after these events raises multiple questions. Why did the judge in his murder case not have the ability to intervene quickly? Why was the post-diversion monitoring on the unrelated matter insufficient for the bar to catch him before he went on to continue to harm a client? Who was there to certify Hawver’s abilities and test his judgment as he practiced for all of those years?⁴⁰ What if his client had failed to find a competent lawyer to appeal his conviction and had been wrongfully executed? Ultimately, the extended failure to monitor a lawyer like Hawver could have yielded deadly consequences.

Perhaps testing would have demonstrated that an eccentric, nonconformist like Hawver had lost the discipline and willingness to submit to conformity that a standardized test performance requires. Perhaps a routine character and fitness reexamination—where opposing counsel, judges, and others in the community weighed in on the status of every lawyer—would have protected the public. Perhaps a decision to sit for a specialty bar renewal would have signaled to others to inquire about his experience in trying criminal cases, of which he apparently had little to none. The broad entry-level bar exam may have served a purpose when he first took it in 1975, but that purpose had expired.

36. Lowry, *supra* note 30.

37. *In re Hawver*, 339 P.3d at 586.

38. *Id.*

39. Lowry, *supra* note 30.

40. According to Hawver’s affidavit, he had an active practice with considerable courtroom experience but none in the arena of capital murder cases. *In re Hawver*, 339 P.3d at 578–79. “In April 2005, I was a private attorney with a general trial practice. I had a busy practice in which I represented people in civil and criminal matters in [several] counties. In addition, I was a candidate for governor of the State of Kansas, and as such I was spending considerable time attending public appearances throughout the state of Kansas. I appeared at all political functions dress[ed] as President Thomas Jefferson.” *Id.* at 578 (second alteration in original).

Moving on to another illustration, neglect alone has the capability of inflicting great harm. Often, lawyers, and even those closest to them, may not even be aware of the harm that they are inflicting. This problem even extends to members of the bench, where scrutiny would presumably be high because of the sheer number of parties and staff keeping an eye on matters. Judges, however, carry such a weight of authority and power that members of the bar and their staff may fear challenging them. Additionally, for judges with lifetime tenure, such questions become more awkward as respected figures lose their abilities.⁴¹

In New York, a particularly sad case emerged in 2020. The New York State Commission on Judicial Conduct investigated a fifty-four-year-old judge with sixteen years of service on the bench for “erratic and at times intemperate” treatment of lawyers and others.⁴² The judge had been showing up late to her courtroom, leaving early, and sometimes not making it into work at all.⁴³ The Commission informed the judge that a separate investigation had commenced about whether she was “suffering from a physical or mental disability that prevented her from properly performing her judicial duties” and recommended her retirement.⁴⁴ Ultimately, this member of the bench, once also highly regarded as a prosecutor, accepted this recommendation and stepped down. The judge reported that she had been diagnosed with “an advanced case of Alzheimer’s disease.”⁴⁵

The descriptions of the judge’s actions indicated unusual, unorthodox, and perhaps confused behavior in the courtroom.⁴⁶ But it was difficult for some in her close world to discern what was happening. The president of the local bar association described her as “smart, empathetic, and well-liked as a jurist” and reported that he “never had any indication, professionally or socially, that [the judge] was slipping.”⁴⁷

News reports indicated that observers could not seem to pinpoint when the judge’s symptoms began manifesting, and though some behavior was public, it was difficult to discern if she was running into other sorts of problems in her chambers.⁴⁸ Nobody would doubt that judges are charged with enormous

41. Justices John Paul Stevens and David Souter had a pact that Souter would monitor him for cognitive decline, perhaps knowing that others would find it difficult to notice it and confront it. See Tessa Berenson, *John Paul Stevens on the Worst Decision of His 34 Years on the Supreme Court*, TIME, (July 16, 2019, 10:17 PM), <https://time.com/5588212/justice-john-paul-stevens-book-interview/> [<https://perma.cc/4JQE-49N6>].

42. Alan Feuer, *Judge Agrees to Retire After Alzheimer’s Diagnosis*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/nyregion/shawndya-simpson-judge-alzheimers-resign.html> [<https://perma.cc/HY7Y-5E3L>].

43. *Id.*

44. *Id.*

45. *Id.*

46. For example, the judge reportedly left the bench abruptly during a hearing without explanation and was mistaken about evidence, including “wrongly suggesting that the prosecution witness had testified for the defense.” *Id.*

47. *Id.*

48. *Id.*

responsibilities, but even with observed erratic behavior, and the onset of a severe disease that affects judgment and memory, this judge was able to wear the robes and wield a gavel for quite some time.⁴⁹

Granted, the age of onset of this disease was unusual here. But where was the routine check on her ability? Not just her baseline cognitive ability to function independently, but a major check on a judge's competence and ability to attend to her solemn responsibilities? Although it is possible for a person to pass a standardized test with this type of medical condition, it is also possible that the prospect of taking such a test would give such a person pause, perhaps pushing them to step aside or ultimately forcing them out.

Professor Raul Ruiz identified categories of competency "critical for bar exam passage: knowledge of the law, cognitive skills, and noncognitive skills."⁵⁰ A practicing lawyer or judge, by passing a bar examination or a similar test, would show knowledge and retention of cognitive skills like "thinking, reasoning, reading, learning, attention span, and memory."⁵¹ Additionally, a lawyer who passes a regularly-administered standardized test would demonstrate the *noncognitive* skills that are reflected in the ability to demonstrate executive function.⁵² A successful retest could demonstrate retention of "tenacity, delayed gratification, self-discipline, and self-control."⁵³ Certainly, a standardized test could reveal at a baseline whether a lawyer like Hawver or the New York judge could still conform and function. For competent lawyers who have already passed the bar, why would they be unable to pass the test again?

Most cases of incompetence are not as high-profile or extreme as the case of Hawver and the New York judge. They are quite routine. They do not appear in news reports. As several studies have concluded, the primary categories of discipline are quiet. They relate to competence, neglect or failure of diligence, and failure to communicate with clients.⁵⁴

B. Which Conduct Failures Lead to Discipline and When?

How do lawyers get into formal trouble, and does bar exam failure tell us anything that can flag this trouble? In 2013, a robust longitudinal study examined

49. *See id.*

50. Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 159 (2020).

51. *Id.* at 161.

52. *Id.* at 164–65. These factors manifest in a school environment in "class attendance, organization, class participation, completion of homework, and studying." *Id.* In a retesting environment, they would require a lawyer to demonstrate the discipline required for a modicum of preparation.

53. *Id.* at 170.

54. *See* Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 811, 813 (2004); Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 462 (2016); Schemenauer, *supra* note 26, *passim* (focusing on "failure to communicate").

the relationship between character and fitness bar admissions concerns and subsequent discipline, using data from the Connecticut bar.⁵⁵ The Connecticut study is replete with enough data to paint a basic picture of how lawyers run into trouble.

Data in the Connecticut study focus on attorney discipline outcomes.⁵⁶ Discipline outcomes can be used as a proxy for attorney misconduct—with caveats. Of course, misconduct and malpractice can go undetected and unpunished, and detection and punishment may not be distributed fairly or consistently throughout the attorney population. It is hard to know, as Anderson and Muller suggest, if small firm and solo practitioners are singled out more for discipline and enforcement because of the nature of their practices and their associated smaller business operations.⁵⁷ It is also hard to know whether the discipline that is observable is more of a function of the demographics of who gets investigated and caught.⁵⁸ A deeper and renewed look into attorney complaints records might offer more data, but again, even raw complaints could distort the picture. Nonetheless, even with these caveats, the data in the Connecticut study support the notion that regular career testing and associated checks could prevent or reduce the number of conduct failures.

1. What Are the Attorney Conduct Failures?

The Connecticut study provides a “crude taxonomy” of conduct rule violations, recording the number of times lawyers were cited for violating identified rule categories.⁵⁹ A lawyer could violate numerous rules in one related action, but this data set counts the number of times each rule was violated. In the Connecticut sample, sanctions imposed for violation of rules 1.4 and 1.3 (communication and diligence) accounted for 38% of the total—the largest chunk.⁶⁰ Adding in competence failures, false statements, and failures to respond to disciplinary matters brings the total to just over half of all sanctions.⁶¹

In order for a test to have a meaningful impact on the profession, the test must somehow screen for these issues. Failure to demonstrate the noncognitive skills required to pass the exam might serve as the warning flag for future failures with communication and diligence. A “failure to keep your act together” category of misconduct could be screened and prevented this way. Again, the absence of discipline to prepare for and sit for a standardized test may flag lawyers who have lost some of their function or need help in their lives.

55. See LESLIE C. LEVIN, CHRISTINE ZOZULA & PETER SIEGELMAN, A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2258164 [<https://perma.cc/2U9E-6ARF>].

56. *See id.*

57. *See* Anderson & Muller, *supra* note 12, at 321.

58. *See id.* at 320.

59. LEVIN, ZOZULA & SIEGELMAN, *supra* note 55, at 14.

60. *Id.*

61. *Id.*

Complicated ethical issues, the stuff of which nightmares of the Multistate Professional Responsibility Exam are made, do not seem to trip up disciplined lawyers as much as the “failure to keep your act together” category, according to the Connecticut study.⁶² Conflicts-of-interest violations, for example, account for fewer than 7% of the rules broken.⁶³ The rest of the disciplinary problems of lower incidence include competence, fee issues, candor to the tribunal, and proper representation termination.⁶⁴

However, the focus should not be merely on the circumstances that lead to discipline. How can clients and the public know that lawyers are sharp, up-to-date, and competent, delivering a level of client service that not only meets the professional standard but also matches the expectations for service from an experienced attorney? Clients may not be well-equipped to assert post hoc whether or not they received the appropriate quality of service for their price, beyond basic lawyer responsiveness. Client expectations might be unreasonably high or unreasonably low. A recertification through testing, on the other hand, could offer the public some confidence about the maintenance of baseline capabilities.

Having discussed the nature of the troubles that lawyers can cause, there are two other questions to address when we consider the case for ongoing mid-career testing. When does the trouble happen? Can the cause of the trouble be predicted? If key intervention points can be identified, the bar can consider whether testing or renewed character and fitness inquiries can help mitigate conduct issues.

2. *When Do Attorney Conduct Failures Occur?*

The Connecticut study provides some limited information about when in their careers lawyers face disciplinary actions, though the shape of the study puts boundaries on its precision. In the data set, “for those who were disciplined, the average length of time between admission and the filing of a grievance leading to a sanction was 10.74 years.”⁶⁵ Of the lawyers sanctioned, over 70% were only disciplined once, and more than half received a sanction no more serious than a public reprimand.⁶⁶

Nonetheless, even one single sanction can be the byproduct of some harmful activity. Of those disciplined, just over 35% received a suspension or disbarment.⁶⁷ Over one-quarter of those disciplined had been disciplined more than once, perhaps revealing that the *disciplinary system* also failed to protect clients effectively.⁶⁸ That is, if the disciplinary system cannot function predictively well enough to stop misconduct, it does raise the question of whether an ongoing examination regime

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 16.

66. *Id.*

67. *Id.*

68. *Id.*

can do it. If coordinated, however, different checks reinforce and complement one another.

The Connecticut findings point in a few directions. The average of 10.74 years between entry into the profession and attorney discipline does not reflect the full extent of discipline and could be lower than the total average for the state.⁶⁹ The longitudinal study scrutinizes only lawyers who joined the Connecticut bar between 1989 and 1992.⁷⁰ Given that the Connecticut study was published in 2013, this average excludes all discipline that could take place in the third and fourth decades of practice, when a substantial amount of discipline happens. Further, the average does not inform about the distribution of discipline over time. However, the datasets analyzed by Professor Kyle Rozema and Anderson and Muller provide more evidence to show that misconduct, though rooted in many causes, continues to manifest throughout lawyer careers.

In their extensive longitudinal analysis of California attorney records from 1975 to the present, Anderson and Muller note that “[t]he incidence of discipline is low overall but increases substantially with the attorney’s number of years of practice.”⁷¹ Meshing somewhat with the Connecticut study, they found that there was almost no discipline during “the first ten years of practice,” but noted that from there, “the rate of discipline increases in a roughly linear fashion.”⁷² As they summarized, “[f]or each year after the tenth year, the percentage of attorneys disciplined increases by approximately 0.15 percentage points, reaching approximately 5% at thirty-five years since admission to the bar and 7% at forty years since admission.”⁷³

Rozema’s comprehensive study of the impact of bar exams on future discipline also reinforces these notions about the timing of disciplinary trouble.⁷⁴ He used historical data to assess the long-term impact of diploma privilege for new lawyers. Though the study is currently under completion, Rozema’s “estimates suggest that lawyers admitted on diploma privilege are publicly sanctioned at similar rates to lawyers admitted after passing the bar exam over the first decade following licensing.”⁷⁵ The entry-level bar exam may not be screening out dangers in the first decade of practice, at least at the levels that many might think.⁷⁶

Consistent data that point to later-career timing of discipline can be found elsewhere. The disciplinary data reported by the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois from 2015 through 2019

69. *Id.* at 16.

70. *Id.* at 1.

71. Anderson & Muller, *supra* note 12, at 312.

72. *Id.*

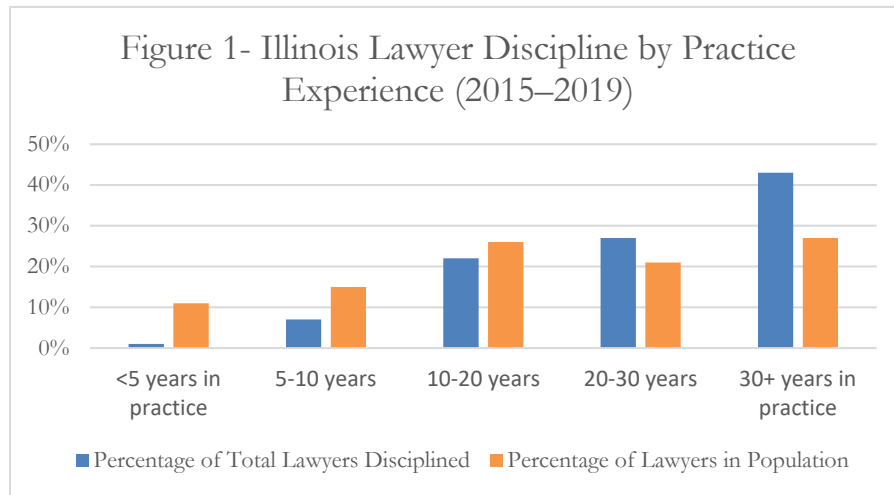
73. *Id.*

74. See Kyle Rozema, *Does the Bar Exam Protect the Public?* (Aug. 20, 2021), <https://ssrn.com/abstract=3612481> [<https://perma.cc/K63G-LC5Z>].

75. *Id.* at 2.

76. See NAT’L CONF. BAR EXAM’RS, *supra* note 1.

offer a demographic and experiential breakdown of attorney discipline.⁷⁷ During this time period, Illinois disciplined 531 lawyers,⁷⁸ and **Figure-1** shows their characteristics. Among the striking findings is that 43% of attorney discipline cases involved lawyers with thirty or more years in practice, outpacing their lawyer census presence, where they constitute roughly 27% of the Illinois lawyer population.⁷⁹ In contrast, only 1% of lawyers disciplined had fewer than five years in practice, while their presence reflected roughly 11% of the population.⁸⁰



The Illinois data demonstrate similar dynamics with respect to discipline and age demographics, which naturally run together. As **Figure-2** illustrates, no lawyers under the age of thirty were disciplined in Illinois during this five-year stretch, though they constituted approximately 4% of the population. In contrast, 71% of the disciplined lawyers were age fifty and over, while constituting only 45% of the lawyer population.⁸¹ Of note, 8% of the lawyers disciplined were over age seventy-five, though they constituted only 3% of the population.⁸²

77. See ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT OF 2019, at 57 (2020); ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT OF 2018, at 38 (2019); ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT OF 2017, at 38 (2018); ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT OF 2016, at 34 (2017); ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., ANNUAL REPORT OF 2015, at 26 (2016).

78. See sources cited *supra* note 77.

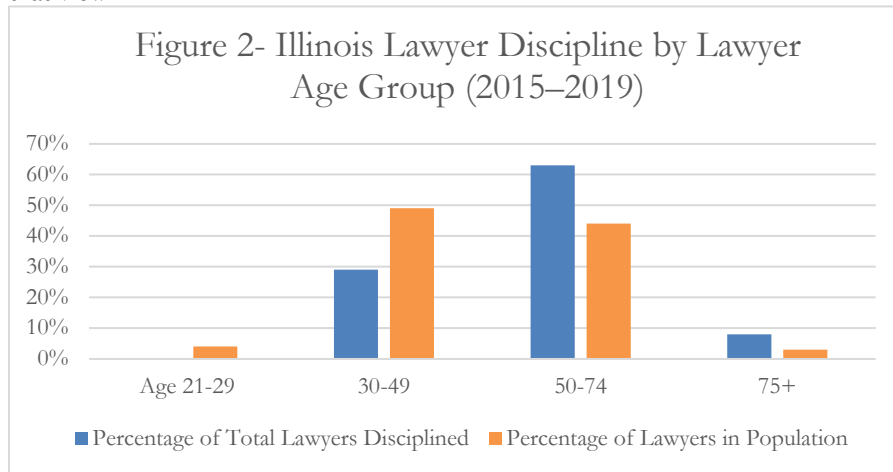
79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

Several broad conclusions could be drawn from these data sets, all worthy of further study. One conclusion might be that the entry-level bar and character and fitness exams function to reduce discipline early in careers by screening out law school graduates with risky profiles. Judge Fischer's comments certainly reflect that view.⁸³



Another conclusion might be that over time, entry-level examinations simply lose their predictive power, so perhaps exams should be administered on a regular, career-long basis. The discipline data might reflect that newer lawyers enjoy the supervision of other lawyers who monitor them or potentially absorb discipline for their mistakes, or that newer lawyers may be given a break for less harmful mistakes. Of note, 60% of Illinois-disciplined lawyers are sole practitioners.⁸⁴ This type of practice may be a common destination for certain types of law graduates,⁸⁵ so perhaps these graduates simply need more help or mentorship.

Rozema's research reveals information that proves useful when searching for the optimal timing for mid-career intervention in order to prevent attorney misconduct. The second decade of practice seems to present an important turning point: "[D]ifferences [between lawyers admitted on diploma privilege and those admitted after passing the bar exam] begin to emerge in the second decade, and the differences become larger in the third decade," after admission to the bar.⁸⁶ He notes that "estimates suggest that the bar passage requirement decreased the share of lawyers who received a public sanction within 25 years after admission from 5.6 percent to 4.4 percent."⁸⁷ The ninety percent upper bound of the estimates

83. See NAT'L CONF. BAR EXAM'RS, *supra* note 1.

84. See sources cited *supra* note 77.

85. See Anderson & Muller, *supra* note 12, at 321.

86. Rozema, *supra* note 74, at 2.

87. *Id.*

“suggests that between 4.6 and 6.5 percent of lawyers admitted without a bar passage requirement were publicly sanctioned within 25 years.”⁸⁸

To be clear, I am not trying to use Rozema’s findings to resolve the diploma privilege debate.⁸⁹ Instead, I am suggesting his data show that later intervention may be warranted with attorneys, regardless of whether the bar exam remains the licensure gatekeeping device.

In sum, discipline tends to happen later in lawyer careers, not earlier. Unsurprisingly, more data are required to understand why. Anderson and Muller claim “that the relationship between lower bar examination score and higher discipline is accurate. The question is one of the magnitude of the effect.”⁹⁰ Without knowing that magnitude, policy choices about the entry-level bar exam become more difficult to make. But the data appears to strongly support the notion that disciplinary troubles tend to increase as bar licenses fade on office walls. As I discuss in Part II, other measures could be used to determine whether attorney misconduct and malpractice can be predicted and screened.

II. CAN CONDUCT PROBLEMS BE PREDICTED OR OTHERWISE SCREENED?

Can state bars determine which active lawyers put their clients at higher risk of harm? Established lawyers constitute over 90% of the profession. As I discuss below, the Connecticut study offers insight into what the character and fitness indicators reveal. In addition, more recent work by Nancy Rapoport and Joseph Tiano, examining the potential for more precise malpractice risk scoring, sheds light on “markers” for malpractice.⁹¹ As the authors show, these markers are quite powerful tools for the future scoring and pricing of lawyer malpractice liability insurance.⁹² Even if these malpractice markers are predictive of trouble, using them as flags to select lawyers for a reexamination audit would be less thorough than requiring all lawyers to undergo reexamination.

However, given that new lawyers must go through a character and fitness examination, we can start by reviewing the data we have about the effectiveness of these examinations and what conclusions, if any, we can make.

A. Character and Fitness Indicators

The Connecticut study sliced character and fitness data finely to distinguish differences between the characteristics of “severely disciplined lawyers” and “less severely disciplined lawyers.”⁹³ “Severely disciplined” lawyers were suspended,

88. *Id.* at 15.

89. *Id.* at 35–40.

90. Anderson & Muller, *supra* note 12, at 319.

91. See Nancy B. Rapoport & Joseph R. Tiano, Jr., *Using Data Analytics to Predict an Individual Lawyer’s Legal Malpractice Risk Profile: Becoming an LPL “Precog,”* 6 U. PA. J.L. & PUB. AFFS. 267 (2020).

92. *See id.*

93. LEVIN, ZOZULA & SIEGELMAN, *supra* note 55, at 15.

disbarred, or elected to resign without the right to reapply.⁹⁴ “Less severely disciplined” lawyers received short suspensions, probation, and reprimands—all lesser sanctions.⁹⁵ Roughly 40% of disciplined lawyers fell into the “severely” disciplined category and about 60% into the “less severely” disciplined category.⁹⁶ The Connecticut study authors found that “the severely disciplined group looks somewhat more like the never disciplined group than like the lawyers who were less severely disciplined.”⁹⁷ This finding indicates that the visible commonalities between these two polar groups makes it difficult to profile them based on entry characteristics.

Professors Leslie Levin, Christine Zozula, and Peter Siegelman authored another in-depth analysis of what the initial character and fitness inquiry might inform about future discipline.⁹⁸ They first highlighted some “differences between never-disciplined and disciplined lawyers.”⁹⁹ Consistent “with the sociology of deviance,” men were more represented than women in the disciplined category.¹⁰⁰ Women were 43% of the sample.¹⁰¹ Following from this, it would be difficult to create a monitoring system based on gender, to say the least.

A second category, “pre-application psychological diagnosis/treatment” also proves socially problematic for screening, as such screening disregards the welfare of aspiring attorneys and law students and may communicate the wrong values about mental health.¹⁰² The social cost of screening on this dimension, especially the exacerbation of a disincentive to seek care, has proven too high, and state bars have started to walk away from this screen.¹⁰³ The authors observed that “lawyers who were subsequently disciplined were more than twice as likely to report having had a pre-application psychological diagnosis/treatment as those who were not.”¹⁰⁴ They note, however, that lawyers may not seek help for fear of stigma, especially if the bar requires reporting.¹⁰⁵

Reliance on entry reporting also cannot account for the mental health challenges that emerge later in life. A twenty-five-year-old lawyer reporting no

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 19.

98. Leslie C. Levin, Christine Zozula & Peter Siegelman, *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 *LAW & SOC. INQUIRY* 51 (2015).

99. *Id.* at 62–63.

100. *Id.* at 63.

101. *Id.*

102. *See id.* at 54, 63.

103. David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, A.B.A.’ (Jan. 22, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing/ [https://perma.cc/7QJ8-HE4R].

104. Levin, Zozula & Siegelman, *supra* note 98, at 63.

105. *Id.* at 54.

diagnosis or treatment may encounter illness later—or merely recognize it later. The interventions on this front should positively promote wellness and destigmatize seeking help.¹⁰⁶ If law students and lawyers know that they should and can seek help without penalty, it might be healthier both for them and their clients.

There is also a third category of characteristics: the prestige or status of the law school from where the attorney graduates. So much ink has been spilled about problems with *U.S. News* rankings that there is no need to waste more.¹⁰⁷ Nonetheless, state bars could use school prestige as a potential predictor of future risk—but perhaps not for the prediction of severe discipline.¹⁰⁸ Fifty-nine percent of those disciplined graduated from law schools in the bottom half of the rankings.¹⁰⁹ That is not a heavy skew, however, and may hew closely to the overall distribution of all lawyers nationally.¹¹⁰ It may be troubling to act on this data going forward, in any case. The transgressions of lawyers who graduated from a school thirty years ago may not readily justify pushing harder on newer graduates of that law school. Given that discipline happens later in careers, this sorting mechanism proves clunky, and retesting may ultimately sort out the later-emerging troubles.

There may be some covariance of discipline problems with the areas of practice that graduates of different types of law schools pursue. Graduates of lower-ranked schools may wind up practicing in smaller or solo firms, and in practice areas that seem to draw more trouble in disciplinary systems.¹¹¹ Would schools admit more students or different profiles of students if the screening took place later? The resulting decisions might create other problems related to access to justice, another factor that would need to be weighed in the cost-benefit equation.¹¹²

Levin, Zozula, and Siegelman found several other differences between disciplined lawyers and non-disciplined lawyers. The authors refer to these as

106. See Jaffe & Stearns, *supra* note 103.

107. See Scott Jaschik, *Do Law Schools Need a Second Ranking from 'U.S. News'?*, INSIDE HIGHER ED (Feb. 18, 2019), <https://www.insidehighered.com/admissions/article/2019/02/18/us-news-plans-new-ranking-law-schools> [<https://perma.cc/SC5L-MPSE>].

108. Levin, Zozula & Siegelman, *supra* note 98, at 71. (“[W]e saw that attending a lower-ranked law school was associated with an increased likelihood of discipline overall, but once we disaggregate, law school rank retains its explanatory power only for less severe discipline—the prestige of the law school attended has no effect on the likelihood of receiving severe discipline.”).

109. *Id.* at 63.

110. See *id.*

111. Anderson and Muller offer a hypothesis that “[g]raduates of some law schools may also be less likely to encounter practice settings where complaints are more common or ethical issues are encountered more frequently. Indeed, many graduates of elite law schools working at elite law firms likely never handle billing, whereas solo practitioners are much more likely to handle clients’ money and engage in behavior likely to lead to comingling of funds.” Anderson & Muller, *supra* note 12, at 321. However, as noted, comingling of funds may not be the problem, rather, there may not be others around to help when financial instability emerges, matters are neglected, or the workload becomes overwhelming.

112. See Richard H. Sander, *Class in American Legal Education*, 88 DENVER U. L. REV. 631, 632–33 (2011) (summarizing extensive data about socioeconomic status and law school enrollment characteristics).

“socially disfavored variables.”¹¹³ The disciplined lawyers were twice as likely to have a criminal conviction prior to applying to the bar, a suspension of a motor vehicle license, or personal credit issues.¹¹⁴ Of note, however, “none of the disciplined lawyers reported bankruptcy on their applications, as compared to four of the never-disciplined lawyers.”¹¹⁵ Does this mean that filing for bankruptcy and reporting it might be an indicator of better fluency with the law and perhaps better judgment? Perhaps some of these filters need revisiting.

Ultimately, any benefits of using these types of criteria to sort out which lawyers to put on watch as they enter the profession would be invariably outweighed by the costs of over exclusion. Levin, Zozula, and Siegelman deliver a blow to the justification for screening law school graduates solely through existing bar-entry character and fitness mechanisms:

The information collected during the character and fitness inquiry does not appear to be very useful in predicting subsequent lawyer discipline. The reason is that the baseline likelihood of discipline among admitted lawyers is so low (about 2.5 percent of the lawyers in our cohort). Thus, even something—such as being male—that doubles the likelihood of subsequent disciplinary action only raises the probability of discipline to 5 percent. It seems unlikely that a regulator would deny admission to an applicant who had only a 5 percent chance of subsequent discipline, especially when the discipline would likely be a single reprimand.¹¹⁶

Levin, Zozula, and Siegelman then raise some extremely provocative questions about the use of entry-level character and fitness examinations period.¹¹⁷ Unless there is serious reason to doubt whether a person can practice law, either due to multiple character and fitness problems or a severe wrong, screening on these dimensions at the outset is time-wasting, expensive, and stressful for those who have accumulated meaningless spots on their record before law school.

Although screening proves costly, the authors are careful not to recommend that state bars consider discarding the practice wholesale or without further study and reflection.¹¹⁸ Levin and Siegelman posit other potential reasons for keeping this system.¹¹⁹ They note that “mere existence of the process [may] discourage[] bad actors from ever applying to law school.”¹²⁰ Indeed, law schools may weed out some applicants on this dimension, too.

Perhaps students with questionable character and fitness attributes who pass the law school admission standards and then stay out of trouble have reformed themselves. One could speculate that a long stretch of avoiding trouble before and

113. Levin, Zozula & Siegelman, *supra* note 98, at 63.

114. *Id.*

115. *Id.*

116. *Id.* at 78–79.

117. *Id.* at 79.

118. *Id.*

119. *Id.*

120. *Id.*

during law school reduces the likelihood of more immediate trouble in careers. This would also explain why discipline emerges later, rather than earlier, in their careers. The entry character and fitness tests are not proximate to practice. Accordingly, character and fitness reviews that take place mid-to-late career may prove to be more predictive of trouble for the vast body of practicing lawyers because these assessments would be concurrent with performance of client work.

Nonetheless, some familiar and serious structural concerns reemerge. If early character and fitness entry screening has low predictive upsides, one must consider that character and fitness screens “may also deter those with a history of relatively minor misconduct, with a disparate impact on racial and ethnic minorities.”¹²¹ Indeed, as the authors suggest, “the extent to which this actually occurs needs to be explored.”¹²² In light of the problems that law schools and the legal profession have encountered with diversity, socioeconomic status, and access to justice, it *must* be explored.¹²³ Perhaps the best way to screen lawyers is to sanction or monitor them when they run into “socially disfavored” character and fitness trouble in their careers, but even these later screens must be monitored for bias. Maybe a mid-career, major driving offense should not necessarily disrupt a lawyer’s practice, but the context of the offense and the offense itself could trigger scrutiny.

One point that Levin, Zozula, and Siegelman make is that a “character and fitness inquiry may also serve symbolic functions . . . [assuring] the public that there are safeguards on who becomes a lawyer, thus promoting public trust in the profession.”¹²⁴ The public image of lawyers could be worse—but not much worse. If this inquiry is part of the formula for improving public trust, lawyers should acknowledge that the formula is not working. The character and fitness inquiry does potentially “socialize” lawyers at entry, “signaling that they are expected to display ‘good character’ throughout their careers, for example, by avoiding substance dependency or criminal judgments.”¹²⁵ The authors ultimately suggest that given the limited predictive power and high costs of implementation of the character and fitness system, and the high costs of preemptively over excluding people from the profession, the system should be further justified by seeking out precisely how much value the system creates.¹²⁶

Of course, the Connecticut study is only one study, but these longitudinal, sociological experiments and studies prove challenging to execute. It remains difficult to conclude what would result if all lawyers with character and fitness problems were admitted and practiced for many decades. But it is also worth noting

121. *Id.*

122. *Id.*

123. *See generally* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003) (examining the demographics of law schools).

124. Levin, Zozula & Siegelman, *supra* note 98, at 79.

125. *Id.*

126. *Id.*

that the Connecticut study focuses only on disciplinary data. As I discuss below, legal malpractice brings other nuances and considerations.

B. Malpractice “Markers”

Entry-level bar exam screening has also been claimed to mitigate attorney malpractice, which can be expressed as the mitigation of risk.¹²⁷ Support for that claim is uneven at best.¹²⁸ According to Rapoport and Tiano, even insurers of legal malpractice liability (LML), who specialize in managing this risk, underutilize available data in their assessment.¹²⁹ LML insurers currently employ risk-calculation factors that have “inherent predictive limitations, allowing for only broad conjecture.”¹³⁰ When regulators make statements about the role of the entry-level bar exam in preventing malpractice within the entire legal population, they are doing so with access to even less information than these sophisticated insurers and their actuaries.

As Rapoport and Tiano observe, “fewer than a dozen factors are considered” by LML insurers; they use “little to no meaningful behavioral data” in their underwriting, despite the rise of availability of “big data.”¹³¹ Rapoport and Tiano advocate supplementing these factors with actual behavioral data, a new set of “malpractice markers.”¹³² They observe that LPL insurers currently use “demographic data,” which they regard as “a poor proxy for behavioral data, borne of guesswork and presumptions about behavioral patterns.”¹³³ If insurers are effectively engaging in guesswork with fewer data, how can regulators justify initial bar screens as career-long risk predictors? Even if imperfect, insurers underwrite LML policies to cover a defined period of risk. Insurers can adjust premiums or refuse to issue future policies. The problem with initial bar licensing, however, is that it purports to be a forever-durable credential, only revisited upon discipline.

127. See e.g., Letter from Chief Justice Rabner, Sup. Ct. N.J., to Ruth Anne Robbins, Clinical Professor of L., Rutgers L. Sch., Anju Gupta, Professor of L., Rutgers L. Sch., & Bernard W. Bell, Professor, Rutgers L. Sch. (Aug. 3, 2020) (on file with author) (“[A]lthough adopting the diploma privilege is appealing in certain respects, the Court cannot overlook the very real concern that it would expose clients and the public to *risk*.” (emphasis added)).

128. See Roy Strom, *Insurers Don’t Really Care if Big Law Lawyers Pass the Bar Exam*, BLOOMBERG L. (July 23, 2020, 1:55 AM), <https://news.bloomberglaw.com/e-discovery-and-legal-tech/insurers-dont-really-care-if-big-law-lawyers-pass-the-bar-exam> [<https://perma.cc/T7UK-TA9X>] (“[R]isk experts are not really bothered by the idea of Big Law first years practicing without a passing bar exam score The test isn’t much of a competence barometer in Big Law, where firms already closely supervise the work of their newest associates, limiting against claims of malpractice . . .”). Granted, this only addresses the BigLaw question, but it also raises the question about why BigLaw would support a socially expensive regime like the entry-level bar exam, as their carriers do not seem to deem diploma privilege as a risk.

129. Rapoport & Tiano, *supra* note 91, at 282–83.

130. *Id.* at 283.

131. *Id.*

132. See *id.* at 282–291, 297.

133. *Id.* at 283.

Before delving into their identification of novel malpractice markers, Rapoport and Tiano distinguish legal malpractice from other ethical violations by isolating the elements.¹³⁴ Malpractice can result from “professional negligence, the law of fiduciaries, or contract law.”¹³⁵ The “four fundamental elements required to establish a *prima facie* malpractice action” are whether there are “damages,” a “duty owed” to the client, a violation or breach of the professional standard, and a causal link between the breach and the damages.¹³⁶ A lawyer who incites a riot, for example, may violate ethical rules, but such an action is not malpractice.¹³⁷

From extensive interviews with insurance carriers, Rapoport and Tiano identified the distinct pieces of demographic data currently in use by LML insurance underwriters, and why they are useful but need supplementation.¹³⁸ The primary data currently employed are “practice area,” “firm size,” “geography,” “claims history/step rating,” and “client roster.”¹³⁹ Note that these factors stand apart from duration of years in practice. Rapoport and Tiano contend that adding in behavioral data “markers” underlying “staffing efficiency,” “workflow efficiency,” “billing hygiene,” “institutional [firm] governance,” “matter oversight,” and “fiduciary risk” would enhance the accuracy of risk assessment.¹⁴⁰ If measured, the inclusion of behavioral points relating to these factors could serve as more robust predictors of malpractice.¹⁴¹ Consequently, lawyers might better manage these behavioral points if insurers linked premiums to these risk dimensions.

Again, if regulators aim to protect clients from harm, the initial bar exam loses predictive value over time, requiring a booster. Though regular reexamination by standardized test does not *directly* measure how well lawyers manage these behavioral markers, successful reexamination draws upon “noncognitive skills” relating to how well lawyers organize their practice and exercise judgment. Rapoport and Tiano’s recommendations for enhancing LML underwriting point toward examining behaviors where risk truly emerges in practice, which involve these noncognitive skills. I single out a few here that bear on the role of the bar exam in risk mitigation.

As for underwriting by practice area, Rapoport and Tiano found that insurance carriers currently deem “mergers and acquisitions, trusts and estates, tax opinions, patent law, securities, plaintiff-side medical malpractice, environmental law, and real estate”¹⁴² as highest risk, based on claims incidence and severity.¹⁴³ Rapoport and Tiano point out, however, that practice areas do not present the entire risk story. In

134. *Id.* at 273–74.

135. *Id.* at 273.

136. *Id.* at 273–74.

137. *See generally id.* at 275–76.

138. *Id.* at 282–90.

139. *Id.* at 283–90. There are also “miscellaneous considerations.” *Id.* at 290.

140. *See id.* at 297–304.

141. *See generally id.*

142. *Id.* at 283.

143. *Id.* at 284.

fact, when lawyers “dabble” outside of their core areas, they encounter trouble.¹⁴⁴ Rapoport and Tiano draw upon the American Bar Association’s malpractice study, which revealed that 60% of all claims result from practice in areas where attorneys spend less than 20% of their practice, and that a mere 7% of claims emanate from practices where attorneys focus on one area only.¹⁴⁵ In other words, the lawyer’s primary identified practice area may not be as meaningful if harm occurs when they stray.

Rapoport and Tiano note, for example, that malpractice might stem from law firms’ failure to steward “staffing efficiency.”¹⁴⁶ That is, some high-billing rate lawyers might work on lower-value tasks while lower-rate lawyers might be assigned to tasks above their paygrade.¹⁴⁷ The “dabbling” problem emerges from failure to manage and monitor who does what legal labor. Without monitoring, lawyers might be tempted, for example, to expand beyond a transactional specialty to serve the personal needs of a high net-worth client.¹⁴⁸ Rapoport and Tiano observe that “invoice data, when evaluated with sophisticated legal data analytics tools, very quickly surfaces trends where attorneys are practicing at the wrong skill set level or in the wrong area of law.”¹⁴⁹ They conclude that such analyses would enable insurers to flag risky behavior, which might be reflected in premiums, or might, in turn, modify law firm monitoring practices.¹⁵⁰

These behavioral markers raise questions about whether lawyers should retake a broad subject-matter bar exam versus a specialized bar exam. Requiring a broader bar exam may incentivize attorneys to stay literate about a broader range of subjects, and perhaps stay humbler about the risks of overextension. However, lawyers could also become overconfident in their breadth of competency after retaking and passing a general bar.

Any rigorous, standardized exam, however, tests broader function and provides more current information about a lawyer’s behavioral tendencies.¹⁵¹ Importantly, many malpractice claims do not issue from “substantive errors.”¹⁵² They emerge, rather, from “administrative” mistakes and deliberate wrongs.¹⁵³ State

144. *Id.* at 285.

145. *Id.* (citing William F. McDevitt, *Dabbling: A Dangerous Practice Even for Accomplished Attorneys*, LAW.COM (June 9, 2016, 12:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202759657347/?slreturn=20201011113526> [https://web.archive.org/web/2020111163651/https://www.law.com/thelegalintelligencer/almID/1202759657347/?slreturn=20201011113526]).

146. Rapoport & Tiano, *supra* note 91, at 297–98.

147. *Id.* at 298.

148. *Id.*

149. *Id.*

150. *See id.* at 292.

151. *See* Ruiz, *supra* note 50, at 164–65, 170 (discussing the cognitive and noncognitive skills that a standardized test like the bar exam measures).

152. Rapoport & Tiano *supra* note 91, at 285 (discussing the American Bar Association’s findings in STANDING COMM.’ ON LAWS.’ PRO. LIAB., AM. BAR ASS’N, PROFILE OF LEGAL MALPRACTICE CLAIMS 2012–2015, at 18 (2016)).

153. *Id.*

bars should heed Rapoport and Tiano's suggestions for the LPL insurance sector, too.

In sum, ethical violations resulting in discipline and malpractice errors seem disconnected from entry-level measures of competence, breadth of knowledge, and noncognitive function. Issues of malfeasance seem disconnected and distant from any measures of character and fitness at entry level. If the entry-level examinations serve any purpose, they seem to serve a more urgent and high-stakes one when administered while lawyers are engaging in more consequential work later in their careers. Those who wander beyond their competencies in later years might be chilled from doing so if a bar exam registers unfamiliarity with the law. The twenty-five-year-old law school graduate sitting for the bar in 1981 may transform into quite a different person by the time they are a sixty-five-year-old lawyer in 2021, entering their fifth decade of practice. Current clients are more likely to value current information when assessing the abilities of lawyers.

Note that this proposal for a license retention exam might prove especially appealing to personal consumers of legal services, who may be less experienced with hiring lawyers. As a quality indicator, a recent test—whether in a narrow subject specialty or more broadly—may assure the consumer of a basic level of quality.

III. LICENSE-RETENTION EXAM AS QUALITY INDICATOR

As noted, the administration of the 2020 exam showed that the legal establishment will go to great lengths to ensure that the entry-level bar exam screening mechanism remains in place. The profession's belief remains strong that the initial bar exam measures "minimum competency"¹⁵⁴ and that bar passage signals that a new lawyer can practice at a minimum level of quality.¹⁵⁵

After regulators complete these entry-level screenings, however, the profession does little to signal to the public that those who passed the bar *still* practice with competence and diligence. Is the mere absence of discipline enough information, if sought, for the public to make informed decisions about which lawyer to hire and how much to pay them? If the profession has faith that the bar exam measures competence—enough faith to administer it during a pandemic—the profession should have the same amount of faith in the exam to help the public assess the quality of all lawyers, not just the 10% who are new.

Lawyers tend to promote and advertise themselves based on experience.¹⁵⁶ Experienced lawyers charge higher rates, so one would expect them to perform at

154. This strain of thinking stretches across bar admissions rules and case law. *See* Kinsler, *supra* note 21, at 921 ("Although the bar exam 'is not a perfect measure of an individual's ability or competency to practice law, 'it's the most accurate . . .'" (quoting *Younger v. Colo. State Bd. of L. Exam'rs*, 625 F.2d 372, 377 (10th Cir. 1980))).

155. As reflected in the actions taken by state bars, this consensus stands apart from what a number of diploma privilege advocates, notably students, academics, and certain practitioners, have strongly expressed.

156. *See infra* Section III.A.

a higher level of competency. With their maturity and established roots, the public would also expect experienced lawyers to demonstrate an impeccable level of character, especially when compared to a twenty-five-year-old recent law graduate. Yet, there are no recent, independent metrics available for clients to use when assessing the current competence of established lawyers. And as I discuss, even after enjoying the services of a lawyer, it may be difficult for a lay client to assess whether they received the value that they expected.

Of course, there are some ways to assess lawyers before hiring them, but there are still many gaps that need to be filled. Lawyers produce advertising and put that information into the market. Advertising information enhances the ability of clients to find and compare lawyers. Third parties also provide information. Some for-profit entities offer peer assessments that matter more in certain markets and have a modicum of reliability, and this information is available if consumers know where to look. State bars make basic licensure information available.¹⁵⁷ But no reliable, objective, quality metrics exist that the public can use as a recent measure of competence and fitness.

Should consumers know more about their lawyers before hiring them and deciding to keep them? Should the bar help consumers decide by reaffirming lawyers' ability to practice with an objective and recent measure? In Section III.A., I discuss some of the challenges presented by the way that lawyers advertise. Professors Jim Hawkins and Renee Knake painstakingly gathered primary data about what "retail" lawyers emphasize in their advertising, finding "experience" as a key advertised attribute.¹⁵⁸ In Section III.B., I situate the challenge that consumers have in assessing the quality of legal services in the basic information-economics literature. Ultimately, retesting lawyers would provide consumers with more information about a lawyer's current abilities and tendencies, and a renewed character and fitness exam would reveal even more.

A. Deficiencies of Lawyer Advertising Information

In 2019, Hawkins and Knake embarked on a quest to find explanations for "why opening the [legal services] market to advertising failed to resolve the access to justice gap."¹⁵⁹ Noting that almost fifty years had passed since *Bates v. State Bar of Arizona*¹⁶⁰ struck down the advertising ban for legal services, they explored why "the *Bates* Court's promise" of a "potentially positive impact of advertising on supply and demand" for lawyers had not been realized in the form of expanded

157. For example, the State Bar of California provides access to an attorney search directory. *Attorney Search*, ST. BAR CAL. <https://apps.calbar.ca.gov/attorney/LicenseeSearch/QuickSearch> [<https://perma.cc/7K12-T98T>] (last visited July 12, 2022).

158. See Jim Hawkins & Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 ILL. L. REV. 1005, 1021 tbl.2.

159. *Id.* at 1005.

160. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

access to justice.¹⁶¹ The *Bates* Court observed that “some 70% of the American public . . . could not afford an attorney or lacked information about legal rights [or] entitlements.”¹⁶² Recent studies show that the access gap appears to have worsened since *Bates*, with “as many as 85% of American households fac[ing] two to three legal problems without assistance from a lawyer.”¹⁶³

After a thorough empirical examination, Hawkins and Knake concluded that a “persisting market failure” emerged from the way attorney advertising “exploit[ed] systematic poor decision-making.”¹⁶⁴ More useful for purposes here were the content and attributes that attorneys were specifically advertising. Hawkins and Knake collected a trove of primary-source data, systematically scouring website advertising for driving-while-intoxicated defense lawyers and automobile plaintiff’s personal injury lawyers in three legal markets: Jacksonville, Buffalo, and Austin.¹⁶⁵ They also incorporated attorney advertising and self-descriptions within Avvo profiles.¹⁶⁶

What did lawyers in these sectors and in these markets advertise in terms of attributes about their own abilities and competence? Hawkins and Knake found that 67% of the lawyers advertised “Years of Experience,”¹⁶⁷ 48% promoted “Endorsements from Professional Associations,” and 14% also noted their “Board Certifications.”¹⁶⁸ Additionally, 44% promoted a “Good Reputation,”¹⁶⁹ 44% offered “Client Reviews/Testimonials,”¹⁷⁰ 39% promoted “Past Victories,”¹⁷¹ which presumably were favorable (but perhaps not necessarily representative), and 22% promoted their Avvo ranking.¹⁷² Finally, 6% advertised their “Honesty,” and perhaps similarly, 4% advertised that they were “Religious.”¹⁷³

Hawkins and Knake pointed out that the promise of *Bates* fell down in part because of the “absence of price information,” which only appeared on 19% of the attorney websites they examined.¹⁷⁴ Comparing and determining value becomes even more challenging for clients without pricing information available.

161. Hawkins & Knake, *supra* note 158, at 1007.

162. *Id.* (citing *Bates*, 433 U.S. at 376).

163. *Id.* at 1008.

164. *Id.* at 1037.

165. *Id.* at 1017.

166. *Id.* at 1020. “Avvo is a company that provides a website with . . . detailed information about lawyers, such as biographical information [and] client reviews . . .” Lawyers can place advertisements on their Avvo profiles. *Id.* at 1017.

167. *Id.* at 1021 tbl.2.

168. *Id.*

169. *Id.*

170. *Id.* Such testimonials can prove problematic. See generally David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope, and Social Welfare*, 19 J.L. & POL’Y 539 (2011) (explaining the potential distortions that can result even from truthful peer endorsements).

171. Hawkins & Knake, *supra* note 158.

172. *Id.*

173. *Id.*

174. *Id.* at 1030–32.

With respect to board certifications, seventeen state bars enable such specialization and have specialty regulation regimes, either through the state bar or through recognition of private certification.¹⁷⁵ Specialty certification does add some assurance that an attorney has met certain criteria—including initial testing thresholds—to practice in a given area. For example, in Arizona, the state bar provides for certification in bankruptcy law, criminal law, family law, estate and trust, injury and wrongful death, real estate, taxation, and workers' compensation.¹⁷⁶ All of these Arizona certifications require standardized testing, including character and fitness renewals, but not repeat testing after receiving initial certification.¹⁷⁷ Rigorous specialty certification can give consumers information about lawyers' abilities in these areas, as the stamp requires demonstration of “a high degree of competence” and overall fitness,¹⁷⁸ current as of the time of examination and application. But lawyers in Arizona who do not choose these programs cannot offer any recent information about competency in any area, nor about overall character and fitness.¹⁷⁹

There are other entities, however, that provide clients with information about lawyer quality and expected value, which can fill in some of the gaps left open by advertising and lack of affirmative measures for regulatory recertification. As noted, several accessible attorney review websites and high-profile ratings providers offer information in certain markets, at varying quality, for those who know where to seek them. Each adds some information for consumers, but each carries limitations in addressing the information gap about lawyer quality.

B. Deficiencies of Third-Party Information

The long-established Martindale-Hubbell and the more recent upstart Avvo both provide avenues for clients to research lawyers and access peer reviews and client reviews. Of note is that along with Lawyers.com and Nolo, Martindale-Hubbell and Avvo have been merged and integrated under the same roof as part of Martindale-Avvo. Though ratings are accessible, the Martindale-Avvo business model aims to “provide comprehensive legal marketing

175. *State Sources of Certification*, AM. BAR ASS'N, <https://www.americanbar.org/groups/specialization/state-sources-of-certification/> [https://perma.cc/YH5M-2622] (last visited July 12, 2022).

176. STATE BAR OF ARIZ., RULES AND REGULATIONS OF THE ARIZONA BOARD OF LEGAL SPECIALIZATION 5–6 (effective July 1, 2018), <https://www.azbar.org/media/qpkhxfgy/bls-rules-and-regulations-effective-07-01-18.pdf> [https://perma.cc/Z85A-MCH6].

177. *Id.* at 6–8.

178. *Id.* at 7.

179. Note that the specialties available to Arizona lawyers do not mesh with the uniform bar examination, which in 2025 may only test across a few of those areas. Bankruptcy, family law, estate and trust, taxation, and workers' compensation will not be tested on the uniform bar exam. *See* TESTING TASK FORCE, NAT'L CONF. BAR EXAM'RS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [https://perma.cc/HC82-VJD6].

solutions including real-time lead generation, online legal profiles, live chat, website services, and lead intake and management tools” to lawyers and law firms.¹⁸⁰ Collectively, Martindale-Avvo claims that it has assembled “the largest legal network online.”¹⁸¹ Providing consumers with reviews draws in client traffic to help make this network work.

What are the challenges that consumers confront when using the “largest legal network online?” These “mediated-reputation-system” business models rely on advertising from entities under review, so the purpose of the network is to sell the ability to influence consumers to choose their lawyers through paid promotion.¹⁸² The Martindale-Avvo network also provides other services to lawyers, using consumer and peer reviews as a way to draw eyeballs. Upon announcement of the formation of the collective entity of Martindale-Avvo, owner Internet Brands boasted of the ability of providing *lawyers* with “[a]ccess to more than 25 million consumers monthly—850,000 of whom request to speak with an attorney—who visit the highly-trafficked domains of Avvo.com, Nolo.com, Lawyers.com, Attorneys.com, AllLaw.com, TotalAttorneys.com, DisabilitySecrets.com, DivorceNet.com, and a variety of other practice-specific sites.”¹⁸³ In other words, clients are not the primary service audience.

Client reviews of lawyers are powerful pieces of information, but they are self-limiting in utility because clients may not be able to assess whether or not their attorney achieved the optimal result for the value. They might be able to assess certain things like speed of response and communication, but other features may prove more challenging. How would a consumer know whether an auto injury settlement was the right amount and achieved with the proper timeliness? How would a consumer know whether their lawyer performed only necessary work in a child custody dispute? Attorney peer reviews can be troubling as well. How many lawyers want to spend time and take the risk of writing a weak review for a peer on a public website?

Martindale-Hubbell’s well-established directory of lawyers and lawyer ratings offers information, but more of a general assurance guide. Lawyers can rate other lawyers on reputation, but deteriorations in reputation may lag behind deteriorations in performance. Martindale used to offer a scale of A-B-C to reflect years of experience, adding a V to ratings for those who were rated by peers as

180. *See About, MARTINDALE-AVVO*, <https://www.martindale-avvo.com/about/> [https://perma.cc/RL92-FUHY] (last visited July 12, 2022).

181. *See id.*

182. *See Friedman, supra* note 170, at 110–20 (discussing Avvo’s business model prior to merger with other brands).

183. Press Release, Internet Brands, Internet Brands Announces Martindale-Avvo to Reflect Breadth and Reach of Legal Network (Oct. 23, 2018, 6:00 AM), <https://www.prnewswire.com/news-releases/internet-brands-announces-martindale-avvo-to-reflect-breadth-and-reach-of-legal-network-300735742.html> [https://perma.cc/RW7T-6KHS].

demonstrating “‘Very High’ ethical standards.”¹⁸⁴ Notably, this prominent ratings directory relied primarily on duration of practice for the primary feature of rating, only offering a blunt instrument to summarize ethical comportment, which is part of, but not all of, ability.

Lately, Martindale-Hubbell changed its well-established system.¹⁸⁵ Today, lawyers can opt in to be reviewed, and those lawyers start the review process by submitting their own suggestions of specific peers to review them, which Martindale then supplements with other reviews in the legal community that it solicits, to enhance “‘integrity.’”¹⁸⁶ The Martindale survey claims to cover “‘Legal Knowledge, Analytical Capabilities, Judgment, Communication Ability and Legal Experience.’”¹⁸⁷

Ultimately, Martindale-Hubbell now assigns lawyers to three Martindale-Hubbell rankings: “‘AV Preeminent®,’” “‘Distinguished,’” and “‘Notable.’” AV Preeminent® is the “‘highest peer rating standard . . . given to attorneys who are ranked at the highest level of professional excellence for their legal expertise, communication skills, and ethical standards by their peers.’”¹⁸⁸ “‘Distinguished,’” the next rung down, Martindale describes as “‘an excellent rating for an attorney who has some experience and is widely respected by their peers for professional achievement and ethical standards.’”¹⁸⁹ Finally, Martindale awards the “‘Notable’” designation “‘to a lawyer who has been recognized by a large number of their peers for their strong ethical standards.’”¹⁹⁰

What is the utility of this review system to the consumer? First, only lawyers who can opt in are listed. It also appears that “‘notable’” might describe the lesser of the rated lawyers. This review mechanism may identify some of the best premium lawyers in the market, but these may not necessarily be the best set of retail lawyers. The review mechanism also fails to provide objective criteria for consumers to measure *all* lawyers.

Super Lawyers, another provider of peer ratings from lawyers, has a high-integrity formula for selecting and presenting lawyers who have been rated as so worthy of designation by their peers. “‘Super Lawyers uses a patented multiphase selection process, including nominations, independent research and peer

184. *Martindale-Hubbell Attorney Peer Ratings and Client Reviews*, MARTINDALE, <https://www.martindale.com/ratings-and-reviews/> [https://web.archive.org/web/20220622104532/https://www.martindale.com/ratings-and-reviews/] (last visited June 22, 2022).

185. *Id.*

186. *Attorneys: Get Started with Peer and Client Review Ratings*, MARTINDALE, <https://www.martindale.com/ratings-and-reviews/attorneys/#contactForm> [https://web.archive.org/web/20220622104430/https://www.martindale.com/ratings-and-reviews/attorneys/] (last visited June 22, 2022).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

evaluations” to create its elite list.¹⁹¹ The process for selection and publication remains completely firewalled from the advertising portion of the enterprise, though the marketing opportunities for lawyers and law firms appear to drive the economics.¹⁹² Nonetheless, this filter enables retail consumers and other clients to see only a top portion of the market. “The Super Lawyers list recognizes no more than 5 percent of attorneys in each state.”¹⁹³ Further, the Super Lawyer “Rising Stars list” for lawyers under the age of forty or in fewer than ten years of practice, “recognizes no more than 2.5 percent of attorneys in each state.”¹⁹⁴ Super Lawyers omits 90% of lawyers from assessment because not all lawyers are super.¹⁹⁵

A client seeking to choose from a list of elite lawyers can find one who has been deemed elite by their peers, in almost any market and specialty. It is difficult, however, to assess the bulk of lawyers through these systems. Some excellent lawyers might not be rated. The median or mode lawyer, who might be capable of performing quality work, might only be rated on Avvo, or not at all. The various sources of information, whether advertising from lawyers, peer evaluations, or consumer evaluations, all have their holes.

The reality is that many clients are not seeking a top-flight, expensive lawyer;¹⁹⁶ they are seeking a competent lawyer to help them solve a problem—if they can even find one or obtain access to one. Because the best third-party data are about the best lawyers, a layered market dynamic emerges. Those who seek premium lawyers have more information available, but these clients may be well-positioned to self-assess lawyers anyway, especially if the clients are corporate in-house counsel or sophisticated repeat users of legal services. At the other extreme, a substantial portion of people who need legal services simply go without help, maybe due in some part to an information problem.¹⁹⁷ Expensive professional gatekeeping may

191. *Attorney FAQ*, SUPER LAWS., https://www.superlawyers.com/about/attorney_faq.html# [<https://perma.cc/6C3J-ED6A>] (last visited July 12, 2022).

192. *Marketing Solutions*, SUPER LAWS., https://www.superlawyers.com/about/marketing_solutions.html# [<https://perma.cc/65C4-KBAY>] (last visited July 12, 2022).

193. SUPER LAWS., *supra* note 191.

194. *Id.*

195. Chambers and Partners provides another example of a firm focused on rating the elite segment of the profession, “delivering detailed rankings and insight into the world’s leading lawyers.” *About Us*, CHAMBERS & PARTNERS, <https://chambers.com/about-us> [<https://perma.cc/UMN9-B6WS>] (last visited July 12, 2022). Chambers uses referees, asking law firms to submit access to clients for client interviews for rating purposes, touting the “independence” of their process. CHAMBERS & PARTNERS, *Methodology*, <https://chambers.com/about-us/methodology> [<https://perma.cc/RJM5-2PX6>] (last visited July 12, 2022).

196. The consensus is that it is difficult to pin down how clients choose lawyers in such a fragmented and diverse market, though it appears that “a law firm’s rate structure” carries importance, along with experience. *How Consumers Choose Lawyers Remains a Mystery*, LEXISNEXIS LEGAL INSIGHTS (Aug. 24, 2020), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/how-consumers-choose-lawyers-remains-a-mystery> [<https://perma.cc/2LEZ-JHE3>].

197. According to the Legal Services Corporation, in 2017, “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.” LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME*

lead to a suboptimal number of lawyers in the profession, which, in turn, leads to access-to-justice deficiencies.

So, the information gap about the competence and capability of lawyers appears to be a problem for those in the middle, who know how to access non-premium lawyers and can afford them. One could characterize this problem as a middle-to-upper-class, socioeconomic problem, though that would be a broad way to describe it. Meshing the fact that roughly 90% of lawyers lack a recent competency demonstration with the fact that over 90% of lawyers are unlikely to have rigorous endorsements from their peers, one can see that a new measure of assurance could help clients.

The only common denominator for measuring lawyer quality and capability is their initial licensure and their continued licensure. Though there are some measures for lawyers to vouch for other lawyers, especially elite ones, few mechanisms exist for consumers to shop for lawyers on value. As the half-life of the initial certification fades, the value of retesting and recertification becomes more palpable. The case for retesting becomes stronger.

C. Other Challenges for Clients in Assessing Lawyers

Though lawyers may not be advertising falsely, they might not be advertising in a way that enables consumers to verify implied claims that are associated with credentials and experience. Because the incidence of lawyer misconduct increases over time, the advertisement of these two factors may lead to distorted consumer assessments.

As Professor Lillian BeVier summarized, “[a]dvertisers’ incentives . . . should be understood as a function either of consumers’ ability to verify claims prepurchase or of consumers’ disinclination to believe self-interested claims.”¹⁹⁸ This may explain why lawyers present limited information in their advertising—because consumers would have difficulty verifying specific claims about quality, and therefore would not believe them. BeVier continues by pointing out that “[c]onsumers . . . should be understood as capable of punishing false advertisers both by spreading the word about the offending product [or service] and by not repurchasing it.”¹⁹⁹ In this instance, *false* advertising is not the issue, as much as absence of information, but clients may lack the ability to reject spotty claims because clients lack the tools to assess the service that they received. “Spreading the word” will not happen when consumers do not know “the word.” For many clients, legal services might not be something regularly sought, so punishing lawyers by not

AMERICANS 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/RAZ5-CCPX>].

198. Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 8 (1992).

199. *Id.*

returning with future business may not have an impact, as it would with retail stores or restaurants.

Moreover, lawyer advertising is often devoid of useful information about price,²⁰⁰ which makes value hard to assess. As the broader information economics literature indicates, claims made about the quality and value of complex offerings like legal services may prove difficult for consumers to understand. Lawyer advertising tends to employ “credence” claims, advertising claims that are difficult for a consumer to assess on dimensions of quality and value both before the fact and after the fact.²⁰¹ Other than the binary retention of active status, or disclosures of misconduct resulting in discipline, few objective indicators assure lawyer quality.

As BeVier points out, “[r]epair services for durable goods are credence goods, because consumers who are generally unfamiliar with the intricacies of such machines cannot fully evaluate either the need for or the quality of the repairs.”²⁰² Such is the nature of credence goods, and such is the nature of much of legal services, which can be as opaque in their nature as repair services. How can a consumer know the nature of the problem as well as the appropriate fix—and whether the fix was effective? This might be as true in the auto shop as it is in a law office or in a courtroom. BeVier contends that consumers will be more skeptical of advertising potential for credence goods because “[t]he more costly it is for the consumer to verify the claims of the producer, of course, the less inclined she will be to believe them and (correlatively) the less inclined the producer will be to disseminate such claims directly through advertising.”²⁰³ This could explain why lawyer advertising may convey thin gruel—if consumers are not as likely to believe lawyer claims, then less information should be expected to be conveyed through advertising.

BeVier further surmises that “markets will develop other means of providing and bonding direct information about credence goods.”²⁰⁴ Here, we can see that the demand for information appears to have emerged in the form of third-party rating services, but in the legal sector, these services cover only parts of the market and in limited form.

Consumers confront information gaps when selecting lawyers, for reasons BeVier addresses, and Hawkins and Knake prove out with their empirical study. Advertising will not provide much useful information to the searching client. Third-party rating services do not provide much more. Regulatory bodies vary in what they convey, but the only information that may prove consistent is the lawyer’s bar passage, their time duration, and occasionally, their law school. If a lawyer pays

200. Hawkins & Knake, *supra* note 158, at 1021 (exploring the limitations of lawyer advertising, looking empirically at what lawyers actually advertise in certain markets).

201. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973).

202. BeVier, *supra* note 198, at 13.

203. *Id.*

204. *Id.*

dues, complies with basic continuing legal education requirements, and stays clear of discipline, the consumer may be left with little information to aid in their decision when hiring a lawyer, or assessing the quality of what services that they received. But how can clients be truly assured of basic quality, when the stakes are as high as Judge Fischer indicates?

One way to reassure consumers about the current quality of lawyers that they are engaging would be to measure lawyer capability objectively. A standardized test, administered on a regular basis, in some form, might serve such a purpose. Even though a retesting instrument may be flawed, it cannot be more flawed than the initial entrance exam, which the profession has fiercely defended. The retest, however, could tell us more about the lawyer who took it. How high did they score? Are they scoring high on some portions and not others? Are their scores increasing, stable, or decreasing over time? Did they take a professional responsibility exam? Did they take a specialty exam? Did they demonstrate familiarity through a more comprehensive exam? Did they pass a background character and fitness test recently—and if so, what did that test affirm or reaffirm?

Perhaps scores based on a bar exam alone might prove unhelpful to consumers, despite the insistence of those who defend the entry-level bar exam that it provides a front-line protection against admission of incompetent persons to the legal profession. The score may not capture all of the skill and wisdom that a lawyer might be able to deliver to a client. Indeed, a more complete, multifaceted lawyer score or rating *could* be developed. A lawyer could be scored on malpractice risk. General disclosures could be made about the tenuous connections between “experience” and risk of misconduct and malpractice. But perhaps, such testing and scoring would be more than consumers need.

An initial solution does not require that kind of complication. An objective assessment of whether an attorney should still practice law, and how well-equipped they are, could be as simple as a timely standardized test and a renewed fitness exam. If one carries faith in the initial bar exam as a measurement, why not carry it a bit further? If one will not carry that faith a bit further, then why the fierce defense of the entry-level exam?

IV. PROPOSALS FOR IMPROVING BAR SCREENING

Consumers only have access to limited information about the bulk of lawyers aside from their experience, which alone might be misleading. Creating an assurance regime for the 90% of lawyers who are established lawyers would help protect consumers from lawyers who have lost function, or who are otherwise on the verge of causing harm. Creating an elaborate rating scheme might be a step too far, but a narrower assessment might prove useful.

Of course, this proposal to retest the bar has many potential downsides. Standardized exams of this sort may prove unreliable and biased, although the same

has been said about the entry-level screening regime.²⁰⁵ Administration of this new approach would be costly, in that lawyers would have to take a break in their practice to prepare for it and take it. These costs, however, could be mitigated by lower malpractice premiums and the elimination of all mandatory continuing-legal-education requirements. And such costs should be measured against the costs of the entry-level regime, including all the gateways that lead up to the bar exam. The burden of retesting might fall harder on some lawyers: lower-earning lawyers might find it more taxing, and lawyers in solo or small practice might not be able to cover their work without planning. But these detriments do not entirely eradicate the positives of the proposal.

Below I lay out a case for a recurring, regular reexamination of lawyers. If this proposed regime for the entire body of practicing lawyers feels inappropriate, too high stakes, or inappropriately matched to a measure that helps consumers, then the same scrutiny should be applied to the entire entry-level gatekeeping system. In Section IV.A., I lay out what the current system is for screening lawyers at entry to the profession and some of the social costs and benefits associated with it. I discuss the “minimum competence” screening standard in Section IV.B., suggesting that regulators could extend this standard to practicing lawyers as well as new lawyers. In Section IV.C., I describe a potential program for lawyer reexamination and testing with several options and an assessment of the associated costs and benefits. Finally, Section IV.D. recommends that the profession conduct a full reappraisal of how it regulates both entry and licensure retention, in light of the fact that the public has vast unmet needs for legal services.

A. Current System for Lawyer Screening

It is not easy to become a lawyer. Though the focus here has been on the bar exam, other barriers exist to entry, many of them also worthy of serious scrutiny and reform. The educational requirements prior to law school, the educational requirements of law school, and the bar and character and fitness exams are all staged and expensive points of entry worth addressing separately. Taken together, their costs loom extremely large.

Before a person is eligible to matriculate at a law school, that person (with limited exceptions) must earn a bachelor’s degree.²⁰⁶ Earning a bachelor’s degree is a high hurdle for most Americans, and a large filter into the profession. Only 33% of the American public over the age of twenty-five has attained a bachelor’s or

205. *See, e.g.*, Shepherd, *supra* note 123 (discussing the entirety of the barriers to entry for Black people into the legal profession).

206. “A law school shall require for admission to its J.D. degree program a bachelor’s degree that has been awarded by an institution that is accredited by an accrediting agency recognized by the United States Department of Education.” AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021, at 32 (Standard 502(a)).

master's degree.²⁰⁷ For those who earn a bachelor's degree, the median time for completion of the program is fifty-two months,²⁰⁸ at a tuition expense that can range widely.²⁰⁹

After investing all of that effort, time, and money in a foundational education, a person seeking to become a lawyer must take a standardized test, usually the Law School Admissions Test (LSAT), in order to apply to an accredited law school.²¹⁰ These exams impose costs on the applicant, both in terms of preparation time²¹¹ and exam fees.²¹² Some have the opportunity to spend money and time on admissions test preparation presumably to put themselves at an advantage in the admissions process.²¹³ Before even filling out an application to law school, aspiring lawyers confront years of education time, academic efforts, tuition expenditures, plus testing preparation and fees, that together form the first barriers to seeking entry into the legal profession. This bundle of hurdles, wrapped in a tangle of finances, privilege, and effort, is formidable, and an aspiring lawyer confronts them before they even open their first law school application.

At this preliminary level, the profession puts up a barrier. All aspiring lawyers must demonstrate not just completion, but capable performance in both undergraduate studies and on standardized tests. Law schools are mandated by their accreditors to only admit students who have a prospect for success in law school,

207. See U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2019, tbl.1 (Oct. 8, 2021), <https://www.census.gov/data/tables/2019/demo/educational-attainment/cps-detailed-tables.html> [<https://perma.cc/3DX9-7QU8>].

208. Fast Facts: Time to Degree, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=569> [<https://perma.cc/GC7T-VBST>] (last visited July 12, 2022).

209. From 2020–21, average annual tuition and fees sticker prices ranged in certain categories of schools from \$9,000 to \$35,000. See Farran Powell & Emma Kerr, *See the Average College Tuition in 2020–21*, U.S. NEWS & WORLD REP., (Sept. 14, 2020, 9:00 AM) <https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic> [<https://web.archive.org/web/20210901103337/https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic>].

210. “A law school shall require each applicant for admission as a first-year J.D. degree student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's program of legal education.” AM. BAR ASS'N, *supra* note 206, at 33 (Standard 503).

211. Princeton Review recommends 250–300 hours of preparation to its clients. See *How Long Should You Spend Studying for the LSAT?*, PRINCETON REV., <https://www.princetonreview.com/law-school-advice/how-long-should-you-study-for-the-lsat> [<https://perma.cc/YWH5-NP5R>] (last visited July 12, 2022).

212. The LSAT can cost over \$400, when all fees are added in. See *About the LSAT*, PRINCETON REV., <https://www.princetonreview.com/law/lsat-information> [<https://perma.cc/MQ5D-9TUK>] (last visited July 12, 2022).

213. See Gabriel Kuris, *How to Weigh LSAT Test Prep Options*, U.S. NEWS & WORLD REP. (May 4, 2020, 10:21 AM), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/how-to-weigh-lsat-test-prep-options> [<https://web.archive.org/web/20200505070633/https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/how-to-weigh-lsat-test-prep-options>]. The Princeton Review's courses can range from \$800 to \$1,800, depending on the type of program. See PRINCETON REV., <https://www.princetonreview.com/law/lsat-test-prep> [<https://web.archive.org/web/20210125043021/https://www.princetonreview.com/law/lsat-test-prep>] (last visited Jan. 25, 2021).

as evidenced by likelihood of graduation and passing the bar.²¹⁴ Also, law schools themselves require character and fitness disclosures as part of their initial application.²¹⁵

Law school itself is a hurdle, of course, and as any reader of this Article knows, the process requires extraordinary effort and commitment in order for a student to achieve a successful outcome. The incremental cost barriers include tuition, technology, and books, but also up to three years of income opportunity forgone, net of any earnings as a clerk.²¹⁶ The lifetime value of a legal education has a financial return, however, and for many, a career satisfaction return—but like most investments, attending law school involves taking on risk and requires time to realize the financial benefit.²¹⁷ Nonetheless, the risk, patience, and diligence required to successfully navigate a legal education program are notoriously formidable.

After graduating from law school, which requires both the fulfillment of academic standards and the school's attestation to character and fitness requirements, a person is eligible to sit for a bar exam.²¹⁸ If the school is accredited by the ABA, a person who graduates can take the exam in any jurisdiction.²¹⁹ Which brings them to the bar exam itself. For the bar applicant, several months of time will be forgone for the student to prepare for and take the exam, and await results.²²⁰ The costs here include the delay of the start of a legal career, expenditures on bar preparation costs,²²¹ potential borrowing costs to enable the exam taker to subsist

214. “A law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar.” AM. BAR ASS'N, *infra* note 206, at 31 (Standard 501(b)).

215. See David Lewis, *Character and Fitness Concerns: How to Amend Your Law School Application*, A.B.A. FOR L. STUDENTS (Feb. 24, 2020), <https://abaforlawstudents.com/2020/02/24/character-and-fitness-how-to-amend-your-law-school-application/> [<https://perma.cc/T3SM-3FGS>].

216. For a summary of law school costs, see *Law School Costs*, LAW SCH. TRANSPARENCY, <https://data.lawschooltransparency.com/costs/tuition/> [<https://perma.cc/L9AP-Q4XQ>] (last visited July 12, 2022).

217. See generally Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014) (showing in detail all of the factors that go into calculating the financial value of a law degree over the course of a career or lifetime).

218. See NAT'L CONF. BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 9–10 (2019), <https://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/M3VV-PZN3>].

219. *Frequently Asked Questions*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/ [<https://perma.cc/FV5S-4RC6>] (last visited July 12, 2022).

220. In New York, a bar applicant can wait months for results. For the July 2019 administration, the bar did not release results until October. See Press Release, N.Y. State Bd. of L. Exam'rs (Oct. 23, 2019), https://www.nybarexam.org/Press/Press%20Release_July2019exam.pdf [<https://perma.cc/N2WR-4QNQ>].

221. A course like Barbri can cost between \$2,000 and \$4,000. See *BARBRI Bar Review*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details/> [<https://perma.cc/CA29-G3GZ>] (last visited July 12, 2022).

during this study and examination period,²²² plus the stress of the effort itself.²²³ For those who pass this exam only after a second try, all of these costs are borne over again, along with an emotional toll, but with the same ultimate result—entry into the profession, just at a higher price.²²⁴

Without addressing the merits of the debate about what the bar exam measures, assume for purposes here that it serves a function to protect the public from incompetent lawyers. It is certainly an expensive system that has been employed to screen out lawyers, as the bar exam itself requires time and resources from all involved. But if it is worth it to impose the bar exam at entry, at such expense, why not use it in regular intervals to assure quality during the rest of a lawyer's career? After all, if the test measures competency, lower amounts of effort and stress would go into the process, as all of the takers will have already passed at entry. Surely, their experience in practice will lend them even greater competency, which the subsequent test would capture.

In order to continue practicing, state bars require little of their members. Some state bars only require the timely paying of dues,²²⁵ reporting on trust accounts,²²⁶ and self-reporting of compliance with continuing legal education requirements.²²⁷ If state bars are serious about the value of bar exams *and* serious about protecting the public from incompetent lawyers, giving a bar exam later and on a regular basis to lawyers would be worth at least an experiment.

As noted, the performance of lawyers can go unchecked until retirement or death, unless a complaint surfaces that leads to discipline or a malpractice claim yields a severe consequence. Over time, lawyers can develop impairments or encounter a variety of personal issues that may, while hidden to potential and current clients, render them unable to perform their serious duties. Or, at the very least, their abilities may be passable, but not reflective of the potential value one might expect at their experience level. In the current system, lawyers can cruise for decades unless they slip, and even then, they must slip in a way that leads their misdeeds or nonfeasance to be detected, and disciplined. Currently, this limited

222. See Cecilia Clark, *Compare Bar Loans for 2022*, NERDWALLET (Jan. 20, 2022), <https://www.nerdwallet.com/best/loans/student-loans/bar-loans> [<https://perma.cc/C3SL-RW2R>].

223. See Rachel E. Kelly and Bridgette L. Williams, *The Bar Exam: The Big Bad Wolf*, A.B.A. (Apr. 12, 2021), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2014/bar-exam-big-bad-wolf/> [<https://perma.cc/3FLZ-NDQZ>].

224. See Joe Regalia, *Second Time's a Charm: A Day in the Life of a Bar Exam Failer*, A.B.A. FOR L. STUDENTS (July 13, 2017), <https://abaforlawstudents.com/2017/07/13/a-day-in-the-life-of-a-bar-exam-failer/> [<https://perma.cc/9BCR-KUE3>].

225. See, e.g., *Membership Fee FAQ*, OR. ST. BAR, <https://www.osbar.org/fees/feeFAQ.html> [<https://perma.cc/CLY7-UR38>] (last visited July 12, 2022) (listing Oregon bar membership fees).

226. See, e.g., *Interest on Lawyer Trust Accounts (IOLTA) Reporting*, OR. ST. BAR, <https://www.osbar.org/IOLTA> [<https://perma.cc/5D5T-XG5V>] (last visited July 12, 2022) (listing Oregon bar's reporting requirements for trust accounts).

227. See, e.g., OR. STATE BAR, MINIMUM CONTINUING LEGAL EDUC. RULES AND REGULATIONS (2022), https://www.osbar.org/_docs/rulesregs/mclerules.pdf [<https://perma.cc/ZZJ9-SVWZ>] (listing Oregon continuing legal education requirements).

system is the only post-bar-admission means of protecting prospective clients and the public.

In sum, it is expensive to enter the legal profession, and the bar exam is another catch in the system that makes it so. What does the bar exam add? Supposedly another layer of security to ensure that law school graduates are qualified to serve as lawyers, on top of these other layers. The common notion is that the bar exam is supposed to be a minimum threshold test for entering the profession. What I propose here is how the exam could be used for other purposes.

B. “Minimum Competence”: A Standard for All Lawyers or Just New Lawyers?

As Jeffrey Kinsler sums up the conventional wisdom, “[t]he purpose of the bar exam is to ensure that new lawyers have minimal competency. Although the bar exam ‘is not a perfect measure of an individual’s ability or competency to practice law, ‘it’s the most accurate’”²²⁸ Of course, Kinsler was writing about the entry-level exam, but his conclusions raise the question about whether the exam would be the “most accurate” way of measuring a *practicing* attorney’s “ability or competency to [continue] to practice law.”²²⁹ It should be noted that the conclusions that Kinsler reaches about the bar exam’s “accuracy” have been hotly contested by others who study the bar exam closely.²³⁰ In fact, the NCBE appears poised to make significant changes to the exam, finding it in need of modernization and adjustment.²³¹ However, for the purposes of this discussion, I ask whether an “accurate exam” for determining competency would be of use in testing lawyers at other career stages.

The ABA’s Model Rules of Professional Conduct (MRPC) wastes no moment, defining competency up front. MRPC 1.1 requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

228. Kinsler, *supra* note 21, at 921 (quoting *Younger v. Colo. State Bd. of Law Exam’rs*, 625 F.2d 372, 377 (10th Cir. 1980)).

229. *Id.*

230. See, e.g., MERRITT & CORNETT, *supra* note 11. This study, sponsored by the Institute for the Advancement of the American Legal System (IAALS), drew upon extensive empirical work to survey the profession to see how the bar exam could be reformed to truly measure what it purports to measure. The authors made twelve recommendations for radical change. The NCBE did not appreciate this input, offering that the current exam’s “ability to measure minimum competence has been confirmed numerous times.” Allie Yang, *Law Grads Faced Financial, Medical Challenges to Take the Bar this Year*, ABC NEWS (Dec. 4, 2020, 2:02 PM), https://abcnews.go.com/amp/US/law-grads-faced-financial-medical-challenges-bar-year/story?id=74511388&cid=74511388&__twitter_impression=true [<https://web.archive.org/web/20220407203748/https://abcnews.go.com/amp/US/law-grads-faced-financial-medical-challenges-bar-year/story?id=74511388>]. The NCBE countered that the IAALS-sponsored study was the product of personal bias. “Their recommendations (insights) for assessment do not appear to be based on data or any research set out in the assessment literature, but rather appear to be based on opinions of the researchers that probably existed before the study was conducted.” *Id.*

231. See NAT’L CONF. BAR. EXAM’RS, *supra* note 179 (discussing recommendation of significant changes to what the bar exam tests).

representation.”²³² Accordingly, “[t]he focus of test standards [for the bar exam] is on levels of knowledge and skills necessary to assure the public that a person is competent to practice . . . [and] to help ensure that those certified or licensed meet or exceed a standard or specified level of performance.”²³³ So, it appears that the standard of Rule 1.1 could serve as a baseline for entry into the profession, in addition to the standard used by state bar authorities in adjudicating whether an attorney may be subject to discipline.

Kinsler observed that two other “ethical rules are generally at issue in client neglect and incompetence cases.”²³⁴ He identified MRPCs 1.3 and 1.4 as the rules that address most problems that clients seem to encounter with their lawyers, at least the ones that end with observable discipline.²³⁵ These two rules maintain that “[a] lawyer shall act with reasonable diligence and promptness in representing a client,” and that “[a] lawyer shall promptly inform . . . client[s] . . . reasonably consult with . . . client[s] about the means [of representation] . . . keep the client reasonably informed . . . promptly comply with reasonable [client] requests for information . . . [and] explain a matter to the extent reasonably necessary to . . . make informed decisions.”²³⁶ Kinsler also includes the MRPC 1.1 competence rule as part of this tangle.²³⁷

Why do lawyers encounter these disciplinary problems in their careers? Judith McMorrow accounts for some through her observation that “more than a third of . . . disciplinary actions against lawyers involve some aspect of business failure.”²³⁸ She noted that these failures are “deeply intertwined with other issues, such as substance abuse, depression, and adult attention deficit disorder.”²³⁹ Whatever the causes, McMorrow continues, “the inability of some lawyers to implement a fundamental and sound business principle of service and competence is the most common problem for clients.”²⁴⁰

As noted, using California data, Anderson and Muller observed that lowering the bar exam cutoff scores correlates with higher rates of attorney discipline,²⁴¹ but much of this discipline emerges in the future.²⁴² Anderson and Muller qualify their observations, emphasizing the need for state bars to collect more data in order to

232. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N).

233. Anderson & Muller, *supra* note 12, at 309 n.6 (quoting AM. EDUC. RESEARCH ASS’N, AM. PSYCH. ASS’N & NAT’L COUNCIL ON MEASUREMENT IN EDUC., *THE STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* 63–64 (2014)).

234. Kinsler, *supra* note 21, at 886.

235. *Id.*

236. MODEL RULES OF PRO. CONDUCT, rr. 1.3, 1.4 (AM. BAR ASS’N).

237. Kinsler, *supra* note 21, at 886.

238. Judith A. McMorrow, *In Defense of the Business of Law*, 40 *FORDHAM URB. L.J.* 459, 462 (2012).

239. *Id.*

240. *Id.*

241. *See generally* Anderson & Muller, *supra* note 12.

242. *Id.* at 321–22.

understand the correlation, while cautioning against concluding causation.²⁴³ They also urge a robust consideration of tradeoffs:

By lowering the cut score, there would be more attorneys who would provide more legal services to the public and potentially increase access to justice and likely lower costs for consumers. The prospect that, eventually, 10% to 20% of those attorneys admitted with passing scores under a new, lower cut score will one day face discipline may not be enough to outweigh these prospective benefits.²⁴⁴

Anderson and Muller provoke questions about other potential markers and timelines for intervention and assessment of lawyer competence that could be handy if regulators change entry bar standards.²⁴⁵ If bar cutoff scores bear a correlation with future discipline, as they point out, we should ask whether regular testing deep into attorney careers would prevent misconduct as well. Perhaps if there are integrity concerns about the profession, some experiments should be launched to see if continued testing matters.²⁴⁶

Why raise this issue now? The profession has doubled down on the entry-level bar as a screening device,²⁴⁷ so why not study it more broadly—or at least contemplate how the screening should work? For those who believe that the bar exam serves a screening function, such a function logically should not end within the months after law school graduation. In fact, the screening function of a standardized test may improve over time, as lawyers confront more problems in the operation of their businesses, their lives, and their well-being. Ongoing testing, if one accepts its validity, could protect clients, but it may also serve to protect lawyers from harming their own reputations.

Perhaps, we have been thinking about assuring “competence” the wrong way. There is no substantial evidence to support the notion that marginal character and fitness problems predict future misconduct resulting in discipline.²⁴⁸ There is no substantial evidence to support the notion that the diploma privilege leads to more discipline of *new* lawyers.²⁴⁹ Maybe the focus of efforts to improve the profession

243. *Id.* at 324–25.

244. *Id.* at 322–23.

245. *Id.* at 323.

246. For an experiment of sorts, see Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. ONLINE 31 (2021), <http://live-moritz-college-of-law.pantheonsite.io/sites/default/files/2021-06/Online-Vol-82-Foster-Pagination.pdf> [<https://web.archive.org/web/20220109122419/http://live-moritz-college-of-law.pantheonsite.io/sites/default/files/2021-06/Online-Vol-82-Foster-Pagination.pdf>] (discussing that in a small experiment, author administered a practice bar exam to practicing attorneys in Oklahoma, who all failed).

247. The announcement of the effort to reshape the bar exam for 2025 makes it appear here to stay. See NAT’L CONF. BAR EXAM’RS, *supra* note 9.

248. LEVIN, ZOZULA & SIEGELMAN, *supra* note 55, at 51.

249. See Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS (forthcoming 2021) (finding that rates of attorney discipline under a diploma privilege regime do not differ from other jurisdictions).

and protect the public should address the corpus of practicing lawyers by proactively helping them.

If lawyers are regularly tested, the results could be used in many ways, not necessarily in ways that seem punitive or prohibitive. State bars can work on helping lawyers who face trouble later in their careers by normalizing intervention and supporting them in efforts to get on track or move on. Testing could be used to blow a confidential whistle and give some lawyers a time-out. This would instill some confidence in the public that the lawyer with whom they currently plan to engage still practices with some level of excellence, if not competence.

C. A Program for Regular Lawyer Examination

In his brief defense of the entry-level bar exam, Judge Zel Fischer, former Chief Justice of the Missouri Supreme Court, seemed incredulous that anyone would question its necessity. He compared the bar exam to entry-level testing in other sectors, specifically in aviation and medicine.²⁵⁰ Judge Fischer deemed it unimaginable for commercial pilots and physicians without entry-level testing to protect the public. However, he did not elaborate on whether the legal profession should follow the lead of commercial aviation and continue to test for competency for the duration of lawyers' careers.

Commercial pilots must undergo monitoring and testing throughout their entire licensed careers, not just at the beginning of their licensure. In fact, commercial pilots are required to engage in continuous medical recertification, including substance abuse detection and reporting,²⁵¹ and are mandated to retire at age sixty-five.²⁵² Though Judge Fischer has apparently not advocated for such measures in the legal profession (which concededly seem somewhat extreme), why shouldn't the legal profession take similar measures, given the data about career-long discipline, and the stakes for clients?

Granted, there are troubles and concerns with allowing the bar exam to spread its presence throughout the duration of professional careers. First, there is, of course, the question about whether it measures what many think it measures. There are enduring, serious social questions to address about the bar exam, including racist roots of the exam and perpetuation of inequity, generally.²⁵³ Though I do not

250. See NAT'L CONF. BAR EXAM'RS, *supra* note 1.

251. Matthew W. Lawrence & Jalayne J. Arias, *Alzheimer's Disease Biomarkers: Another Tool for FAA Pilot Screening?*, J.L. & BIOSCIENCES, 2019, at 85, 90–91.

252. Fair Treatment for Experienced Pilots Act, 49 U.S.C.A. § 44729(a) (West 2009); see Nicholas D. O'Conner, Note, *Too Experienced for the Flight Deck? Why the Age 65 Rule is Not Enough*, 17 ELDER L.J. 375, 376 (2009) (noting the age was raised from sixty, where it had been set from 1959 through 2007).

253. For a recent summary of these concerns, see Pilar Margarita Hernández Escontrías, *The Pandemic Is Proving the Bar Exam Is Unjust and Unnecessary*, SLATE (July 23, 2020, 5:45 PM), <https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html> [<https://perma.cc/5WM9-CA4F>]. Though the 2020 administration compelled more people to revisit these problems,

address these questions here, they warrant even more concern and study if the methods are applied more broadly. However, those who fervently support the bar exam as a measure of competence should consider whether there would be value in extending testing throughout the profession, the substance, the timing, and the methods, to see if the social costs of administration mesh with the benefits. Or perhaps reconsider the entirety of the screening mechanisms as they stand.

1. Proposal for New Regulatory Regime

The costs of the current regulatory structure for lawyers are massively front-loaded, designed to filter in new lawyers and supposedly filter out the unqualified after aspiring lawyers have invested in acquiring expensive and successful undergraduate and professional education credentialing. Spreading the costs of screening across the length of a career might prove more equitable and inclusive—and more protective of the public.

The ABA could certainly tighten up regulation of admissions standards in law schools, but doing so would create a different set of problems with equity. Allowing prospective lawyers to test into the bar in waves, or through competency blocks, would allow new lawyers to enter the profession and empower them to take on more responsibility over time. Their progress would be transparent to consumers, perhaps as a product of experience, breadth of testing, and competency of testing. But successful graduation from law school could be a primary marker for entry, with other credentialing coming later. The current time-consuming system of bar study and result delay emerged during an era when higher education was more affordable,²⁵⁴ so the delay of entry may not have been as costly. A new entry-level bar exam could test a narrow range of subjects or generalizable skills that a new lawyer would need but could perhaps be administered in stages so that new lawyers could be ready to practice.

As for the profession, I contend that the evidence presented in this Article supports exploration of the value of testing at regular intervals throughout lawyers' careers. Though some may contend that general tests of legal knowledge would be wasteful for a specialized practitioner, the evidence that lawyers stray into malpractice when going beyond the bounds of their field may point to a need for a general test. An alternative might be mandatory specialty testing, which would serve notice to clients that a lawyer is strongly qualified to practice in a certain area. Giving lawyers a choice, allowing lawyers to do both, or alternating every five years between both tests, would signal that the lawyer has retained the cognitive and noncognitive functions required to take a test and pass it.

others had identified such issues long prior. *See generally* Shepherd, *supra* note 123 (delineating the entirety of the barriers to entry for Black people into the legal profession).

254. *See* Abigail Johnson Hess, *The Cost of College Increased by More than 25% in the Last 10 Years—Here's Why*, CNBC (Dec. 13, 2019, 10:18 AM), <https://www.cnbc.com/2019/12/13/cost-of-college-increased-by-more-than-25percent-in-the-last-10-years.html> [https://perma.cc/557M-T4AN].

How difficult should a recertification test be? If the initial bar exam measures competence, one would expect experienced lawyers to be more competent. Logically, this would mean that the threshold should be higher, but maintaining the entry-level standard might be enough of a signal. At the very least, eccentrics like Dennis Hawver might be caught in the net of performative non-conformity with respect to a standardized test. And a lawyer in cognitive decline would have severe difficulty with such a test. To avoid age discrimination, however, such tests need to be regular and not merely administered to selected attorneys or attorneys over a certain age or practice-time threshold.

A character and fitness reexamination needs to have extremely high standards, however. This is the type of exam that one would hope to slow down the Dennis Hawver-types before they cause harm, rather than after the fact. Experienced lawyers have access to funds and engage in high-stakes practice scenarios that new lawyers do not. Independent and regular evaluations of an attorney's fitness to practice law yield more protective value as a career progresses than at the very beginning. That is, if one believes that entry-level character and fitness are predictive, later character and fitness prove more proximate, and potentially more predictive, though this hypothesis still warrants testing.

Any number of combinations and permutations of a testing and credentialing regime could be rolled out to serve the functions of allowing more people to practice law, preventing lawyers from causing harm before it happens, and signaling to clients and consumers how well the lawyer functions and in what areas. Posting detailed scores might be too extreme for initial consideration, but posting recertification might prove reasonable and helpful.

2. Potential Downsides of New Regime

One objection to extending testing to the "other" 90% of the profession could be that reexamination testing would not prove indicative of the performance of experienced lawyers. That is, the extension of testing to all lawyers would screen out too many lawyers who should still be practicing. Such a position would need to be reconciled with the fierce defense of the bar exam as an entry-level measure of competence.

Another objection is that such an exam would come at a high cost to practicing lawyers, both in terms of opportunity cost and administrative hassle and in the potential to lose business or have a suspended license. As to the former, the cost and hassle should be with the social cost of the entirety of the entry process to the profession. Further, the elimination of continuing legal education requirements would enable attorneys—who are already presumed competent—to make similar time for preparation and examination. The time spent on continuing legal education would be spent on practical education for the exam itself.²⁵⁵

255. Other forms of continuing education may prove valuable, but the market can be left to determine which programs are useful. For a discussion of the limited value of mandatory continuing

Suspending a license for a bar exam failure might seem extreme mid-career, and even be damaging to some clients, so flexibility could be given as to the duration of time a lawyer could use to retake a failed exam. However, a failed character and fitness exam should raise an immediate flag, and the state bar should actively intervene to ensure that the lawyer will not cause harm.

Another equity-rooted objection might be that some lawyers, particularly those who serve the public interest, cannot afford to take the time and spend the money to take the exam as easily as lawyers practicing in large, national law firms. There are a few ways to address this question. First, if a new system of testing is implemented, malpractice claims may drop both in frequency and magnitude, and these savings can be passed along. Second, if the profession is serious about serving the public and protecting the vulnerable through maintenance of a public-interest bar, the administrative costs can be leveled through means testing by income or by employer status. That is, lawyers who earn less or who work for nonprofits could be reexamined for a lower fee than partners in a corporate practice with higher earnings.

If a lawyer wishes to take a specialty exam, particularly in a state that already permits specialization and allows attorneys to advertise their specialization, they should have that opportunity to substitute such an exam. But this exam, too, should be retaken at regular intervals if it is to be the competency exam—not just a lifetime pass at entry into the specialty bar. In fact, these specialty exams may be the model to consider, and they are already available.²⁵⁶

Some specialty certified bars demand a great deal from lawyers. For example, to achieve certification in Arizona, an established lawyer:

[M]ust demonstrate honesty, integrity, and professionalism as defined by the Lawyer's Creed of Professionalism of the State Bar of Arizona, and a high degree of competence in the practice of the particular field of law. The required degree of competence is substantially higher than that possessed by a general practitioner who regularly handles a matter in that particular field of law. For purposes of this rule, a "high degree of competence" shall meet the following standards:

1. The applicant demonstrates a substantially complete knowledge of substantive law and rules of practice, procedure, evidence, and ethics pertaining to that particular field of law;
2. The applicant demonstrates a high degree of skill, thoroughness, preparation, effectiveness, professionalism, and judgment in that particular field of law;

legal education, see Rima Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, 36 NOTRE DAME J.L., ETHICS & PUB. POL'Y (forthcoming 2022), <https://scholarship.law.georgetown.edu/facpub/2386> [<https://perma.cc/TXR9-TNM4>].

256. For example, Arizona permits entrance into specialty areas, but the entrance "exam must be taken by initial applicants only." STATE BAR OF ARIZ., *supra* note 176, at 10.

3. The applicant satisfactorily completes a written examination in the topics specified in paragraphs (1) and (2) above; and
4. The applicant possesses a substantially complete knowledge of and can demonstrate a high degree of skill in the use of alternative dispute resolution as it applies in the field.
5. Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which they practice, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond their competence relevant to the matter undertaken, bringing these to the client's attention, and (5) properly prepares and carries through the matter undertaken.²⁵⁷

In addition to these substantive tests, the Arizona specialty areas require that lawyers, upon entry to their certification, subject themselves to another fitness evaluation, in part at the assessment of their peers.

With each application, the applicant will submit the names of at least five Arizona attorneys, other professionals[] who practice in the field, and/or judges before whom the applicant has appeared, who are familiar with the applicant's practice, not including current partners or associates The Advisory Commission will select at least five additional Arizona lawyers, judges, or qualified professionals as references from cases/matters/projects submitted by the applicant. The references will be requested to provide written comments concerning the applicant not limited to such specific topics as knowledge, skill, thoroughness, preparation, effectiveness, and judgment. References who provide negative and/or adverse comments concerning an applicant will be requested to provide the factual basis and any substantiating information for them.²⁵⁸

Why only limit such reassurances to specialty certifications? Why not extend this approach to all lawyers? And why only check in once, not regularly? Perhaps the specialty bars provide clues toward a future where consumers have recent information about lawyer competence and peer reputation.

All lawyers could benefit from a refresh of ethics, too. And all lawyers could benefit from a refresh of general changes to law and legal systems in the decades since they received their law degree. A retest could incentivize a study of the critical changes. Further, all clients could benefit from a general assurance that their lawyer is fit to practice.

3. Rebalancing the System

A reassessment of the costs and benefits of gating the profession is overdue. Recent debates about the purpose of bar exams should ignite a discussion about how to regulate the bar and how to best protect and serve clients. The substantial up-front barriers to practicing law could be lowered to let more junior lawyers into

257. *Id.* at 7.

258. *Id.* at 9.

the funnel and encourage them to develop skills as they go. The continued monitoring of lawyers in a more proactive and systematic way could win public confidence, make it easier to find capable lawyers, and ultimately prevent the infliction of harm.

The entry-level bar exam is far too distant to serve the function of protecting a client from a lawyer of long and distinguished service who has run into financial troubles or who has simply slipped in their ability to serve. There is no reason to be less concerned about under screening current lawyers for competency to practice than new lawyers—perhaps there is reason to be more concerned.

To borrow words from John Foster Dulles, the cost-benefit debates about the 2020 administration of the bar exam during the height of the COVID-19 pandemic should spur the legal profession to undergo an “agonizing reappraisal” of who enters the profession, how they enter it, and who should remain in it. And this reappraisal should include the role of standardized testing and fitness testing. Should these tests stay? Should these tests go? Should they be administered, if they stay, to active practitioners? There are a number of ways to study this question. But one question should be asked—why, other than tradition and habit, is the profession’s regulatory structure the way it is—and going forward, could it be better for the public?

CONCLUSION

State bars have stubbornly clung to the bar exam as the entry-level gatekeeper between law school graduates and the profession. They have done so largely in the name of assuring quality of lawyers for consumers. The same concept applies to character and fitness tests which are performed at entry and then never again. These tests effectively are intended to assure consumers about a lawyer’s competency for a lifetime unless the lawyer runs into disciplinary trouble. Even malpractice may not be visible to potential clients, just the bar exam passage and any disciplinary record. Apparently, the bar exam is deemed to be a powerful enough screening tool that using it at the onset of one’s career is sufficient.

However, state bars should consider whether their feelings and hunches about the bar exam and other entry-level fitness exams are sincere enough to warrant further administration to the 90% of lawyers who are experienced lawyers. That is, state bars should be confident enough in the bar exam as a measurement device to apply it to current lawyers.

Certainly, such measures would prove unpleasant and costly to lawyers, but the potential benefits of this type of regulatory regime have not been measured—and may prove popular with a public that holds lawyers in low esteem. Such costliness should be compared with the social cost of the entry-level bar exam and measured against annual time and money spent on continuing legal education maintenance. The competent lawyer should not have to invest too much in preparation for such an exam.

For those who push back on this proposal as being too costly, too much of a hassle, or not helpful in providing relevant information to consumers, I would press them to think more about the purpose of the entry-level exam. “Diploma privilege” may be a system for which a new generation of law students and lawyers are advocating, a system similar to that of Wisconsin’s. But the current system could also be described as “bar exam privilege”—where passing the bar exam once may give unwarranted privilege to practice forever, in spite of future competency questions. This makes just as much or just as little sense as implementing diploma privilege.