

Article

Modern Diploma Privilege: A Path Rather Than a Gate

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INTRODUCTION

Over the course of U.S. history, lawyers have been licensed by a variety of different methods.¹ Today, almost everyone who seeks to become an attorney must pass through the gate of the bar exam. Typically administered in convention centers across the United States, the bar exam is generally a two-day, closed-book exam for which examinees have spent the previous eight to ten weeks cramming full-time.² In most states, the bar exam consists of essay and multiple-choice questions that require examinees to memorize thousands of legal rules and apply them to

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1. See generally Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335 (2006) (outlining historical trends in legal training and licensure). The question of whether lawyering should require licensure at all is a question beyond the scope of this Article.

2. Full-time study is the standard recommendation, but it is not possible for all graduates, many of whom must meet ongoing financial and caregiving obligations. See, e.g., Kerriann Stout, *5 Tips for Studying for the Bar Exam While Working Full-Time*, ABOVE THE L. (May 21, 2018), <https://abovethelaw.com/2018/05/5-tips-for-studying-for-the-bar-exam-while-working-full-time> [<https://perma.cc/KT7X-XPL9>] (“If you can avoid working during this time, you absolutely should.”).

short fact patterns in order to analyze legal consequences.³ Of course, this bears very little resemblance to the practice of law,⁴ where clients have messy and evolving tales that lawyers research meticulously for long hours, incorporating many resolution strategies beyond the litigation framework.

The bar exam is also the pits to go through. It represents the highest of personal and professional stakes. Examinees are, for the most part, deeply in debt and going deeper as they study. The bar exam is offered only twice a year, so failure means a significant delay in licensure and employment opportunities.⁵ The whole experience is intellectually, financially, and emotionally fraught.

To add to all this pressure, in 2020 and 2021, it wasn't even clear that bar exams were going to happen.⁶ The COVID-19 pandemic, which made it physically dangerous for examinees to gather for the exam, amplified calls for a licensure alternative—in particular, diploma privilege.⁷ “Diploma privilege” is a licensure mechanism by which the earning of a law school diploma alone confers the privilege to practice law.⁸ Graduation, rather than the bar exam, is the final gate through which a person must pass to become a lawyer.

3. See *What Is the Bar Exam?*, BARBRI, <https://www.barbri.com/about-the-bar-exam> [https://perma.cc/TV95-488B] (outlining the exam format).

4. The legal profession is not alone in criticizing its licensure mechanism as being unrelated to practice. See, e.g., Joshua A. Krisch, *Board Certification and Fees Anger Doctors*, N.Y. TIMES (Apr. 13, 2015), <https://archive.nytimes.com/well.blogs.nytimes.com/2015/04/13/board-certification-and-fees-anger-doctors> [https://perma.cc/3VWP-NZRT] (highlighting doctors' frustrations with licensing requirements).

5. *Comprehensive Guide to Bar Admission Requirements*, NAT'L CONF. OF BAR EXAM'RS & A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR 32 (2020) [hereinafter *Bar Admission Requirements*], https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [https://perma.cc/PKU6-LDWU]. Delaware and Palau only offer the bar exam once per year. *Id.*

6. Claudia Angelos, Sara J. Berman, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action 1* (Ohio State Moritz Coll. of L., Legal Studies Working Paper Series No. 537, 2020).

7. *Id.* at 6.

8. See *id.* at 5 (“Wisconsin has long used a diploma privilege, which licenses most graduates of the state’s schools without the need to take a bar exam.”).

The heyday of diploma privilege was roughly from the 1870s to the 1890s, when law school curricula became standardized under the influence of Christopher Columbus Langdell,⁹ and law schools were in search of incentives to entice students to attend.¹⁰ Although diploma privilege is currently the exception, there is nothing to prevent the creation of different—better—paths to licensure.¹¹ This Article proposes such a pathway: a modern diploma privilege.

A modern diploma privilege is a licensure framework that allows state licensure authorities to identify what competencies are expected of first-year attorneys, then partner with law schools to assess those competencies. Freed from the format and timing of a bar exam, schools can assess a broader range of competencies over longer time horizons. This will allow the development of law school curricula aimed at preparing students to assist clients rather than to pass the bar exam. The modern diploma privilege is structured as an ongoing partnership between licensure authorities and schools, which means that changes can be easily made to the list of desired competencies and/or the assessment methods. This in turn allows for a nimbler licensure mechanism that can quickly adapt to changes in the evolving market for legal services.

9. Troy J.H. Andrade, Comment, *Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 249, 258 (2010) (noting also that “[t]he accreditation gap is often cited as the origin of the standard written bar examination”).

10. Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L. REV. 36, 38–39 (1974). The existence of diploma privilege meant that graduates could be immediately licensed to practice (as opposed to sitting for the bar exam without a formal legal education), and it also elevated the status of law schools with a state stamp of approval. *See id.* Then—as now—bar “examinations were criticized on the one hand for failure to deal with general principles of law and for concentration on details of local practice, and on the other hand for being too broad in scope.” *Id.* at 39.

11. As of this writing, the only established paths to licensure based on the satisfaction of law school graduation requirements are in Wisconsin and New York. For more discussion of these requirements, see *infra* Part I.C. New York and Oregon are exploring other paths to licensure, and other states may well follow suit. For information on New York’s project, see *Third Report and Recommendations of the Task Force on the New York Bar Examination*, N.Y. ST. BAR ASS’N (June 2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf> [<https://perma.cc/2PK3-6A6V>]. For Oregon, see *Recommendation of the Alternatives to the Bar Exam Task Force*, OR. ST. BD. OF BAR EXAM’RS (June 18, 2021), <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf> [<https://perma.cc/7HQX-GAHW>].

Part I of this Article explains the actors involved in legal licensure in the United States and reviews and critiques historical licensure methods, with particular emphasis on the bar exam and diploma privilege. Part II contains the broad strokes of the modern diploma privilege proposal, in which state licensure agencies can carefully define the competencies expected of first-year lawyers, then partner with law schools and the practicing bar to develop assessments that accurately measure those competencies over appropriate time horizons. Part III analyzes the ways in which the modern diploma privilege more accurately licenses the *right* attorneys. It discusses the “ratio of regret,” that is, reducing both the number of competent law graduates who are kept out of the profession and the number of incompetent examinees who manage to pass the bar exam. Part III also addresses the racial disparities in bar exam results and explores how the modern diploma privilege can be part of ameliorating these disparities, as well as addressing suggestions that the bar exam keeps attorney disciplinary actions low. A brief conclusion follows.

This Article provides the broad outlines of the modern diploma privilege proposal. Hopefully, the proposal will inspire additional research that will expand and fine-tune the proposal. For example, future research could consider the constitutionality, logistics, and practicality of the modern diploma privilege proposal; as well as what specific competencies, curricular requirements, and assessments should constitute a modern diploma privilege.

I. THE WHY, HOW, AND WHO OF LAW LICENSURE

Historically, lawyers in the United States have been licensed by a variety of methods, including apprenticeship, diploma privilege, oral examination, written examination, and no examination at all.¹² In the modern era, though, the written bar exam is the near-universal gate through which a would-be lawyer must pass in order to receive a state-sanctioned license to practice law. This Part outlines the roles of the various institutions that play a part in law licensure, as well as analyzes the rationales, pros, and cons of the bar exam. This Part then goes on to describe and assess the primary alternative to the bar

12. Andrade, *supra* note 9, at 257–58; Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 645 (referencing Wisconsin's earliest days of statehood with open admission to the bar to those of good character).

exam, the diploma privilege, currently in use in Wisconsin and New Hampshire.

A. THE PLAYERS: INSTITUTIONAL ROLES IN LAW LICENSURE

Law licensure is controlled at the state level. Each state's supreme court (and in some instances its state legislature) establishes the standards a would-be lawyer must meet in order to be licensed.¹³ For example, Pennsylvania's attorney admissions rules are promulgated by the state supreme court,¹⁴ while in Michigan the rules are promulgated by the state supreme court in conjunction with the state legislature.¹⁵ The actual administration of these licensure requirements is typically delegated to a state agency, usually called some variation of "the board of law examiners," such as the "Illinois Board of Admissions to the Bar"¹⁶ or the "Board of Law Examiners of the State of North Carolina."¹⁷ These state agencies may have both boards of directors, who make policy decisions at a more granular level than the supreme court, as well as staff that process applications and administer bar exams.¹⁸ These state supreme courts, boards of law examiners, and staff are collectively referred to herein as "state licensing authorities."

13. *Chart 1: Promulgation of Rules, Prelegal Education Requirements, Law Student Registration, and Bar Exam Eligibility Before Graduation*, NAT'L CONF. OF BAR EXAM'RS & A.B.A. (2021), <https://reports.ncbex.org/comp-guide/charts/chart-1> [<https://perma.cc/4AW5-KP8J>] (summarizing which state bodies control bar admissions).

14. *Id.*

15. *Id.*; *About the Board of Law Examiners*, MICH. CTS., <https://www.courts.michigan.gov/administration/committees-boards/board-of-law-examiners/new-ble-page> [<https://perma.cc/MLH6-A78D>] ("The State Board of Law Examiners (BLE) was created by the Michigan Legislature to oversee the investigation and examination of persons who apply for admission to the State Bar. . . . Board members are nominated by the Supreme Court and appointed by the Governor for five-year terms.")

16. *Illinois Board of Admissions to the Bar*, ILL. BD. OF ADMISSIONS TO THE BAR, <https://www.ilbaradmissions.org/home> [<https://perma.cc/WB2F-TC5G>].

17. *North Carolina Bar Admission Registration*, BD. OF L. EXAM'RS OF THE ST. OF N.C., <https://www.ncble.org/home> [<https://perma.cc/YW64-PHBU>].

18. *E.g.*, *Rules Governing Admission to the Bar in Missouri*, MO. BD. OF L. EXAM'RS, <https://www.mble.org/rule-8> [<https://perma.cc/TZ3U-G7KV>]; *Frequently Asked Questions*, SUP. CT. OF GA. OFF. OF BAR ADMISSIONS, <https://www.gabaradmissions.org/faq> [<https://perma.cc/U473-PZAF>] (consisting of two boards, one for fitness and one for competence, as well as a staff of analysts who process applications).

Every jurisdiction in the United States offers a bar exam for law licensure, and in almost every jurisdiction, it is the only way for a new lawyer to gain admission.¹⁹ This Article is focused on first-time bar admission; if a person who is already a practicing lawyer in one state seeks admission in another state, they may be able to gain admission without taking a bar examination.²⁰

Although they have no official role in licensing individual attorneys, both the American Bar Association (ABA) and the Association of American Law Schools (AALS) long ago crowned the bar exam as the appropriate licensure mechanism.²¹ The ABA is the professional organization that, among other things, accredits U.S. law schools as a delegate of the Department of Education.²² The AALS is a nonprofit organization of law schools that seeks

19. *E.g.*, *Supreme Court Rules for the Government of the Bar of Ohio*, SUP. CT. OF OHIO 245, <https://www.supremecourt.ohio.gov/docs/LegalResources/rules/govbar/govbar.pdf#App3> [<https://perma.cc/D54M-HZZZ>]; *Rules Governing Admission to the Practice of Law in Colorado*, COLO. SUP. CT. 8 <https://www.coloradosupremecourt.com/PDF/BLE/Rules%20Governing%20Admission%20to%20Practice%20Law%20in%20Colorado.pdf> [<https://perma.cc/W5UV-3LSA>] (“All applicants who are ineligible for admission on motion as a qualified out-of-state attorney . . . or by UBE score transfer . . . must, as a condition of admission, take and pass the Colorado bar examination.”).

20. UBE scores may be transferred from one UBE jurisdiction to another, and most states offer licensure reciprocity to attorneys licensed in other jurisdictions if the test taker meets the required score threshold. Each state makes its own determinations about these issues. *See, e.g.*, *Rules Governing Admission to the Alabama State Bar: Persons Entitled to Admission Without Examination*, ALA. ST. BAR, <https://admissions.alabar.org/rule-3> [<https://perma.cc/5AJK-UPM9>]; *General Description of Qualifications for Admission to the New Jersey Bar*, N.J. BD. OF BAR EXAM’RS, <https://www.njbarexams.org/appinfo.action?id=1> [<https://perma.cc/97TP-FZSJ>] (“To be admitted to the New Jersey Bar one must . . . qualify for and pass the New Jersey bar examination or apply using a qualifying Uniform Bar Examination (UBE) score, or qualify and apply for admission by motion [reciprocity] . . .”).

21. Goldman, *supra* note 10, at 40–41 (noting that the ABA “denounced” diploma privilege in 1921, and the AALS “condemn[ed] the admission of persons without examination” at about the same time). The ABA declared its explicit preference for written bar examinations in the 1920s. Moran, *supra* note 12, at 647 (“[B]y the 1920s, the American Bar Association declared ‘graduation from a law school should not confer the right of admission to the bar, and . . . every candidate should be subjected to an examination by a public authority to determine his fitness.’”) (citation omitted).

22. *Legal Education and Admission to the Bar*, A.B.A., https://www.americanbar.org/groups/legal_education [<https://perma.cc/DM3D-LJFP>] (“The [ABA] Section’s Council is recognized by the U.S. Department of Education (DOE) as the national accrediting agency for programs leading to the J.D.”).

to “uphold and advance excellence in legal education.”²³ Helmed by and run for law professors, it is an influential organization in legal education.²⁴

Nationally, the content of the modern bar examination is dominated by the National Conference of Bar Examiners (NCBE).²⁵ The NCBE is a nonprofit organization that authors all or part of the bar exam in every U.S. jurisdiction except Louisiana and Puerto Rico.²⁶ Forty-one jurisdictions (and counting) administer the Uniform Bar Exam (UBE), which is authored completely by the NCBE.²⁷ This means that the bar exam content and timing is identical in each of those jurisdictions, and that the bar exam in those jurisdictions contains no jurisdiction-specific content. The remaining jurisdictions, again with the exception of Louisiana and Puerto Rico, use one or more components of the UBE as part of their state bar exam.²⁸

The historical squabble over how best to license lawyers can be viewed as a balance of power among the practicing bar, law schools, state licensing authorities,²⁹ and increasingly the

23. *About AALS, ASS'N OF AM. L. SCHS.*, <https://www.aals.org/about> [<https://perma.cc/6JLK-AJY9>].

24. *See id.*

25. *Multistate Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mbe> [<https://perma.cc/69GJ-3VEL>] (showing that nearly all states administer the NCBE-authored MBE, the multiple-choice portion of the bar exam).

26. *Id.*

27. *Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube> [<https://perma.cc/H3D9-NEKD>]. State adoption of the Uniform Bar Exam has accelerated in the face of declining bar passage rates in the mid-2010s. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 5 (2019). As of this writing, New York state is considering reverting from the Uniform Bar Exam to an exam that is at least partially authored by New York state authorities. Susan DeSantis, *New York State Bar Association Calls for State to Withdraw from the Uniform Bar Exam*, N.Y. ST. BAR ASS'N (June 12, 2021), <https://nysba.org/new-york-state-bar-association-calls-for-state-to-withdraw-from-the-uniform-bar-exam> [<https://perma.cc/T5L2-HHW4>].

28. All jurisdictions except Louisiana and Puerto Rico use the Multistate Bar Exam, the multiple-choice portion of the UBE. *Multistate Bar Examination*, *supra* note 25. The Multistate Performance Test and the Multistate Essay Exam are only slightly less popular. *Multistate Performance Test*, NAT'L CONF. OF BAR EXAM'RS, <https://ncbex.org/exams/mpt> [<https://perma.cc/7XDK-QB8L>]; *Multistate Essay Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://ncbex.org/exams/mee> [<https://perma.cc/HV2A-632N>].

29. Joan W. Howarth, Dean Emerita & Professor of Law, Mich. State Univ. Coll. of L., Keynote Address at Brigham Young University J. Reuben Clark Law

NCBE.³⁰ Bar examinations traditionally shifted that power to the state licensure authorities and the practicing bar in the form of both writing and grading bar exams. The rise of the NCBE and its UBE, however, mean that neither the practicing bar nor the state licensure authorities in fact have any effective control over the content of the exam. Law schools are left out of the licensure loop, too, except to teach what's on the bar exam.³¹ (The NCBE will think this unfair of me. It asserts that its bar exam is designed to test those subjects “regularly taught in law schools,”³² and indeed, the NCBE includes law professors on its question-drafting committees.³³)

In contrast, traditional diploma privilege—which will be discussed in more detail in Part I.C below—placed licensure decisions in the hands of law schools. This Article proposes a middle ground, termed a “modern diploma privilege,” which better balances the interests and authorities of state licensure authorities, the practicing bar, law schools, clients, and the public.³⁴

School's Law & Leadership Conference: A Short History of Attorney Licensing: Tales of Protection, Prestige, Exclusion & Good Faith, at 0:15:45 (Jan. 29, 2021), <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-morningkeynote/LeadershipConference-morningkeynote.html>; see, e.g., Stephen E. Kalish, *Legal Education and Bar Admissions: A History of the Nebraska Experience*, 55 NEB. L. REV. 596, 598 (1976) (describing the shifting licensing schemes throughout Nebraska's history). The law-office training era before and during the Civil War emphasized the authority of the already-practicing bar over the licensure of new attorneys. By the end of the nineteenth century, however, power began to shift to the centralized state licensing authority and law schools—particularly the full-time law schools. *Id.* at 612.

30. Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 10 (2020) (“[T]he NCBE stance [of requiring bar exams even during a pandemic] bears witness to a monumental shift in power wielding—away from the states and in favor of the private NCBE—that is the result of the widespread adoption of the [UBE].”).

31. Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 359–61 (2003) (describing private influences on law school curriculum).

32. *Bar Admission Requirements*, *supra* note 5, at ix.

33. The NCBE is currently in the process of developing a new iteration of the bar exam, and it is consulting with a variety of stakeholders, including current and retired law school faculty. *Announcing NCBE's Content Scope Committee*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/announcing-ncbes-content-scope-committee> [https://perma.cc/6M7L-Z8EP].

34. See discussion *infra* Part II.

B. WHY A BAR EXAM?

The purpose of any licensing scheme is to ensure that all members of a profession are competent and authorized to provide their services to the public. The purpose of law licensing in particular is either to ensure the minimum competence of new lawyers or, depending on your perspective, to serve a protectionist function maintaining the exclusiveness of an already-peopled (and overwhelmingly white)³⁵ club.³⁶

To the second rationale, bar exams may have been deliberately designed “to stunt the growth of new law schools that generally had less rigorous admission criteria and predominantly served immigrants and racial minorities.”³⁷ For example, South Carolina granted diploma privilege in 1886 to graduates of the “state law school,” which for two years was interpreted to include Black graduates of Allen University’s law school.³⁸ In 1888, however, the statute was amended to refer specifically to public schools, meaning the all-white University of South Carolina.³⁹ Then, in 1950, when South Carolina was forced to open a (separate) state law school for Black students, the diploma privilege disappeared in favor of the bar exam.⁴⁰ One legislator even introduced the bar exam bill as being “designed to ‘bar Negroes and some undesirable whites’” from the legal profession.⁴¹

As to the competency-confirming rationale, the primary benefit of bar exams over diploma privilege is their predictability, as between examinees, between administrations, and in the current UBE era, between states—in the vast majority of states, the

35. See *infra* Part III.B.

36. Compare *Bar Admission Requirements*, *supra* note 5, at ix (indicating that the purpose of the bar exam is to “protect the public, not to limit the number of lawyers admitted to practice”), with Griggs, *supra* note 30, at 50 (“The NCBE was established by the ABA Section on Legal Education and Admission to the bar to eliminate overcrowding in the profession.”), and Roger Baron, *Diploma Privilege Hearing, HB 1073, Feb. 2, 2022*, YOUTUBE, at 0:20:17 (Feb. 6, 2022), https://youtu.be/Bg_N5_bBcQc?t=1217 (showing the statement of state’s attorney John Fitzgerald, which asserted that the bar exam is less about protecting consumers than about reducing competition and keeping attorneys’ fees high).

37. Milan Markovic, *Protecting the Guild or Protecting the Public? Bar Exams and the Diploma Privilege*, 35 GEO. J. LEGAL ETHICS 163, 169 (2022).

38. W. LEWIS BURKE, ALL FOR CIVIL RIGHTS: AFRICAN AMERICAN LAWYERS IN SOUTH CAROLINA, 1868–1968, at 95–96 (2017) (outlining efforts to exclude Black lawyers from the legal profession).

39. *Id.*

40. *Id.* at 96.

41. Andrade, *supra* note 9.

format of the exam and scope of testable material are predictable from one administration to the next.⁴² This consistency is a distinct departure from previous licensure methods, such as reading the law and oral examination, which were notoriously inconsistent.⁴³ Diploma privilege, too, was becoming increasingly suspect as not being sufficiently standardized; law licensure was deemed “too important to leave to anyone other than the state, and that in the absence of an impartial test the [law] schools had a tendency to relax instruction and standards.”⁴⁴ The written bar examination, by contrast, is supposed to test “things everyone is supposed to know.”⁴⁵

Arguments in favor of the bar exam include that it forces law school graduates into a useful comprehensive review between law school and practice, assessing whether they can identify issues without being told precisely what subject is being tested by the title of the exam question.⁴⁶ It may also keep law school standards high,⁴⁷ as law schools are incentivized to train and graduate students who can pass the bar exam.⁴⁸ The ABA

42. Cf. *Preparing for the MBE*, NAT'L CONF. OF BAR EXAM'RS, <https://ncbex.org/exams/mbe/preparing> [<https://perma.cc/9R6Z-YV7B>] (outlining a standard format for the MBE).

43. Moran, *supra* note 12, at 646 (“Oral examination was not a great barrier to admission. A candidate who failed an oral examination simply found a more sympathetic judge.”); also see *id.* at 645–46 for an amazing anecdote of Abraham Lincoln administering an oral bar examination from the bathtub.

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

45. Andrade, *supra* note 9, at 259 (quoting Dean Oliver S. Rundell of the Wisconsin School of Law).

46. Moran, *supra* note 12, at 647–48 (summarizing purported benefits of the bar exam).

47. *Id.*

48. Law schools are both intrinsically and extrinsically motivated to keep their bar passage rates high. Bar passage rates figure into law school ranking schema, schools advertise their bar passage rates when recruiting new students, and bar passage is a factor in a school's accreditation and re-accreditation. Robert Morse, Kenneth Hines, Eric Brooks & Daniel Lara-Agudelo, *Methodology: 2023 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 28, 2022), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/785L-CKYY>] (outlining the methodology in use at the time by which U.S. NEWS & WORLD REPORT ranks law schools); e.g., *Minnesota Law by the Numbers*, UNIV. OF MINN. L. SCH., <https://law.umn.edu/admissions/minnesota-law-numbers> [<https://perma.cc/HTC2-SFLK>] (using a high bar-passage rate to attract students); see *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021*, A.B.A. 25, 45 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_

supports bar examinations as being objective, at least as compared to diploma privilege, “because third parties, who do not have relationships or financial interests in the results,” judge competency.⁴⁹ Embedded here is a valid critique of diploma privilege: law school faculty have a financial incentive to pass even weak students, since students who fail their courses are less likely to continue paying tuition.

Yet the bar examination is also roundly criticized. Critics alternately argue that it doesn’t test enough subjects, or conversely that it tests too many unimportant details of the law.⁵⁰ It assesses test-taking skills rather than legal knowledge.⁵¹ It tests only a small subset of lawyering skills.⁵² The closed-book format emphasizes memorization, which is not a meaningful skill in practice.⁵³ The speed required to complete the exam within time limits is unrealistic.⁵⁴ Passing the bar exam requires tremendous amounts of time spent in preparation, making it

admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf [https://perma.cc/7J5A-DWDE] (requiring that “[a]t least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation,” and that “a law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar”).

49. Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 32 (2018) (citing Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 274 (2007)). The NCBE, though, makes a fortune from examinees’ bar exam fees. *National Conference of Bar Examiners (NCBE)*, CAUSE IQ (Aug. 22, 2021), <https://www.causeiq.com/organizations/national-conference-of-bar-examiners,362472009> [https://perma.cc/94K6-LF2L] (showing the NCBE’s revenue and expenses).

50. Glen, *supra* note 31, at 365–67.

51. *Id.* at 368–72.

52. ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION 200 (2007) (noting that bar exam results are “limited in their usefulness and valid only on particular questions”).

53. Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 37 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [https://perma.cc/2X-EENA] (“[N]ew lawyers should not rely upon memorized rules during their first year of practice.”).

54. *Id.* at 64 (criticizing the bar exam’s emphasis on quick multiple choice questions); *see also* Baron, *supra* note 36, at 0:11:52 (arguing that the multiple-choice portion of the bar exam in particular punishes examinees who are “slow and methodical readers,” which is not harmful to clients in practice).

“more a test of economic advantage—the ability to devote ten weeks to unpaid memorization of legal principles—than of minimum competence to practice law.”⁵⁵ Multiple-choice questions, which disproportionately determine an examinee’s score on the bar exam,⁵⁶ are not a part of law practice.⁵⁷ Grading of essays and other written work is inconsistent and unfair.⁵⁸ The fact that passing scores differ from state to state (even when the examination is exactly the same) defies logic and undermines validity.⁵⁹ The UBE does not test state and local distinctions or procedural rules.⁶⁰ The concept of “minimum competence” was not defined before bar exams were written,⁶¹ suggesting that any bar exam is invalid from the start.⁶² Objective tests such as the bar exam are not good predictors of how an examinee will perform in

55. Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO ST. L.J. 31, 41 (2021).

56. Griggs, *supra* note 27, at 24–29. On the Uniform Bar Exam, the MBE accounts for fifty percent of the examinee’s total score, and examinees’ essay scores are scaled to MBE results. *Id.*

57. Merritt & Cornett, *supra* note 53, at 65–67.

58. J. Kirkland Grant, *The Bar Examination: Anachronism or Gatekeeper to the Profession?*, 70 N.Y. ST. BAR J. 12, 13–14 (1998). Experienced bar exam essay graders spend an average of two to two-and-one-half minutes grading each essay, which students have thirty to forty minutes to write. *Id.*

59. Joan W. Howarth, *The Case for a Uniform Cut Score*, 42 J. LEGAL PRO. 69, 75–76 (2017) (comparing bar cut scores to other, nationally uniform, professional tests). Discussing the MBE in particular, Dean Howarth writes,

[t]hese MBE cut [read: passing] score disparities undermine simple logic, psychometric validity, and optimal protection of the public. They constitute bad logic because every state is attempting to use the same test to predict exactly the same thing: minimum competence to practice law. They are bad science because setting a cut score is a ‘critical step’ in assuring the validity of the use of the exam.

Id. at 70–71 (citations omitted); *see also* Griggs, *supra* note 27, at 21–23 (criticizing cut score disparities).

60. Griggs, *supra* note 27, at 51 (titling a section of the Article: “State Bar Examiners Seem to Have Given Up on State Law”). One-third of UBE states have no licensure component that addresses local law. *Id.* at 52; *Bar Admission Requirements*, *supra* note 5, at 36–38 (outlining the scope of local licensure components); *see also* Baron, *supra* note 36, at 0:27:20 (arguing that the entities and interests writing the bar exam do not have South Dakotans’ interests in mind).

61. *Cf.* Merritt & Cornett, *supra* note 53, at 3 (noting that there is no universally agreed upon definition for minimum competence).

62. A test is valid if it measures what it purports to. *See* Chong, *supra* note 49, at 40–55 (discussing the factors that make any test valid); Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 407–10 (2019) (discussing what constitutes minimum competence).

practice.⁶³ The material memorized for the bar exam is quickly forgotten.⁶⁴

In defense of the validity of the bar exam, the NCBE has suggested that declines in passage rates are entirely the result of “less able” test takers⁶⁵ and that students’ participation in externships harms their bar passage potential, as these students are removed from law school classrooms for a portion of their education.⁶⁶ This latter suggestion rightly infuriates those interested in practical legal education: “There can be no greater contradiction in the legal profession [than] if the actual practice of law cannot serve as a proxy for competency presumed by examination.”⁶⁷

63. Glen, *supra* note 31, at 429–30 (explaining that “[e]xtrapolation asks whether we can infer from the applicant’s test performance that she will perform similarly in the actual practice of law,” and that objective tests rank low for extrapolation). By contrast, “[d]irect observation of performance in actual practice” and simulations are strong predictors of extrapolation ability. *Id.* at 430.

64. Foster, *supra* note 55, at 37–41 (outlining a study of sixteen young attorneys who *all* failed a simulated MBE, including the questions in their own practice areas).

65. Memorandum from Erica Moeser, President, Nat’l Conf. Bar Exam’rs, to Law School Deans (Oct. 23, 2014), https://online.wsj.com/public/resources/documents/2014_1110_moesermemo.pdf [<https://perma.cc/3X66-7MDR>] (blaming low bar passage rates on the test-taking cohort); *see also* Erica Moeser, *President’s Page*, BAR EXAM’R, Dec. 2014, at 4, 4 [hereinafter Moeser, *President’s Page*] (claiming that the MBE, as a test, was faultless in a year of low passage rates).

66. Moeser, *President’s Page*, *supra* note 65, at 6; *see also* Markovic, *supra* note 37, at 196 (“The bar exam has historically been an obstacle to the expansion of experiential courses.”) (citing Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 624, 625–26 (2019)). There is no empirical data to suggest that experiential courses contribute to declining bar passage rates; rather, the opposite. *See* Scott Johns, *A Statistical Exploration: Analyzing the Relationship (If Any) Between Externship Participation and Bar Exam Scores*, 42 OKLA. CITY U. L. REV. 281, 307 (2018) (studying 637 University of Denver Law graduates and finding “little to no relationship between the number of externships taken and bar passage outcomes”); *see also* Anahid Gharakhanian, Carolyn Young Larmore & Chelsea Parlett-Pelleriti, *Achieving Externship Success: An Empirical Study of the All-Important Law School Externship Experience*, 45 S. ILL. U. L.J. 165, 166 (2020) (showcasing an empirical study “reveal[ing] a high level of externship success, measured in terms of practice readiness”).

67. Griggs, *supra* note 30, at 24; *see also* Marsha Griggs, *Sorry Not Sorry: Temporary Practice in a Pandemic*, NW. U. L. REV. NULR OF NOTE (May 11, 2020), <https://blog.northwesternlaw.review/?p=1399> [<https://perma.cc/VZ22>]

Fundamentally different alternatives to the bar exam have been frequently proposed, though none of the proposals have taken off. (The NextGen bar exam is not a fundamental change to the licensure process, as it offers different kinds of questions but still stands as a gate between law graduates and licensure.) Proposals for structural changes have been made: stakeholders have suggested that the existing bar exam could be broken into its component parts and offered at different or multiple times, including during law school.⁶⁸ Assessments could shift from numerical scores to qualitative determinations such as “excellent, adequate, poor or unsatisfactory.”⁶⁹ Applicants could participate in supervised and assessed practicums that would gauge a broad variety of lawyering skills in practical context.⁷⁰

The COVID-19 pandemic invited a variety of stakeholders to question the utility, efficacy, and mechanics of the bar exam. While the rest of the legal profession, including law schools, pivoted quickly to online modalities, bar examiners did not.⁷¹ Despite “passionate requests for emergency licensing measures,”⁷² many states held in-person bar exams in July 2020.⁷³ Other

-4T8X] (drawing attention to the ABA’s support of supervised practice during the COVID-19 pandemic).

68. Griggs, *supra* note 27, at 61–68; Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 98 (2007); Howarth & Wegner, *supra* note 62, at 423 (proposing a three-part legal licensing model).

69. Glen, *supra* note 31, at 429.

70. See the Public Service Alternative Bar Examination proposed by Dean Glen, *supra* note 31, at 347, also described in Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1702 (2002), and the Community Legal Access Bar Alternative proposed by law students at the University of Arizona, summarized in Trujillo, *supra* note 68, at 92–94.

71. See Griggs, *supra* note 30, at 4–7 (comparing law schools’ responses to COVID-19 with the responses of bar licensing authorities, which “lagged woefully behind”).

72. *Id.* at 22.

73. See Sam Skolnik, *Thousands of Law Grads to Take Bar Exam in Person Despite Covid*, BLOOMBERG L.: BUS. & PRAC. (July 28, 2020), <https://news.bloomberglaw.com/business-and-practice/thousands-of-law-grads-to-take-bar-exam-in-person-despite-covid> [<https://perma.cc/X6P2-BR7G>] (stating “a total of 23 states” went ahead with in-person exams in July 2020). When one examinee in Colorado tested positive after taking the two-day exam in person, it made national news. Morgan Gstalter, *Law Graduate Tests Positive for Coronavirus After Taking In-Person Bar Exam*, HILL (Aug. 4, 2020), <https://thehill.com/blogs/blog-briefing-room/news/510488-law-graduate-tests-positive-for-coronavirus>

states shifted—sometimes at very late hours⁷⁴—to online testing formats, risking novel technological problems and accessibility issues.⁷⁵ Only five jurisdictions adopted any kind of emergency

-after-taking-in [<https://perma.cc/J2PY-F5SV>] (discussing the specific student's circumstances, what protocols were used in Colorado, and what other nearby states were doing regarding the bar).

74. Florida had insisted it would proceed with an in-person July bar exam, *Florida Board of Bar Examiners Move Forward with July 2020 Bar Exam*, FLA. BAR (May 5, 2020), <https://www.floridabar.org/the-florida-bar-news/florida-board-of-bar-examiners-moves-forward-with-july-2020-bar-exam> [<https://perma.cc/PQ6Z-LG8H>], until it caved on July 1st and announced it would administer an online exam on August 19th. Dan Sullivan, *Florida High Court Cancels In-Person Bar Exams, Will Go Online*, TAMPA BAY TIMES (July 1, 2020), <https://www.tampabay.com/news/florida/2020/07/01/florida-high-court-cancels-in-person-bar-exams-will-go-online> [<https://perma.cc/4L8C-RW2W>]. Then, at 11 PM on August 16th, Florida announced that the August 19th exam would not go forward. See *Florida Board of Bar Examiners Postpones August 2020 Bar Exam*, FLA. SUP. CT. (Aug. 17, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Board-of-Bar-Examiners-postpones-August-2020-Bar-Exam> [<https://perma.cc/FL3G-GR9T>]; Karen Sloan, *Florida Postpones Online Bar Exam Two Days Before the Test*, LAW.COM (Aug. 17, 2020), <https://www.law.com/dailybusinessreview/2020/08/17/florida-postpones-online-bar-exam-two-days-before-the-test> [<https://perma.cc/6M72-S3GE>] (detailing the cancellation). An abbreviated exam was eventually held online on October 13th; 71.7% of examinees passed. See *Florida Bar Score Comparisons*, FLA. BD. OF BAR EXAM'RS (Nov. 20, 2020), <https://www.floridasupremecourt.org/content/download/690132/file/11-20-2020-Florida-Bar-Score-Comparisons.pdf> [<https://perma.cc/2B2W-Q8SP>] (summarizing the total number of students from each of Florida's law schools who took the abbreviated exam and the percent who passed).

75. See Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER, SOC. POL'Y & L. 537, 568–69 (2020) (discussing the impact COVID-19 had on examinees with disabilities in a section titled “COVID-19 as a Case Study in Bar Exam Ableism”); Shea Swauger, *Software That Monitors Students During Tests Perpetuates Inequality and Violates Their Privacy*, TECH. REV. (Aug. 7, 2020), <https://www.technologyreview.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics> [<https://perma.cc/9477-J8UK>] (noting that exam proctoring software “reinforces white supremacy, sexism, ableism, and transphobia” and that “[t]he use of these tools is an invasion of students' privacy and, often, a civil rights violation”); Karen Sloan, *States Say the Online Bar Exam Was a Success. The Test-Taker Who Peed in His Seat Disagrees*, LAW.COM (Oct. 7, 2020), <https://www.law.com/2020/10/07/states-say-the-online-bar-exam-was-a-success-the-test-taker-who-peed-in-his-seat-disagrees> [<https://perma.cc/62F4-BQEU>] (describing issues specific students had with the online exam); Karen Sloan, *Test Takers Slam New York's First Online Bar Exam in New Survey*, LAW.COM (Oct. 16, 2020), <https://www.law.com/nationallawjournal/2020/10/16/test-takers-slam-new-yorks-first-online-bar-exam-in-new-survey> [<https://perma.cc/UXG6-DRAM>] (summarizing a survey in which forty-one percent of

licensure.⁷⁶ The NCBE actively resisted the idea of emergency licensure, disparaging diploma privilege as an inept measure of competence⁷⁷ and commissioning its own poll to show that the public prefers lawyers to be licensed by way of a bar exam.⁷⁸ The NCBE, of course, makes money when states administer its bar exam components.⁷⁹

All this hoopla occurred even as need mounted to increase, not decrease, the number of licensed lawyers, as the pandemic itself increased the public need for legal services, and racial injustice issues dominated headlines.⁸⁰ As Professor Marsha

respondents reported technological problems during the exam); Stephanie Francis Ward, *Amid Claims That Online Bar Exam Went Well, Some Test-Takers Have a Different View*, A.B.A. J. (Oct. 20, 2020), <https://www.abajournal.com/web/article/amid-claims-that-online-bar-exam-went-well-some-test-takers-have-a-different-view> [<https://perma.cc/5QND-QTS3>] (juxtaposing positive administrative opinions of the online exam with the negative experiences encountered by many examinees); Cheryl Miller, *Bar Survey of October Exam Takers Reveals Tech Support and Other Concerns*, LAW.COM (Feb. 5, 2021), <https://www.law.com/nationallawjournal/2021/02/05/bar-survey-of-october-exam-takers-reveals-tech-support-and-other-concerns> [<https://perma.cc/4ST9-NPZT>] (outlining the complaints and comments given by examinees after remote bar exam).

76. Louisiana, Oregon, Utah, Washington state, and Washington D.C. each enacted some form of emergency diploma privilege for July 2020; all returned to a bar examination for February 2021. Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege Are Going Back to Bar Exam Admissions*, A.B.A. J. (Dec. 10, 2020), <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions> [<https://perma.cc/WW2N-AQZD>].

77. See *National Survey Finds Support for Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (Sept. 30, 2020), <https://www.ncbex.org/news/national-survey-bar-exam> [<https://perma.cc/5BQF-PLML>] (targeting the usefulness of diploma privilege by citing legal experts' opinions calling it "not a good idea" and suggesting the bar exam is "critical to the protection of the public interest").

78. See Karen Sloan, *Americans Want In-Person Bar Exams, Poll Finds*, BLOOMBERG L. (Sept. 30, 2020), <https://www.law.com/2020/09/30/americans-want-in-person-bar-exams-poll-finds> [<https://perma.cc/L43N-AB73>] ("The NCBE's poll looks to attempt to defend the exam by highlighting public opinion that it serves a key function in ensuring the competence of new lawyers.").

79. According to its June 2020 tax filing, the NCBE made \$39.3 million in revenue the previous year and reported assets of \$128.3 million. *National Conference of Bar Examiners (NCBE)*, *supra* note 49.

80. See Angelos et al., *supra* note 6, at 2 (suggesting "the COVID-19 crisis almost certainly will increase demand for all types of legal services"); Ricardo C. Carrasco, *Pandemic, Social Injustice, Coping and Hope*, FL. OCCUPATIONAL THERAPY ASS'N: BLOG (Aug. 19, 2020), https://www.flota.org/index.php?option=com_dailyplanetblog&view=entry&category=sis-article&id=43.

Griggs pointedly asked, “What is it about the bar exam and those who champion it, that not even a deadly global contagion would deter its administration?”⁸¹

C. DIPLOMA PRIVILEGE AS AN ALTERNATIVE

As of this writing, there are two notable exceptions to the otherwise nationwide requirement that a new lawyer must pass a bar exam in order to be licensed to practice law, which provide promising guidance toward a licensure system without bar exams.⁸² Wisconsin offers licensure by diploma privilege, or what at least one stakeholder calls “curriculum-based licensure”⁸³: state supreme court rules provide that graduates from Wisconsin’s two in-state law schools who pass a set of required courses

pandemic-social-injustice-coping-and-hope [https://perma.cc/D4KJ-GP27] (characterizing the adversity of 2020 as a “disruption involv[ing] a life-threatening phenomenon such as a pandemic . . . later layered with social justice issues”).

81. Griggs, *supra* note 30, at 42.

82. Diploma privilege is in place in Wisconsin and New Hampshire, as the text above discusses in more detail. Other states are currently exploring licensure mechanisms other than the bar exam. Oregon has made the most progress, with the Supreme Court having approved an “experiential pathway” and a post-graduate “supervised practice pathway” to licensure; the logistics of those pathways are currently being worked out. *Licensure Pathway Development Committee*, OR. ST. BAR, <https://lpdc.osbar.org> [https://perma.cc/XNN6-TKHQ]. Other states have formed various committees to explore non-bar-exam licensure, including California. See *Blue Ribbon Commission on the Future of the Bar Exam*, ST. BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Blue-Ribbon-Commission> [https://perma.cc/2RU6-Z9GC] (“The Blue Ribbon Commission is charged with developing recommendations concerning whether and what changes to make to the California Bar Exam, and whether to adopt alternative or additional testing or tools to ensure minimum competence to practice law.”); see also *Competency Study – 2021 to 2023*, MINN. ST. BD. OF L. EXAM’RS, <https://www.ble.mn.gov/bar-exam/competency-study-2021-to-2023> [https://perma.cc/H3WE-KK4N] (detailing a comprehensive two-year study of the bar in Minnesota); *Committee Report: Guidance on Future of the New York Bar Examination*, N.Y.C. BAR (Sept. 21, 2022), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/future-ny-bar-exam-working-group-request-initial-response> [https://perma.cc/VM54-YRBL] (responding to a judicial inquiry regarding five specific issues pertaining to the future of the bar exam in New York).

83. Jun Byung Park, *University of South Dakota Knudson School of Law Panel Discussion: Diploma Privilege*, YOUTUBE, at 10:58 (Feb. 8, 2022), <https://youtu.be/AUZ4uElpdCU?t=658>. Dean Kelly is also a member of the Wisconsin Board of Bar Examiners. See *Members of the Board of the Bar Examiners*, WIS. CT. SYS., <https://www.wicourts.gov/courts/offices/bbmembers.htm> [https://perma.cc/R6BR-WWWY] (listing the current members).

may be admitted to practice in the state without taking the bar exam.⁸⁴ Wisconsin does administer a bar exam for out-of-state law graduates seeking licensure, as well as for any in-state graduates who did not complete the required courses.⁸⁵

The other exception is the Daniel Webster Scholar Honors Program (DWS) at the University of New Hampshire Franklin Pierce School of Law.⁸⁶ DWS students are selected after the first year of law school and placed into a parallel curriculum alongside other law students.⁸⁷ The DWS curriculum is specifically designed to “broaden the range of lessons [taught], reducing doctrinal instruction [via] Socratic . . . and . . . case method[s],” while “integrating knowledge with skills and values.”⁸⁸ Attention is paid to “instruction in professionalism.”⁸⁹ Along with faculty assessment and an emphasis on self-assessment, student work product is collected regularly and assessed portfolio-style by the bar examination authorities.⁹⁰ Students who complete the program are licensed to practice law without taking the bar exam, though the program touts itself as being a “two-year bar exam”—rather than a shortcut to licensure, the program is framed as a more rigorous path.⁹¹

84. WIS. SUP. CT. R. § 40.03.

85. See *id.* §40.04 (discussing the bar examination).

86. *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [<https://perma.cc/47S5-XCVD>].

87. See Alli Gerkman & Elena Harman, *Ahead of the Curve, Turning Law Students into Lawyers: A Study of the Daniel Webster Scholars Honors Program at the University of New Hampshire School of Law*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 3–11 (Jan. 2015), https://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf [<https://perma.cc/G736-QSSA>] (discussing the program’s structure, admissions, and curriculum); John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. FOR L. & SOC. CHANGE 101, 115–22 (2009) (providing the “genesis” and overview of the program). The “holistic” admissions criteria include things like “have humility.” Gerkman & Harman, *supra*, at 6.

88. Garvey & Zinkin, *supra* note 87, at 115.

89. *Id.*

90. See *id.* at 117, 121 (describing the portfolio process).

91. See *Daniel Webster Scholar Honors Program*, *supra* note 86 (“Successful Webster Scholars pass a variant of the New Hampshire Bar exam during their last two years of law school and are sworn into the New Hampshire bar the day before graduation.”); Garvey & Zinkin, *supra* note 87, at 122 (coining the term “two-year bar exam”).

Those familiar with the DWS program sing its praises.⁹² The only issue with the program is its scalability.⁹³ The University of New Hampshire is the only law school in New Hampshire, with about 200 students per class,⁹⁴ only twenty-four of whom participate in the DWS program.⁹⁵ As such, it is a small-scale program. Expanding the program beyond its current size, or replicating it in other states, poses capacity challenges to bar examiners and law professors.⁹⁶

Champions of the DWS program have offered advice for replicating the program, including by “unbundling” it.⁹⁷ Such advice includes how to design a program from scratch (developing a mission statement, etc.)⁹⁸ and for replicating the enriching learning environment by placing emphasis on “formative and reflective assessment in a practice-based context” and “collaboration” between school and the broader legal community.⁹⁹ This advice appears to be aimed at law schools and faculties rather than state licensure authorities, however. The pedagogical benefits of the program stand alone, but the path to licensure at graduation is an undeniable benefit of the DWS program.

92. See Gerkman & Harman, *supra* note 87, at 1 (“The Daniel Webster Scholar Honors Program is ahead of the curve in graduating new lawyers ready to venture into the profession—and others can learn from its success.”).

93. Megan M. Carpenter, Dean, Univ. of N.H. Franklin Pierce Sch. of L., Panel at Brigham Young University J. Reuben Clark Law School’s Law & Leadership Conference: Alternatives to the Bar Examination, at 21:38 (Jan. 29, 2021), <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-alternatives/LeadershipConference-alternatives.html> (stating the “biggest problem” is that she would want to offer this program to “every single student”).

94. *2020 Standard 509 Report*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L. 2 (Dec. 1, 2020), https://law.unh.edu/sites/default/files/media/2020/12/2020_standard_509_report.pdf [<https://perma.cc/TGF8-BP6C>] (displaying that 203 first-year students were enrolled for the 2019–20 school year as of October 5, 2019).

95. Gerkman & Harman, *supra* note 87, at 5.

96. See *id.* at 16 (summarizing some of these “capacity and community support challenges” to replication and expansion). Gerkman and Harman also note that the selection process and student learning preferences may make the program unsuitable for some students. *Id.*

97. See *id.* at 22–24 (outlining recommendations for successful replication by parsing out the key elements that “foster success” in the program).

98. Garvey & Zinkin, *supra* note 87, at 127–29 (providing twelve concrete recommendations for how to establish a similar program).

99. Gerkman & Harman, *supra* note 87, at 23–24.

Diploma privilege, like any licensure mechanism, has its strengths and weaknesses.¹⁰⁰ The most potent argument against a pure diploma privilege is that it places licensure decisions in the hands of law school faculty and administration, who are not subject to oversight and whose personal financial incentives are not aligned with the state's interest in confirming minimum competence. Law faculty and administration, who under the diploma privilege become *de facto* licensure authorities, have an undeniable financial interest in passing students. Students who fail classes are less likely to continue as law students, which would mean loss of tuition to the faculty's employer, the law school. Law schools are incentivized to collect tuition, and faculty at a law school facing financial hardship may be especially incentivized to help retain students by awarding low-but-passing grades to students who underperform.

Law schools do not all require the same courses for graduation, so possession of a diploma does not ensure competence in, or even exposure to, consistent subject matter or skills development. Lack of coordination among faculty, including the lack of standardized course coverage, assessment methods, and grading, mean that students who attend different law schools (or take the same classes with different professors at the same law school) are not assessed consistently across the population. Inadequate or inconsistent quality of instruction is an additional concern. For these and other reasons, the diploma privileges extended to law graduates in five jurisdictions during the COVID-19 pandemic were purely a response to an emergency; however laudable under the public health circumstances, they were not grounded in thoughtful assessment of compliance with licensure standards.

This Article, in contrast, proposes a method by which states can develop diploma privilege standards in partnership with law schools and the practicing bar so that graduates are assessed more deeply and more comprehensively than a two-day, closed book exam could ever accomplish. This proposal avoids many of the bar exam's pitfalls—emphasis on memorization, financial stresses on examinees, etc.¹⁰¹—while also providing consistency and oversight of assessment to ensure minimum competency.

100. Throughout this Article, I attempt to interrogate a broad variety of potential pitfalls and promises of diploma privilege.

101. See *supra* notes 50–64 and accompanying text (listing common critiques of the bar exam).

II. PROPOSAL: MODERN DIPLOMA PRIVILEGE

A regular complaint from the practicing bar is that law graduates aren't practice-ready when they join a firm, and a regular critique of the bar exam is that it's not a realistic simulation of practice.¹⁰² Law schools owe a duty to prepare students for the practice of law, including the bar exam that is the gate through which graduates must pass. Law schools may be emphasizing preparation for the bar exam over preparation for practice, though if they are, it is a rational choice.

Yet, both qualitative and quantitative data demonstrate that graduates of the DWS program, described above,¹⁰³ are "ahead of the curve" in all lawyering competencies as compared to first-year attorneys who took a standard law school curriculum and passed a bar exam.¹⁰⁴ One study assessed new lawyers with a standard interview—new lawyers interviewed an actor who was trained to assess soft skills as well as substantive knowledge.¹⁰⁵ In this study, the actor presented a wills problem, including an intestate testator with non-adopted children and a variety of assets and liabilities.¹⁰⁶ The DWS program graduates outperformed the other lawyers, irrespective of LSAT score or

102. See *supra* notes 50–54, 56 and accompanying text (providing critiques of the bar related to its relevance in practice). Moreover, so long as law firms prioritize law school prestige, class rank, and law review service in their hiring criteria, law students act rationally when they eschew practical experiences in favor of academic ones. See Alli Gerkman & Logan Cornett, *Foundations for Practice, Hiring the Whole Lawyer: Experience Matters*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 2 (Jan. 2017), https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_hiring_the_whole_lawyer.pdf [<https://perma.cc/K4EE-4ANK>] ("This perceived skills gap may suggest that law schools are, in fact, falling short when preparing their students for practice. It may also suggest that legal employers are falling short when it comes to developing hiring practices that result in good hires.").

103. See *supra* notes 86–99 and accompanying text for a discussion of the DWS program.

104. See Gerkman & Harman, *supra* note 87, at 12–22 (detailing the procedure and findings of specific qualitative and quantitative studies).

105. See *id.* at 12, 17–20 (describing the study). This standardized client is akin to the standardized patient in medical training. Garvey & Zinkin, *supra* note 87, at 121–22.

106. See Gerkman & Harman, *supra* note 87, at 17 (listing the points of information students were expected to learn from the actors and were assessed on).

class rank at graduation.¹⁰⁷ The program prides itself on producing “client-ready” graduates.¹⁰⁸

Although the DWS program may not be perfectly replicable, this Article proposes a similar model, termed a “modern diploma privilege” which could produce better lawyers and assess their competence in a more comprehensive (and humane) way. State bar licensure authorities should be authorized by their supreme courts or legislatures to partner with law schools to develop and accredit a legal education program, the completion of which would satisfy licensure authorities that the graduate possesses minimum competency to practice law. This path to licensure will incentivize law schools to develop curricula that meet the needs of the practicing bar, and it will produce law school graduates who are better trained to meet the needs of clients. Freed from the time, subject matter, and modality constraints of the bar exam, licensure authorities and law schools can better train and assess law students in the broad variety of skills required of a new lawyer.

These law school graduates would then be licensed to practice law at the point of graduation, without the need to pass a bar exam. Any law student who doesn’t complete the modern diploma privilege framework can take the bar exam. This will result in fewer people taking the bar exam, streamlining grading and speeding results. The bar exam itself should, of course, be improved, though further discussion of that question is not engaged here, as it is being rigorously debated elsewhere.¹⁰⁹

The remainder of this Part analyzes various ways in which such a program could be scaffolded and discusses the weaknesses and drawbacks to the proposal.

A. IDENTIFY DESIRED COMPETENCIES

Once authorized to do so by state supreme courts, state licensure authorities should begin to develop a list of competencies desired (and by extension required) of first-year attorneys.

107. *See id.* at 18–22 (summarizing the findings that DWS graduates performed better in the study and that there was no evidence that it was solely because the DWS program accepted high achieving students).

108. Garvey & Zinkin, *supra* note 87, at 118 (“The stated mission of the Daniel Webster Scholar Honors Program is ‘making law students client ready.’”). The choice of the phrase “client-ready” as compared to “practice-ready” is intriguing.

109. *See, e.g., supra* notes 50–64, 68–70 and accompanying text (laying out critiques of the bar exam and potential structural changes).

States can utilize a variety of methods to develop such a list, including conducting surveys or focus groups of members of the local bar, or relying on existing research.

Indeed, for decades, scholars have been carefully studying and categorizing the skills, values, and knowledge required by first-year attorneys; state licensure authorities can and should rely on this research rather than reinventing the wheel.¹¹⁰ Importantly, many skills identified by researchers as being central to the effective practice of law are the “soft” skills that are not, and cannot, be assessed on a written bar examination. The flexibility of the modern diploma privilege framework allows state licensure authorities to think beyond the current incarnation of the bar exam in developing a list of desired competencies.

In a 2008 report, the ABA Section on Legal Education and Admission to the Bar conducted a survey of then-existing literature on lawyering competencies.¹¹¹ The report summarizes the *Carnegie Report*¹¹² and Roy Stuckey’s *Best Practices* book,¹¹³ finding a variety of themes among sources.¹¹⁴ The ABA report then pointed toward insights of legal practitioners calling for educators to balance academic skills such as analysis, research, and theory with more boots-on-the-ground skills like “working

110. The studies summarized in this Article are limited to those conducted regarding the U.S. legal system. International perspectives, particularly from common-law jurisdictions, could also be referenced and incorporated. For example, the Canadian Centre for Professional Legal Education has developed a Competency Framework with three major components: “Lawyer Skills” (including communication skills and “legal matter management”), “Professional Ethics and Character” (including “code of conduct knowledge,” character and professional responsibilities, and professional ethics), and “Practice and Self-Management” (including time/project management, conflict management, self-management, and managing relationships). *CPLED Competency Framework*, CANADIAN CTR. FOR PRO. LEGAL EDUC., <https://cpled.ca/about-cpled/competency-framework> [<https://perma.cc/F8ZX-BXEK>].

111. *Report of the Outcomes Measures Committee*, A.B.A. SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR (July 27, 2008) [hereinafter *Outcomes Report*], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.pdf [<https://perma.cc/UA8Z-ACCR>].

112. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

113. STUCKEY, *supra* note 52.

114. *See Outcomes Report*, *supra* note 111, at 6–11 (summarizing “three issues that are critical to any discussion of the use of outcome measures in legal education,” each of which is addressed by both the *Carnegie Report* and Stuckey’s *Best Practices* book).

with clients, managing a file, the business of law practice, negotiations, etc.”¹¹⁵ The ABA report also noted the importance of clinical, externship, clerking, and simulation experiences; “clear, concise writing” in a broader variety of contexts; professionalism; “business acumen, composure, conflict management, creativity, ability to deal with people of all kinds and classes, ethics and values, integrity and trust, and the ability to set priorities and build teams”; as well as “practical judgment, passion and engagement, listening, stress management,” etc.¹¹⁶

Research by the Institute for the Advancement of the American Legal System (IAALS) in 2016 likewise found that characteristics and professional competencies, as opposed to legal skills, were more important for newly-minted lawyers.¹¹⁷ Important characteristics for a “good lawyer” included “integrity, trustworthiness, conscientiousness, and common sense,” as well as “professional competences such as listening attentively, speaking and writing, and arriving on time.”¹¹⁸ On the other hand, specific legal skills, such as “drafting policies, preparing a case for trial, conducting or defending depositions,” or the “use of dispute resolution techniques to prevent or handle conflicts,” were found to be less important.¹¹⁹ Other lawyering skills are certainly necessary over a longer time horizon, but this research found the referenced characteristics and competencies to be “necessary in the short term.”¹²⁰

More recently, in 2020, Professor Deborah Jones Merritt and Logan Cornett found in a study that minimum competence

115. *Id.* at 14 (summarizing themes from a 2005 Arizona bench and bar survey).

116. *Id.* at 14–15 (detailing further insights from other studies and practitioners).

117. See Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 1–2 (July 2016), https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf [<https://perma.cc/H8C7-JJH3>] (finding, based on survey data, that a lawyer needs to have character as well as skills and competencies to be a “whole lawyer”).

118. *Id.* at 3.

119. *Id.*

120. See *id.* at 30–34 tbl.3 (listing seventy-seven competencies that survey respondents found to be “necessary in the short term”). Skills identified as those important to “acquire over time” included “develop[ing] expertise in a certain area,” “determining appropriate risk mitigation strategies,” “delegat[ing] to and manag[ing] support staff,” “assess[ing] the soundness of a . . . proposed solution,” etc. *Id.* at 27 tbl.2.

is established by twelve “building blocks,” which they note are “interconnected competencies,” all of which are required in order to assure protection of clients.¹²¹ This study is recounted here in more detail because of its scope, rigor, and recentness. The identified building blocks include:

- “The ability to act professionally and in accordance with the rules of professional conduct,” a skill which requires practice in context, not just discussion in the abstract;¹²²
- “An understanding of legal processes and sources of law,” not a “warped view of the legal system in which federal law dwarfs state and local law, while courts overshadow legislatures, agencies, and alternative dispute resolution”;¹²³
- “An understanding of threshold concepts in many subjects,” as opposed to memorization of detailed rules;¹²⁴
- “The ability to interpret legal materials,” noting that “[l]awyers provide value to their clients not because they can access legal materials, but because they know how to interpret them”;¹²⁵
- “The ability to interact effectively with clients,” including a variety of skills, such as gaining trust, gathering facts, identifying the client’s goals, communicating regularly, conveying information and options in a way the client can understand, helping the client choose a strategy, managing client expectations, breaking bad news, and coping with difficult clients;¹²⁶
- “The ability to identify legal issues,” including both “diagnosis” of the problem and “recommended treatment,” noting that law school exams consist of “compact fact patterns,” complete with triggering words, while client stories are messy and incomplete;¹²⁷

121. Merritt & Cornett, *supra* note 53, at 30.

122. *Id.* at 32–34.

123. *Id.* at 35–37.

124. *Id.* at 37–38. A “threshold concept” is defined as an “insight that transforms understanding of a subject.” *Id.* at 37.

125. *Id.* at 39–40.

126. *Id.* at 40–44.

127. *Id.* at 45–47. The authors found that “issue spotting for [law school or bar] exams was superficial; [whereas] issue identification in practice required three related abilities and sets of knowledge: (1) The ability to think critically,

- “The ability to conduct research,” including both legal research (e.g., answering a specific legal question, checking sources of law for information and updates, finding local rules and practices) and the acquisition of client facts and non-legal information;¹²⁸
- “The ability to communicate as a lawyer” concisely, in language clients understand, using methods effective for the audience and setting, while attending carefully to communication from others, and negotiating effectively;¹²⁹
- “The ability to understand the ‘big picture’ of client matters”;¹³⁰
- “The ability to manage a law-related workload responsibly,” including “careful time management, meticulous organization, and effective collaboration”;¹³¹
- “The ability to cope with the stresses of legal practice”;¹³² and
- “The ability to pursue self-directed learning.”¹³³

Another 2020 study, conducted in California, collected and analyzed data on what that state’s attorneys do in their daily tasks, as well as the knowledge required to complete those tasks.¹³⁴ “Factual and legal analysis” was, unsurprisingly, the most common task performed by attorneys with 0–10 years of practice experience.¹³⁵ The specific competencies identified, listed in order from most to least important, included¹³⁶:

with an emphasis on the word *critical*, (2) An understanding of threshold concepts in a wide range of legal subjects, and (3) The ability to interact effectively with clients.” *Id.* at 45 (emphasis original).

128. *Id.* at 48–50.

129. *Id.* at 51–55.

130. *Id.* at 56–57.

131. *Id.* at 58–60.

132. *Id.* at 60–61.

133. *Id.* at 61–62.

134. *The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam*, ST. BAR OF CAL. 3–10 (2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> [<https://perma.cc/LA89-FP45>].

135. *See id.* at 12–13 fig.2 (depicting common practice tasks based on the number of years in practice).

136. *Id.* at 18 fig.6.

- Drafting and writing;
- Research and investigation;
- Litigation;
- Issue spotting and fact gathering;
- Communicating with others;
- Giving counsel and/or advice (whether via conversation, in person, or by phone);
- Maintaining the client relationship;
- Negotiation and closing;
- Case or matter management;
- Establishing the client relationship;
- Practice management; and
- Supervision and collaboration.

Teaching students how to cope with and correct practice errors is also a fundamental skill.¹³⁷ So is cross-cultural lawyering, which can be added to the list of competencies assessed and required for bar licensure.¹³⁸ Leadership is also a skill worthy of

137. Andrea A. Curcio, Professor of L., Ga. State Univ. Coll. of L., Panel at the Brigham Young University J. Reuben Clark Law School's Law & Leadership Conference: Examining the Bar Examination, at 1:04:44 (Jan. 29, 2021), <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-examiningthebar/LeadershipConference-examiningthebar.html> (recognizing error correction as an important skill and stating that it is best taught through clinical experiences, which many students may not engage with because they opt for bar-tested courses).

138. See Glen, *supra* note 31, at 420–23 (recognizing cross-cultural lawyering as “increasingly critical to good practice”). The ABA agrees. It recently added a requirement that all law schools “provide education to law students on bias, cross-cultural competency, and racism.” *ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, A.B.A. 18 Standard 303(c) (2022) [hereinafter *ABA Approval Procedures*], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf [https://perma.cc/988N-V4EH]. See generally NEIL W. HAMILTON & LOUIS D. BILIONIS, LAW STUDENT PROFESSIONAL DEVELOPMENT AND FORMATION: BRIDGING LAW SCHOOL, STUDENT, AND EMPLOYER GOALS 102 app.B (2022), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0E9C8E7535983F18A4DA08A5CCBC29EF/9781108745659AR.pdf/Law_Student_Professional_Development_and_Formation.pdf?event-type=FTLA [https://perma.cc/96V9-5ENQ] (stating that out of a sample of 186 law schools only “twenty-seven includ[ed] a cross-cultural learning outcome” as of June 2020).

teaching and assessing.¹³⁹ Obviously, many of these crucial competencies are not and cannot be tested on a bar exam. The modern diploma privilege framework removes the physical and temporal constraints of the bar exam and encourages state licensure authorities to honestly and creatively consider what competencies are required to be an effective first-year attorney.

B. ASSESS COMPETENCIES

Once a list of desired competencies has been established, state licensure authorities can partner with law schools to develop methods to assess the competencies. Such a partnership can assess law student competencies in a variety of methods and over various time horizons.

The word “partnership” is used here deliberately. It connotes an arrangement that is acceptable and beneficial to both parties—law schools can be confident and proud that they are providing an educational experience that prepares graduates for immediate entry into the profession,¹⁴⁰ and state licensure authorities can be assured of those new attorneys’ competencies across a better and broader range of skills, knowledge, and values than the bar exam provides. State bar licensure authorities may investigate the details of the law school curriculum as deeply as they and their law school partners deem necessary.¹⁴¹

State licensure authorities need not have the same partnerships with each school. Nor must a modern diploma privilege be awarded to every student in a school; some schools and states may wish to start with a small pilot program and expand later, or, like New Hampshire does, keep the program deliberately contained. Modern diploma privilege arrangements can be tailored based on the school’s curriculum, market, specialty, etc. As purely hypothetical examples, a state like Nevada may wish to include a competency in gaming law, states on a coast may wish

139. See Doris DelTosto Brogan, *Stories of Leadership, Good and Bad: Another Modest Proposal for Teaching Leadership in Law Schools*, 45 J. LEGAL PRO. 183, 185 (2021) (“Because lawyers are often looked to as leaders, law schools must prepare law students for leadership.”).

140. Law schools with a modern diploma privilege will also likely enjoy a comparative advantage in recruiting matriculants.

141. See Francis X. Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana’s Experiment in Controlling Legal Education*, 26 J. LEGAL EDUC. 449, 460 (1973) (suggesting that in a system, like diploma privilege, where certain courses and requirements must be met for bar eligibility, bar examiners would need to inquire into course coverage, textbook selection, etc.).

to include a competency in maritime law, and states with certain natural resource deposits may wish to include a competency in oil and gas law.

It is also possible for a modern diploma privilege to encompass only partial licensure. A modern diploma privilege could pair beautifully with a limited licensure system, if a state were to pursue such a path.¹⁴² Moreover, states need not be limited to partnerships with law schools in their own states. A law school located on a state border may send significant numbers of graduates across state lines, and that school could partner with neighboring states to establish a modern diploma privilege.

1. Courses as Potential Means of Imparting and Assessing Knowledge and Skills

One method of assessing the competencies identified by a jurisdiction may be to require law graduates' satisfactory completion of specific courses.¹⁴³ Wisconsin takes this approach; state statutes list the courses and credit load required for an in-state law school graduate to qualify for diploma privilege.¹⁴⁴ A few law students graduate from in-state Wisconsin law schools without having completed the diploma privilege requirements; these students sit for the Wisconsin bar exam in order to be licensed.¹⁴⁵ Likewise, the DWS program also has extensive curricular requirements, including completion of some courses designed specifically for the program's students.¹⁴⁶ Those New

142. For example, Arizona has a limited license for "document preparers," California has "courthouse facilitators" and document preparers, and New York City has "court navigators" for landlord/tenant and consumer debt cases. Howarth & Wegner, *supra* note 62, at 442. In their article, Howarth and Wegner also go on to propose a "Limited License for High Need Practice Areas After Two Years in Focused J.D. Curriculum." *Id.* at 443–46.

143. The state of Indiana used to require satisfactory completion of fifty-four credits in fourteen course areas in order to sit for the state bar exam. Beytagh, *supra* note 141, at 449.

144. WIS. SUP. CT. R. § 40.03.

145. See Kevin Kelly, Assoc. Dean of Acad. Affs., Univ. of Wis. Sch. of L., Panel at the Brigham Young University J. Reuben Clark Law School's Law & Leadership Conference: Alternatives to the Bar Examination, at 10:40 (Jan. 29, 2021), <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-alternatives/LeadershipConference-alternatives.html> (describing situations when students opt out or do not qualify for diploma privilege).

146. See Gerkman & Harman, *supra* note 87, at 9 (laying out the DWS program's course requirements). The DWS program requirements, coupled with the requirements placed on all law students at the University of New Hampshire, leave DWS students only seven credits of electives. *Id.*

Hampshire law graduates who do not complete the DWS program take the bar exam in order to be licensed.¹⁴⁷

Required courses can focus on both the knowledge and skills identified as core competencies required to practice in the specific state. Requirements might include courses on local law¹⁴⁸ or courses taught or supervised by practitioners in the jurisdiction. For schools where most graduates remain in-state to practice, this could be a very positive step, but for schools where students disperse to a number of states, the approach could be problematic—incentivizing taking courses that will not be applicable to graduates while also failing to offer courses that would assist those graduates.¹⁴⁹ It could also have the effect of deemphasizing specialty courses, forcing a law school's curriculum toward required survey courses rather than electives.¹⁵⁰ A further critique of requiring specific courses is that this strategy forces students to decide quite early in their legal educations where they will practice, which also impacts hiring.¹⁵¹

Requiring particular courses in order to take advantage of modern diploma privilege would ensure graduates had exposure to and were assessed on certain doctrinal information (business

147. See *id.* at 1 (differentiating the DWS program as an alternative that does not require sitting for the bar). Perhaps ironically, New Hampshire administers the UBE, so non-DWS students are not tested on any New Hampshire law. See *Bar Examination*, N.H. JUD. BRANCH, <https://www.courts.nh.gov/lawyers/nh-bar-admissions/bar-examination> [https://perma.cc/4QYT-RHR6] (discussing the bar exam as administered in New Hampshire).

148. Both law schools in Wisconsin include state law courses in their curricula. See Mark Hansen, *Wisconsin Bar Weighs a Degree of Change*, A.B.A. J., Apr. 2007, at 19, 19 (citing proponent of diploma privilege who finds the focus on Wisconsin law to be a strength of the system). The inclusion of state-specific requirements will help avoid constitutional concerns regarding diploma privilege, which future research should explore.

149. Beytagh, *supra* note 141, at 458 (positing the potential concerns of national-focused law schools in regard to a 1970s Indiana law requiring certain classes to sit for the state bar). Professor Beytagh notes that Notre Dame, located in Indiana, might face this concern. *Id.* From 2019 to 2021, 301 distinct employers hired Notre Dame graduates, spread over 40 U.S. and international jurisdictions—only twenty-six of the 301 employers were in Indiana. See *Employment Data*, UNIV. OF NOTRE DAME L. SCH., <https://law.nd.edu/professional-life/employment-data> [https://perma.cc/4QWK-V8EZ] (scroll down to “Post-Graduation Employers, 2019–2021”).

150. See Beytagh, *supra* note 141, at 457–58 (emphasizing issue in context of 1970s Indiana rule).

151. *Id.* at 457 (discussing how, by taking certain required courses for bar eligibility, “students will be forced to make earlier decisions about where to practice than they would like to”).

associations, evidence law, etc.) and skill-building opportunities. Required courses need not, however, be the single vehicle to establish a modern diploma privilege, as will be discussed in Subsection II.B.2 below.

Of course, if states are to require the completion of specific courses in law school in order to qualify for a modern diploma privilege, those courses should be chosen with care. The Wisconsin requirements have been reasonably criticized as “unprincipled” because no particular reason was given to elevate the enumerated subjects above others.¹⁵² Requiring specific courses also risks calcifying a curriculum, continuing to require increasingly outmoded concepts or delivery methods in law schools while the practice of law evolves.¹⁵³ Statutory course requirements signal state distrust of law school faculty,¹⁵⁴ which may undermine public trust in the law schools, as well as stifle curricular innovation. The modern diploma privilege partnership framework is superior to statutory course requirements because courses and content can be adjusted without legislative intervention.

There may also be concerns of a more administrative nature, such as determining whether a particular course meets the statutory requirement if the titles are different or if one combines topics the other breaks out. For example, would a course called “Constitutional Law” satisfy a statutory requirement for a course in “constitutional law and administrative law?”¹⁵⁵ State licensure authorities would need to decide whether a student could take a particular course after graduation to satisfy the statutory requirement.¹⁵⁶ State licensure authorities and their law school partners would also have to come to agreement on how deeply the state would inquire into course content, teaching materials, teaching methods, formative and summative assessments, rubrics, etc.¹⁵⁷

152. Peter K. Rofes, *Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court*, 82 MARQ. L. REV. 787, 789 (1999).

153. See *id.* at 789–90. Professor Rofes asserts that Wisconsin diploma privilege statutes result in “freezing into the Wisconsin statute books a permanent (and permanently obsolete) required curricula,” and “that vision cannot square with the realities of lawyering at the dawn of the new millennium.” *Id.*

154. *Id.* at 790.

155. See Beytagh, *supra* note 141, at 455–56 (discussing various administrative difficulties).

156. *Id.* at 456–57. The answer to this question may be of particular import to graduates of out-of-state law schools that did not offer courses on the other state’s procedure, for example. *Id.* at 457.

157. *Id.* at 460.

Under the current bar exam system, law school curricula are at least somewhat driven by what material is tested on the bar exam, while the content of the bar exam is at least partially driven by what material is taught in law schools.¹⁵⁸ This circular logic reinforces the status quo while also disincentivizing either law schools or bar examiners from considering what skills and knowledge are required by the practice of law.¹⁵⁹ A modern diploma privilege allows both law schools and state licensure authorities to consider a much broader variety of skills and knowledge, as opposed to merely debating whether or not, say, UCC Article 9 ought to be tested on the bar exam.

If multiple states seek to adopt required curricula as part of a modern diploma privilege, the ABA or AALS could help coordinate efforts so as to minimize state-to-state differences or reduce duplicative work.¹⁶⁰ The ABA also has the authority to require certain courses at all accredited law schools by amending its Standards and Rules of Procedure for Approval of Law Schools.¹⁶¹ Currently, Standard 303 contains certain curricular requirements of all accredited law schools, including a course in professional responsibility, two writing experiences, and six credits of experiential learning.¹⁶² In effect, Standard 303 in coordination with Standard 302¹⁶³ asks, what does a new lawyer need to know?¹⁶⁴ The ABA, in its role as law school accreditor, could pursue this line of inquiry further.

158. See Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 451–52 (2004) (noting that the bar exam tests subjects required in nearly all law schools and that the bar exam influences law school curriculum).

159. Curcio, *supra* note 137, at 1:00:57.

160. Beytagh, *supra* note 141, at 459.

161. Griggs, *supra* note 30, at 60–61; see also Markovic, *supra* note 37, at 197 (“The ABA *qua* regulator could exercise its authority to ensure that law schools still cover core subjects . . .”). For a review of the curriculum requirements, see *ABA Approval Procedures*, *supra* note 138, at 18 Standard 303.

162. *ABA Approval Procedures*, *supra* note 138, at 18 Standard 303.

163. Standard 302 requires learning outcomes for competency in, at a minimum, “[k]nowledge and understanding of substantive and procedural law,” legal analysis, reasoning, research, problem-solving, written and oral communication, ethics, and “[o]ther professional skills.” *Id.* at 17.

164. Standard 301 defines the objectives of legal education: “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” *Id.* Standard 315 also requires a law school to “conduct ongoing evaluation of the law school’s program

2. Experiences as Potential Means of Assessing Knowledge and Skills

Since legal employment and practical experience have been deemed “the most helpful in determining whether a new lawyer possesses the foundations necessary for success,”¹⁶⁵ states and law schools may partner together to determine that internships, externships, residencies, or clinics are effective in preparing law students for competent practice.¹⁶⁶

In their study discussed above,¹⁶⁷ Merritt and Cornett recommend that each law student complete three credits of client interaction, three credits of negotiation, three credits on the lawyer’s role as a “public citizen having special responsibility for the quality of justice,”¹⁶⁸ four credits of a closely-supervised clinic, and four credits of a clinic or externship.¹⁶⁹ Law schools may not currently offer these experiences for credit, or may do so only with limited enrollment numbers. Scaling up meaningful experiential courses may be resource-intensive, but it would provide students with exceptional learning experiences while building and assessing important competencies.

The modern diploma privilege also provides an opportunity for the state supreme court, bar licensure authorities, law schools, and the practicing bar to reconnect as part of the legal community that cooperates to license new lawyers.¹⁷⁰ Simulation courses or externships taught or supervised by practicing attorneys can introduce a level of practicality not offered by casebook education, as well as ensure students’ exposure to jurisdictional

of legal education” and “make appropriate changes to improve the curriculum.” *Id.* at 26.

165. Gerkman & Cornett, *supra* note 102, at 25.

166. See Howarth & Wegner, *supra* note 62, at 428 (recommending “required residencies” for law students and noting that “law is exceptional among professions in not requiring substantial clinical experience prior to licensure”).

167. See *supra* Part II.A.

168. Merritt & Cornett, *supra* note 53, at 75 (quoting MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS’N 2020)).

169. *Id.* at 74–76.

170. See Hansen, *supra* note 148 (asserting that the Wisconsin Supreme Court has “in-depth knowledge of and especially high regard for the state’s two law schools”).

specifics and norms.¹⁷¹ These experiences also return the practicing bar to the licensure practice, as compared to the bar exams currently dominated by the NCBE.¹⁷²

Importantly, assessment of applicants' performance during any supervised practice setting must be uniform, accountable, and transparent in order to avoid biases.¹⁷³ Existing bodies of research should be utilized in developing assessments.¹⁷⁴

3. Assessment Formats and Timing

The modern diploma privilege framework not only allows for a more comprehensive list of desired competencies, but it also allows for flexible means by which (and when) to assess those competencies. This flexibility allows assessments to be carefully matched to the competencies being measured.

We know that written tests are limited in their ability to assess competence and predict effective performance in the future.¹⁷⁵ Performance tests and open-book formats better simulate the practice of law, in contrast to the bar exam's emphasis on multiple-choice questions and memorization.¹⁷⁶ Legal research assessments can be incorporated into performance

171. Requiring education in local practice will also help ensure the constitutionality of a modern diploma privilege, which future research should consider further.

172. See *supra* notes 25–28 and accompanying text.

173. Glen, *supra* note 31, at 446 (noting that “[u]niformity of evaluation criteria is critical to anticipating and avoiding bias” and suggesting that the “evaluation process . . . needs to be both accountable and transparent”); see Dr. Hoops, MD (@DoctorHoopsMD), TWITTER (June 28, 2021), <https://twitter.com/ShariDunawayMD/status/1409598749731602433> [<https://perma.cc/3CU9-SHAT>] (“I got docked a bunch of points on my med school OSCE [Objective Structured Clinical Examination] for wearing hoop earrings during a test. Evaluator wrote ‘earrings, unprofessional.’”).

174. See generally, AM. EDUC. RSCH. ASS'N, AM. PSYCH. ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 1 (2014) (“[P]rovid[ing] criteria for the development and evaluation of tests and testing practices and . . . provid[ing] guidelines for assessing the validity of interpretations of test scores for the intended test uses.”).

175. See Merritt & Cornett, *supra* note 53, at 71 (“Recognize that written exams assess, at most, only half the building blocks that constitute minimum competence.”); Glen, *supra* note 31, at 431 (noting that “the current bar examination [is] notably weak in what would seem to be the most important dimension, the ability to predict future performance”).

176. Merritt & Cornett, *supra* note 53, at 72–73; Howarth & Wegner, *supra* note 62, at 456–60. The NextGen bar exam is being developed, in part, to reduce

tests.¹⁷⁷ Any such assessments should be designed to ensure accessibility for all students, including those with disabilities.¹⁷⁸

Furthermore, assessments of attorney competence need not be the entire responsibility of law schools, nor must they end at the point of licensure. A NextGen-style exam could be administered after the second year of law school, for example. States could also increase their reliance on the Multistate Professional Responsibility Exam (MPRE) for assessing ethical competencies and could modernize their approach to continuing legal education (CLE),¹⁷⁹ such as requiring CLEs be related to an attorney's practice area or requiring assessment after CLE completion.¹⁸⁰

C. ONGOING PARTNERSHIP

In order to address genuine concerns about the diploma privilege—assessment standards of faculty, relevancy of curriculum, etc.—states and law schools should consider their modern

emphasis on memorization and multiple-choice questions. *Overview of Recommendations for the Next Generation of the Bar Examination*, NAT'L CONF. OF BAR EXAM'RS 2 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [https://perma.cc/HP72-R83D] (“Our decisions were guided by the prevailing views expressed by stakeholders during Phases 1 and 3: that the bar exam should test fewer subjects and should test less broadly and deeply within the subjects covered, that greater emphasis should be placed on assessment of lawyering skills to better reflect real-world practice and the types of activities newly licensed lawyers perform . . .”).

177. Merritt & Cornett, *supra* note 53, at 72; see also Patrick J. Meyer, *Adding Legal Research to the Bar Exam: What Would the Exercise Look Like?*, 53 AKRON L. REV. 107, 109 (2019) (“My proposal is to add an interactive legal research exercise to the MPT [Multistate Performance Test], meaning that applicants would have to conduct research in one or more databases to answer questions.”). Meyer suggests that the interactive nature of research means that testing it on the bar exam would test other skills as well, such as “problem solving, legal analysis and reasoning, legal research, organization and management of legal work, and (possibly) factual investigation.” *Id.* at 120.

178. Merritt & Cornett, *supra* note 53, at 70 (quoting AM. EDUC. RSCH. ASS'N ET AL., *supra* note 174, at 50). See generally Moss, *supra* note 75, at 561 (“Whilst access to sit for the exam and the potential to pass and become an attorney is important, the accommodations process for the exam itself is crucial to ensure disabled students have the best chance of success.”).

179. Markovic, *supra* note 37, at 201 (reasoning that “yearly ethics training [through CLEs] will have more of an impact on practicing attorneys than courses and exams taken at the beginning of their careers”).

180. Robert C. Fellmeth, Bridget Fogarty Gramme & C. Christopher Hayes, *Cartel Control of Attorney License and the Public Interest*, 8 BRIT. J. AM. LEGAL STUD. 193, 229 (2019).

diploma privilege partnership to be an ongoing one. That is, the state licensure authorities and the law schools should revisit their partnership arrangements periodically, and perhaps at regularly-defined intervals. This would allow states and law schools to reaffirm that the desired competencies are being effectively assessed and the modern diploma privilege continues to be appropriately conferred.

Under a modern diploma privilege, law faculty must take seriously their responsibility to the public and the practicing bar and must remember that their assessment of student performance will affect whether law students become lawyers. By revisiting the state-law school partnership periodically, state licensure authorities can confirm or reaffirm their acceptance of faculty assessment standards.

Furthermore, periodic revisiting of the partnership will allow states and law schools to update, modernize, or innovate the legal education available to law students. Whereas a statutory list of required courses can calcify into an outdated curriculum over time,¹⁸¹ a modern diploma privilege offers a framework for a more flexible partnership. States can add or delete desired competencies; law schools can revise or remove curricular offerings or requirements.

D. WEAKNESSES AND DRAWBACKS TO MODERN DIPLOMA PRIVILEGE

This Subpart attempts to candidly acknowledge and explore weaknesses and drawbacks to the modern diploma privilege proposal.

First and foremost, state supreme courts must approve modern diploma privilege as a valid licensure pathway.¹⁸² It will take considerable time and effort on the part of many people to de-

181. See *supra* note 153 and accompanying text.

182. Carol L. Chomsky, Andrea A. Curcio & Eileen Kaufman, *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 896 (2021) (“Several states—including Oregon, California, New York, Georgia, Washington, Minnesota, and Utah—created task forces, committees, or commissions to consider whether a better licensing system could be created.”). However, willingness to explore is not the same as approval. See David Pitt, *Court Declines Elimination of Bar Exam Proposal*, IOWA CITY PRESS-CITIZEN (Sept. 5, 2014), <https://www.press-citizen.com/story/news/local/2014/09/05/court-declines-elimination-bar-exam-proposal/15168225> [<https://perma.cc/2ASL-26E6>] (discussing Iowa’s exploration and then rejection of diploma privilege).

velop a list of desired competencies and to develop an appropriate curriculum to teach and assess those competencies. State licensure authorities—including supreme courts, legislatures, boards of law examiners, and state licensure staffs—as well as law school faculties and staffs, will all have to devote significant amounts of time to these efforts. If states decide to develop different programs at different law schools, that workload increases with the number of different programs. Who will do this work? Licensure and skills experts in law schools are often academic support, bar preparation, and legal writing faculty, who are likely already overworked, underpaid, disrespected, and disproportionately female.¹⁸³

Both the initial development and the ongoing nature of the partnership will be time-consuming. The burdens will be highest in states with the most law schools; Texas, for instance, has ten law schools, so even with a standard set of desired competencies, the Texas Board of Law Examiners might be participating in as many as ten law school partnerships. That is not to say that all partnerships must launch at the same time; the state may wish to pilot the program with one school and expand gradually.

Law faculty may also object to state licensure partnership on the grounds that it would amount to state oversight and a loss of academic freedom.

Furthermore, the modern diploma privilege proposed here is in many ways the antithesis of the UBE, which is rapidly expanding across the country. The benefits of the UBE are its consistency and its portability.¹⁸⁴ Modern diploma privilege, as proposed here, is potentially quite inconsistent between states and law schools, and the portability of licensure would also involve granular decisions. Modern diploma privilege may increase difficulty in obtaining reciprocity; that is, using existing licensure in one state to gain admission to the bar of another state without taking the new state's bar exam.¹⁸⁵ On the other hand, the UBE

183. Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School's Experience*, 31 COLUM. J. GENDER & L. 65, 66–69 (2015).

184. As of October 2022, more than 41,000 UBE scores had been transferred from one jurisdiction to another. Minnesota Law Review, *1 Opening Remarks and Keynote Address, 107 MLR Symposium*, YOUTUBE, at 0:34:20 (Oct. 7, 2022), <https://youtu.be/nLN5QsR5rqs>.

185. For more information on reciprocity, see generally *Reciprocity: Guide to States Where You Can Practice Law*, JD SUPRA (Aug. 19, 2021), <https://www.jdsupra.com/legalnews/reciprocity-guide-to-states-where-you-7387684> [<https://perma.cc/Q79U-R3EM>].

is a demonstrably bad assessment of competence in skills, knowledge, and values actually required in the first year practicing law,¹⁸⁶ so ideally the effort required to enact modern diploma privileges will be worth it.

Another benefit to the bar exam over the modern diploma privilege is that the bar exam—flawed as it is—is consistent. The subject matter tested, testing formats, and the time, effort, and resources required to pass it are all reasonably consistent and thus predictable.¹⁸⁷ The proposal of a modern diploma privilege, on the other hand, introduces the potential for a textured approach to competency assessment. I argue in this Article that the flexible framework of a modern diploma privilege makes it a better assessment of competence and thus a better path to licensure, but I acknowledge that it introduces the undesirable potential for inconsistency in the licensure process. It is not my intent to be unfair to any would-be attorney, though I recognize that disparate treatment may be perceived as unfairness. In particular, if novel assessment methods are embraced, such as assessing law student performance in practice settings, care must be taken that such assessments are objective and free from bias.

Introducing a modern diploma privilege as a new path to licensure may also risk creating a two-tiered licensure system, those lawyers licensed via modern diploma privilege and those licensed via a bar examination. Notably, there is no evidence that such a two-tiered system exists in states with current or recently-retired diploma privileges such as Wisconsin, Mississippi, Montana, South Dakota, or West Virginia,¹⁸⁸ though grumbling has been reported in response to the COVID-19 emergency diploma privileges conferred in some states.¹⁸⁹

186. See *supra* Part II.A.

187. The format of the NextGen bar exam is currently in development, making the transition from UBE to NextGen an inconsistent and somewhat unpredictable process. *Implementing the Next Generation of the Bar Exam, 2022–2026*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/about/implementation-timeline> [<https://perma.cc/4XXM-HSCW>]. Once the NextGen bar exam is established, however, it will presumably be just as consistent between administrations as the UBE currently is.

188. Glen, *supra* note 31, at 461. Mississippi, Montana, South Dakota, and West Virginia have done away with their diploma privileges in recent years—or at least more recently than most states. *Id.* at 461–62.

189. See Sam Skolnik, *Over 1,000 New Lawyers Get Licenses Without Taking Bar Exam*, BLOOMBERG L. (Jan. 4, 2021), <https://news.bloomberglaw.com/business-and-practice/over-1-000-new-lawYERS-get-licenses-without-taking-bar>

One might also wonder which way such a two-tiered system would tilt. Perhaps the bar exam would be considered the higher burden, lessening the status of someone licensed via diploma privilege: “[t]he boy who takes advantage of these alleged [diploma privilege] benefits will go through life with a lingering doubt as to whether he really could have passed the examination,”¹⁹⁰ and so, presumably, would his clients. On the other hand, if the modern diploma privilege were carefully designed and well understood by the practicing bar as well as the public, perhaps that would become the more prestigious licensure method.¹⁹¹

III. LICENSING THE RIGHT ATTORNEYS

Even as the NCBE moves to develop the NextGen bar exam, which will test more fundamental lawyering skills than the current UBE, no bar exam can accurately measure performance of all the skills and knowledge required to practice law. There is overlap, certainly, but many skills required in practice are not assessed by a bar exam, and much information tested on the bar exam will not be applicable to each attorney’s practice. This makes the bar exam “an artificial barrier to practice—one that harms the public by failing to screen for the knowledge and skills that clients need from their attorneys.”¹⁹²

-exam [<https://perma.cc/F5RA-CHR7>] (“The programs are not without detractors. In Oregon, Louisiana, and D.C., privilege was approved by courts by slim margins, with each order accompanied by three dissenting votes.”); Matthew Stanford, *Emergency Diploma Privileges Are Not the Solution to Coronavirus-Caused Bar Exam Delays*, SCOCABLOG (Apr. 8, 2020), <http://scocablog.com/emergency-diploma-privileges-are-not-the-solution-to-coronavirus-caused-bar-exam-delays/?print=pdf> [<https://perma.cc/LH33-AUF2>] (“The current pandemic crisis is neither the best time nor the best reason to make fundamental, permanent changes to law licensing.”).

190. Homer D. Crotty, *Standards for Bar Examiners: The Time Has Come for Substantial Reform*, A.B.A. J., Feb. 1955, at 117, 118. One hopes, though is not confident, that “boy” sounded less condescending in 1955.

191. See Glen, *supra* note 31, at 465 (noting that legal employers may actually prefer candidates who received their license via an alternative to the bar exam that provided experience and practical training); see also Natalie Runyon, *Exploring Diploma Privilege and Alternatives for Attorney Licensure*, THOMSON REUTERS INST. (Apr. 13, 2021), <https://www.thomsonreuters.com/en-us/posts/legal/diploma-privilege> [<https://perma.cc/A8C4-C4B7>] (recognizing that employers often prefer students who have received licensure through a bar exam alternative that provides practical experience because they are able to interact with clients from the start and are “undeterred with difficult assignments”).

192. Foster, *supra* note 55, at 33.

Simultaneously, there is a staggering access to justice gap in the United States.¹⁹³ If the bar exam is keeping people out of the profession who would in fact make good lawyers, the bar exam must be reconsidered or abandoned.¹⁹⁴

By contrast, the modern diploma privilege proposed in this Article is designed to measure more competencies more accurately, so as to set the right people on the path to licensure. This Part explores several important aspects of whether licensure systems operate to effectively license the competent while keeping out the incompetent: the “ratio of regret”¹⁹⁵ in bar exam cut scores, racial diversity, and disciplinary actions.

A. THE RATIO OF REGRET

In an ideal world, a licensing scheme for legal professionals should not allow incompetent people to become licensed attorneys, nor should it keep competent people out of the profession. A bar exam-based system walks this tightrope by setting a minimum passing score (frequently called a “cut score,” in a glass-half-empty sort of way).¹⁹⁶ A minimum passing score that is set too low hurts the public by allowing incompetent people to become lawyers, but a score set too high also hurts the public by keeping competent people out of the profession.¹⁹⁷

Setting a minimum passing score for a bar exam thus risks being either underinclusive or overinclusive.¹⁹⁸ No matter where a bar exam cut score is set, the licensure system will experience a “ratio of regret”—the system will either regretfully keep competent people out of the profession (if the passing score is set too high) or allow incompetent people into it (if the passing score is

193. Merritt & Cornett, *supra* note 53, at 6.

194. *Id.* (“A licensing system that imposes unnecessary barriers to admission may exacerbate the justice gap.”). Griggs notes that the need for lawyers is especially acute in the current era of the COVID-19 pandemic and the crisis of racial justice inequities. Griggs, *supra* note 30, at 20.

195. Howarth, *supra* note 59, at 79 (quoting GREGORY J. CIZEK & MICHAEL B. BUNCH, STANDARD SETTING: A GUIDE TO ESTABLISHING AND EVALUATING PERFORMANCE STANDARDS ON TESTS 304 (2007)).

196. *E.g.*, Howarth, *supra* note 59, at 70; Mitchel Winick, Victor D. Quintanilla, Sam Erman, Christina Chong-Nakatsuchi & Michael Frisby, Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards 3 (Oct. 14, 2020) (unpublished manuscript), <https://dx.doi.org/10.2139/ssrn.3707812>.

197. Howarth, *supra* note 59, at 79.

198. Glen, *supra* note 31, at 448–49.

set too low).¹⁹⁹ In deciding where to set their jurisdiction's minimum passing score, licensure authorities must simply decide which direction and how much error they're comfortable with.²⁰⁰

Yet there is little to no guidance on what score on a bar exam constitutes "minimum competence." The NCBE, which authors the UBE (adopted by most U.S. jurisdictions), insists that a bar exam—*its* bar exam—is the most effective way to assess competence,²⁰¹ but nevertheless expresses absolutely no opinion on what score on the UBE establishes minimum competence.²⁰² This is puzzling, to say the least. The organization that holds its instrument out as the only psychometrically valid assessment of lawyer competence²⁰³ nevertheless leaves individual jurisdictions to determine what score on the UBE constitutes a passing score. Leave the assessment to us experts, the NCBE urges, because jurisdictions don't have resources or expertise to write a bar exam. But somehow those jurisdictions are expected to know best what score on the NCBE's exam equals passing in their jurisdiction. The NCBE's abdication of expertise on this crucial point undermines the validity of the exam as an assessment mechanism.

The bar exam is probably keeping out many people who would likely be competent lawyers. This is so not only because the exam tests at least some material that is unrealistic and unnecessary to practice,²⁰⁴ but also because the bar exam is a significant financial strain on examinees. One study estimated that

199. Howard, *supra* note 59, at 79.

200. *See id.* at 79–81 (discussing the various factors which should be considered in determining the cut score).

201. *See Understanding the Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS 13 (2022), <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [<https://perma.cc/Y5FA-W4UB>] (stating that the UBE "assures a high-quality, uniform system of assessment of minimum competence").

202. *See UBE Scores*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/scores> [<https://perma.cc/BSP7-ETFZ>] ("Jurisdictions set their own minimum passing scores for the UBE.").

203. *See Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube> [<https://perma.cc/5XZ4-MS6U>] ("The UBE is designed to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law.").

204. For example, the criminal law tested on the UBE and all its components is largely common law. *Tips for Criminal Law and Procedure on the Multistate Bar Exam*, 7SAGE BAR (June 15, 2021), <https://7sage.com/bar/tips-for-criminal-law-and-procedure-on-the-multistate-bar-exam> [<https://perma.cc/J8PE>]

it costs an average of \$29,000 just to take the bar exam.²⁰⁵ After graduating from law school with an average of \$115,481 in law school debt alone—that figure does not include undergraduate or other educational debt²⁰⁶—the bar exam licensure system prevents law graduates from practicing law at least until after their bar results come in. For a May graduate taking the July bar exam, that means the earliest they can possibly begin practicing law is September, October, or November, depending on how quickly their state grades and releases scores. In the meantime, law graduates are strongly discouraged from working while studying for the bar.²⁰⁷ Living expenses do not stop accruing, and basic bar preparation courses—which, under the current regime, are necessary for bar passage—can cost anywhere from \$1,000 to \$4,000.²⁰⁸

-UF6N]. Criminal common law is not current in most United States jurisdictions. Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 409 (2021) (“[F]ederal courts do not have jurisdiction over common law criminal prosecutions, and . . . a supermajority of states have abolished common law crimes.”) (citation omitted). Bar examinees are required to memorize and apply archaic definitions.

205. *E.g.*, Grant Rodgers, *Justices Ask: Eliminate the Bar Exam?*, DES MOINES REG. (Aug. 27, 2014), <https://www.desmoinesregister.com/story/news/2014/08/28/bar-exam-hearing/14717163> [<https://perma.cc/282S-K5SN>]; *see also* Nathan Allen, *So Long, Iowa Bar?*, TIPPING THE SCALES (Aug. 29, 2014), <https://tippingthescales.com/news/so-long-iowa-bar> [<https://perma.cc/A9BQ-V9RV>].

206. This figure is from 2018. Christopher J. Ryan, Jr., *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, 2021 U. ILL. L. REV. 97, 100.

207. *See, e.g.*, Ammon Jeffery, *Working While Studying for the Bar: Is It Even Possible?*, CRUSHENDO (Dec. 15, 2020), <https://crushendo.com/working-while-studying-bar-exam-possible> [<https://perma.cc/C95R-SEUX>].

208. As of this writing, Barbri courses range in price from \$1,999 to \$4,199. *Barbri Bar Review*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details/#enroll> [<https://perma.cc/GF4N-QJVW>]. Kaplan courses range from \$1,499 to \$3,999. *New York Bar Review Court*, KAPLAN, <https://www.kaptest.com/bar-exam/courses/new-york-bar-review> [<https://perma.cc/9PCE-LPTE>]. Other companies, such as Themis, Quimbee, Helix, AmeriBar, etc., offer commercial bar prep courses at somewhat lower prices. *See Bar Exam Prep and Review Guide*, NAT’L JURIST, <https://nationaljurist.com/national-jurist-home/bar-exam-2> [<https://perma.cc/GU3J-P933>] (describing and providing pricing for various bar prep courses). Customers can sometimes negotiate a discount, and if an examinee has already secured post-bar employment, the law firm may cover the cost of the bar prep course. On the other hand, many bar examinees feel compelled to purchase multiple products to supplement their studies.

A modern diploma privilege, on the other hand, would not only permit better, more accurate assessment of all the knowledge and skills required to practice law, but it would allow graduates to be licensed upon graduation. This would spare the expense, delay, and physical barriers²⁰⁹ the bar exam places on law school graduates—applicants with disabilities have a tremendously difficult time getting accommodations on the bar exam²¹⁰—as well as providing better attorneys more quickly to the public.

B. EFFECT ON DIVERSITY

Another crucial aspect of this proposal is that a modern diploma privilege has the potential to decrease the racial disparities experienced by bar examinees of color, which contributes to the tremendous lack of diversity in the practicing bar. The ABA found a *twenty-two percent* discrepancy in the 2020 bar pass rates of first-time white and Black examinees.²¹¹ Note that this disparity did not occur at the point of law school graduation; rather, it was the bar exam itself that fenced many Black examinees out of the profession at an enormously disproportionate rate.²¹²

Law is one of the least diverse professions in the United States,²¹³ which prevents the profession as a whole from effectively representing a diverse public. Many variables along the

209. See Moss, *supra* note 75, at 566–69 (discussing the many barriers people with disabilities face when trying to take the bar).

210. *Id.* at 561 (“Whilst access to sit for the exam and the potential to pass and become an attorney is important, the accommodations process for the exam itself is crucial to ensure disabled students have the best chance of success.”); Baron, *supra* note 36, at 0:31:22 (showing the statement by Anthony Murdock on his experience seeking accommodations on the bar exam, describing the process as “quite frankly, disgusting”).

211. Karen Sloan, *New ABA Data Shows Stark Contrast in Bar Pass Rates Among Racial Groups*, LAW.COM (June 22, 2021), <https://www.law.com/2021/06/22/new-aba-data-shows-stark-contrast-in-bar-pass-rates-among-racial-groups> [<https://perma.cc/KNL3-MA8B>].

212. Moran, *supra* note 12, at 653 (noting that diploma privilege “avoids the disparate impact on minority applicants that bar examinations have imposed for decades”).

213. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that> [<https://perma.cc/AFD4-QAR8>]; see also *Labor Force Statistics*

pipeline to the legal profession contribute to high attrition rates for would-be lawyers of color, including the bar exam, law school attrition, the LSAT, and more.²¹⁴ Discrimination occurs during the attorney hiring process, too.²¹⁵ Law student debt is borne disproportionately by minoritized students, including women and students of color.²¹⁶

High cut scores on bar exams contribute to this lack of diversity,²¹⁷ and if we as a profession were certain the bar exam accurately measured competence to practice, that would be one thing.²¹⁸ But we aren't, so artificially high cut scores are merely

from the *Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 25, 2023), <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/S3HC-VQQS>] (showing that 87.8% of lawyers in 2022 identify as white); *Report Card on the Diversity of California's Legal Profession*, THE ST. BAR OF CAL. (2022), <https://publications.calbar.ca.gov/2022-diversity-report-card/diversity-2022-california-licensed-attorneys> [<https://perma.cc/HN2M-2JVX>] (finding that while white people make up 39% of California's adult population, they are 66% of California's licensed attorneys).

214. Victor D. Quintanilla, Professor of Law and Val Nolan Faculty Fellow, Ind. Univ. Bloomington, Maurer School of Law Panel at Brigham Young University J. Reuben Clark Law School's Law & Leadership Conference: Alternatives to the Bar Examination, at 0:30:10 (Jan. 29, 2021), <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-examiningthebar/LeadershipConference-examiningthebar.html>. The LSAT constricts entrance

into the legal profession for women, racial minorities, applicants of low socioeconomic status, and applicants with disabilities. This is because the ABA requires law schools to use an admissions test in the admissions process, and the LSAT is the only one recognized by the ABA. Eremipagamo M. Amabebe, Note, *Beyond 'Valid and Reliable': The LSAT, ABA Standard 503, and the Future of Law School Admissions*, 95 N.Y.U. L. REV. 1860, 1860 (2020). Pipeline problems begin before law school, too. One effort to diversify the legal profession addresses pipeline issues as early as high school. Marisa Manzi & Nina Totenberg, "Already Behind": *Diversifying the Legal Profession Starts Before the LSAT*, NPR (Dec. 22, 2020), <https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat> [<https://perma.cc/2HJQ-VW9Y>].

215. See Press Release, Nat'l Ass'n for L. Placement, NALP's New Employment and Salary Report Highlights Disparities in Outcomes by Race and Ethnicity (Oct. 21, 2020), <https://www.nalp.org/uploads/PressReleases/NALPPressReleaseJobsandJDsOctober212020.pdf> [<https://perma.cc/454L-3TAA>] (finding that "Black graduates were employed in bar passage required jobs at a rate 17 percentage points lower than white graduates").

216. Ryan, *supra* note 206, at 106, 136–37.

217. Winick et al., *supra* note 196, at 4.

218. Foster, *supra* note 55, at 33–34 ("The exam is particularly harmful because it disproportionately fails nonwhite candidates, without evidence that it is a valid measure of minimum competence."). The racial disparities in bar exam

-serving a gatekeeping function to keep diverse lawyers who successfully completed law school out of the profession.²¹⁹

Indeed, the bar exam has historically and intentionally been used to keep diverse lawyers out of the profession. Ostensibly, the rise of the bar exam was to protect the public from incompetent lawyers and inconsistent licensing methods, but there is significant evidence to suggest racial and anti-immigrant animus.²²⁰

A modern diploma privilege will not solve the problem of the legal profession's lack of diversity—there are many leaky places in the pipeline—but it can help reduce or eliminate the bar exam as an instrument of exclusion. An alternative to the bar exam has the potential to reduce stereotype threat among law students and law graduates of color, as well.²²¹

The racial disparity in bar exam pass rates is a result of both content and structural issues around the bar exam and bar preparation.²²² Some bar exam questions rely on biases and assumptions not everyone shares in order to reach the “correct” answer. Professor Christina Shu Jien Chong demonstrates how a constitutional law question about a school dress code requires the applicant to assume—as the question drafter does—that there is

results may suggest a bias unrelated to competence. Andrade, *supra* note 9, at 259–60.

219. Winick et al., *supra* note 196, at 4.

220. Andrade, *supra* note 9, at 253–56 (detailing blatant discrimination against women, Black people, Jewish people, and immigrants seeking to enter the legal profession); Merritt & Cornett, *supra* note 53, at 5 (summarizing the “racist and protectionist roots” of the bar exam).

221. See Glen, *supra* note 31, at 472–76 (discussing the work of Claude Steele, including studies showing that “where tests are presented as a measure of ability, Black students perform worse than Whites; where participants are not told that the test measures ability Blacks and Whites perform the same; and where ability is not specified but participants are ‘race-primed’ by specifically asking them questions about their race, Black students again are less successful”) (citations omitted). The bar exam discourages minority law school applicants and affects the education of those who matriculate. *Id.* at 389–92.

222. See Roger Baron, *Bar Exam Preserves “White Privilege,”* RAPID CITY J. (Mar. 30, 2022), https://rapidcityjournal.com/opinion/baron-bar-exam-preserves-white-privilege/article_bb1c3436-6200-59f4-8456-f04bfe806158.html [https://perma.cc/NN3R-WVLT] (discussing the discriminatory effects of the bar exam, including that the disparate impact on racial minorities was reduced for a time when some of the bar exam questions were created by local lawyers and “aligned with the law school’s curriculum”).

no gender bias at play which would trigger heightened scrutiny.²²³ The question also presumes that the examinee shares the drafter's cultural values about the "appropriate" length of a pair of shorts.²²⁴

The financial advantage required to "devote ten weeks to unpaid memorization of legal principles" is more likely to accrue to white applicants than applicants of color.²²⁵ Furthermore, bar examinees of color in 2020 were also preparing for the bar exam not only during a pandemic but during the social upheaval surrounding the police and vigilante killings of unarmed Black men and women such as George Floyd, Ahmaud Arbery, Breonna Taylor, and too many others.²²⁶

Some attempt to cast this dismal reality as a mere delay, noting that high "eventual pass[] rates" on the bar exam mean that diversity is delayed but not denied.²²⁷ But if applicants will eventually pass the bar exam out of sheer perseverance, their licensure should not be delayed in the meantime.

A modern diploma privilege, which provides a better assessment of attorney competence through a broader variety of competencies over a more sensible timeline, allows licensure as of the point of graduation.²²⁸

C. COMPETENCE AND DISCIPLINARY PROCEDURES

Those who cling to the bar exam as the best arbiter of attorney competence express concern that other paths to licensure, such as diploma privilege, would give rise to increased numbers of grievances filed against attorneys. Logically speaking, this connection falls flat, as the bar exam tests very little, if any, professional responsibility content. Professional responsibility is

223. Chong, *supra* note 49, at 59–60.

224. *Id.* Additional examples from Chong include an evidence question that requires the examinee to conclude that a husband would not be emotionally stressed two hours after his wife was struck by a speeding car, *id.* at 60–61, and seven more questions reprinted and analyzed in Appendix C, *id.* at 88–96.

225. Foster, *supra* note 55.

226. Griggs, *supra* note 30, at 12–13 ("Those horrible and graphic narratives were superimposed onto the distress of the pandemic.").

227. Glen, *supra* note 31, at 387 (quoting Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, L. SCH. ADMISSION COUNCIL, at viii (1998), <https://archive.lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/S8EP-RR9W>]).

228. Trujillo, *supra* note 68, at 96 (diploma privilege "mitigates the disparate impact of the bar exam on minorities and women").

tested on its own exam, the MPRE, which is required for licensure in almost every jurisdiction.²²⁹ On the NextGen Bar Exam, “professional responsibility will serve as the context for assessing some Foundational Skills” though unlike on the MPRE, text of the applicable rules will be provided.²³⁰

A recent study of four states analyzed the frequency of public attorney sanctions before and after the states abolished diploma privilege, finding that rates of sanction for bar-examined attorneys and diploma-privileged attorneys were comparable in the first years after becoming licensed but diverged modestly over longer periods of time.²³¹ A study of Wisconsin attorneys analyzed those who were admitted via diploma privilege and those admitted by bar examination and found that “passing a bar examination had no statistical correlation with the number or rates of attorney discipline (ethical and/or incompetent representation) in Wisconsin.”²³² Nationwide, Wisconsin is average in terms of the rate of complaints against attorneys, and it files fewer disciplinary charges than other states, which does not suggest that diploma privilege creates a cesspool of unethical attorneys.²³³

229. *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mpre> [<https://perma.cc/T8GF-Q8U7>].

230. *FAQs About Recommendations*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/faqs> [<https://perma.cc/64UE-V9C4>].

231. Kyle Rozema, *Does the Bar Exam Protect the Public?*, 18 J. EMPIRICAL LEGAL STUD. 801, 802–03 (2021) (studying Mississippi, Montana, South Dakota, and West Virginia, all of which abolished diploma privilege in the 1980s; finding differing rates of public sanction between diploma privileged lawyers and bar examined lawyers in the second and third decade of practice, with 3.9% of bar examined lawyers sanctioned and 5.1% of diploma privileged lawyers sanctioned within twenty-five years of practice).

232. William Wesley Patton, *Admitting Law Graduates by Bar Examination Versus by Diploma Privilege: A Comparison of Consumer Protection*, 45 J. LEGAL PRO. 243, 247 (2021). This study reviewed attorney discipline matters from January 2013 to March 2016. *Id.* at 246. It found that during that time period, six percent of diploma privilege-admitted attorneys were disciplined (81 of the 1,285), while 4.5% of bar-examined attorneys were disciplined (50 of 1,114). *Id.* at 247. The difference was statistically insignificant. *Id.* The study also concluded that the bar-examined attorneys “committed more serious ethical violations and had a higher recidivism rate.” *Id.*

233. Markovic, *supra* note 37, at 185, 188.

California's recent decision to lower the cut score of its bar exam sparked several studies on whether this move would increase attorney discipline.²³⁴ One study found no relationship between cut score and attorney discipline.²³⁵ A second study of California data found more incidence of discipline among attorneys who passed the bar exam with lower scores, noting that “[t]he incidence of discipline is low overall but increases substantially with the attorney’s number of years of practice.”²³⁶ Past studies have found some correlation between attorney discipline and bar exam failure.²³⁷

The articles that found divergence in discipline rates over time—regardless of whether the articles were studying the bar exam versus diploma privilege or studying bar exam cut scores—concluded that the bar exam offers modest protection to the public from incompetent lawyers.²³⁸ Yet the fact that discipline rates increase over *decades* does not logically suggest that it is the bar exam that prevents disciplinary actions.²³⁹ If attorney rates of discipline are lower in the first decade of practice, it is not obvious how the bar exam is the thing protecting the public. After

234. These studies were not conducted to examine the difference between bar exam licensure and diploma privilege; rather, they studied whether adjusting the passing score on the bar exam would affect disciplinary actions.

235. Michael B. Frisby, Sam C. Erman & Victor D. Quintanilla, *Safeguard or Barrier: An Empirical Examination of Bar Exam Cut Scores*, 70 J. LEGAL EDUC. 125, 159 (2020).

236. Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 312 (2019). The authors estimated bar exam scores by using the twenty-fifth and seventy-fifth percentile LSAT scores of the examinee’s law school. *Id.* at 313. The sample size was enormous (more than 240,000 lawyers), and the authors discuss the need for individualized rather than aggregated data regarding bar exam scores and attorney discipline. *Id.* at 325.

237. *Id.* at 318 (citing Leslie C. Levin, Christine Zozula & Peter Siegelman, A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline 26 (Mar. 15, 2013) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.2258164>, and Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN’S L. REV. 883, 885 (2017)).

238. Anderson & Muller, *supra* note 236, at 310; Rozema, *supra* note 231, at 803.

239. Markovic, *supra* note 37 (noting that “[t]here may be a relationship between bar exam performance and discipline, but this does not signify that the bar exam requirement has a direct effect on discipline”; indeed, “correlation between bar exam performance and misconduct is likely attributable to lawyers’ differential practice settings, which are based in large part on their academic records”).

all, time and distance from the bar exam do not increase an attorney's ability to pass it.²⁴⁰

Professors Robert Anderson and Derek Muller acknowledge several possibilities that explain disparate disciplinary rates other than bar exam score: the socioeconomic gap between those attending high- and low-ranked law schools, the possibility for disparate prosecution of discipline issues, and the possibility that differing employment prospects and situations may also affect the incidence of disciplinary issues.²⁴¹ Furthermore, since disciplinary actions tend to occur late in practice, the authors suggest that other markers of disciplinary problems should be identified and studied.²⁴²

Moreover, attorney disciplinary actions are rarely ever related to material tested by the bar exam, which again suggests that the bar exam itself does not reduce attorney disciplinary matters. In a review of California disciplinary actions from January to April 2016, none of the 163 matters were related to bar-tested, substantive, non-professional responsibility topics.²⁴³ Indeed, malpractice claims are usually about filing and investigatory matters.²⁴⁴

CONCLUSION

A modern diploma privilege would be a better law licensure method than the current near-universal bar exam system. For a modern diploma privilege, state licensure authorities would partner with law schools to develop a concrete list of competencies a newly licensed lawyer should possess, and this list of competencies need not be constrained by what is currently tested on the bar exam. The competencies may include substantive knowledge and a wide variety of legal and "soft" skills, such as legal research, client counseling, multicultural lawyering, workload management, and wellness. Once the licensure authorities and law schools have established this list of desired competencies, they can develop assessment methods that can be administered by the law school over the course of a student's legal education. Once the competencies are established, the student can

240. Foster, *supra* note 55, at 37–41 (discussing a study where practicing lawyers took a simulated MBE and consistently failed; most even failed the questions in their practice areas).

241. Anderson & Muller, *supra* note 236, at 320–21.

242. *Id.* at 323.

243. Patton, *supra* note 232, at 250.

244. Trujillo, *supra* note 68, at 80–81.

become licensed immediately upon graduation (assuming other licensure requirements, such as character and fitness, are satisfied). If law students graduate from law school without satisfying the modern diploma privilege requirements, those graduates can take the bar exam for licensure.

There are strengths and weaknesses of diploma privilege as a method of licensing new attorneys. The diploma privilege is superior to a bar exam in that it allows for the assessment of more skills and knowledge over a more appropriate time horizon than a closed-book exam that takes place over the course of twelve hours in two days. On the other hand, diploma privilege turns licensure decision-making over to law school faculties, who may be inconsistent and may have a financial incentive to pass borderline students.

The modern diploma privilege need not be a one-size-fits-all framework, though it would save time and administrative efforts if states developed standardized lists of desired competencies and consistent partnerships with individual law schools. Importantly, the modern diploma privilege can and should be revisited periodically to ensure the desired competencies and assessments are appropriate, functional, and unbiased. This way, the modern diploma privilege can evolve as the practice of law changes. It will also free law schools to experiment with curricular innovations without fear of leaving students unprepared for the bar exam.

The goal of the modern diploma privilege is to provide a better assessment than the bar exam so as to license the right attorneys. Done well, the modern diploma privilege will decrease the “ratio of regret” and decrease racial disparities of bar exam licensure, all while maintaining or increasing the quality of service provided to clients.