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### Who Watches the Watchmen? Using the Law Governing Lawyers to Identify the Applicant Duty Gap and Hold Bar Examiner Gatekeepers Accountable

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WHO WATCHES THE WATCHMEN? USING THE  
LAW GOVERNING LAWYERS TO IDENTIFY  
THE APPLICANT DUTY GAP AND HOLD BAR  
EXAMINER GATEKEEPERS ACCOUNTABLE

*Ashley M. London\**

2023 MICH. ST. L. REV. 377

*Quis custodiet ipsos custodes — Juvenal\*\**

ABSTRACT

*The legal profession holds lawyers to high standards in their personal and professional lives and expects aspiring members to follow the ethical rules with scrupulous precision and candor. Yet the*

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\* Assistant Professor of Law and Director of Bar Preparation, The Thomas R. Kline School of Law of Duquesne University. Thank you to the AccessLex Institute’s Center for Legal Education Excellence and The Association of Academic Support Educators (AASE) for awarding me one of five inaugural AccessLex-AASE ASP Faculty Scholarship grants in 2021 to complete this work. It was presented on May 25, 2022, at the Ninth Annual AASE Conference held at St. Mary’s University School of Law in San Antonio, TX. Special thanks to my AASE mentors, Prof. Catherine Christopher (Texas Tech University School of Law) and Prof. Kris Franklin (New York Law School) for their guidance, advice, and edits throughout the process of developing and writing this Article. Prof. Christopher, your generosity and enthusiasm fire my goals! Thank you to my friends and mentors Prof. Agnieszka McPeak (Gonzaga University School of Law) and Vice Dean Jo-Ann M. Verrier (University of Pennsylvania Carey School of Law) for showing me how to give back and help others in the academy and for amazing substantive edits that helped make this Article more impactful. I also deeply appreciate the feedback and insights to this piece provided by Thomas J. Farrell, chief disciplinary counsel for the Disciplinary Board for the Supreme Court of Pennsylvania. Thank you to my research librarian colleagues in the Duquesne Kline Law Library and the amazing people in my scholarship group (Profs. Jane Moriarty, Maryann Herman, Katherine Norton, Ann Schiavone, Grace Orsatti, April Milburn-Knizner, John Towers Rice, and Marissa Meredith). I am especially grateful to my awesome research assistants Katie Butler, Erin McLuan, Molly Campbell, and Megan Koma. Any errors are my own. None of this would have been possible without their assistance and expertise. Finally, my heartfelt thank you to my husband Rudi and my daughter Larken, whose love and sacrifices support my academic career.

\*\* See JUVENAL, THE SIXTEEN SATIRES 140 (Peter Green trans., 1967) (“But who is to keep guard [o]ver the guards themselves?”); see also ALAN MOORE ET AL., WATCHMEN, at Postface (1987).

*profession, and those monitoring admission to the profession, affords no protections or recourse to this class of aspiring professionals during that critical period between graduation and successful bar passage.*

*Without reform, this previously unacknowledged duty gap will continue to demoralize and potentially harm future lawyers and reflect negatively on the profession as a whole. Supervising bodies, discussed within, treat applicants as if they have already committed an ethical breach. Indeed, applicants are charged with meeting standards strikingly similar to those required for lawyer reinstatement after disciplinary action. Throughout the licensing process, duty remains a one-way street with applicants bearing the burden of compliance.*

*This ethical duty gap was laid bare as these self-appointed supervisory bodies—boards of law examiners across the country—displayed a deeply entrenched commitment to a gatekeeping function by maintaining rigid and opaque lawyer licensing procedures as they administered the bar examination multiple times in the midst of the COVID-19 pandemic. Many boards made decisions putting the health, safety, and emotional well-being of bar applicants at risk, and in some instances prevented applicants' exam scores from being portable. Times such as these have historically prompted changes to the ABA Model Rules of Professional Conduct.*

*What the COVID-19 bar exam crisis revealed is an uncomfortable truth: The legal profession appears to exhibit a marked lack of compassion, fairness, and ethical obligation to bar applicants in the period between graduation and licensure. The newest members of a so-called noble profession appear to be owed fewer duties than a potential client by every entity involved in the lawyer licensing process and have little to no recourse to have their complaints heard or addressed.*

*This truth is shaking the foundations of the law licensing system, and applicants and others are calling for reform. Yet, on an individual basis, many boards of law examiners across jurisdictions cling to the status quo or adopt the Uniform Bar Examination (UBE). Promulgated by the Madison, Wisconsin-based nonprofit organization the National Conference of Bar Examiners (NCBE), the UBE is graded and scaled by psychometricians whose duty is to maintain the statistical reliability of its product and whose transparency is limited due to its nonprofit status. Boards of law examiners give broad deference to the NCBE, even though the company is not subject to actionable ethical oversight by the*

*jurisdictions that employ it—not in regard to its business practices, profitability, or code of conduct.*

*Bar applicants, meanwhile, lose the protection of being enrolled in ABA-accredited law schools. The commercial bar preparation companies they are forced to employ do not owe any ethical duties to applicants either, as most are privately-held companies who bind users with arbitration clauses, choice of law provisions, and threats of reporting applicants to their jurisdiction’s board of character and fitness if products are misused.*

*This Article calls attention to the duty gap between bar examiners, the legal profession, and aspiring lawyers, identifying and scrutinizing its genesis and presence. It also suggests bar reform is best achieved through greater oversight of the lawyer licensing process by current members of the profession and insists jurisdictions treat bar applicants with the duties prescribed by the rules of professional conduct. Who watches the watchmen? In a self-regulating profession, we all do.*

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## INTRODUCTION

It has been the rallying cry of the powerless for centuries: Who watches the watchmen?<sup>1</sup> It is attributed to savage satirist poet Juvenal who spoke out against human brutality and the corruption that characterized the prelude to the fall of ancient Rome, but generation after generation finds power in those words.<sup>2</sup> Feminist activist Louisa Lowe cited them in her nineteenth-century pamphlet titled, “*Quis Custodiet Ipsos Custodes?*” to decry the Victorian practice of placing unconventional women in lunatic asylums against their will.<sup>3</sup> The phrase appears again in modern culture in the DC Comics graphic novel, *Watchmen*, as its characters grapple with the collective duty of humanity to hold those in power accountable for their actions.<sup>4</sup> The analogy to the professional self-governance of lawyers is obvious.<sup>5</sup>

This same cry became a roar from bar applicants in 2020, 2021, and 2022, as the aftershocks of the extreme disruption of the lawyer licensure process caused by the COVID-19 pandemic rippled across every jurisdiction.<sup>6</sup> A chasm between the interests of bar examiners and the interests of bar applicants was laid bare and became subject to intense public scrutiny.<sup>7</sup> An uncomfortable truth emerged: The

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1. See JUVENAL, *THE SIXTEEN SATIRES* 140 (Peter Green trans., 1967); ALAN MOORE ET AL., *WATCHMEN*, at Postface (1987).

2. See JUVENAL, *supra* note 1.

3. See EMILY MIDORIKAWA, *OUT OF THE SHADOWS: SIX VISIONARY VICTORIAN WOMEN IN SEARCH OF A PUBLIC VOICE* 205–07 (2021).

4. See MOORE ET AL., *supra* note 1, at 9, 24.

5. See MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS’N 1983).

6. See Abigail J. Hess, ‘*Literal Hell*’ – *How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC (Aug. 19, 2020, 5:40 PM), <https://www.cnn.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html> [<https://perma.cc/3H76-LHLR>].

7. See Marsha Griggs, *An Epic Fail*, 64 HOWARD L.J. 1, 2 (2020) (detailing the crisis caused during the COVID-19 pandemic by boards of law examiners across the country whose adherence to the status quo was clung to in detriment to the newest members of the legal profession; the crisis revealed the system of licensure of attorneys in the United States is at best broken, and at worst actively damaging new lawyers and reflecting poorly on the legal profession as a whole); see also Elizabeth Gil, *Insight: Beyond the Bar Exam—Covid-19’s Call to the Legal World*, BLOOMBERG L. (Aug. 20, 2021, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-beyond-the-bar-exam-covid-19s-call-to-the-legal-world> [<https://perma.cc/2L2P-V4RE>] (explaining that when New York cancelled the July 2020 bar exam, it led bar takers to believe an in-person exam would be held in September and then cancelled again electing to hold the exam in October); *Florida Board of Law Examiners Postpones August 2020 Bar Exam*, FLA. SUP. CT. (Aug. 17, 2020, 6:45 AM), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Board-of->

gatekeepers of the legal profession observe no ethical duties to bar applicants during that narrow window between graduation and licensure, even as they exact duties of scrupulous honesty and integrity from applicants.<sup>8</sup> These duties owed by bar applicants mirror the requirements of competency, candor, and lofty moral qualifications exacted of lawyers who have committed ethical violations, faced discipline, and subsequently sought reinstatement.<sup>9</sup> The newest members of the legal profession are treated with suspicion, highlighting a deep, one-way duty gap damaging to aspiring attorneys during one of the most vulnerable times of their professional lives.<sup>10</sup>

Duties both ethical and legal are the heart of what it means to be a licensed attorney.<sup>11</sup> The licensed practitioner is charged with a

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Bar-Examiners-postpones-August-2020-Bar-Exam [https://perma.cc/QY5R-TL5F]; PA. BD. OF L. EXAM'RS, PENNSYLVANIA BAR EXAM TO BE ADMINISTERED REMOTELY IN OCT. 2020 (2020), <https://www.pacourts.us/storage/media/pdfs/20210508/221006-file-9631.pdf> [https://perma.cc/CF8E-HR54] (“We know this has been a stressful time for bar applicants . . .”); *Bar Exam Modifications During COVID-19: 50-State Legal Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/> [https://perma.cc/GZR5-HDS6] (last visited Nov. 12, 2023) (containing a full list of jurisdictions and how each addressed the COVID-19 pandemic).

8. See MODEL RULES OF PRO. CONDUCT r. 8.1 (AM. BAR ASS'N 1983) (stating applicants owe a mandatory duty to not make false statements and to correct any misapprehension that may arise as a way to protect the integrity of the profession).

9. See 204 PA. CODE § 83 r. 218(c)(3) (stating disbarred or suspended attorney shall have the burden of demonstrating by clear and convincing evidence that such person has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth and that the resumption of the practice of law within the Commonwealth by such person will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest); see, e.g., MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 19–25 (AM. BAR ASS'N 2020); *DC Bar Disciplinary Rules – Section 16 Reinstatement, ATT'Y GRIEVANCES*, <https://attorneygrievances.com/law-library/dc-bar-disciplinary-rules/section-16-reinstatement> [https://perma.cc/3UPM-J8HZ] (last visited Nov. 12, 2023); see VA. CODE ANN. § 54.1-3935; see *Me. Bar. R. 29, CASOTEXT*, <https://casetext.com/rule/maine-court-rules/maine-bar-rules/maine-disciplinary-rules/rule-29-reinstatement-after-disciplinary-suspension-for-more-than-six-months> [https://perma.cc/25T6-CJ87] (last visited Nov. 12, 2023).

10. See *Some Advice to the New, or Soon to be Lawyer*, UpCounsel, <https://www.upcounsel.com/lectl-some-advice-to-the-new-or-soon-to-be-lawyer> [https://perma.cc/R79P-RB3Z] (last visited Nov. 12, 2023).

11. See also MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR ASS'N 1983) (explaining lawyers also owe legal duties as fiduciaries); DISCIPLINARY BD. OF SUP. CT. OF PA., PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT r. 1.15(a)(3) (2023) (stating a lawyer is a fiduciary). See generally MODEL RULES OF PRO. CONDUCT pmb1. (AM. BAR ASS'N 1983) (explaining that the ABA Model Rules of Professional Conduct represent the highest and best ideals of the profession, while also setting forth

variety of duties and obligations owed to the public, the bar itself, and the judicial system.<sup>12</sup> According to the early twentieth-century legal ethicists who laid the foundation for the modern iteration of the Model Rules, one of the most sacred duties is that of lawyers self-policing the profession to maintain the public trust.<sup>13</sup> This concept of *noblesse oblige* was contemplated in the 1908 Canons of Professional Responsibility in Canon 29 titled, “Upholding the Honor of the Profession.”<sup>14</sup> Canon 29 exhorts lawyers to remember their privileged positions and to use them not only to uphold the honor and dignity of the profession, but also to improve upon it.<sup>15</sup> This concept of self-regulation is codified in today’s version of Model Rule 8.3, which

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the ethical guidelines upon which discipline can be meted out to attorneys who do not meet the standards; compliance relies upon the attorney’s own voluntary actions, reinforcement through peer and public opinion, and, if needed, disciplinary proceedings).

12. See HENRY S. DRINKER, *LEGAL ETHICS* 59, 69, 190 (1953). Drinker was a prominent member of the Philadelphia Bar and former lecturer on legal ethics at the University of Pennsylvania Law School, who worked with the William Nelson Cromwell Foundation to write a new and updated book on legal ethics published in 1953. See *id.* at vii–viii. Drinker also served as the Chairman of the Standing Committee on Professional Ethics and Grievances Committee of the American Bar Association (ABA). See *id.* He dedicates part two of his book to the elucidation of the obligations owed by an attorney to the public, the courts, the client, and in relation to other lawyers because of the “special privileges granted to [him].” See *id.* at 190. Among the duties he opines upon, the duty to be punctual, and not to employ dilatory tactics, but he opens with a discussion of the solemn duty to police the bar. See *id.* at 59. Drinker’s message is codified in ABA Model Rule 8.3: Reporting Professional Misconduct. 8.3(a): “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 1983). Knowledge is judged by an objective standard and is defined in Model Rule 1.0(f) Terminology: “[k]nowingly,” ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from [the] circumstances.” See *id.* r. 1.0(f) (AM. BAR ASS’N 1983).

13. See DRINKER, *supra* note 12, at 59–60 (“Much of the public suspicion of lawyers is due to the realization that most of the abuses of which lawyers are guilty could be eliminated if the bar and the courts were constantly alert and willing to do their full duty in this regard.”).

14. See *id.* at 3 (“The traditions of an honored profession bind him to a higher and much more difficult duty.”). The lawyer must strive to exhibit “[o]bedience to the [u]nforceable.” See *id.* at 4; see also, George Sharswood, *Sharswood’s Professional Ethics*, AM. L. REG., 193, 202–03 (1855); Woodrow Wilson, *The Lawyer and the Community*, 33 ANNU. REP. AM. BAR ASS’N 419, 435 (1910). Regarding Canon 29, see AM. BAR ASS’N, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, 583 (1908) [hereinafter FINAL REPORT].

15. See FINAL REPORT, *supra* note 14, at 583.

mandates members of the legal profession report not only their own misconduct, but also the misconduct of others.<sup>16</sup> The legal profession has an “unquestioned interest in enforcing its disciplinary rules,” and a duty to “promot[e] loyalty and fraternity between fellow practitioners.”<sup>17</sup>

The ethical standards we developed and apply to one another in the legal profession are rooted in a latent identity crisis—are lawyers more akin to tradespeople, are we professionals, can be we both?<sup>18</sup> Many law school professional responsibility courses spend the first or second classes asking students to explore the differences delineating these concepts, and ultimately concluding that while we may engage in many business-like behaviors, the rules of professional conduct set lawyers apart because we are bound by a legally-enforceable code of ethics.<sup>19</sup> Academics and the mainstream media continue the debate

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16. See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 1983). Reporting Professional Misconduct requires lawyers who suspect their peers or superiors of not maintaining the integrity of the profession to inform the proper authorities. See *id.*; ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 752 (10th ed. 2023).

17. See Ryan Williams, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 932 (2008).

18. See JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 1 (1916). Cohen writes the seminal work examining the dichotomy of whether or not the law is a business or a profession and why the practice of law should not be about generating business. See *id.*; Samuel J. Levine, *The Law: Business or Profession?: The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*, 40 FORDHAM URB. L.J. 1, 2 (2016). Scholars of legal ethics and the legal profession discuss here the relevance of the themes and analyses generated by Cohen about the law and legal practice as a business or a profession. See *id.*; see also John J. Parker, *A Profession Not a Skilled Trade*, 8 S.C.L. REV. 179, 179 (1955). Here, John J. Parker, Chief Justice of the United States Court of Appeals for the Fourth Circuit, argues in an address to the University of South Carolina School of Law that law is a profession and not a skilled trade because “the chief end of a trade or business is personal gain; the chief end of a profession is public service.” See *id.* The role of the Model Rules of Professional Conduct is to put a check on unscrupulous attorneys who, without the restraint of the code of ethics, would engage in practices that would discredit and bring shame to the profession. See MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS’N 1983).

19. My own included. I begin my Professional Responsibility classes by asking whether students know the difference between morals and ethics, and whether law is a business or a profession, or both. It sparks lively and insightful conversations and opens students up to the broader applicability of the Rules of Professional Conduct as actual practice guideposts and not just as a necessary ABA-required code course. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 12–13 (12th ed. 2021) (explaining that some jurisdictions legally bind lawyers to rules of ethics).



with the increased use of technology pushing lawyering further into the realm of a business or an industry rather than that of a public service.<sup>20</sup> Whether a business, a profession, or a combination of both, self-regulation through the promulgation and enforcement of the Rules of Professional Conduct remains a hallmark of the legal profession.<sup>21</sup> Indeed, Julius Henry Cohen captured the critical importance of the self-governance of the legal profession when he stated, “Ours is a profession . . . We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house.”<sup>22</sup>

The rules of professional conduct hold lawyers to higher standards in both our personal and professional lives.<sup>23</sup> We are expected to be candid in our dealings, avoid conflicts, and engage in conduct that is prompt, diligent, and competent.<sup>24</sup> We even owe sacred duties of silence and confidentiality to people who may never hire us but with whom we had one single consultation.<sup>25</sup> We must refrain from deceit, dishonesty, and under a newly promulgated rule we must actively refrain from engaging in harassment or discrimination.<sup>26</sup> In

20. See, e.g., Mark A. Cohen, *Law Is a Profession and an Industry - It Should Be Regulated That Way*, FORBES (Mar. 29, 2018, 6:39 AM), <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/?sh=67c0696e6598> [<https://perma.cc/7MSQ-UABW>] (explaining that technology in the profession pushes it further into the territory of an industry but does not relinquish the “core tenets of legal practice”).

21. See GILLERS, *supra* note 19, at 14.

22. See Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 177 (2012) (quoting JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 109 (1924)).

23. See, e.g., MODEL RULES OF PRO. CONDUCT pmb1. (AM. BAR ASS’N 1983) (“A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.” . . . “A lawyer should promote public confidence in our system and in the legal profession.”).

24. See *id.*

25. See MODEL RULES OF PRO. CONDUCT r. 1.18(b) (AM. BAR ASS’N 1983) (explaining a lawyer shall not share information regarding the person and their circumstances even if no client-lawyer relationship results and a lawyer shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter).

26. See *id.* at r. 8.4 (“It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct

recent iterations of the rules, we must also be competent in the use of new technologies.<sup>27</sup> If we violate these rules, discipline is swift, and public shaming may follow.<sup>28</sup>

Unfortunately, this duty to protect, enforce, and promote solidarity in the legal profession does not extend to recent law school graduates. These graduates are forced to take a licensing examination governed by an outdated set of decades-old standards requiring a high-pressure written examination as a requirement for establishing

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or other law; (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”).

27. See *id.* at r. 1.1 (requiring that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .”). Florida requires three technology credit hours every three years, and North Carolina has a one-hour annual requirement. See FLA. BAR, RULE 6.10-3 MINIMUM CONTINUING LEGAL EDUCATION STANDARDS (2023), [https://www-media.floridabar.org/uploads/2023/08/2023\\_02-AUG-RRTFB-Chap.6-8-21-2023-ADA-Complaint.pdf](https://www-media.floridabar.org/uploads/2023/08/2023_02-AUG-RRTFB-Chap.6-8-21-2023-ADA-Complaint.pdf) [<https://perma.cc/9BRS-ACBC>] (requiring lawyers to participate in technology training while completing their continuing legal education requirements); *CLE Requirements in North Carolina for Lawyers*, N.C. STATE BAR, <https://www.nccle.org/for-lawyers/requirements/renewing-lawyers/> [<https://perma.cc/2R6C-XCVY>] (last visited Nov. 12, 2023); see also Jeff Cox, *Why Every State Should Require Technology CLEs*, LAW TECH. TODAY (May 20, 2019), <https://www.lawtechnologytoday.org/2019/05/why-every-state-should-require-technology-cles/> [<https://perma.cc/A66J-QNP9>] (arguing that every state “should require licensed attorneys to complete at least one hour of technology training per year in order to promote . . . competence”).

28. Many states publish online databases that announce attorney names with their violations and punishments. See, e.g., *Bucks County Attorney Brian M. Puricelli Temporarily Suspended*, DISCIPLINARY BD. OF THE SUP. CT. PENN. (July 11, 2022), <https://www.padisciplinaryboard.org/news-media/news-article/1568/bucks-county-attorney-brian-m-puricelli-temporarily-suspended> [<https://perma.cc/WBE9-Y8N9>]; *Attorney Discipline*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Public/Discipline/Attorney-Discipline> [[perma.cc/LW7U-KFGX](https://perma.cc/LW7U-KFGX)]; *Published Attorney Discipline Cases*, KAN. JUD. BRANCH, <https://www.kscourts.org/Attorneys/Published-Attorney-Discipline-Cases> [<https://perma.cc/QP95-78SR>] (last visited Nov. 12, 2023); *Find by Name*, STATE OF MICH. ATT’Y DISCIPLINE BD., <https://www.adbmich.org/about-us/attorney-database> [<https://perma.cc/GPY7-HUP5>]; *Recent Disciplinary System Actions*, VA. STATE BAR, <https://vsb.org/Site/Site/news/disciplinary-actions.aspx> [<https://perma.cc/Y3SD-A8PZ>] (last visited Nov. 12, 2023).

competency to practice law.<sup>29</sup> Graduates must also submit unquestioningly to character and fitness reviews notable for their lack of transparency and, in some cases, their punitive effects.<sup>30</sup> The current licensure process does not address—or even contemplate—serious issues with the computer-based testing that became patently obvious during the pandemic administrations of the bar exam, and again in July 2022 even though administrators were aware the ExamSoft product could be problematic for takers.<sup>31</sup>

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29. See generally Deborah J. Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Oct. 28, 2020), <https://iaals.du.edu/publications/building-better-bar> [<https://perma.cc/5A75-VD6L>] (explaining the need to update the bar exam to more accurately measure competency for today’s workplace while also omitting the barriers that may bar entry of the diverse future legal workforce).

30. See Keith W. Rizzardi, *Excess Confidentiality: Must Bar Examiners Defy Administrative Law and Judicial Transparency?*, 34 GEO. J. OF LEGAL ETHICS 423, 427, 429–33 (2021) (explaining the role of bar examiners in exploring “whether a person is ‘fit to perform the obligations and responsibilities of an attorney’” and arguing bar examiners, unlike other regulated professionals, are not required to disclose procedures and processes used in determining bar admittance).

For the July 2022 administration of the bar examination, several applicants took to Twitter to document issues with their state boards of law examiners that included being initially excluded from taking the examination due to insufficient ridges on fingerprinting, as well as delays in confirmation of admittance because of an unavoidable issue with life-sustaining medical equipment. See Jessica Flowers (@TheFontLawer), TWITTER (July 23, 2022, 11:12 PM), <https://twitter.com/TheFontLawyer/status/1551042692544696321> [<https://perma.cc/DUJ8-ZFTF>].

Jessica Gore documented her experience with Georgia bar examiners and the exhaustive process to receive accommodations for use of an insulin pump as a Type 1 diabetic. See *id.* Nathan Blake faced an issue with Indiana bar examiners who near exam day refused to honor his fingerprint card due to insufficient details in his fingerprint ridges. See Joe Patrice, *Examiners Turn Away Applicant For ‘Insufficient Ridges’ On Fingerprints in Case That Was on Your Bar Exam Bingo Card*, ABOVE THE L. (July 21, 2022, 10:47 AM), <https://abovethelaw.com/2022/07/examiners-turn-away-applicant-for-insufficient-ridges-on-fingerprints-in-case-that-was-on-your-bar-exam-bingo-card/> [<https://perma.cc/Z983-8R7T>]. Applicants often fear reprisals from boards of law examiners and delete or anonymize critical postings. See *id.*

31. See Legal Educators with Backgrounds in Bar Licensing, *Letter to the Council of the Section of Legal Education and Admissions to the Bar: Licensing Considerations for the 2021–22 Council Agenda* (July 19, 2021) (on file with author) (addressing the many shortcomings of the 1987 policy published by the ABA Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners (NCBE)); see also Stephanie F. Ward, *Shortly Before July Bar Exam, ExamSoft Announces New Windows Laptops Likely Won’t Run Testing Software*, ABA J. (Jul. 21, 2022, 11:17 AM), <https://www.abajournal.com/web/article/new-windows-devices-likely-wont-run-bar-exam-software-examinees-learn-shortly-before-test> [<https://perma.cc/5Q84-JDF4>] (bar examinees notified just days in

At present, the legal profession owes more ethical duties to potential clients than to the newest, most vulnerable, and deeply indebted law graduates seeking admittance into its ranks.<sup>32</sup> Applicants to the bar across jurisdictions during COVID-19 administrations make this evident.<sup>33</sup> Recent law graduates across the country reported feeling hazed, pressured, burdened, and in “literal hell.”<sup>34</sup> Many spoke to media outlets about pandemic bar exam procedures only on the condition of anonymity for fear of retaliation during the character and fitness process.<sup>35</sup> The rise in demand for abolishing the bar examination in favor of admission diploma privilege grew louder on popular social media platforms like X, formerly known as Twitter.<sup>36</sup>

During and following these administrations, legal ethics issues such as conflicts, diligence, competence, and maintaining the integrity

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advance of the exam that their Windows laptops with a 12th-generation Intel Core processor probably won't work for the July bar exam). Duquesne Law had one graduate purchase a new computer for the July 2022 bar examination and had to abandon it due to the glitch.

32. Vulnerable because of the amount of debt they take on and having to wait months between passing the bar and getting their scores back before gaining employment. See Melanie Hanson, *Average Law School Debt*, EDUC. DATA INITIATIVE (June 15, 2023), <https://educationdata.org/average-law-school-debt> [<https://perma.cc/TN2E-RAGS>]. In 2021, 74% of law students graduated in debt. See *id.* The average amount students borrow to attend law school was \$119, 292, and \$96,251 to attend a top 10 law school. See *id.* The average law student owes \$160,000 in student loan debt. See *id.*

33. See Hess, *supra* note 6.

34. See *id.*; Deborah Jones Merritt et al., *Pandemic Bar Exam Left Many Aspiring Lawyers Behind*, BLOOMBERG L. (Jan. 6, 2021, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/pandemic-bar-exams-left-many-aspiring-lawyers-behind> [<https://perma.cc/88J7-JB5M>].

35. See Hess, *supra* note 6.

36. See Jeff J. Roberts, *It's Not Easy Being an Aspiring Lawyer Taking the Bar Exams During a Pandemic*, FORTUNE (July 12, 2020, 9:30 PM), <https://fortune.com/2020/07/12/taking-the-bar-exams-during-covid-lawyers-law-students-us-coronavirus-pandemic/> [<https://perma.cc/AT6Z-R23Y>]; see, e.g., Diploma Privilege for D.C. (@dp4dc), TWITTER (June 2020), <https://twitter.com/dp4dc> [<https://perma.cc/5XHP-TBAJ>]; Diploma Privilege for Florida (@DP4FL), TWITTER, (June 2020), <https://twitter.com/DP4FL> [<https://perma.cc/2BSD-CXJV>]; Diploma Privilege for Maryland (@Dp4Md), TWITTER (July 2020), <https://twitter.com/Dp4Md> [<https://perma.cc/V7P7-A3UP>]; Diploma Privilege for New York (@dp4ny), TWITTER (July 2020), <https://twitter.com/dp4ny> [<https://perma.cc/PC28-2AKM>]; TX Diploma Privilege Before We All Die (@fightforDPinTx), TWITTER (June 2020), <https://twitter.com/fight4DPinTx> [<https://perma.cc/LCR6-ESPS>]; PA for Diploma Privilege (@LSERC2020), TWITTER (June 2020), <https://twitter.com/LSERC2020> [<https://perma.cc/3HC8-E3A7>]; Illinois for Diploma Privilege (@dp4il), TWITTER (Sept. 2020), <https://twitter.com/dp4il> [<https://perma.cc/K79P-D9NF>].

of our profession, and even issues of bias in relation to access to technology and bar examinations, have all been called into question, shaking the foundations of the lawyer licensing system.<sup>37</sup> Advocates call for reform at every level, yet on an individual basis many jurisdictions are either clinging to the status quo by continuing to administer home-grown examinations, or adopting the National Conference of Bar Examiners' (NCBE) Uniform Bar Examination (UBE). And many of these decisions by bar examiners have been made hastily, after decades of holding out, without the employ of a formal task force, or only after surveying limited numbers of bar administrators and omitting a broader survey of constituents.<sup>38</sup>

This Article suggests the current lawyer licensing process is not governed in any direct and meaningful way, despite the professional self-regulation provisions embedded in the rules of professional conduct.<sup>39</sup> This creates a duty gap that abandons our newest members immediately upon graduation.<sup>40</sup> Remediating this duty gap would signal to recent law graduates that they matter.<sup>41</sup> It would be a step forward in reclaiming the trust and confidence in the licensing process.<sup>42</sup> And it would be a step forward in reclaiming overall trust in our profession.<sup>43</sup> Lawyers may be best held accountable through a

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37. See Griggs, *supra* note 7, at 2 (“The dogged insistence on [the] status quo that led to the bar exam chaos of 2020, has placed this method and purpose of bar examination under national scrutiny.”).

38. See CLAUDIA ANGELOS ET AL., THE BAR EXAM AND THE COVID-19 PANDEMIC: THE NEED FOR IMMEDIATE ACTION 1 (Mar. 22, 2020), <https://scholars.law.unlv.edu/facpub/1248> [<https://perma.cc/EW2Y-K3ZB>]. Despite these calls for reform, eleven jurisdictions have not embraced these calls. See *Uniform Bar Examination*, NCBE, [ncbex.org/exams/ube](http://ncbex.org/exams/ube) [<https://perma.cc/WM6W-ETB5>] (indicating that the jurisdictions that have not yet adopted the UBE are California, Delaware, Florida, Georgia, Hawaii, Louisiana, Mississippi, Nevada, South Dakota, Virginia, and Wisconsin). The Commonwealth of Pennsylvania adopted the UBE in 2021 (the first exam was administered in July 2022) after decades of holding out—with no notice to law school stakeholders or others. See *In re: Order Amending Rules 102, 202, 203, 204, 205, 206, 304, 311, and 341 and Adopting Rule 207 of the Pennsylvania Bar Admission Rules*, No. 897, SUP. CT. RULES DOCKET (Jan. 4, 2022). *But see id.* (Baer, J., dissenting) (stating that the 272 cut score “disadvantages Pennsylvania’s law students and law schools generally by making Pennsylvania an outlier”). Only five of thirty-nine UBE states at the time of the order had cut scores above 270, while those in Pennsylvania’s geographic region range from 266 to 270. See *id.*

39. See *infra* Part II.

40. See *infra* Part III.

41. See *infra* Part IV.

42. See *infra* Part IV.

43. See *infra* Part IV.

collective enterprise, one that necessarily includes the so-called watchmen of the legal profession—the state boards of law examiners, many members of whom are themselves licensed attorneys and judges.<sup>44</sup> Indeed, under the rules of professional conduct, all licensed lawyers are charged to be the watchmen and therefore guardians of the legal profession.<sup>45</sup>

### I. A HISTORY OF WATCHMEN—SELF-REGULATION AS STATUS SYMBOL AND CONTROL MECHANISM

The history of how lawyers are made in the United States is a motley one, but the exclusionary function of a gatekeeping class of watchmen has remained a constant.<sup>46</sup> While the vast majority of today's aspiring lawyers must all endure the rigors of a closed-book, two- or three-day bar examination consisting of essays, performance tests, and multiple-choice questions, that was not always the case.<sup>47</sup> Nor was it always the case that anyone of any gender or race could

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44. See COHEN, *supra* note 18, at 22–23. The Pennsylvania Board of Law Examiners is comprised of lawyers and judges who live in the Commonwealth. See *Board Members of Pennsylvania*, PENN. BD. OF L. EXAM'RS, [https://www.pabarexam.org/board\\_information/members.htm](https://www.pabarexam.org/board_information/members.htm) [<https://perma.cc/SER5-CC9D>] (last visited Nov. 12, 2023). California's board of law examiners is a mix of attorney and non-attorney members. See Committee of Bar Examiners, STATE BAR OF CA., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Committee-of-Bar-Examiners> [<https://perma.cc/MX3L-9LW8>] (last visited Nov. 12, 2023). The Florida Board of Bar Examiners consists of 12 members of the Florida Bar and three public members who are not lawyers. See *Rules of the Supreme Court Relating to Admissions to the Bar*, FLA. BD. OF BAR EXAM'RS, <https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-13> [<https://perma.cc/3LEE-AVV7>] (last visited Nov. 12, 2023).

45. See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 1983).

46. See David M. White, *The Definition of Legal Competence: Will the Circle Be Unbroken?*, 18 SANTA CLARA L. REV. 641, 653–56 (1978).

47. See Catherine M. Christopher, *Modern Diploma Privilege: A Path Rather Than a Gate*, 107 MINN. L. REV. 2777, 2783–84 (2023) (detailing the reach of the National Conference of Bar Examiners); David L. Hudson, Jr. & Andrea Gemignani, *The Other Bar Hurdle: An Examination of the Character and Fitness Requirement for Bar Admission*, 48 MITCHELL HAMLINE L. REV. 500, 501 (2022). Today's bar examination is the brainchild of the National Conference of Bar Examiners, which first administered the MBE in 1972. See Nat'l Conf. of Bar Exam'rs, *NCBE Testing Milestones*, 90 BAR EXAM'R 24, 24 (2021). Author's Note: The character and fitness portion of the bar examination that all examinees must pass is outside of the scope of this Article, yet is very much a part of the bar exam process, and has its own set of gender, ethnic, and racial concerns attached to it.

qualify to sit for the bar examination.<sup>48</sup> People of color and women were systematically excluded from admittance to the bar due to outright racism and to cultural attitudes painting females as too gentle, timid, delicate, and subject to emotional swings to practice law.<sup>49</sup> Immigrants and their progeny also found themselves left out of the legal profession at the turn of the century due to a limited number of opportunities to secure apprentice positions.<sup>50</sup>

Prior to the advent of the written examinations, aspiring lawyers “read [the] law,” or engaged in an apprenticeship model by working under the aegis of a more experienced practitioner and performing work as a law clerk.<sup>51</sup> Several important figures from history became lawyers in this manner, such as John Adams and Thomas Jefferson.<sup>52</sup> Shortly after the American Revolution, the country saw the proliferation of more formal law schools, including The Litchfield

48. See Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1201 (2008).

49. See *id.* at 1202 (“In 1847, the Bar in Allegheny County, Pennsylvania, refused to admit George B. Vashon because he was black.”) (citing J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944, at 152 (1993)). In 1912, the ABA restricted its membership to white lawyers only. *ABA Timeline*, AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/timeline/](https://www.americanbar.org/about_the_aba/timeline/) [<https://perma.cc/Q8UL-UAHT>] (last visited Nov. 12, 2023). The ABA rescinded “the membership of William H. Lewis, the first black assistant U.S. attorney general, who had been elected in August 1911.” See *id.* In addition, only white men were admitted as members. See *id.* Regarding the cultural exclusion of women, see Langford, *supra* note 48, at 1201; see also Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 497 (1985) (“The only substantial group effectively excluded on grounds of character seems to have been women. To nineteenth century jurists, the ‘natural and proper timidity and delicacy which belongs to the female sex’ disables it from legal practice; the ‘peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife.’”) (citing *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), and citing *In re Goodell*, 39 Wis. 232, 245 (1875)).

50. See RICHARD L. ABEL, *AMERICAN LAWYERS* 43 (1989).

51. See Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 366–67 (1996). Massachusetts became the first state to have a written bar examination in 1855. See *id.* at 366 (citing DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 810–11 (2d ed. 1995)); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 198 (1986); see also Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 126–28 (1976) (detailing the system of apprenticeship in colonial America).

52. See Livia Gershon, *The Origins of American Law Schools*, *JSTOR DAILY* (Dec. 30, 2014), <https://daily.jstor.org/america-runs-law-schools/> [<https://perma.cc/QJ23-WAQQ>] (detailing the origin of American law schools).

Law School, which was founded in 1784 by Tapping Reeve.<sup>53</sup> Competitors such as Harvard, William & Mary, and Yale soon followed.<sup>54</sup> Today there are 196 American Bar Association (ABA) accredited law schools operating in the United States along with 36 non-ABA-accredited law schools.<sup>55</sup>

At one point in the history of how lawyers are made, diploma privilege—or the process by which a law school graduate would automatically become licensed to practice law after successfully completing a program of study—was a less mythical process.<sup>56</sup> It first appeared in Virginia in 1842 by statute.<sup>57</sup> By 1870, seven states via their nine law schools introduced the privilege by which graduation equaled automatic admission to the bar in the school's jurisdiction.<sup>58</sup> The University of Wisconsin secured the right to diploma privilege for its students around 1870, and 152 years later the state of Wisconsin is home to two of the three law schools in the country that continues to license attorneys via diploma privilege.<sup>59</sup> The proliferation of diploma

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53. See Edward T. Howe, *The Litchfield Law School: Connecticut's First Law School*, CONN. HIST. (Mar. 30, 2021), <https://connecticuthistory.org/the-litchfield-law-school-connecticuts-first-law-school/> [<https://perma.cc/7JFF-LGZA>] (detailing early legal education and the apprentice system).

54. *About*, HARVARD L. SCH., <https://hls.harvard.edu/about/> [<https://perma.cc/5W6P-R5CH>] (last visited Nov. 12, 2023). Harvard Law School was founded in 1817. See *id.* Yale Law School was founded around 1810. *Our History*, YALE L. SCH., <https://law.yale.edu/about-yale-law-school/glance/our-history> [<https://perma.cc/MTS8-6T8A>] (last visited Nov. 12, 2023). William & Mary Law School was founded in 1779. Davison M. Douglas, *Jefferson's Vision Fulfilled*, WM. & MARY, <https://law.wm.edu/about/ourhistory/index.php> [<https://perma.cc/C3VT-WKLW>] (last visited Nov. 12, 2023); Dudley W. Woodbridge, *Short History of the Marshall Wythe School of Law*, WM. & MARY L. SCH. (1954), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1002&context=history> [<https://perma.cc/FB36-VAJL>].

55. *List of ABA-Approved Law Schools*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/in\\_alphabetical\\_order/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/) [<https://perma.cc/8M9S-VWZ7>] (last visited Nov. 12, 2023); *Other Law Schools*, L. SCH. ADMISSION COUNCIL, <https://www.lsac.org/choosing-law-school/find-law-school/non-aba-approved-law-schools> [<https://perma.cc/B7PW-HL62>] (last visited Nov. 12, 2023). ABA stands for the American Bar Association, which is the licensing body in the U.S. for law schools. *Legal Education*, AM. BAR ASS'N, <https://www.americanbar.org/topics/legaled/> [<https://perma.cc/Z84X-4FNH>] (last visited Nov. 12, 2023).

56. See ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 248–59 (1921).

57. See *id.* at 249.

58. See ABEL, *supra* note 50, at 43 (1989).

59. See *id.*; *Services for Attorneys*, WIS. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/9BAM->



privilege was cut off at the knees starting in 1892 when the ABA established itself as a national gatekeeper and launched a successful campaign to have diploma privilege abolished in favor of a system of law school regulation and bar examinations to measure lawyer competence.<sup>60</sup> There is also evidence suggesting South Carolina eliminated diploma privilege in the 1950s to exclude Black graduates of the privately-owned Allen University from obtaining admittance this way instead of sitting for a bar examination.<sup>61</sup> Today, all jurisdictions require or offer access to a written examination as a method of licensure for in-state and out-of-state applicants, and taking a written bar examination is the conventional manner by which modern law school graduates get ushered into the legal profession.<sup>62</sup>

The institution of examinations did little to help, and may have encouraged, exclusion.<sup>63</sup> An example of the socioeconomic exclusionary nature of the early bar exam can be found in the Commonwealth of Pennsylvania.<sup>64</sup> On January 23 and 24, 1903, the Preliminary Examination for entry into one of the country's older bars

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CVW3] (last visited Nov. 12, 2023) (describing under the Diploma Privilege subheading that graduates of the Wisconsin Law School and Marquette University Law School are admitted to the practice of law by complying with the terms of SCR 40.03 along with a certificate of competence from their law school and a certification by the Board of Law Examiners to their character and fitness); *see also* WIS. SUP. CT. R. 40.03; *Daniel Webster Scholar Honors Program*, U.N.H. FRANKLIN PIERCE SCH. L., <https://law.unh.edu/academics/daniel-webster-scholar-honors-program> [https://perma.cc/A28W-QXA9] (last visited Nov. 12, 2023) (demonstrating that the other law school with diploma privilege is the University of New Hampshire Franklin Pierce College of Law's Daniel Webster Scholars Program); Christopher, *supra* note 47, at 2793–94.

60. *See* White, *supra* note 46, at 659 n.84 (1978) (detailing the rise and expansion of the powers of the ABA, as well as the establishment in 1900 of the Association of American Law Schools (AALS), which led to the diminution of the use of diploma privilege and a rise in the number of watchmen at the state and national level); *see also* Robert Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 405, 458 (Donald Fleming & Bernard Bailyn eds., 1971).

61. *See* Christopher, *supra* note 47, at 2785 (citing W. LEWIS BURKE, ALL FOR CIVIL RIGHTS: AFRICAN AMERICAN LAWYERS IN SOUTH CAROLINA, 1868–1968, at 95–96 (2017)) (detailing the reach of the National Conference of Bar Examiners).

62. *See generally* *Uniform Bar Examination*, NAT'L CONF. BAR EXAM'RS (2023), <https://www.ncbex.org/exams/ube/> [https://perma.cc/8TTH-ZQZ6] (listing the jurisdictions in which the Uniform Bar Exam is administered).

63. *See* White, *supra* note 46, at 654.

64. *See* 1903 *Preliminary Examination*, PA. BD. L. EXAM'RS, [https://www.pabarexam.org/board\\_information/history/prelim.htm](https://www.pabarexam.org/board_information/history/prelim.htm) [https://perma.cc/M358-45RS] (last visited Nov. 12, 2023).

was administered.<sup>65</sup> The forty-three applicants were asked to perform relatively complex geometry and algebra calculations, as well as to translate from its original Latin selections from Book IV, Chapter VII, of Julius Caesar's *The Gallic Wars*.<sup>66</sup> The exam tested an in-depth knowledge of the history of both England and the U.S. in the afternoon paper administered from 2 p.m. to 6 p.m., and the exam concluded with the following question: "Name in . . . chronological order the several Presidents of the United States, and give a brief account of that event in the respective administrations of five of them which you think of the greatest national or international significance."<sup>67</sup> The knowledge required for passage of this exam was aimed at a certain class of would-be lawyers as a structured statewide school system did not exist, and many people could not obtain education on these topics, and certainly not advanced degrees.<sup>68</sup> Applicants taking this Preliminary Examination did not need to know how to apply the common law elements of murder, nor any of the exceptions to the hearsay rule.<sup>69</sup> In fact, there were no law-related questions to be found on this Preliminary Examination.<sup>70</sup>

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65. See *id.* (citing briefly to the history of the PA Bar); see also Joel Fishman, *The Establishment of the Pennsylvania State Board of Law Examiners, 1895–1902*, PA. BAR ASSOC. Q. 73, 76 (2005) (describing how as early as 1759, the PA Supreme Court required attorneys to be examined before admission to Court, how local rules for Allegheny County appear as early as 1811, and how in 1823 the Philadelphia local rules called for all attorneys to be citizens of the United States and of lawful age).

66. See *Sample Preliminary Examination*, PA. BD. L. EXAM'RS, [https://www.pabarexam.org/board\\_information/history/1903.htm](https://www.pabarexam.org/board_information/history/1903.htm) [<https://perma.cc/VTM2-TBNE>] (last visited Nov. 12, 2023) (demonstrating how applicants also had to translate passages from Virgil and Cicero, as well as to name some of Cicero's "most distinguished contemporaries" and to give a "brief sketch of his character and career as a lawyer, orator, and statesman"). Ask any law student today if they could perform algebraic equations and the response would likely be, I didn't go to law school to do math. Indeed, most of us do not.

67. See *id.*

68. See *id.* After the first preliminary examination, drafted by the original members of the Pennsylvania Board of Law Examiners, was assessed, only twenty-four passed, six received conditional passes, and thirteen were unsuccessful in their attempt. In other words, there was about a 55.8% pass rate, which would be unacceptable by today's ABA standards. See AM. BAR ASS'N, REVISIONS TO STANDARD 316: BAR PASSAGE (REVISED 5/6/2019), at 1 (2019), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may19/may-7-19-316-memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may19/may-7-19-316-memo.pdf) [<https://perma.cc/SA86-RNFD>].

69. See S. Rep. No. 93-1277 (1974) (demonstrating that, to be fair, the Federal Rules of Evidence were not adopted by the Supreme Court of the United States until Nov. 20, 1972, and became effective on July 1, 1973).

70. See *Sample Preliminary Examination*, *supra* note 66.

But no matter what the licensure mechanism, from reading law to passing the bar exam, at every single point in the history of American lawyers, the access to the practice of law has been regulated by watchmen.<sup>71</sup> Practitioners selected apprentices, practitioners enforced exclusions based on race, gender, or socioeconomic limitations, and law schools and legislatures granted or withheld diploma privilege.<sup>72</sup> While self-regulation has historical roots as a hallmark of the legal profession and a means by which lawyers and boards of law examiners claim to reduce client uncertainty and to protect the public from lawyer incompetence, self-regulation has often appeared to outsiders as an insular process designed to better protect inept members of the profession rather than the society they serve.<sup>73</sup> Additionally, history would show there has been underenforcement of ethical rules that control misconduct.<sup>74</sup> As we evaluate self-regulation over time, we see concern that it becomes merely an assertion of status.<sup>75</sup> Critics say legal self-regulation betrays self-interested behaviors, and perhaps nowhere is that made more clear than by examining the way in which the watchmen of today focus their energies on controlling the population with no leverage in the established lawyer governance system: new law graduates.<sup>76</sup> After all, one purpose of erecting high barriers to entry in any industry has always been to stymie competition.<sup>77</sup>

This Article proceeds in three sections. First, it will detail the rise of the board of law examiners as the primary gatekeeper of the legal profession and show how a lack of transparency, typified by

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71. See ABEL, *supra* note 50, at 40 (explaining that there was little regulation during the formative years of the legal profession).

72. See *id.* at 85–90

73. Protecting the public and public service is a strong theme of the Model Rules of Professional Conduct Preamble and Scope and the individual boards of law examiners across the country. See MODEL RULES OF PRO. CONDUCT, at pmb1., scope (AM. BAR ASS'N 1983); see, e.g., PA. BD. OF L. EXAM'RS, [https://www.pabarexam.org/\[https://perma.cc/AG6C-TR6B\]](https://www.pabarexam.org/[https://perma.cc/AG6C-TR6B]) (last visited Nov. 12, 2023) (“The mission of the PA Board of law examiners preserves the integrity of the legal system, and protects all individuals seeking legal representation from unethical or incompetent lawyers.”).

74. See ABEL, *supra* note 50, at 38.

75. See *id.* at 37–38.

76. See generally Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 *FORDHAM L. REV.* 1079, 1081, 1096, 1099 (2005) (arguing that cartelization of the legal profession has led to a decline in professionalism in the progression, and that self-regulation for lawyers looks like self-service to the needs of its members and reducing entry into the legal profession, while increase society demands for the services of lawyers).

77. See generally *id.* at 1098.

restricted access to both funding and governance of these boards, obscures this process to the detriment of bar applicants.<sup>78</sup> Second, it will identify the ethical duty gap between bar applicants and all organizations involved in the bar licensure process including the NCBE and the bar examination industrial complex, which profits from the production and control of bar preparation programming.<sup>79</sup> Finally, it will conclude by offering suggestions on how to remedy the duty gap to restore faith and trust in the bar licensure process by utilizing existing structures and guidance from the rules of professional conduct.<sup>80</sup>

#### A. The Rise of The Board of Law Examiner Class, and the Implications of Insular Bureaucratic Control Mechanisms on Diversity

Boards of law examiners operated as gatekeepers of the profession well before adoption of the Canons of Professional Ethics by the ABA, which set the floor for the self-regulation of lawyer conduct in 1908.<sup>81</sup> That meant the state-level regulation of lawyers was left to the personal proclivities and morals of those in power.<sup>82</sup>

In 1872, New Hampshire's Superior Court was the first to establish a committee charged with overseeing the admission of applicants to the bar.<sup>83</sup> In less than two decades, Ohio, Wisconsin, and Connecticut had instituted similar systems.<sup>84</sup> After several years of

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78. See *infra* Section II.A.

79. See *infra* Part III.

80. See *infra* Part IV.

81. See DRINKER, *supra* note 12, at appx. C (demonstrating that the code of ethics was adopted and explaining what the individual ethics are); see also COMM. ON CODE OF PROF. ETHICS, FINAL REPORT OF THE COMMITTEE ON THE CODE OF PROFESSIONAL ETHICS, 567-69, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/1908\\_code.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf)

[<https://perma.cc/WQ6D-KCGJ>] (demonstrating that the code of ethics was adopted in 1908 and that boards of law examiners were operating as gatekeepers before that).

82. See Jarvis, *supra* note 51, at 375.

83. See *id.* (citing ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, 102 (1921)); see also Alfred Z. Reed, *The Opportunities of a Board of Bar Examiners*, 7 AM. L. SCH. REV. 591, 592 (1932) (detailing the rise of the state boards of law examiners beginning between 1868 and 1878, starting in New Hampshire, and also detailing two earlier unsuccessful attempts made at establishing a National Conference of State Boards of Law Examiners in 1900 and again in 1904).

84. See Jarvis, *supra* note 51, at 375. In 1902, the fee to join the bar in Pennsylvania was ten dollars. See *id.*; Fishman, *supra* note 65, at 90. Today, it costs \$650 to file the application and further fees to take the exam. See Jarvis, *supra* note 51, at 375; *Bar Exam Fees and Deadlines*, PA. BOARD OF L. EXAM'RS (last visited

intense debate, the Supreme Court of Pennsylvania created a board of law examiners by a *per curium* order in May 1902, and it also adopted ten rules pertaining to admission of lawyers by the new State Board of Law Examiners.<sup>85</sup> Rules required law school attendance, recommendation by members of the state board of law examiners, a showing of good moral character, the passage of a written exam, and of course paying a fee.<sup>86</sup> The echoes of these historical rules can still be found in the charges and on the checklists of today's boards of law examiners.<sup>87</sup>

By 1917, three-quarters of the states bestowed a central certifying authority on boards of law examiners, and an increased emphasis was placed on strengthening the moral character inquiries conducted on applicants.<sup>88</sup> While the depth and breadth of the underlying racism and sexism embodied in the early days of the character and fitness examinations conducted by boards of law examiners is outside the scope of this Article, it is important to note that at least some of the common concerns underlying the increase in oversight at this time was motivated by prejudice-based protectionism under the guise of professional self-regulation.<sup>89</sup> When applicants were denied entry to a state's bar, the only recourse was to take an action to court,<sup>90</sup> which was really just asking another watchman of

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Nov. 12, 2023), [https://www.pabarexam.org/bar\\_exam\\_information/fees.htm](https://www.pabarexam.org/bar_exam_information/fees.htm) [<https://perma.cc/N774-FNPN>].

85. See Fishman, *supra* note 65, at 90.

86. See *id.* at 90.

87. See, e.g., MICH. RULES BD. LAW EXAM'RS 1, 2, 3, 6 (2023).

88. See Rhode, *supra* note 49, at 499 (1985) (citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980S, 99 (G. Edward White et al. eds., 1983)); see also CORINNE LATHROP GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT 61–64 (1966).

89. See Rhode, *supra* note 49, at 499–500 (suggesting an underlying concern of bar examiners at the time was to restrict membership in the legal profession by excluding Eastern European immigrants, people of color, and Jewish persons); see also, Carol M. Langford, *supra* note 48, at 1206 (citing Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Character*, 68 IND. L.J. 647, 649 (1993)). The Commonwealth of Pennsylvania is noted for maintaining a preceptor system in 1928 that included an initial interview that afforded board of law examiners with an opportunity to “dissuade the ‘unworthy’ candidates from pursuing” the law, which at the time included many applications from members of the Jewish faith. See *id.*

90. See Langford, *supra* note 48, at 1207–08 (2008) (citing *Schware v. Board of Law Examiners*, 353 U.S. 232, 246 (1957)). *Schware* is cited as a turning point in the lawyer licensing process to a more rational and less subjective standard. See *id.* In *Schware*, the Board of Bar Examiners in New Mexico denied petitioner the right to sit for the bar exam on the ground that he lacked “good moral character.” See *Schware*,

higher authority to examine the motivations of the board of law examiners issuing the denial as part of its gatekeeping function. Members of the state supreme courts face a challenge similar to the board of law examiners' membership in that they also lack diversity on the bench.<sup>91</sup> This gatekeeper in particular is largely a homogenously Caucasian body because only 17% of national state supreme court justices identify as people of color even today.<sup>92</sup>

Modern legal ethics scholars appear to have demonstrated boards of law examiners themselves may not overtly exclude candidates seeking admission to the bar on the basis of prejudicial examinations of character as had occurred so obviously in the past.<sup>93</sup> In 1985, Professor Deborah Rhode found about one in 500 applicants was kept from becoming licensed on the grounds of character and fitness.<sup>94</sup> However, if the actions being taken by the boards of law examiners are ostensibly a regulatory scheme designed to protect the public from unfit lawyers, on closer inspection it appears instead as a "cleverly disguised guild arrangement" protecting those controlling the politics of the bar.<sup>95</sup> The vagaries of enforcement, the emphasis on policing character and fitness, and the lack of transparency in the

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353 U.S. at 239 (1957). His background revealed that for a period of four to six years, Schwere had used several aliases, had been arrested but never convicted, and was a member of the Communist Party. *See id.* at 246. The State Supreme Court upheld the decision of its board of law examiners. *See id.* at 239. The Supreme Court reversed on the grounds that the State of New Mexico denied Petitioner's right to due process by denying him the opportunity to sit for the bar exam and avail himself of the opportunity to practice law. *See id.* at 247. The court also held that a state can require high standards for qualification to become a member of the bar, but that any specified qualification must have a rational connection with the applicant's fitness or capacity to practice law. *See id.* at 239.

91. *See* Mac Brower, *State Supreme Courts Don't Match American Diversity*, DEMOCRACY DOCKET (Nov. 30, 2021), <https://www.democracydocket.com/analysis/state-supreme-courts-dont-match-americas-diversity> [<https://perma.cc/XP7M-SGQN>].

92. *See id.*

93. *See* Rhode, *supra* note 49, at 504, 512–513. Rhode's landmark and comprehensive empirical study conducted in 1985 demonstrates that while candidates may not be excluded from the outset on grounds of character, the processes by which the state boards administer these character and fitness investigations are hampered by a lack of time, financial resources, and staffing, which leads to a wide degree in variability in consistency from jurisdiction to jurisdiction. *See id.* This has meant more of the duty of screening bar applicants may be falling to law schools. *See id.*

94. *See id.* at 516; *see also* Patrick L. Baude, *An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Character*, 68 IND. L. J. 647, 651 (1993).

95. *See* Baude, *supra* note 94, at 648.

operations of these gatekeepers have led scholars like Rhode to conclude, “the evolution of current oversight structures parallels the growth of societies for the suppression of vice,” meaning as these watchmen become increasingly bureaucratic and administrative they lose their sense of a moral sentiment and instead become just another barrier to entry.<sup>96</sup> Critics point to the lack of inclusion of diverse membership on the boards of law examiners, along with the heightened secrecy, lack of transparency, and immunity from challenges surrounding actions taken by the board as additional reasons for treating these watchmen with suspicion.<sup>97</sup>

Research increasingly shows that even if the not-very-diverse boards of law examiners themselves are not overtly acting with discriminatory intent, their slavish adherence to the administration of an increasingly “uniform” bar examination may be getting the job done regardless.<sup>98</sup> Adopted at the time of this Article by forty-one out of fifty-one jurisdictions, the UBE is under fire by legal scholars and educators whose studies suggest that race is a statistically significant factor in the bar passage rates for that exam.<sup>99</sup> So is sex, according to Professor Jane Grise, whose recent study appears to show women do not perform as well on multiple choice tests and this form of assessment can interfere with a female’s ability to demonstrate her knowledge.<sup>100</sup> It is important to note the UBE consists of 200 multiple-

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96. See Rhode, *supra* note 49, at 591 (citing SYDNEY SMITH, THE SOCIETY FOR THE PREVENTION OF VICE, *reprinted in* SELECTED WRITINGS OF SYDNEY SMITH 287, 292 (W.H. Auden ed., 1956)). Rhode further contends that if a profession’s regulatory process is to be truly meaningful, that its force should be “conserved for acts bearing directly on professional practice.” See *id.* at 591.

97. See Langford, *supra* note 48, at 1218 (noting that in CA information is not readily available about the make-up of the membership of the Moral Character Committee, and that similar information is missing from the websites of other states).

98. See Scott Devito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 UNIV. MICH. J. L. REFORM 597, 635 (2022).

99. See *UBE Jurisdictions*, NAT’L CONF. BAR EXAM’RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> [https://perma.cc/9YYU-9SNJ] (last visited Nov. 12, 2023); Devito et al., *supra* note 98, at 635 (using publicly available data to draw conclusions about a law school’s ethnic make-up and correlating bar pass success rates, and highlighting the need for additional data and research).

100. See generally Jane Bloom Grise, *Question #1: Is There a Gender Gap in Performance on Multiple Choice Exams?* A. Always B. Never C. Most of the Time, 43 WOMEN’S RTS. L. REP. 140, 143 (2021) (contrasting the underperformance of women on the multiple-choice portions of tests with their overperformance on the essay portions).

choice questions weighted at a full 50% of the examination.<sup>101</sup> Finally, being a female has also been penalized by bar examiners who employ punitive rules and regulations regarding menstruation, including not allowing bar applicants to carry hygiene products discretely, and not allowing for adequate bathroom breaks during the remote administration of the exam during the pandemic.<sup>102</sup> Humiliation, harassment, and even mandating that bar takers use hygiene supplies provided by the board of law examiners themselves in certain jurisdictions, or only placing those products in the women's restrooms and thereby further marginalizing transgender or non-binary individuals, all received greater focus in the wake of COVID-19.<sup>103</sup>

Alfred Zantzing Reed documented the legal profession's march toward an examination system for law school graduates and perhaps presciently noted that both parties—those in favor of diploma privilege and those in favor of bar examinations—were actually wrong for asserting the superiority of their polar opposite positions when neither one was the only possible alternative to the other.<sup>104</sup> What resulted was the rise of the bar examiner class and bar admission by examination only, with the bar examiner gatekeepers pretending, “to greater powers of discrimination than it possesses” in determining who is and who is not fit to be a licensed lawyer.<sup>105</sup> Reed noted the rise of the examination system led to an exam expert crammers could beat, which means it was not really a test of competence but of memorization.<sup>106</sup> A century later, this claim not only plagues the bar exam, but gives rise to a strategy that enforces the multi-million dollar bar examination industrial complex.<sup>107</sup> Now, even artificial intelligence (AI) developers are finding ways to hack the

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101. See *UBE Scores*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/exams/ube/scores> [<https://perma.cc/4DR4-LWCL>] (last visited Nov. 12, 2023).

102. See Marcy L. Karin et al., *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1, 3, 6–7 (2021).

103. See *id.* at 6–8.

104. See REED, *supra* note 56, at 270.

105. See *id.*

106. See *id.*

107. See Andrea A. Curcio, *Society of American Law Teachers Statement on the Bar Exam July 2002*, 52 J. LEGAL EDUC. 446, 447, 448 (2002) (“Second, the [bar] examination overemphasizes the importance of memorizing legal doctrine. Memorizing legal rules in order to pass the bar examination does not guarantee that what is memorized will actually be retained for any length of time after the exam . . . . In fact, practicing lawyers who rely upon their memory of the law, rather than upon legal research, may be subject to judicial sanctions and malpractice claims.”).



memorization-based bar examination.<sup>108</sup> In December 2022, AI platform ChatGPT-3.5 achieved a 50.3% on the MBE, and achieved passing scores in the Evidence and Torts sections of the multiple-choice portion of the bar examination but did not pass the exam as a whole.<sup>109</sup> Just three months later, ChatGPT-4 passed the bar exam having achieved a score that placed its attempt in the 90<sup>th</sup> percentile of human bar examinees.<sup>110</sup>

Today, every jurisdiction has a board of law examiners charged with determining whether or not an applicant meets the qualifications for licensure set by that jurisdiction's state supreme court.<sup>111</sup> These

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108. See MICHAEL J. BOMMARITO & DANIEL MARTIN KATZ, *GPT TAKES THE BAR EXAM* 1, 6 (2022).

109. See *id.* (noting that while the AI program did not pass the bar exam as a whole, it came disturbingly close to the average 68% correct law graduates with at least seven years of higher education are able to achieve). The results exceeded the expectations of the testers and struck fear into the heart of legal academics everywhere. See *id.*; see also Debra Cassens Weiss, *AI Program Earned Passing Bar Exams Scores on Evidence and Torts; Can it Work in Court?* (Jan. 12, 2023, 9:03 AM), <https://www.abajournal.com/news/article/ai-program-earned-passing-bar-exam-scores-on-evidence-and-torts-can-it-work-in-court> [<https://perma.cc/3ZSR-73LB>] (noting some legal scholars' fears that students will use AI programs to cheat on take-home exams).

110. See Debra Cassens Weiss, *Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile*, ABA JOURNAL (Mar. 16, 2023, 1:59 PM), <https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile> [<https://perma.cc/8JBU-WXBW>].

111. See *About the Board*, TEX. BD. L. EXAM'RS, <https://ble.texas.gov/about> [<https://perma.cc/K2KR-36G9>] (last visited Nov. 12, 2023) ("The Texas Board of Law Examiners is an agency of the Texas Supreme Court. The Board's sole purpose is to qualify applicants for admission to the State Bar of Texas. In performing its duties, the Board administers and interprets the Rules Governing Admission to the Bar of Texas . . . Each member must be a U.S. Citizen, licensed to practice law in Texas, over the age of 35, and have been a practicing lawyer or judge of a court of record for a combined total of 10 years."); FLA. BD. BAR EXAM'RS, <https://www.floridabarexam.org/> [<https://perma.cc/8C9G-GD5Q>] (last visited Nov. 12, 2023) (explaining that the FL Board of Law Examiners is an administrative agency of the Supreme Court, its primary purpose being screening applicants for character and fitness requirements, and to ensure new members demonstrate minimum technical competence, which means passing the FL bar exam); PA. BD. BAR EXAM'RS, *supra* note 73 (explaining that the PA Board of Law Examiners (PABOLE) states a stronger mission than mere licensing). The PABOLE is responsible to preserve the integrity of the legal system, and to protect all individuals seeking representation from unethical or incompetent lawyers. See *id.* The members of the board charge themselves with evaluating the likelihood of an applicant's ability to uphold, and commit to, the standards of the profession. See *id.* Members of the PABOLE are lawyers and judges. See *id.*; N.H. BD. BAR EXAM'RS REGULS., BOARD OF BAR EXAMINERS REGULATIONS, <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-07/nh-board-of-bar-examiners-regulations.pdf> [<https://perma.cc/F8DK-G9CV>]; see also

boards are overseen by members of the supreme court of each state and act like an administrative agency.<sup>112</sup> They are largely funded by the appropriations committee for the judiciary in each jurisdiction, with budgets ranging from \$1.8 million in Virginia to \$5.7 million in New York.<sup>113</sup> However, some jurisdictions do not provide easily-accessible financial data, including Pennsylvania and California.<sup>114</sup> Boards of law examiners are the ultimate watchmen of the legal profession as it exists today because they control the fate of all bar applicants, and by statute, most are shielded from civil liability for conduct arising out of the performance of their duties.<sup>115</sup> Membership

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*Rule 42 – Admission to the Bar; Board of Bar Examiners; Character and Fitness Committee*, CASETEXT, <https://casetext.com/rule/new-hampshire-court-rules/new-hampshire-rules-of-the-supreme-court/administrative-rules/rule-42-admission-to-the-bar-board-of-bar-examiners-character-and-fitness-committee> [<https://perma.cc/9H9L-8L8X>] (noting that NH, the state boasting the first BOLE in the U.S., charges its membership with determining eligibility of bar applications for admission and shields them with immunity from civil liability for any conduct arising out of the performance of their gatekeeping duties).

112. See *About the Board*, *supra* note 111.

113. See, e.g., JUD. DEPT., COMMONWEALTH OF VIRGINIA 2020–2022 BIENNIAL BUDGET 6 (2020), <https://dpb.virginia.gov/budget/buddoc21/BudgetDocument.pdf> [<https://perma.cc/QK3E-LA6N>]; N.Y. STATE UNIFIED CT. SYS., BUDGET FISCAL YEAR 2022 96 (2022), [https://ww2.nycourts.gov/sites/default/files/document/files/2020-12/FY2022-JUDICIARY-Budget-Final\\_0.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2020-12/FY2022-JUDICIARY-Budget-Final_0.pdf) [<https://perma.cc/95GZ-JMBC>]; BOARD OF BAR EXAMINERS, BUDGET SUMMARY FY 2021 ENACTED (2021), <https://budget.digital.mass.gov/summary/fy20/enacted/judiciary/bar-examiners/?tab=budget-summary> [<https://perma.cc/57EZ-NY85>] (explaining that Massachusetts Board of Examiners budget was \$1.85 million for the 2021 fiscal year).

114. E.g., COMMONWEALTH OF VA., *supra* note 113. Author’s Note: Obtaining information about the financing of Boards of Law Examiners ranges from moderately difficult to impossible. See *id.* Moderately difficult describes the process for obtaining information about financing in jurisdictions such as NY and VA because it takes time to sift through lengthy legislative documents. See *id.*; PA. BD. LAW EXAM’RS, *supra* note 73. It is impossible to obtain information about the financing of the Board of Law Examiners for jurisdictions like Pennsylvania because the Board of Law Examiners is a self-funded entity and does not have to disclose its financials. See *id.*; *Committee of Bar Examiners*, STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Committee-of-Bar-Examiners> [<https://perma.cc/DM57-2FNZ>] (last visited Nov. 12, 2023). Obtaining information from the Boards of Law of Examiners in California is impossible because documents cannot be found and requests for budget information were ignored. See *id.*

115. See *2020 Statistics*, BAR EXAM’R, <https://thebarexaminer.ncbex.org/article/spring-2021/2020-statistics> [<https://perma.cc/E4RZ-W355>] (explaining most recent statistics show that in 2020, 60,784 people sat for the bar examination across all jurisdictions); see N.H. SUP. CT., R. 42 § XV(a) (LexisNexis 2023) (“[T]he board members, committee members, the administrator of the office of bar admissions, and their staff, counsel, investigators, proctors, agents, and members of any hearing

on these boards varies from jurisdiction to jurisdiction, but most are appointed by a state's high court and must be members in good standing for that state's bar.<sup>116</sup>

In terms of a lack of diversity of representation, most members of today's boards of law examiners hail from large or medium-sized law firms and do not allow participation from law school faculty members.<sup>117</sup> According to the American Lawyer's 2021 Diversity Scorecard, the total number of minority lawyers rose from 17.8% in 2020 to just 18.5% in 2021, and the issue is so dire that large companies such as Facebook, Hewlett Packard (HP, Inc.), and Novartis are using financial pressure to encourage these firms to diversify.<sup>118</sup> Yet progress in the area remains slow, meaning diversity

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panels, in performing their duties under this rule, are regarded as acting as officers of the court and shall be immune from civil liability for any conduct arising out of the performance of their duties.”); 204 PA. CODE pt. IV, ch. 71, subch. A, 105(A) (2023) (providing civil immunity to examiners acting within the scope of employment); 204 Pa. CODE pt. IV, ch. 71, subch. A, R. 105(B) (2023) (“Records, statements of opinion and other information regarding an applicant for admission to the bar communicated by any entity, including any person, firm, or institution, without malice, to the Board of Law Examiners, or to its members, employees or agents are privileged, and civil suits predicated thereon may not be instituted.”).

116. See *Committee of Bar Examiners*, *supra* note 114 (“[The State Bar of California’s Committee of Bar Examiners] includes nine non-attorney members, appointed by the Governor, the Senate Rules Committee and the Speaker of the Assembly. The California Supreme Court is responsible for appointing 10 examiners to the Committee of Bar Examiners. At least one of the 10 examiners must be a judicial officer in this state, and the balance must be California licensed attorneys. At least one of the attorney examiners shall have been admitted to practice law in California within three years from the date of his or her appointment.”); *Supreme Court Boards*, UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/> [<https://perma.cc/Z5ZT-J7HJ>] (last visited Nov. 12, 2023) (“[Board of Law Examiners is a Supreme Court board comprised of] seven members of the Pennsylvania bar who are eligible to serve a maximum of two three-year terms. It is comprised of lawyers and judges who reside and work throughout the state. There are no non-lawyer members of this board.”).

117. See also *Membership Requirements for the Board of Law Examiners*, UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/courts/supreme-court/committees/membership-requirements-for-the-board-of-law-examiners> [<https://perma.cc/NZX3-KRUG>] (explaining Pennsylvania specifically excludes law school faculty from membership). See generally M.A. Cunningham, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 TUL. L. REV. 1015, 1024–25 (1992) (noting that boards of law examiners do not pull membership from small, solo firms, or government employees. Instead favoring members of large or medium-sized law firms, which has an effect on diversity and representation. “Less than one-quarter of all states allow for a limited lay membership on such boards.”).

118. See Staci Zaretsky, *The 2021 Biglaw Diversity Scorecard*, ABOVE L. (May 24, 2021), <https://abovethelaw.com/2021/05/the-2021-biglaw-diversity->

among gatekeepers inevitably moves along at a similar rate and thus continues to suppress the appetite for instituting change.<sup>119</sup> Relying on our own “good faith” that boards of law examiners will put a premium on eliminating racial disparities and the disparate impacts of bar examinations has not yet been enough to guarantee meaningful oversight of these issues so long as these gatekeepers continue to operate unchallenged.<sup>120</sup>

## B. No Formal Character and Fitness Requirements for Bar Examiners

If the boards of law examiners are meant to act as the blunt bureaucratic instrument for jurisdictions to determine an applicant’s fitness to become a licensed member of the bar, what unique ethical considerations go into the running of such an important operation?<sup>121</sup> The short answer is that no single independent or unifying body of promulgated (and thus enforceable) ethical rules directly speaks to the critically important duties bar examiners engage in while managing the lawyer licensure process.<sup>122</sup> Bar applicants are not yet lawyers, and also not clients, so protection of this class is limited to oversight and advocacy from currently licensed lawyers.<sup>123</sup>

An attempt at uniform regulation of bar examiners has been suggested for decades by the ABA Section on Legal Education and

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scorecard/ [https://perma.cc/UVY6-HMYQ]; *The 2021 Diversity Scorecard: Ranking the Legal Industry*, AM. LAW. (May 24, 2021), https://www.law.com/americanlawyer/2021/05/24/the-2021-diversity-scorecard-ranking-the-legal-industry/ [https://perma.cc/P4XJ-YNSR]; Ellen Milligan & Tod Gillespie, *Diversity at Elite Law Firms is So Bad Clients Are Docking Fees*, BLOOMBERG L. (Oct. 5, 2021, 4:00 AM), https://www.bloomberg.com/news/articles/2021-10-05/big-law-has-a-diversity-problem-and-corporate-clients-are-stepping-in [https://perma.cc/3DCC-2DHP].

119. See Milligan & Gillespie, *supra* note 118.

120. See Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 935 (2020) (explaining courts have held bar examiners immune from civil liability).

121. See *Mission Statement and Code of Ethics*, VA. BD. BAR EXAM’RS, https://barexam.virginia.gov/code.html [https://perma.cc/CF8G-BXH3] (last visited Nov. 12, 2023) (explaining the ethical considerations that the Virginia Board of Bar Examiners examine).

122. See *id.* (explaining the Virginia Board of Law Examiners has created and published its own “Code of Ethics” which states that the employees of the Commonwealth of Virginia and the Virginia Board of Law Examiners will make protecting the public its top priority, it will “act with integrity . . . treat all persons in an evenhanded, respectful and courteous manner . . . [and] act with integrity and a spirit of respectful cooperation.”).

123. See MODEL RULES OF PROF. CONDUCT r. 5.1 (AM. BAR. ASSN. 1983).

Admissions to the Bar and the Madison, Wisconsin-based nonprofit bar examination creator and purveyor, the NCBE, in its 2022 Comprehensive Guide to Bar Admissions Requirements.<sup>124</sup> This document, produced every year and distributed to all U.S. law schools, begins with a non-binding “Code of Recommended Standards for Bar Examiners.”<sup>125</sup> This code has been in existence since 1959, with updates made as recently as 2019.<sup>126</sup> Its stated purpose is to, “lead toward uniformity of objectives and practices in bar admission throughout the United States.”<sup>127</sup> It suggests the guiding light of all bar examiners be embodied in this one simple yet incredibly potent phrase: “the protection of the public and the system of justice.”<sup>128</sup> This weighty consideration is the stated purpose of boards of law examiners across the country.<sup>129</sup> The code suggests bar examiners adopt rules of confidentiality to protect applicant information, provide a due process for an applicant who appeals a ruling, and implement additional guidelines designed to protect the integrity of the written exam itself.<sup>130</sup> A flaw in the current code is that no other specific duties to applicants are prescribed.<sup>131</sup> There are no suggestions for effective

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124. See NAT’L CONF. BAR EXAM’RS & AM. BAR ASSOC. SECTION LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2022, at vii (2022) [hereinafter 2022 COMPREHENSIVE GUIDE]. Author’s Note: The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, nor has any approval been sought. Accordingly, these materials should not be construed as representing the policy of the American Bar Association.

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

129. See PA. BD. OF L. EXAM’RS, <https://www.pabarexam.org/> [<https://perma.cc/8UL3-J6LJ>] (providing that the PA Board of Law Examiners stated mission is to “preserve[] the integrity of the legal system, and protect[] all individuals seeking legal representation from unethical or incompetent lawyers”); VA. BD. OF BAR EXAM’RS, <https://barexam.virginia.gov/> [<https://perma.cc/FME8-WLZQ>] (providing that VA’s first item on the Code of Ethics says its top priority is to protect the public); THE STATE BAR OF CAL., <https://www.calbar.ca.gov/about-us/our-mission> (providing that CA state bar’s Committee of Bar Examiners notes that its primary function is to protect the public).

130. See generally 2022 COMPREHENSIVE GUIDE, *supra* note 124. Author’s Note: The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, nor has any approval been sought. Accordingly, these materials should not be construed as representing the policy of the American Bar Association.

131. See *id.* at vii (providing a list of “Eligibility of Applicants,” that details the duties owed by applicants to bar examiners, including: the burden of proof of establishing eligibility to sit is on the applicant, each applicant must have completed

communication with applicants, no requirements of diligence or competence in the use of technology for exam administration, no formal method is provided for addressing applicant complaints outside of reapplication issues, and no reference is made to the rules of professional conduct.<sup>132</sup> It is also promulgated by an organization whose goal is the creation, sale, and administration of the only standardized test for licensing lawyers in the United States.<sup>133</sup> In the recently published 2023 edition of the Comprehensive Guide to Bar Admissions, the Code of Recommended Standards for Bar Examiners has been completely removed and no explanation for its absence is provided in the preface.<sup>134</sup>

Where bar examiners are licensed lawyers and overseen by members of the state's highest court, the rules of professional conduct in that jurisdiction, coupled with the Code of Judicial Conduct, should be applied both expressly and impliedly as the job is either a judicial or statutory function, or both.<sup>135</sup> This follows from the charge that all lawyers have a special duty of managing the self-regulation of the profession under Model Rule 8.3 and its directive to report

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three-fourths of the work acceptable for a baccalaureate degree; and, each applicant must complete all requirements for a JD or LLB degree from ABA approved law school).

132. *See id.* at vii–x.

133. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, <https://www.ncbex.org/about/> [<https://perma.cc/4CT7-CM52>] (providing that the NCBE develops and produces “licensing tests for bar admission and provides character and fitness investigation services”).

134. *See* NAT'L CONF. BAR EXAM'RS & AM. BAR ASSOC. SECTION LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2023, at v [hereinafter 2023 COMPREHENSIVE GUIDE] (providing a Preface on page V, and removal of the proposed code evidence by its absence in the Table of Contents).

135. *See* RULES OF THE STATE BAR 4.1, [https://www.calbar.ca.gov/Portals/0/documents/rules/Rules\\_Title4\\_Div1-Adm-Prac-Law.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf) [<https://perma.cc/Q36H-KNVL>] (establishing that the Supreme Court of California has inherent jurisdiction over the practice of law in California); RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW, pt. b, sec. 1, <https://www.gabaradmissions.org/rules-governing-admission> [<https://perma.cc/XVX5-E387>] (establishing that Board of Law Examiners are appointed by the Supreme Court of Georgia); BAR ADMISSION RULES 103, <https://www.pabarexam.org/pdf/rules.pdf> [<https://perma.cc/EY54-HML9>] (establishing that the Supreme Court of Pennsylvania has inherent and exclusive power to regulate the admission to the bar and the practice of law); OHIO CONST. art. IV, sec. 2(B)(1)(g), <https://codes.ohio.gov/ohio-constitution/section-4.2> [<https://perma.cc/F87F-3TE2>] (establishing that the Ohio Supreme Court shall have original jurisdiction over the admission to the practice of law, the discipline of persons admitted, and all other matters relating to the practice of law).

professional misconduct, as well as from Restatement § 1 of The Law Governing Lawyers, which unequivocally states that “upon admission to the bar of any jurisdiction, a person becomes a lawyer and is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions.”<sup>136</sup> The Kentucky Bar Association in a 2010 ethics opinion focusing on the appropriate analysis under SCR 3.103(8.3) perhaps stated it best: “As officers of the legal system, lawyers must take the affirmative responsibility to assure that both the bench and bar maintain the highest standards.”<sup>137</sup> When all licensed practitioners accept this responsibility, both the independence and respect of the process are maintained and the public interest is best served.<sup>138</sup> The lack of transparency in the operations of most board of law examiners does not allow outside lawyers to take a closer look and engage in the important process of self-regulation of the profession.<sup>139</sup>

Boards of law examiners and the NCBE, which creates the most-utilized written bar examination in the country, might have continued to go about their ordinary routines of bar licensure for decades with only the occasional speed bump had the COVID-19 pandemic not torn through their operations like it did all courts, law schools, the legal profession, and the world.<sup>140</sup> Until recently, the appetite for change in

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136. See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 1983) (noting that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (AM. L. INST. 2000). Although Restatements are not given the full force of law in other areas such as Torts or Contracts, courts often look to both the Rules of Professional Conduct and the Restatements when asked to adjudicate ethical matters involving lawyers.

137. See KY. BAR ASS’N, ETHICS OPINION KBA E-430 1, 3 (2010), [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics\\_Opinions\\_\(Part\\_2\)\\_kba\\_e-430.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_kba_e-430.pdf) [<https://perma.cc/M8RU-F9LM>].

138. See *id.* (summarizing the preamble to Kentucky’s Rules of Professional Conduct. The full statement is: “The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.” SCR 3.130 (Preamble)).

139. See *id.*

140. See Marilyn Cavicchia, *In Wake of COVID-19, Several Jurisdictions Explore Other Ways to License New Lawyers*, AM. BAR ASS’N (Nov. 1, 2022),

the lawyer licensing process was primarily limited to members of the legal academy and new graduates, prodded by powerless applicants with no recourse to complain other than on social media and even then, with caution.<sup>141</sup> In August 2020, as concerns about administering the bar examination in person during the height of the COVID-19 pandemic became increasingly public, NCBE's Judith Gundersen appeared on a panel at a Miami Law symposium and said communications made to her and members of her staff had been the "subject of extreme lack of civility and professionalism," and such comments could be construed as "character and fitness issues."<sup>142</sup> The Tweet Gundersen highlighted as an example of this concerning conduct was from a well-known X, formerly known as Twitter, parody account, Yale Law Practitioners, and it stated, "It would be a shame if a bunch of diploma privilege kids registered and then roasted her during the Q&A!!!"<sup>143</sup> Setting aside whether or not this specific example would constitute actionable legal harassment, the idea that a Tweet encouraging the promotion of an alternative method of licensure could be construed as a character and fitness issue that might potentially keep an applicant from becoming a licensed lawyer could feel like a threat to the most vulnerable.<sup>144</sup> This is especially true when the assertion is suggested by one of the biggest gatekeepers in the business today, who is herself a licensed attorney.<sup>145</sup> At the very least,

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[https://www.americanbar.org/groups/bar-leadership/publications/bar\\_leader/2022-23/fallissue/in-wake-of-covid-19-several-jurisdictions-explore-other-ways-to-license-new-lawyers/](https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2022-23/fallissue/in-wake-of-covid-19-several-jurisdictions-explore-other-ways-to-license-new-lawyers/) [<https://perma.cc/X54Z-C97H>].

141. *See id.*

142. *See* Joe Patrice, *NCBE Prez Issues Threat to Tie Up Licenses of Bar Exam Critics*, ABOVE THE LAW (Aug. 6, 2020, 11:43 AM), <https://abovethelaw.com/2020/08/ncbe-prez-issues-threat-to-tie-up-licenses-of-bar-exam-critics/> [<https://perma.cc/T2CV-STV7>]; MiamiLawOfficial, *Miami Law/AALS JLE Online Legal Ed. Symposium: Panel 3 – Regulatory Views*, YOUTUBE (Aug. 12, 2020), <https://youtu.be/5pujygn3o4g> [<https://perma.cc/3KTN-J55A>] (providing that Miami Law hosted a virtual symposium on how Covid-19 was transforming legal education).

143. *See* @YPractitioners, TWITTER (Aug. 5, 2020, 10:26 AM), <https://twitter.com/YPractitioners/status/1291017678610731009> [<https://perma.cc/2B7T-5Q2N>].

144. *See id.*

145. *See* *LawyerProfile*, STATE BAR OF WISCONSIN, <https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1007391> [<https://perma.cc/G8EP-WX86>] (last visited Nov. 12, 2023) (providing that Judith Gundersen has held a license in WI since 1987 and remains an active member in good standing).



it suggests bar examiner watchmen simply cannot be challenged by non-licensed lawyers-to-be without stoking fear of repercussion.<sup>146</sup>

### C. Lack of Transparency Stymies Healthy Self-Regulation

Today's bar examiners have a difficult job, perhaps even an impossible one.<sup>147</sup> They are asked to assess an applicant's character and fitness to practice law using elaborate background checks exposing under-age drinking or public urination charges but cannot immediately predict whether or not a new lawyer will embezzle money from a client.<sup>148</sup> They are also stuck using the results of a

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146. *See id.*

147. *See* Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 23 (2019) ("Those most closely connected to the making of a lawyer are seemingly damned if they do and damned if they don't in a circuitous cycle of criticism of bar pass thresholds. Damned if they do: as bar examiners face reproach from law students and bar takers for not lowering cut scores in an era of epic bar failure. Damned if they don't: as previous decades of high bar passage netted complaints against state bar examiners that the bar pass threshold was not high enough.") (footnotes omitted); *see also* Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 929 (2001).

148. It is important to note here that the academic study of the correlation between bar passage and bar exam cut scores is scant, but it does exist. There are two primary articles that purport to show that failing the bar exam is related to higher level of attorney discipline. I note them here for completeness, but also to show that the Kinsler article is limited in scope to lawyers who were licensed to practice law in Tennessee between Jan. 1, 2005, and Dec. 31, 2014, and limited solely to the TN bar exam, and that it focuses on attorneys who committed ethical violations within 2 to 12 years of being licensed. *See* Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883, 897-99 (2017) (concluding that, in a limited observation group of attorneys licensed to practice in Tennessee who committed ethical violations within two to twelve years of being licensed, lawyers who failed the bar exam were more likely to face discipline than those who passed on the first attempt); *cf.* Robert Anderson IV & Derek T. Muller, *The High Cost of Lowering the Bar*, 32 GEO. J. LEGAL ETHICS 307, 310 (2019) (demonstrating a relationship between bar exam scores and discipline rates with inability to conclude that lower scores cause higher discipline rates and noting that its predictions could not be exact due to limited data suggesting a need for a larger study with more data). *See generally* *Character & Fitness Questionnaire*, ILL. BD. OF ADMISSIONS TO THE BAR, <https://www.ilbaradmissions.org/browseapplication.action?id=1> [<https://perma.cc/58VY-D6B5>] (last visited Nov. 12, 2023) ("In connection with your answers to questions 46, 47 and 48, you are advised that no advice of counsel, statute, court order, or legal proceeding withholding adjudication reducing charges, expunging information from any record, sealing any record, or purporting to authorize any person to deny the existence or occurrence of any information or matter shall excuse less than full disclosure of the information required.") For example, in Illinois, applicants must disclose any and all felony charges, any offenses involving the use of

standardized test that may be prized by psychometricians for its “reliability”<sup>149</sup> but remains under fire for its impact on diversity and will be swapped out for a new version of the bar exam in 2026 with limited input from adopting jurisdictions.<sup>150</sup> For the majority of jurisdictions that adopted the UBE, promulgated by the NCBE, even grading, scoring, and administrative practices are taken out of their hands by the nonprofit organization that decides unequivocally when and how the exam will (or will not) be administered.<sup>151</sup> It would be a

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drugs or alcohol and driving, and a 25-year accounting of formal or informal detention, restraint, citation, summons, custodial restraint, conviction, charge, probation, supervision, or, “forfeited collateral in connection with any offense against the law or an ordinance, or accused of committing a delinquent act, other than traffic offenses set forth in response to question 48 and as set forth in your Driving Record provided under question 49.” *See id.*

149. *See New to Bar Admissions? What You Might Like to Know About: Terms Often Used in Reference to the Bar Examination*, THE BAR EXAMINER (2021), <https://thebarexaminer.ncbex.org/article/summer-fall-2021/new-to-bar-admissions/> [<https://perma.cc/6XU6-Z538>] (discussing reliability and how it is calculated); *see also* Mark R. Raymond et al., *The Testing Column: Ensuring Fairness in Assessment*, THE BAR EXAMINER (2021), <https://thebarexaminer.ncbex.org/article/spring-2021/the-testing-column-ensuring-fairness-in-assessment/> [<https://perma.cc/6QAD-A7MH>] (detailing fairness in assessments, how the NCBE conducts periodic practice analysis, and how they are trained to avoid test content that could be confusing, inflammatory, etc.).

150. *See Implementing the Next Generation of the Bar Exam, 2022-2026*, NEXTGEN BAR EXAM, <https://nextgenbarexam.ncbex.org/about/implementation-timeline/> [<https://perma.cc/P8KS-YDS4>] (last visited Nov. 12, 2023) (showing that the NextGen bar exam will be in place by 2026 with limited input from adopting jurisdictions because small boards of primarily practitioners and some law professors, created by the NCBE, will conduct pilot testing); *see also Meet the Implementation Steering Committee Members*, NEXTGEN BAR EXAM, <https://nextgenbarexam.ncbex.org/isc-members/> [<https://perma.cc/KD3C-KFE8>] (last visited Nov. 12, 2023) (exhibiting NCBE’s members of a new Implementation Steering Committee that will provide for a smooth transition to the new bar exam); *NCBE Announces Members of the Jurisdiction Advisory Committee*, NEXTGEN BAR EXAM, <https://nextgenbarexam.ncbex.org/ncbe-announces-members-of-the-jurisdiction-advisory-committee/> [<https://perma.cc/HAF6-N8G5>] (last visited Nov. 12, 2023) (providing the complete list of members and noting that not all jurisdictions are represented).

151. *See* Paul Caron, *NCBE To Offer MBE, MEE, And MPT Online in October, But Not The UBE*, TAXPROF BLOG (June 4, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/06/ncbe-to-offer-online-mbe-mee-and-mpt-exams-in-october-bit-not-the-ube.html](https://taxprof.typepad.com/taxprof_blog/2020/06/ncbe-to-offer-online-mbe-mee-and-mpt-exams-in-october-bit-not-the-ube.html) [<https://perma.cc/DHK5-UA4Z>] (explaining that during the July 2020 bar examination cycle, the NCBE declined to offer a full bar exam or the UBE and stating the scores applicants earned would be used for local purposes only, which defeated the purpose of the portability of a UBE score and left administering jurisdictions with no other option); *see also* Stephanie Francis Ward, *NCBE Plans to Offer Some Remote Exams for New October Testing*

grave mistake, however, to dismiss these state-operated gatekeepers as toothless tigers.<sup>152</sup>

Instead of delegating duties to the NCBE, bar examiners could play a pivotal role in developing the modern bar exam and could be instrumental in closing the duty gap by adopting greater transparency measures, encouraging collaboration in their jurisdictions, and exercising greater oversight of the products they employ.<sup>153</sup> According to The Carnegie Foundation, bar examiners alone stand in the void between understanding the past as it relates to the changing trends in legal education and the future of the practicing legal profession as it evolves.<sup>154</sup> The Foundation's 2011 report invites bar examiners to reconsider their choice of assessing professional skills and to move beyond just employing the performance-based testing strategies at play on the current bar exam because bar examinations today "create incentives for students to take courses on the broad range of subjects tested on bar examinations, rather than to develop more in-depth expertise in areas where they hope to practice."<sup>155</sup> The report further suggests bar examiners have the power to help develop the skills of all

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*Date But Not For UBE*, ABA JOURNAL (June 2, 2020, 10:22 AM), <https://www.abajournal.com/news/article/ncbe-plans-to-offer-some-remote-exams-for-new-october-testing-date-but-not-ube> [https://perma.cc/7JQ5-AR45] (communicating the NCBE's decision to decline offering its MBE product as an online option for the February 2022 bar exam; instead, it decided to offer make-up exams in March if areas were prohibited from gathering in person due to the COVID-19 virus). See generally Christine Charnosky, *Amid Rising COVID Concerns, NCBE Says Remote February Bar Exam No Longer Possible, But Offers Makeup Options*, AM. LAWYER (Jan. 12, 2022, 2:24 PM), <https://www.law.com/2022/01/12/amid-rising-covid-concerns-ncbe-says-remote-february-bar-exam-no-longer-an-option-but-offers-makeup-options/> [https://perma.cc/PL46-JTTC] (stating that Nevada, a UBE jurisdiction, decided not to administer the MBE).

152. See JUDITH WELCH WEGNER, THE CARNEGIE FOUNDATION'S EDUCATING LAWYERS: FOUR QUESTIONS FOR BAR EXAMINERS 11, 17, 20 (2011).

153. See Griggs, *supra* note 147, at 45, 49.

154. See WEGNER, *supra* note 152, at 11; see also *Foundation History*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, <https://www.carnegiefoundation.org/about-us/foundation-history/> [https://perma.cc/7KVD-KEQZ] (establishing an independent policy and research center focused on upholding the dignity of teaching and higher education, founded in 1905 by Andrew Carnegie and chartered by an act of Congress a year later, which conducted a study of the case method in 1914 that is now the foundation of law school classes today).

155. See WEGNER, *supra* note 152, at 21.

new lawyers if only they would consider alternative modes of testing and increase collaboration with law schools.<sup>156</sup>

Public scrutiny of a process as important, weighty, and professionally determinative as the bar exam and of the bar examiners that create and administer the test is as unavoidable as it is essential in a profession rooted in the ideals, rights, and responsibilities of self-governance.<sup>157</sup> Yet statutes shielding state bar examiners from both scrutiny and responsibility chill the operation of the self-regulation mechanisms embedded in the law governing lawyers.<sup>158</sup> For example, in Michigan, the board of law examiners consists of five active members of the bar, but board meetings are not open to the public, and agendas and minutes of the meetings are privileged and not available for public inspection.<sup>159</sup> In contrast, California appears to offer one of the most tempered approaches by publishing its meeting minutes scrubbed of confidential applicant information.<sup>160</sup> States such as Pennsylvania, Indiana, Kentucky, and Virginia all provide broad civil immunity to bar examiners for acts committed in the course of their official duties relating to the bar examination, character and fitness qualification, and licensing.<sup>161</sup>

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156. See *id.* at 19 (“While I do not believe it is advisable for bar examiners to require prospective lawyers to have taken certain courses in order to sit for the bar exam in particular jurisdictions, I hope that bar examiners who read this will consider whether there are ways in which their choice of assessment of profession skills could be reconsidered.”).

157. See Griggs, *supra* note 147, at 23 (“The public scrutiny associated with the bar exam is altogether endless, unavoidable, and essential.”); Macey, *supra* note 76, at 1094–96 (“[A] core requirement of any system of regulation is the ability to control the firms and individuals subject to the regulation.”). Macey argues that the romantic notion of self-regulation of the legal profession is a concept whose time has come and gone as competitive pressures have increased, and that unfortunately the bar has transformed itself into only serving the self-interested needs of its members. See *id.* An example of which certainly must include the actions of contemporary bar examiners. See *id.*

158. See Rizzardi, *supra* note 30, at 429 (showing that forty-four states operate in a system that makes the actions of each’s board of law examiners confidential and in many cases immune from civil actions).

159. See RULES, STATUTES, AND POLICY STATEMENTS 30–31 (2022), [https://www.courts.michigan.gov/4906ea/siteassets/committees,-boards-special-initiatives/ble/ble\\_rules\\_statutes\\_policy\\_statements\\_may2022.pdf](https://www.courts.michigan.gov/4906ea/siteassets/committees,-boards-special-initiatives/ble/ble_rules_statutes_policy_statements_may2022.pdf) [<https://perma.cc/RT2B-54DW>]; see also MICH. COMP. LAWS § 600.928.

160. See STATE BAR OF CALIF., COMMITTEE OF BAR EXAMINERS MEETING NOTICE AND AGENDA (2020), <https://board.calbar.ca.gov/Agenda.aspx?id=15660&t=0&s=false> [<https://perma.cc/V9X2-G2EG>].

161. See generally Rizzardi, *supra* note 30; 204 P.A. CODE § 71.105; KY. R. SUP. CT. 2.009; IND. RULES OF COURT Rule 20; VA. CODE ANN. § 54.1-3925.3.

Rules curtailing transparency and accountability of board activities cast distrust—perhaps unwarranted in many cases—on these servants of the legislature, judiciary, and the legal profession.<sup>162</sup> Unlike other administrative and regulatory agencies, boards of law examiners are creatures of the judiciary who operate in an opaque universe made impenetrable by a system of rules that keep their inner workings a closely-held secret.<sup>163</sup> Bar examiners implement rules and orders, which are adopted by the supreme court of their jurisdiction, and exclusively control the flow of new lawyers into the marketplace.<sup>164</sup> Even if membership into the legal profession is a privilege and not a right, self-regulation is also a privilege of the legal profession that when exercised in restrictive and monopolistic ways has garnered negative attention and invited an exercise of control by external authorities.<sup>165</sup> In the wake of the devastation left by the COVID-19 administrations of the bar examination, the pervasive suppressive behaviors of boards of law examiners came to the forefront.<sup>166</sup> A prime example of this lack of transparency occurred at the height of the pandemic when bar examiners across the nation were cancelling or rescheduling bar examinations, or holding them in person, with little notice and not much explanation.<sup>167</sup> Bar applicants had no recourse to file complaints and were left in a lurch awaiting decisions on which

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162. This Article is not suggesting the confidentiality requirement for applications and sensitive information revealed therein be released. Only that the actions of the board be made clear and open to scrutiny and investigation. As will be addressed later, the applicant should be treated like a client and Rule 1.6 would apply. See MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

163. See Rizzardi, *supra* note 30, at 429. (showing forty-four states operate in a system that makes the actions of each's board of law examiners confidential and in many cases immune from civil actions).

164. See *id.* at 431 (“Typically, these bar examiners implement rules or orders adopted by the state’s highest court.”).

165. See ABEL, *supra* note 50, at 123–26, 229 (detailing actions taken by the Federal Trade Commission (FTC) in the mid to late 1980s to assert control over the activities of lawyers. As the agency responsible for consumer protection legislation, the FTC occasionally turns its eye to the practices of lawyers whose self-regulating status has not kept the profession from running afoul of federal anti-trust laws); see also Goldfarb v. Va. State Bar, 421 U.S. 773, 791-93 (1974) (providing that, where the U.S. Supreme Court held that the fee schedules of a local bar association were prohibited by the anti-trust laws, the Court in that case rejected the argument that Virginia’s state regulation (i.e., self-regulation) of the legal profession should exempt lawyers from antitrust laws).

166. See Griggs, *supra* note 7, at 11.

167. See *id.* at 5–7 (noting that many states failed to take timely actions during the pandemic, leaving law graduates in a lurch financially and perhaps even endangering their health).

they had no input.<sup>168</sup> In spite of a public lambasting from law graduates, suggestions from law professors, and pushback from practicing attorneys, boards of law examiners maintained their stony silence and carried on with no serious outside oversight or public repercussions.<sup>169</sup> The effective self-regulatory exercise of applying the rules of professional conduct to members of the legal profession cannot take place in the dark.<sup>170</sup> That is why disciplinary hearings for lawyers are now being hosted live via YouTube in states such as Pennsylvania, and most jurisdictions operate public attorney-look-up searches so the public can investigate lawyers licensed in that state.<sup>171</sup>

Excessive obscurity, indemnification, and a failure to disclose inner workings of the board creates a system where no one can watch the watchmen. This situation fails to build trust in the system, which exacerbates the existing duty gap, and pokes a sharp stick in the eye of lawyer self-regulation.

## II. IDENTIFYING THE ETHICAL DUTY GAP

With as many duties as lawyers assume upon licensure, it seems more than a little problematic to consider the newest members of the legal profession are owed no formal ethical duties by any entity involved in the bar examination or licensure process for that window

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168. *See id.*

169. *See id.* at 6–7; *see also* CLAUDIA ANGELOS ET AL., THE BAR EXAM AND THE COVID-19 PANDEMIC: THE NEED FOR IMMEDIATE ACTION 7 (2020).

170. *See* ANGELOS, *supra* note 169, at 7.

171. *See, e.g.*, Disciplinary Board of the Supreme Court of PA (@DBoardPA), TWITTER, <https://twitter.com/dboardpa> [<https://perma.cc/NYQ5-UCMR>]; The Disciplinary Board, YOUTUBE, <https://www.youtube.com/@disciplinaryboard2813> [<https://perma.cc/5SYZ-6VZW>] (showing that the Disciplinary Board of the Commonwealth of Pennsylvania is both progressive and transparent and showing that, not only does the agency host live hearings for both punishment and reinstatement via the Internet, but it also operates an active Twitter account engaging with lawyers in a modern and accessible manner); *Finding a Lawyer*, N.C. STATE BAR, <https://www.ncbar.gov/for-the-public/finding-a-lawyer> [<https://perma.cc/6SGJ-P24N>] (providing that the North Carolina State Bar operates a comprehensive attorney look up feature for the public); *see also Look up an Attorney*, DISCIPLINARY BD. OF THE SUP. CT. OF PA., <https://www.padisciplinaryboard.org/for-the-public/find-attorney> [<https://perma.cc/BUK4-PX76>] (providing that the Pennsylvania Disciplinary Board operates a comprehensive attorney look up feature for the public); *Lawyer Search*, STATE BAR OF WISC., <https://www.wisbar.org/Pages/BasicLawyerSearch.aspx> [<https://perma.cc/KXW4-7DZZ>] (providing that the Wisconsin State Bar also operates a comprehensive attorney lookup feature and that this is a feature operated by most state bar organizations across the United States).

of approximately three months between graduation and the bar examination, or for the total of five or six months after as they wait for their results.<sup>172</sup> Recent law graduates are not quite lawyers, not quite clients, and are no longer under the direct care, control, or supervision of their law schools, and so exist in a liminal space where no clear duties are owed to them.

Set free from the relatively safe womb of law school where they are owed duties such as a specified student-to-faculty ratio, at least a 75% ultimate bar passage rate, and to be free from discrimination as set forth by the ABA in its gatekeeping role as accreditor,<sup>173</sup> newly-minted law graduates exist in a netherworld where they can neither practice law, nor can they control any aspect of the processes applied to them, yet they must scrupulously meet the burdens prescribed such as candor, painstaking honesty, diligence, transparency, timeliness, and of course the duty to pay the required fees and costs associated with sitting for the bar exam.<sup>174</sup> All are burdens bearing a striking

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172. See MODEL RULES OF PRO. CONDUCT r. 1.6, 1.9, 1.18, 1.3, 3.3, 8.4 (AM. BAR ASS'N 1983).

173. See generally AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2020), [https://www.americanbar.org/content/dam/aba/administrative/legaleducation\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf](https://www.americanbar.org/content/dam/aba/administrative/legaleducation_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf). [<https://perma.cc/4XAH-HYBE>] (providing that, while law schools do not owe prescribed lawyer ethical duties to students, plenty of duties are set forth by the American Bar Association in how law schools educate their law students and American's future lawyers); MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (governing accredited law schools in the United States); see also American Bar Association, *The American Bar Association's Role in the Law School Accreditation Process: A Report of the ABA Section of Legal Education and Admissions to the Bar*, 32 J. LEGAL EDUC. 195, 195 (1982) (providing that ABA Rule 316 now requires that accredited law schools also must meet a 75% bar passage rate and that violations of these ABA standards can lead to accredited law schools receiving sanctions).

174. See NCBEX, *Comprehensive Guide to Bar Admission Requirements*, <https://reports.ncbex.org/comp-guide/charts/chart-7/> [<https://perma.cc/TPY3-GA4K>] (providing that the bar examination is a costly exercise for law graduates, as, in addition to paying registration fees from \$250 in Indiana or in addition to \$1,000 in Arkansas, a majority of applicants will also pay a separate fee of between \$100 to \$175 to use their laptops to type the exam); see also NCBEX, *Registering for the MPRE*, <https://www.ncbex.org/exams/mpre/registration/> [<https://perma.cc/Q42Z-V6GC>] (providing that this is also after the fees required to sit for, and pass, the MPRE, which costs \$125); Valerie Keene, *Best Bar Review Courses*, <https://crushbarexam.com/best-bar-review-course/> [<https://perma.cc/3R5D-GRB6>] (last visited Nov. 12, 2023) (explaining that these costs are above and beyond the cost of commercial bar prep courses, which range from a comparatively low \$999 for Quimbee and \$1,199 for Helix by AccessLex, up to \$3,995 for Barbri); Karen Sloan,

resemblance to the requirements laid upon lawyers who have violated the rules and are now seeking reinstatement.<sup>175</sup> Like the world of the fictional *Watchmen*, the world the bar examiner watchmen inhabit today has dark corners that can be difficult to navigate while applicants hold no power to challenge the forces at work—a reality that can lead to the powerless feeling oppressed.<sup>176</sup>

### A. Bar Applicants Owe Meticulous Ethical Duties

Most states require bar applicants to satisfy at least five criteria: they must attain a certain age; education or experience; take and pass an examination; profess an oath; and, must meet the standards set by the bar examiners known more commonly as the character and fitness requirements.<sup>177</sup> Bar applicants must complete a lengthy and detailed application delving into their private lives, finances, and criminal records (or lack thereof) and must sign broad waivers allowing bar examiners to conduct comprehensive inspections of otherwise confidential personal data.<sup>178</sup> These waivers often include broad

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*A Longer, Cheaper Bar Exam Prep Program Looks to Upend the Industry*, <https://www.reuters.com/legal/legalindustry/longer-cheaper-bar-exam-prep-program-looks-upend-industry-2021-09-07/> [<https://perma.cc/PYE7-238A>]; Bryce Welker, *Best Bar Exam Prep Courses*, CRUSH THE CPA, <https://crushthecpaexam.com/best-bar-exam-prep-course/> [<https://perma.cc/H83H-WKJA>] (last visited Nov. 12, 2023); Shirlene Brown, *Breaking Down the Cost of the Bar – The Fees No One Tells You About*, <https://barexamtoolbox.com/breaking-down-the-cost-of-the-bar-the-fees-no-one-tells-you-about/> [<https://perma.cc/G8BP-J32V>] (last visited Nov. 12, 2023).

175. See THE DISCIPLINARY BD. OF THE SUP. CT. OF PA., THE PA. RULES OF DISCIPLINARY ENFORCEMENT r. 218(c)(3) (2023).

176. See JEFFREY WU, THE GREATER GOOD: ANALYZING MORALITY IN WATCHMEN 5 <https://www.bu.edu/writingprogram/journal/past-issues/issue-8/wu/> [<https://perma.cc/4YQE-AEA9>].

177. See SUSAN R. MARTYN ET AL., TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (Rachel E. Barkow et al. eds., 5th ed. 2022).

178. A majority of jurisdictions require the completion of online bar applications. See, e.g., *Application to Take the Bar Exam*, SUP. CT. OF OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/attorneys/admission-to-the-practice-of-law-in-ohio/admission-applications/application-to-take-the-bar-examination/> [<https://perma.cc/33HJ-9GVJ>] (last visited Nov. 12, 2023); *Online Filing Information*, PA. BD. OF EXAM'RS, [https://www.pabarexam.org/online\\_file\\_info/online\\_info.htm](https://www.pabarexam.org/online_file_info/online_info.htm) [<https://perma.cc/QVP7-HW8N>] (last visited Nov. 12, 2023); *Admissions Online Application*, STATE BAR OF NEVADA, <https://nvbar.org/licensing-compliance/admissions/admissions-online-application/> [<https://perma.cc/68ZG-ZQES>] (last visited Nov. 12, 2023); *First Time Applicant – How to Apply*, TENN. BD.



clauses indemnifying the bar examiners, their agents and representatives, and any person providing information as part of the investigation from liability.<sup>179</sup> Although board of law examiners across jurisdictions state the confidentiality of the applicant's information will be maintained, there is no way to investigate how this is

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OF LAW EXAM'RS, [https://www.tnble.org/?page\\_id=89](https://www.tnble.org/?page_id=89) [<https://perma.cc/GFK5-BPY9>] (last visited Nov. 12, 2023); *Bar Examination Application Instructions*, BD. OF LAW EXAM'RS – W. VA. JUDICIARY, <http://www.courtswv.gov/legal-community/Bd-of-Law/exam-instructions.html> [<https://perma.cc/YXQ7-VEFT>] (last visited Nov. 12, 2023) (showing applications asking for personal information ranging from undergraduate experiences, parental addresses and contact information, military history, child support and alimony payments, professional licenses, and a detailed employment history going back years).

179. *See, e.g.*, PA. BD. OF LAW EXAM'RS, BAR APPLICATION (2021), [https://www.pabarexam.org/pdf/203\\_205/203\\_sampleapplication.pdf](https://www.pabarexam.org/pdf/203_205/203_sampleapplication.pdf) [<https://perma.cc/85NC-EGFS>] (including that Pennsylvania's waiver states: "I hereby release, discharge, and exonerate the Pennsylvania Board of Law Examiners, its agent and representatives, and any person so furnishing information from any and all liabilities of every nature and kind arising out of the furnishing or inspection of such documents, records, and other information, or the investigation made by or on behalf of the Pennsylvania Board of Law Examiners"); MD. STATE BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION TO THE BAR OF MARYLAND BY UNIFORM BAR (last visited Nov. 12, 2023), <https://www.mdcourts.gov/sites/default/files/import/ble/pdfs/samplefilingfees.pdf> [<https://perma.cc/C67K-95ER>] (providing that Maryland's waiver goes even further: "I hereby release and exonerate every employer, school official, and every other person, firm, officer, organization, or institution that shall act in good faith with the authorization and release provided herein, from any and all liability of every nature and kind growing out of or in any way pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Character Committees, the State Board of Law Examiners, the Court of Appeals of Maryland, or their authorized representatives. I further waive, absolutely and forever, any privilege not protected by the Constitutions of the United States of America or the State of Maryland that I may have regarding information bearing on my good moral character and fitness to perform the responsibilities of an attorney under applicable Maryland law"); N.Y. STATE SUP. CT. APPELLATE DIVISION, APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW IN THE STATE OF NEW YORK (2023), [https://www.nybarexam.org/admission/B-Bar\\_Admissions-Questionnaire.pdf](https://www.nybarexam.org/admission/B-Bar_Admissions-Questionnaire.pdf) [<https://perma.cc/UT2J-A8RW>] (providing that New York's waiver includes the following language: "I hereby release, discharge, and exonerate the Appellate Division of the Supreme Court and its Committees on Character and Fitness, their members, agents and representatives, as well as any person furnishing information to the committee from any and all liability of every nature and kind in the course of their duties arising out of the investigation made by the Appellate Division into my moral character, professional reputation, and general fitness for the practice of law, including, without limitation, the inspection of documents, records, and other information related to my treatment for any mental health, drug, alcohol or other substance related condition, or any addiction").

accomplished and the inner workings of these boards is held strictly confidential, nor is there recourse for applicants in the event of a breach.<sup>180</sup> In fact, the call to confidentiality on the part of these boards came from the NCBE itself, as a measure to balance the need to protect the applicant, the sources, and the public.<sup>181</sup> Notably, even if currently licensed lawyers wanted to peer into the process, this shroud of confidentiality and lack of transparency prohibits such oversight except by the limited numbers of licensed practitioners admitted to the ranks of bar examiners, or the judiciary who oversees these bodies.<sup>182</sup>

Bar applications are considered living documents and must be updated continuously until the applicant gains admission by passing both a jurisdiction-specific bar examination and the national ethics examination (the Multistate Professional Responsibility Exam, or MPRE, promulgated by the NCBE).<sup>183</sup> They are designed to utilize general criteria such as a history of criminal or civil judgments to assess an applicant's ability to act honestly. Examiners also investigate the academic integrity of the applicant by using questions such as:

Have you ever been denied enrollment, dismissed, suspended, expelled, subject to discipline, including disciplinary probation for plagiarism, cheating, dishonesty, fraud, or any other reason, or withdraw in lieu of discipline from any academic institution or organization, beyond high

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180. See generally Rizzardi, *supra* note 30, at 458–59 (2021) (stating that bar examiners insistence on excessive confidentiality as to the inner workings of their organization does not enhance the reputation of the legal system, and that as agents of the judiciary state bar examiners should refrain from using overbroad confidentiality clauses and reform their operations to better conform with the rules of professional conduct).

181. See *id.* at 434 (citing *Comprehensive Guide to Bar Admission Requirements* viii, NAT'L CONF. OF B. EXAM'RS (2019), <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf> [<https://perma.cc/7XAK-KPDB>]); *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BD. EXAM'RS, <https://ncbex.org/exams/mpre> [<https://perma.cc/3Y77-5XLH>] (last visited Nov. 12, 2023); cf. William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 AMERICAN L. REV. 171, 197 (2009) (discussing the failures of some major federal laws to strike a balance between confidentiality and transparency in the Federal Advisory Committee Act, Government in the Sunshine Act, and the Negotiated Rulemaking Act).

182. See Rizzardi, *supra* note 30, at 446.

183. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at 18–22.

school, for any reason (does NOT include academic discipline or probation for poor or failing grades).<sup>184</sup>

All of these inquiries are employed as a way for the examiners to assess the fitness of each applicant to hold a license to practice, and to determine whether or not the future officer of the court has acted in a way that shows a respect for the rule of law.<sup>185</sup> Applicants are asked to show the absence of a history of drug or alcohol abuse, or to illustrate how they have overcome such issues by successfully seeking treatment.<sup>186</sup> Finally, the duty of disclosure on bar applications can even extend into a candidate's sealed records, including expunged records, which disallows the "second chance" such procedures are designed to offer and serves as a secondary penalty to applicants.<sup>187</sup>

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184. See PA. BD. L. EXAM'RS, 203 BAR APPLICATION FOR EXAM DATE 2/22/2021 9 (2021), [https://www.pabarexam.org/pdf/203\\_205/203\\_sample\\_application.pdf](https://www.pabarexam.org/pdf/203_205/203_sample_application.pdf) [<https://perma.cc/7H9J-NYJV>].

185. See *In re* Application of Converse, 602 N.W.2d 500, 507 (Neb. 1999) (holding that bar applicants bear the burden of proving the requisite character and fitness in seeking admission to practice); see also *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) (holding a state can require high standards of qualification, such as good moral character or proficiency in its law, before admitting an applicant to its bar); *Konigsburg v. State Bar of Cal.*, 366 U.S. 36, 40 (1961) (holding applicant to the bar bears burden of proof to show good moral character).

186. Title II of the Americans with Disabilities Act (ADA) applies to bar admissions questions. See, e.g., *ACLU v. Individual Members Ind. State Bd. of L. Exam'rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at \*6, \*25–29 (S.D. Ind. Sept. 20, 2011) (holding bar-application questions such as "From the age of 16 years to the present, have you been diagnosed with or treated for any mental, emotional or nervous disorders?" prohibited by the ADA's disability-discrimination requirements because not necessary to determine whether applicant poses a "direct threat," but narrowly focused question such as "Do you have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner" complies with ADA's essential eligibility requirements).

187. See *State v. Greene*, 573 N.E.2d 110, 111–12 (Ohio 1991) (reversing trial court's denial of prospective attorney's petition to expunge his criminal conviction due to error in law when decision was based on the court's belief that that the applicant would not have to disclose the expunged record, in fact, the applicant would be required to disclose expunged conviction as part of application process); see, e.g., *Lydia Johnson, The Illusion of a Second Chance: Expunctions Versus the Law School and State Bar Application Processes*, 9 FLA. A & M UNIV. L. REV. 183, 186, 188, 201 (2013) (requesting a law student to disclose sealed or expunged records is unfair, as dealing and expungement are meant to wipe the slate clean and allows citizens a second chance, and it is logical to believe a person who has a record expunged would not be required to further disclose); see also *Att'y Grievance Comm'n v. Hunt*, 76 A.3d 1214, 1220 (Md. 2013) (holding that circuit court did not err in concluding attorney violated Maryland Lawyer Rules of Professional Conduct 8.1(a) and (b) and

The only ceiling to this inquiry into an applicant's affairs appears to be set by the First Amendment, wherein bar examiners cannot inquire into the beliefs of applicants as a measure of fitness to practice law.<sup>188</sup>

Submitting to the bar application process means a recent law graduate must give all of themselves and expect nothing but a paper pass to enter an exam room where they will have paid for an opportunity to take the one test that will determine whether or not they are competent to be admitted to the practice of law (they will even pay an additional non-refundable fee to use their own laptops).<sup>189</sup> Applicants, who are not yet licensed lawyers, are also under a duty explicitly set forth in the ABA Model Rules of Professional Conduct in Rule 8.1: Bar Admissions and Disciplinary Matters.<sup>190</sup> This rule states unequivocally that an applicant has a mandatory duty to refrain from making a false statement of material fact, or to fail to correct a misunderstanding, or to fail to respond to demands for information from the admissions or disciplinary authority.<sup>191</sup> While there is a clear

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8.4(b), (c), and (d), when attorney did not disclose criminal activities on bar application because he had not yet been charged and convicted at the time the application was filed).

188. See *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7–10 (1971). An applicant to the State Bar of Arizona refused to answer a question asking what organizations she had been associated with since the age of 16 and refused to answer as to whether or not she had ever been a member of the Communist Party or any organization that attempted to overthrow the U.S. government. The bar refused to process her application, and the Arizona Supreme Court denied her petition for show cause as to why she should not be admitted. Supreme Court reversed and remanded, holding the First Amendment prohibited state bar examiners from asking about an applicant's views and associations solely to withhold a right or benefit. *Id.*; see also *In re Stolar*, 403 U.S. 23, 30 (1971) (requiring a Bar applicant to list all the organizations to which he had belonged since registering as a law student and those of which he had ever been a member was impermissible in light of the First Amendment).

189. See *Computer Based Testing (CBT) Fees*, PA. BD. L. EXAM'RS (last visited Nov. 12, 2023), [https://www.pabarexam.org/bar\\_exam\\_information/cbtfees.htm](https://www.pabarexam.org/bar_exam_information/cbtfees.htm) [<https://perma.cc/YNK9-AJUW>] (showing in Pennsylvania, in order for an applicant to use a laptop to take the exam, a separate fee must be paid, known as "CBT fees," or computer-based testing fees. The timely fee for laptop use is \$115. The late fee is \$165).

190. See ABA CPR POL'Y IMPLEMENTATION COMM., RULE 8.1: BAR ADMISSIONS AND DISCIPLINARY MATTERS 2–5 (2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_1.pdf) [<https://perma.cc/CN53-U7UF>] (showing model Rule 8.1 has also been adopted by jurisdictions such as, Kentucky, Nevada, New Jersey, Pennsylvania, West Virginia, and more).

191. See MODEL RULES OF PRO. CONDUCT r. 8.1 (AM. BAR ASS'N 1983) (stating that an applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter shall not: (a)

duty contained here for the applicant, and an implication of punishment for a violation of this duty, there is no single rule of ethics for the legal profession that speaks to the duties and responsibilities of the bar examiner class itself.<sup>192</sup>

Today's version of ABA Model Rule 8.1—with its explicit one-way duty applied to bar applicants—wasn't always so lopsided, as the duty to police the profession rested squarely on those already holding licenses at the time the rules were first developed from the traditional Canons.<sup>193</sup> In 1964, when President Lewis F. Powell and the House of Delegates of the ABA created a special commission to recommend changes be made to the previously existing Canons created 56 years before, the duty appeared to work both ways: attorneys were charged with ensuring disqualified applicants could not be granted a license, but once the disqualifying factor had resolved, the lawyer could take steps to make reinstatement to “full right to practice.”<sup>194</sup> Model Rule

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knowingly make a false statement of material fact, or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 (Confidentiality)).

192. Many jurisdictions require members of their board of law examiners be attorneys. Compare VA. CODE ANN. § 54.1-3919 (1950), and *Membership Requirements for the Board of Law Examiners*, UNIFIED JUD. SYS. OF PA., <https://www.pacourts.us/courts/supreme-court/committees/membership-requirements-for-the-board-of-law-examiners> [<https://perma.cc/NBJ8-KHKQ>] (last visited Nov. 12, 2023), and *Rules for Admission to the Bar and the Discipline of Attorneys*, IND. RULES CT., [https://www.in.gov/courts/rules/ad\\_dis/#\\_Toc139466470](https://www.in.gov/courts/rules/ad_dis/#_Toc139466470) [<https://perma.cc/AP6T-Q9YY>] (last visited Nov. 12, 2023) (revealing that many jurisdictions require members of their board of law examiners be attorneys), with MASS. GEN. LAWS ch. 221, § 35 (stating that Commonwealth of Massachusetts's board of law examiners consist of five persons, at least four of whom shall be residents of different counties and they are appointed by the justices of the Supreme Court), and ME. REV. STAT. ANN. tit. 4, § 801 (West 2023) (showing that Maine also allows non-attorneys to serve on its board of law examiners).

193. See Am. Bar Ass'n, *Report of the ALI-ABA Committee on Continuing Legal Education*, 80 ANN. REP. AM. BAR ASS'N 458, 470 (1955) (“It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy.”).

194. See MODEL CODE PRO. RESP., at i-ii (AM. BAR ASS'N 1980) (collecting and publishing the formal opinions of the Committee on Ethics and Professional Responsibility in 1967, after a determination that the Canons, standing alone, did not give enough guidance to new lawyers and were not deemed a clear enough “teaching instrument” and therefore needed revision, and formally adopting the Model Code of Professional Responsibility in 1969, amendments now occur regularly through the Committee on Ethics and Professional Responsibility, as mandated by the bylaws of

8.1 existed in a general form in DR 1-101, Maintaining Integrity and Competence of the Legal Profession, but using the language that put the duty squarely on attorneys to ensure they did not further applications of persons known “to be unqualified in respect to character, education, or other relevant attribute.”<sup>195</sup> While an ethical gap still exists under these rules—the profession is protected, not specifically the applicant—at least some form of checks and balances appears to have been contemplated, instead of giving bar examiner gatekeepers exclusive control over the licensing process.<sup>196</sup>

Explicit references to duties owed by lawyers to the newest aspiring members of the profession (bar applicants) all but disappear in the timeline of policy and initiatives set forth by the ABA by the early 1990s.<sup>197</sup> The 1992 ABA House of Delegates’ Report of the Commission on Evaluation of Disciplinary Enforcement mentions bar

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the American Bar Association); *id.* at EC 1-3; *see, e.g., id.* at DR 1-101(B). “An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and education reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.” *See id.* at EC 1-6.

195. *See id.* at DR 1-101(B) (“A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.”); *see also Procedural Due Process and Character Hearings for Bar Applicants*, 15 STAN. L. REV. 500, 500 (1963) (“Every state in the United States, as a prerequisite for admission to the practice of law, requires that applicants possess ‘good moral character.’ Although the requirement is of judicial origin, it is now embodied in legislation in most states.”); *In re Monaghan*, 222 A.2d 665, 670 (Va. 1966) (“Good character in the members of the bar is essential to the preservation of the integrity of the courts. The duty and power of the court to guard its portals against intrusion by men and women who are mentally and morally dishonest, unfit because of bad character, evidenced by their course of conduct, to participate in the administrative law, would seem to be unquestioned in the matter of preservation of judicial dignity and integrity.”); *see also Hallinan v. Comm. Bar Exam’rs*, 421 P.2d 76, 81 (Cal. 1966) (“Fundamentally, the question involved in both situations [i.e., admission and disciplinary proceedings] is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude. At the time of oral argument the attorney for respondent frankly conceded that the test for admission and for discipline is and should be the same. We agree with this concession.”).

196. *See* Am. Bar Ass’n, *supra* note 193, at 470.

197. *Compare* MODEL CODE OF PRO. CONDUCT r. 8.1 (AM. BAR ASS’N 2001), *with* MODEL CODE OF PRO. CONDUCT r. 8.1 (AM. BAR ASS’N 2002).

applicants only once and in the context of the ABA National Discipline Data Bank used by character and fitness committees to investigate bar applicants seeking admissions to the bar across jurisdictions.<sup>198</sup> Rule 8.1 existed in its current form by the time the Ethics 2000 Committee released its reports and red-line suggestions for changes, and the Commission did not recommend any changes to the rule text itself.<sup>199</sup> This stagnation in the development of rules relating to bar applicants, and the apparent diminishment of reciprocal duties, roughly corresponds with the beginning of the timeline of discussions between the ABA and the NCBE about the creation of a UBE in 2002.<sup>200</sup> Representatives from the ABA Section of Legal Education and Admissions to the Bar, along with the Bar Admissions Committee of the ABA Section of Legal Education and Admissions to the Bar, were engaged by 2006 with the NCBE in creating what would become the UBE.<sup>201</sup> In 2010, Missouri and North Dakota became the first jurisdictions to adopt the UBE exam.<sup>202</sup> By 2018,

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198. See ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, at xi (1992) (“The Commission was created in February 1989 to conduct a nationwide evaluation of lawyer disciplinary enforcement and to provide a model for responsible regulation of the legal profession into the twenty-first century.”); see also *id.* at 83–84 (finding the data bank an underutilized resource, the committee asked for the ABA to provide or seek adequate funding to make the resource more readily accessible); *The National Lawyer Regulatory Data Bank*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/services/databank/](https://www.americanbar.org/groups/professional_responsibility/services/databank/) [<https://perma.cc/3VKG-ZSE9>], (last visited Nov. 12, 2023).

199. See ABA ETHICS 2000 COMM'N REPORT ON THE MODEL RULES OF PRO. CONDUCT, REPORTER'S EXPLANATION OF CHANGES 10 [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/e2k\\_migated/10\\_85rem.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/e2k_migated/10_85rem.pdf) [<https://perma.cc/9UDW-5FQB>] (last visited Nov. 12, 2023) (showing no recommendations were made to change the text or substance of the rule or comments, though the comments were clarified to ensure applicants knew there was a duty to supplement an answer if it was incorrect upon submission and an enhanced reminder that bar admission is a judicial procedure was intended from former Model Rules in the Report on the Model Rules of Professional Conduct by the Ethics 2000 Committee); see also MODEL RULES OF PRO. CONDUCT r. 8.1 (AM. BAR ASS'N 1983).

200. See *The UBE from Early Concept to Present: A Timeline*, THE BAR EXAMINER (Sept. 2016), <https://thebarexaminer.ncbex.org/article/september-2016/the-ube-from-early-concept-to-the-present-a-timeline/> [<https://perma.cc/GVN9-FDS2>] (beginning discussions in 2002 about the development, creation, and feasibility of a uniform bar exam among stakeholders such as the American Bar Association (ABA), the Association of American Law Schools (AALS), and the Conference of Chief Justices (CCJ)).

201. See *id.*

202. See *id.*

twenty-five jurisdictions had signed on, and in 2022 every United States jurisdiction with the exceptions of California, Nevada, South Dakota, Louisiana, Wisconsin, Mississippi, Georgia, Florida, and Virginia had adopted the test.<sup>203</sup>

It should be axiomatic—in consideration of the underpinnings of the creation, development, and history of the promulgation of the rules of professional conduct—that all licensed lawyers have a duty to uphold integrity of the profession by ensuring bar applicants meet the standards set forth in our self-governing profession.<sup>204</sup> After all, an acceptance of the obligation to act as guardians of the law and to act as enlightened professionals engaging in self-government are the bedrock principles from which the rules of professional conduct flow—and how the public is best served.<sup>205</sup> And yet, the majority of licensed lawyers today are kept firmly outside of the bar licensure process because it is blanketed in nearly impenetrable mystery.<sup>206</sup> If there is a rule of professional conduct speaking to the duties owed by the applicants to the bar, it seems a corresponding one could be added to address the duties and responsibilities of the bar examiner gatekeepers protecting the public. Without one, the rules speak loudly as to who is expected to behave or be subject to discipline, and who is not.<sup>207</sup>

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203. See *UBE Jurisdictions*, *supra* note 99.

204. See MODEL RULES OF PRO. CONDUCT pmb. § 12 (AM. BAR. ASS'N 1983) (“The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.”).

205. See MODEL CODE OF PROF. RESP. pmb. (AM. BAR ASS'N 1983) (“The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.”); *cf.* CANONS PROF. ETHICS pmb. (AM. BAR ASS'N 1908).

206. See NAT'L CONF. OF BAR EXAM'RS & AM. BAR. ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS 2021, at vii (Judith A. Gunderson & Claire J. Guback eds., 2021) [hereinafter 2021 COMPREHENSIVE GUIDE].

207. SEE MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2002).



## B. The National Conference of Bar Examiners Owes Bar Applicants No Ethical Duties

Promulgated by the NCBE, the UBE tests would-be lawyers using multiple choice questions, essays, and closed-universe writing exercises.<sup>208</sup> Founded in 1931, the non-profit carved a niche for itself developing, administering, and gatekeeping who will be allowed to enter the legal profession today.<sup>209</sup> The exam products it sells to jurisdictions are written by psychometricians who prize statistical reliability, and the exam questions contain no state-specific laws.<sup>210</sup> Broad deference is given to the NCBE, but the company is not subject to any broad oversight by the jurisdictions that employ it.<sup>211</sup> There is no possible review of its business practices or profitability, nor is there an independent, cross-jurisdiction, body of lawyers tasked with overseeing the production of its exams and ensuring its practices comport with the rules of professional conduct.<sup>212</sup> Notably, the NCBE's current executive director did not sit for a bar examination due to her graduating from the University of Wisconsin: she earned

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208. See Lori McMaster, *McMaster Examines the Practicality of the Uniform Bar Examination*, ALLEGHENY CNTY. BAR ASS'N (Aug. 2, 2019), <https://www.acba.org/lori-mcmaster/mcmaster-examines-the-practicality-of-the-uniform-bar-examination/> [<https://perma.cc/BBH7-KPVY>]; see also *About the National Conference of Bar Examiners*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/about> [<https://perma.cc/GT93-UDHH>] (last visited Nov. 12, 2023).

209. See *About the National Conference of Bar Examiners*, *supra* note 208; *Bar Exams*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/bar-admissions/bar-exams/](https://www.americanbar.org/groups/legal_education/resources/bar-admissions/bar-exams/) [<https://perma.cc/K9A6-R5CY>] (last visited Nov. 12, 2023).

210. See *Do I Have to Know State Law for the Uniform Bar Exam?*, JD ADVISING, <https://jdadvising.com/do-i-have-to-know-state-law-for-the-uniform-bar-exam> (last visited Nov. 12, 2023) [<https://perma.cc/RJX2-8TVA>]. According to the NCBE, all research/psychometric staff have scientific backgrounds, and all staff working directly on the operational equating of NCBE's exams, have PhDs in psychometrics. Most staff without PhDs specifically in psychometrics have advanced degrees in closely related fields. See *NCBE Media Kit*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/about/media-kit/> [<https://perma.cc/X77D-QYNR>] (last visited Nov. 12, 2023).

211. See *Media Kit*, *supra* note 210.

212. For example, NCBE, as a registered nonprofit in Wisconsin, is overseen by the state rules and regulations, but is not subject to those same rules and regulations in other jurisdictions. Nonprofits also must file the 990N reports. To view the NCBE's most recent 990, see National Conference of Bar Examiners, IRS, <https://apps.irs.gov/app/eos/details/> [<https://perma.cc/QM3Q-V8MS>] (search by inputting 36-2472009 as the Employer Identification Number (EIN)).

her licensure through the mechanism of diploma privilege.<sup>213</sup> Even as the NCBE begins a years-long process of overhauling the bar examination, its methodologies and procedures lack critical transparency in terms of what will be tested and how, and participants on the task force must sign non-disclosure agreements.<sup>214</sup> Through its NextGen Bar Exam of the Future website, the NCBE provides flashy updates including a colorful timeline of development and asserts it began small-scale testing of prototypes in 2022, though no specifics

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213. Several outlets have reported on Judith Gunderson's admission through diploma privilege. See, e.g., Brian L. Frye, *The NCBE is a Joke, Give "Judge Judy" The Boot*, JURIST (Aug. 5, 2020), <https://www.jurist.org/commentary/2020/08/brian-frye-ncbe-judith-gundersen/> [<https://perma.cc/6E3P-NKEX>]. In addition, Gunderson herself has gone on record to say she has not taken a bar examination. Gunderson has led the NCBE since her predecessor Erica Moser retired in 2017. See @diplomaprivileg, TWITTER (Aug. 3, 2020, 6:00 PM), <https://twitter.com/diplomaprivileg/status/1290407241959370754> [<https://perma.cc/T2GR-BEP9>]; Allie Yang, *Law Grads Faced Financial, Medical Challenges To Take the Bar This Year*, ABC NEWS (Dec. 4, 2020, 2:02 PM), <https://abcnews.go.com/US/law-grads-faced-financial-medical-challenges-bar-year/story?id=74511388> [<https://perma.cc/Z7JE-CGT7>]; see *The National Conference of Bar Examiners Names Judith A. Gunderson as President and CEO*, NAT'L CONF. BAR EXAM'RS, <https://www.ncbex.org/news/judith-gundersen-ncbe-president-ceo/> [<https://web.archive.org/web/20220218214600/https://www.ncbex.org/news/judith-gundersen-ncbe-president-ceo/>] [<https://perma.cc/97K8-SMJA>].

214. Author's Note: Members of the NCBE have attended conferences across the country this year speaking to law professors about the NextGen Bar Examination (i.e. Association of Academic Support Educator's (AASE) annual conference in San Antonio, TX, in May 2022, Southeastern Association of Law Schools (SEALS) at the Sandestin Resort, FL, in July 2022, and the American Bar Association (ABA) Annual Meeting in Chicago, IL, in August 2022). See *AASE 2022 Annual Conference Agenda*, ASS'N ACAD. SUPPORT EDUCATORS, [https://associationofacademicsupportededucators.org/wp-content/uploads/2022/05/Final-Schedule\\_AASE-2022\\_5.13.pdf](https://associationofacademicsupportededucators.org/wp-content/uploads/2022/05/Final-Schedule_AASE-2022_5.13.pdf) [<https://perma.cc/BP62-K5D3>]; *SEALS 2022 Annual Conference Agenda Wednesday July 27, 2022*, SE. ASS'N L. SCHS., <https://sealslawschools.org/submissions/schedule.php?year=2022> [<https://perma.cc/4QA3-QUFH>]; *Events: The Next Generation of the Bar Exam*, ABA, [https://www.americanbar.org/groups/legal\\_education/events/2022-annual/](https://www.americanbar.org/groups/legal_education/events/2022-annual/) [<https://perma.cc/RF6P-93T7>] (last visited Nov. 12, 2023). NCBE officials show examples of questions and timelines, as well as topics that will be covered. However, when asked to share slides with members of AASE, the NCBE declined multiple requests. Additionally, a law professor at Duquesne University School of Law was selected to serve on one of its development committees and was asked to sign a non-disclosure agreement. The fact of the non-disclosure agreement was shared, as well as the fact of being selected to take part, but the professor did not share with the author any content or topics covered in the meetings attended.

as to which law schools will be involved in the testing have been released.<sup>215</sup>

The NCBE's stated mission perhaps revealingly places "candidates" at the end of a long list of entities it purports to serve—including bar admissions authorities, courts, and the legal education community.<sup>216</sup> Additionally, the NCBE's stated mission that it "promotes fairness, integrity, and best practices in bar admissions for the benefit and protection of the public in pursuit of *its* vision of a competent, ethical, and diverse legal profession," does not reference the rules of professional conduct at all.<sup>217</sup> The rules of professional conduct govern all licensed lawyers and explicitly set forth the standards of the legal profession in the preamble as self-governing, independent, autonomous, and working for the public interest and specifically not in furtherance of "parochial or self-interested concerns of the bar."<sup>218</sup> The preamble also states the "ultimate authority over the legal profession is vested largely in the courts," and that the rules themselves provide the framework for the ethical practice of law.<sup>219</sup> There is, not surprisingly, no mention of a check on the power or transparency of a nonprofit corporation.<sup>220</sup>

As the number of nonprofit organizations increases worldwide, so do the questions about the transparency of such organizations.<sup>221</sup> In the U.S., approximately 1.8 million nonprofit organizations reported expenditures of \$1.94 trillion, and in 2008 the sector reportedly

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215. See *FAQs About Recommendations*, NEXTGEN, <https://nextgenbarexam.ncbex.org/faqs/> [<https://perma.cc/75RY-F5DD>] (last visited Nov. 12, 2023).

216. See *NCBE Releases National Mean for March 2022 MPRE*, NAT'L CONF. BAR EXAM'RS (April 28, 2022), <https://www.ncbex.org/news/mpre-march-2022-results> [<https://perma.cc/ZS7G-3VWF>] ("The National Conference of Bar Examiners serves bar admission authorities, courts, the legal education community, and candidates by providing high-quality assessment products, services, and research; character investigations; and informational and educational resources and programs. It promotes fairness, integrity, and best practices in bar admissions for the benefit and protection of the public in pursuit of its vision of a competent, ethical, and diverse legal profession. For more information, visit the NCBE website at <http://www.ncbex.org>.").

217. See *id.* (emphasis added).

218. See MODEL RULES OF PRO. CONDUCT pmb1. §§ 10, 12 (AM. BAR ASS'N 2022).

219. See *id.* at §§ 10, 16.

220. See *id.* at § 10.

221. See Cristina Ortega-Rodríguez et al., *Transparency as a Key Element in Accountability in Non-Profit Organizations: A Systematic Literature Review*, 12 *SUSTAINABILITY* 1, 1 (2020).

provided 10% of U.S. jobs.<sup>222</sup> These entities are set up to achieve favorable tax regimes, are subject to fewer governmental regulations than traditional public or private-sector entities, and are largely established to achieve their stated social missions.<sup>223</sup> Nonprofits owe duties to stakeholders and donors, but have limited market regulation and no direct voter control, and as such regulators have long called for increased “ethical self-discipline” for these organizations.<sup>224</sup> Without these, the question of to whom the nonprofit is answerable remains unclear and not entirely simple.<sup>225</sup> Some measures ethicists have suggested for nonprofit entities as ways to cultivate and demonstrate ethical self-discipline are: clear articulation of a mission statement; transparency about the accumulation of assets, annual income, and annual expenditures; publishing executive salaries; and, being wary of appeasing funding sources at the cost of other constituencies.<sup>226</sup> If accountability is also rooted in integrity, the leaders of these nonprofits should also take public responsibility for the actions or inactions of the organization, and further invite the public to scrutinize the behavior of the leadership.<sup>227</sup> Open access to the inner workings of a nonprofit organization can diminish critique, as well as promote trust

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222. See Bruce K. Behn et al., *The Determinants of Transparency in Nonprofit Organizations: An Exploratory Study*, 26 *ADVANCES IN ACCOUNTING* 6, 6 (2010) (providing evidence of the voluntary nature of financial disclosure in the nonprofit sector, as well as details of how government officials, donors, and other stakeholders, have expressed concerns about the lack of transparency in this sector); see also LEWIS FAULK ET AL., *NONPROFIT TRENDS AND IMPACTS 2021*, at 5 (2021), <https://www.urban.org/sites/default/files/2022-10/Nonprofit%20Trends%20and%20Impacts%202021.pdf> [<https://perma.cc/4TK8-XXLQ>].

223. See Ortega-Rodríguez et al., *supra* note 221, at 3–4.

224. See Robert P. Lawry, *Accountability and Nonprofit Organizations: An Ethical Perspective*, 6 *NONPROFIT MANAGEMENT & LEADERSHIP* 171, 171–73 (1995) (stating nonprofits are not required to turn a profit, hence no obligations to shareholders. Unregulated by the government marketplace, nonprofits occupy a special place that can sometimes elude traditional measures of accountability. While accountability is a word commonly used in a discussion of ethics, the word itself is not coextensive with ethics; although to be accountable does mean to accept responsibility for maintaining the integrity of the organization it is not coextensive with the term ethics. What is needed is a precise taxonomy of those to whom some answerability is required.).

225. See *id.* at 172.

226. See *id.* at 177–78.

227. See *id.* at 174–75 (“[A] perfectly ethical ideal of accountability implies a willingness to endure public scrutiny . . .”).

in a nonprofit organization or institution.<sup>228</sup> Non-accessibility and lack of transparency may result in the loss of public confidence because it erodes trust and can increase negative suspicion, even when that suspicion is not actually founded in fact.<sup>229</sup>

One-on-one access to the NCBE directors and staff can be difficult, if not impossible, for a bar applicant to achieve. Additionally, fiscal oversight of the NCBE is difficult to tease out due to the reporting mechanism it lawfully employs with the federal government.<sup>230</sup> The primary source of data on U.S. nonprofit organizations necessarily comes from IRS Form 990 data, which is the “only systematic yearly government data source on nonprofit organizations” available for research and examination by those outside of these organizations.<sup>231</sup> However, utilizing data from the Form 990 can be tricky because the information is not externally audited.<sup>232</sup> The form itself is also difficult to decipher since numbers are given, but the details are scant and not required to be included by the IRS.<sup>233</sup> The most recent Form 990 available from the IRS for the NCBE was filed in 2019, and it is on this form that some details of the operations of the nonprofit come to light, including a total compensation of \$10.7 million for its executive staff in salaries, wages, and pension accruals and benefits, and the amount paid to independent contractors such as the \$3.89 million paid to the Law School Admissions Counsel (LSAC) for exam administration and a joint conference.<sup>234</sup> In the filing, NCBE reported a total revenue of

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228. See Regina E. Herzlinger, *Can Public Trust in Nonprofits and Governments Be Restored?*, HARV. BUS. REV., Mar.–Apr. 1996, at 97, 106–07.

229. See Behn et al., *supra* note 222, at 6.

230. See *id.*

231. See LEWIS FAULK ET AL., *supra* note 222, at 5.

232. See Behn et al., *supra* note 222, at 6.

233. See *Nonprofit Transparency – What Your Organization Must Do to Satisfy the IRS*, DC BAR PRO BONO CTR. (Aug. 2018), [https://www.lawhelp.org/files/7C92C43F-9283-A7E0-5931-E57134E903FB/attachments/B2D4AD16-FD41-CE47-AD99-A2DBD2F2F42B/publicdisclosure-\(2018\).pdf](https://www.lawhelp.org/files/7C92C43F-9283-A7E0-5931-E57134E903FB/attachments/B2D4AD16-FD41-CE47-AD99-A2DBD2F2F42B/publicdisclosure-(2018).pdf) [<https://perma.cc/8UJT-R5LE>]. Nonprofits required to file a 990N do not have to make the complete Schedule B available for public inspection. See *id.* Regulations “exclude the name and address of any contributor to the organization from the definition of documents required to be disclosed.” See *id.* No information about the personal identification of officers, directors or employees, are required. Optional disclosures include governing documents and conflict of interest policies. See *id.* Public disclosure of those governing documents is not required by the IRS. See *id.*

234. See I.R.S. FORM 990, NAT’L CONF. OF BAR EXAM’RS 7–8 (2019). This Form 990 shows that Executive Director Judith Gundersen is the highest compensated

\$19,166,610 from its examination services, all of which is a related or exempt function revenue item.<sup>235</sup> While examination services could represent the amount paid to the NCBE by the jurisdictions that administer the nonprofit's exams, it is impossible to tease out the individual costs to each jurisdiction, and that information is also not made widely available to the public or members of the bar.<sup>236</sup> The NCBE's investigative services brought in revenue totaling \$5,446,535 in 2019, and the "education services" line item brought in total revenue of \$1,789.<sup>237</sup> The total functional expenses for the 2019 filing were \$21.99 million, with \$18.3 million in program services expenses and \$3.69 million in management and general expenses.<sup>238</sup> In terms of grants or money given to other organizations in 2019, the NCBE paid \$150,000 to the Council on Legal Opportunity, Inc. (CLEO), for a new collaboration to help CLEO's programming dedicated to bringing diversity to the legal profession.<sup>239</sup> Two research grants were awarded for a total of \$9,000, but the recipients and purpose are not included.<sup>240</sup> Of the nine top executives listed on the 990N, four are currently-licensed attorneys, including NCBE Executive Director Gundersen, General Counsel Brad Gilbert, Director of Test Development and Operations Cherry Beth Hill, and Chief Strategy Officer Kellie Early. Brad Gilbert and Cherry Hill are licensed in Wisconsin, and Kellie Early is licensed in Missouri.<sup>241</sup> The bottom line of profitability for the

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employee at NCBE, reporting \$335,968 with an additional \$32,285 paid to her from the "organization and related organizations." *See id.* Mark Albanese, the Director of Testing and Research, was paid \$250,595, with an additional \$37,014 from the "organization and related organizations," and no employee is listed as making less than \$131,619 in reportable compensation from the NCBE (Andrew Mroch, the Senior Research Psychometrician). *See id.* at 10. Staff salaries are not reported individually on the 990. *See id.*

235. *See id.* at 9.

236. *See* Rizzardi, *supra* note 30, at n.113.

237. *See* I.R.S. FORM 990, *supra* note 234, at 9.

238. *See id.* at 10.

239. *See id.* at 10; *see NCBE and CLEO Announce New Collaboration, THE BAR EXAM'R*, Winter 2018-2019, <https://thebarexaminer.ncbe.org/article/winter-2018-2019/ncbe-and-cleo-announce-new-collaboration/> [https://perma.cc/DJ7E-FQ5F].

240. *See* I.R.S. Form 990, *supra* note 234, at 10.

241. *See* STATE BAR OF WISCONSIN, DIRECTORIES, <https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1041444> [https://perma.cc/5PQK-L96C] (last visited Nov. 12, 2023) (showing attorney license information for Brad Gilbert); *see* STATE BAR OF WIS., DIRECTORIES, <https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1007391> [https://perma.cc/M8DS-2NTE] (showing attorney license information for Judith Gundersen); *see* STATE BAR OF WIS., DIRECTORIES,

NCBE is revealed on Line 19 of the 2019 Form 990 in the Revenue less expenses line, or where it reported its net income.<sup>242</sup> In 2018, the NCBE reported \$4.5 million in net income, and in 2019 that number jumped to \$17.28 million, but it appears that came from a dramatic increase in the NCBE's investment income year-over-year.<sup>243</sup>

If the financials and structure of the NCBE itself are unclear and opaque, and the rules of professional conduct as a whole do not apply to the organization itself, the nonprofit reveals that its fealty and focus is devoted to the testing products they develop to sell.<sup>244</sup> NCBE Executive Director Gundersen pens an annual "President's Page" for the organization's external publication, *The Bar Examiner*.<sup>245</sup> Gundersen discussed the new hires made by the nonprofit (without disclosure of their salaries) in the Spring 2022 edition and links to a report by Rosemary Reshetar, discussing why bar exam pass rates are lower in February than in July, but there is no disclosure of the financials of the NCBE, nor are there robust discussions of the inner workings of the organization itself.<sup>246</sup> Gundersen describes the NCBE as, "conservative with a small 'c'" and says that, "the public, admissions authorities, and even examinees and law schools would

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<https://www.wisbar.org/directories/pages/lawyerprofile.aspx?Memberid=1052301> [<https://perma.cc/E4V9-WCA4>] (showing attorney license information for Cherry Beth Hill); see MO. BAR, LAWYER DIRECTORY, [https://mobar.org/site/content/For-the-Public/Lawyer\\_Directory\\_Detail.aspx?ID=e1044bc6-4def-4fc2-8b82-7c4f285aa2e9](https://mobar.org/site/content/For-the-Public/Lawyer_Directory_Detail.aspx?ID=e1044bc6-4def-4fc2-8b82-7c4f285aa2e9) [<https://perma.cc/7TPR-2UJT>] (showing attorney license information for Kellie Early).

242. See I.R.S. Form 990, *supra* note 234, at 10.

243. See *id.* (finding that in 2018 the NCBE reported \$3.2 million in investment income and in 2019 reported \$14.65 million in investment income; and, its program services revenue went from \$22.46 million in 2018 to \$24.6 million in 2019, while its expenses remained stable from \$21.1 million to \$21.9 million in 2019).

244. See NCBE Media Kit, NAT'L CONF. BAR EXAM'R, <https://www.ncbex.org/about/ncbe-media-kit> [<https://perma.cc/4E38-4NS9>] (last visited Nov. 12, 2023).

245. See Judith A. Gundersen, *President's Page*, THE BAR EXAM'R, <https://thebarexaminer.ncbex.org/article/spring-2022/presidents-page-1-2/> [<https://perma.cc/AM5R-3JW5>] (last visited Nov. 12, 2023).

246. See *id.*; Rosemary Reshetar, *The Testing Column: Why Are February Bar Exam Pass Rates Lower than July Pass Rates?*, THE BAR EXAM'R, <https://thebarexaminer.ncbex.org/article/spring-2022/the-testing-column-5/> [<https://perma.cc/9ANA-XQHB>] (last visited Nov. 12, 2023) (stating that, according to the NCBE, while the tests are "maximally" the same in July and February and the scaling is appropriately considered across multiple administrations of the exam, the population of takers is lower in February than in July, and consists of a higher number of takers who were unsuccessful on their first attempts).

want the entity that produces the lawyer licensing exam to be.”<sup>247</sup> In her own words, the organization exercises “faithful adherence to best practices in testing, our reliance on robust measurement expertise and a skilled editorial staff, and our collaboration with a vast network of volunteer subject-matter experts well trained in item writing and reviewing.”<sup>248</sup> What is marked about the communications from the NCBE are the robust and detailed discussions of how and why its examination products are equated and scaled.<sup>249</sup> The NCBE does not reveal how much it charges jurisdictions for its products and services. It asserts its tests are to be considered valid and reliable, and the Multistate Bar Exam (MBE) product plays a critical role in the NCBE’s goal for reliability and reproducibility.<sup>250</sup> In July 2022, the NCBE posted several notifications on Twitter that it is hiring for positions such as Research Specialist, a Visual Designer, a Testing Accommodations Implementation Specialist, a Test Associate, and a Copy Editor.<sup>251</sup> But by August 2022, the posts indicated that only the position for the Test Associate remained open and no salaries were listed.<sup>252</sup>

If the NCBE appears to support a duty, as a strong nonprofit is called to do, it is to its own testing metrics, equating process, psychometricians, and the development of its testing products (MBE, MPT, MEE, MPRE), including the development of its upcoming NextGen Bar Exam.<sup>253</sup> While accuracy and reliability in testing

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247. See Gundersen, *supra* note 245.

248. See *id.*

249. See NAT’L CONF. BAR EXAM’RS, BAR EXAM FUNDAMENTALS FOR LEGAL EDUCATORS 14 (2020), [https://thebarexaminer.ncbex.org/wp-content/uploads/NCBE\\_Bar\\_Exam\\_Fundamentals\\_022620.pdf](https://thebarexaminer.ncbex.org/wp-content/uploads/NCBE_Bar_Exam_Fundamentals_022620.pdf) [<https://perma.cc/WQ9A-6VFB>] (detailing how examination products are developed, administered, and scored, and how the organization reveals that all question writers and editors of content receive bias training; however, NCBE does not provide detailed studies on how its examination products affect takers based on race, ethnicity, or gender).

250. See *id.* (discussing how licensing exams must stay valid and reliable, and must do so in a reproducible way; stating the MBE plays a key role in this ideology for the NCBE).

251. See, e.g., @NCBEX, TWITTER (July 11, 2022, 12:39 PM), <https://twitter.com/NCBEX/status/1546534594849124352> [<https://perma.cc/2QD2-729J>].

252. See NCBE, *Test Associate*, <https://ncbe.bamboohr.com/jobs/view.php?id=42&source=aWQ9Nw%3D%3D> [<https://perma.cc/YM9B-NNL7>] (last visited Nov. 12, 2023).

253. The NextGen Bar exam has its own website. See *NextGen Bar Exam of the Future*, NCBE, <https://nextgenbarexam.ncbex.org/> [<https://perma.cc/BTR7-4FXV>] (last visited Nov. 12, 2023). It is purported to launch in 2026. See *id.*



metrics purportedly benefits exam takers and participating jurisdictions who rely on the results, this prioritization of a duty to the test product itself over the health and safety of the applicants, as well as their future careers, became startlingly clear at the height of the COVID-19 pandemic.<sup>254</sup> The NCBE delayed announcing whether online bar examinations would be provided to jurisdictions to administer in July 2020, even as jurisdictions such as California and Massachusetts announced online examinations only as a safety precaution.<sup>255</sup> That action could be excused as a consequence of the confusion of the times as many jurisdictions were delaying the bar exam and the world itself seemed on fire.<sup>256</sup> However, by the time the NCBE announced it would provide an online examination in late July, the nonprofit also declared it would not provide its typical scoring or scaling for the online examination, which meant the exam would not allow successful takers to take it for a portable score.<sup>257</sup> The decision to eliminate portability—the primary incentive for many bar applicants to sit for the UBE exam—and voiding the eligibility for score transfer, was made without any further disclosures of who was in the room when that decision was made.<sup>258</sup> This protected the

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254. See Griggs, *supra* note 7, at 4–5.

255. See *id.* at 9–10.

256. See Stephanie Francis Ward, *Decision About Releasing July Bar Exam Materials Will Come in May, NCBE Says*, ABA J. (Mar. 27, 2020, 1:43 PM), <https://www.abajournal.com/news/article/ncbe-decision-about-releasing-july-bar-exam-materials-will-come-in-may> [<https://perma.cc/V5AK-7LYC>].

257. See *Past NCBE COVID-19 Updates*, NAT'L CONF. BAR EXAM'RS (Jan. 10, 2022), <https://www.ncbex.org/ncbe-covid-19-updates/past-updates/> [<https://perma.cc/AW56-MHPD>] (“This remote testing option will not constitute the full bar exam or the UBE. Scores earned on the remotely administered test will be used for local admission decisions only, and not qualify as UBE scores. The scores will not be eligible to be transferred as UBE or MBE scores to other jurisdictions or released to candidates via NCBE Score Services.”).

258. See Griggs, *supra* note 7, at 9–11; see also *Past NCBE COVID-19 Updates*, *supra* note 257. These announcements were made without explanation of why the NCBE was providing a limited bar exam for remote testing option, or who the nonprofit was working with to formulate its COVID plans other than it was working “closely” with jurisdictions. See *Past NCBE COVID-19 Updates*, *supra* note 257. On June 1, 2020, Gundersen appeared to advocate for either in-person tests or postponement of the exam in a media release:

NCBE continues to strongly advocate that a full-length, standard, in-person administration of the bar exam/UBE is best for a number of reasons, including psychometric issues, exam security, and the testing environment of candidates, who may not have access to comparable testing conditions or equipment. We recognize, however, that these are extraordinary times. It is worth noting that many other high-stakes professional licensing exams, such as those for the medical, health care, engineering, and public

integrity of the NCBE's products, but could not be described to have been made in the best interests of applicants who relied on their successful UBE scores to transfer to other jurisdictions where they may have found employment.<sup>259</sup> Gundersen herself characterized the work of reviewing procedures, conferring with admissions authorities, and improving the scoring processes and technology as, "Boring? Perhaps. Important? Yes."<sup>260</sup> But of paramount importance are the bar examinees themselves who are tasked to sit for this examination and rely on it to determine their competence and fitness to practice law as well as obtaining future employment.<sup>261</sup>

### C. The Bar Exam Industrial Complex Owes Bar Applicants No Ethical Duties

If information is difficult to obtain about the inner workings of nonprofit corporations, information on the profitability and professional organization of privately-held commercial bar preparation providers is even more challenging.<sup>262</sup> If a company is not publicly traded and registered with the Securities and Exchange Commission (SEC), then it is not required to report or disclose financial or other information to the public because it does not seek financing from shareholders in the general public.<sup>263</sup> Although there has been a rise in the discussion and development of business ethics and corporate responsibility over the past two decades, and around 90% of Fortune 500 firms have a corporate code or practice and guidelines for making ethical decisions, there is still a lack of

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accounting professions, are to the best of our knowledge still being held in person or are being postponed until they can be held in person[.]

*See id.* Also, scores earned on the remotely administered test would only be used for local admissions, and not qualify as portable UBE scores, however no justification was given for the decision. June 1, 2020 release. *See id.*

259. *See Past NCBE COVID-19 Updates*, *supra* note 257.

260. *See Gundersen*, *supra* note 245.

261. *See Griggs*, *supra* note 7, at 12.

262. *See generally How To Find Private Company Revenue: Best Practices for Research*, SOURCESCRUB (May 3, 2023), <https://www.sourcescrub.com/post/how-to-find-private-company-revenue-best-practices-research> [<https://perma.cc/HJ9Z-DUWG>] (describing how to find financial information about private companies).

263. *See id.*; *see also* Amber Keefer, *The Differences in Tax Reporting Between Publicly Traded Corporations & Privately Held*, CHRON, <https://smallbusiness.chron.com/differences-tax-reporting-between-publicly-traded-corporations-privately-held-36563.html> [<https://perma.cc/QS7D-EVGL>] (last visited Nov. 12, 2023).

consensus as to their nature, scope, and enforceability.<sup>264</sup> Government regulatory agencies have promulgated bodies of rules and statutes to enforce violations, but developments in corporate or business ethics remain largely rule-based and focused on ensuring regulatory compliance to avoid criminal liability rather than on promoting or enforcing ethical conduct.<sup>265</sup>

Dallas, Texas-based BARBRI, Inc. (BARBRI)—creator of the largest and most well-established commercial bar preparation program in the country—is a privately held company founded in 1967, according to its owner private equity investment firm Francisco Partners.<sup>266</sup> The global private equity investment firm acquired BARBRI in 2021 for an undisclosed amount from Leeds Equity Partners, LLC.<sup>267</sup> Francisco Partners reports having more than \$25 billion in assets under management, and its investments include payment and commerce company VeriFone, Inc., nutrition and fitness tracking application MyFitnessPal, Inc., and global self-service ticketing platform Eventbrite.<sup>268</sup> According to RocketReach, an online research database, BARBRI's revenue is \$65 million.<sup>269</sup> Bar applicants who may choose to pay from \$1,999 for the

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264. See John Donaldson & Irene Fafaliou, *Business Ethics, Corporate Social Responsibility and Corporate Governance: A Review and Summary Critique*, 6 EUR. RSCH. STUD. J. 90, 92–94 (2003).

265. See Michael L. Michael, *Business Ethics: The Law of Rules*, CORP. SOC. RESP. INITIATIVE 2–3 (2006); see also *Sarbanes-Oxley Code of Ethics*, SEC, <https://www.sec.gov/Archives/edgar/data/917100/000119312512100695/d267494dex99codeeth.htm> [<https://perma.cc/C56D-6C5G>] (setting a minimum requirement for covered officers such as principle executive officer, president and principal financial officer, and treasurers, and emphasizing actual and apparent conflicts of interest, and admonishments for offers not to use personal influence or relationships to determine investments or financial reporting). Sanctions for violations can include requirements that violators undergo training, monetary penalties, suspension or additional remedies to cover financial losses. See *id.*

266. At the time of this writing, Francisco Partners had obtained ownership of BARBRI. It is important to note that increasingly the purchases of these companies is volatile and subject to change. See *Francisco Partners to Acquire Leading Legal Education Provider BARBRI*, FRANCISCO PARTNERS (Mar. 31, 2021), <https://www.franciscopartners.com/news/francisco-partners-to-acquire-leading-legal-education-provider-barbri> [<https://perma.cc/HE9Q-R5LP>].

267. See *id.*

268. See *Investments*, FRANCISCO PARTNERS, <https://www.franciscopartners.com/investments> [<https://perma.cc/S77R-JHHG>] (last visited Nov. 12, 2023); see also *Francisco Partners to Acquire Leading Legal Education Provider BARBRI*, *supra* note 266.

269. See *BARBRI Inc. Information*, ROCKETREACH, [https://rocketreach.co/barbri-inc-profile\\_b5e24060f42e6282](https://rocketreach.co/barbri-inc-profile_b5e24060f42e6282) [<https://perma.cc/NY6R-BULB>] (last visited Nov. 12, 2023).

self-pass course, and up to \$3,999 for the ultimate pass course, are bound by an extensive terms of use agreement that includes an arbitration and class/collective action waiver.<sup>270</sup> Any actionable duties existing between the company and the bar applicants are primarily based in contract law and likely to be settled confidentially in arbitration.<sup>271</sup> The company does discuss its “corporate social responsibility” on its website, which states the company, “strive[s] to be a responsible business that meets high standards of ethics and professionalism.”<sup>272</sup> Its enumerated business ethics include three points: “[s]afety and fair dealing,” “[r]espect toward the student/consumer,” and that it will promote “[a]nti-bribery and anti-corruption practices.”<sup>273</sup> The company concludes that it “expect[s] to be held accountable by our communities, employees, and all business partners around the globe,” but how and by whom?<sup>274</sup> Even companies sensitive to their reputations are fairly insulated from legal action by users, if not from social media posts and other online chatter from dissatisfied users.<sup>275</sup>

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270. See BARBRI, BARBRI BAR EXAM REVIEW COURSE ENROLLMENT AGREEMENT (2020), [https://barreview.barbri.com/hubfs/Legal/Terms-and-Conditions-Various-Courses/2020-2021\\_BARBRI-Bar-Review-Terms-and-Conditions\\_updated%20Aug2020.pdf](https://barreview.barbri.com/hubfs/Legal/Terms-and-Conditions-Various-Courses/2020-2021_BARBRI-Bar-Review-Terms-and-Conditions_updated%20Aug2020.pdf) [<https://perma.cc/SW2W-M89H>].

271. See *Terms of Use*, BARBRI, <https://www.barbri.com/terms-of-use> [<https://perma.cc/TTX5-SBBB>] (last visited Nov. 12, 2023) (describing how Barbri’s terms of use include an arbitration provision specifying that arbitration will be held in Dallas, Texas, administered by the American Arbitration Association, and stating Arbitration awards are not court records, and as such remain confidential); see also *Terms of Service*, TESTMAX (Sept. 25, 2017), <https://testmaxprep.com/policies/terms> [<https://perma.cc/2EMC-L245>] (discussing how Test Max’s Terms of Service also contain an arbitration clause with the arbitration to be held in Los Angeles, California).

272. See *Corporate Social Responsibility*, BARBRI, <https://www.barbri.com/corporate-social-responsibility/> [<https://perma.cc/KSJ8-U9DZ>] (last visited Nov. 12, 2023).

273. See *id.*

274. See *id.*

275. See, e.g., *Law School Memes for Edgy T14s*, FACEBOOK, <https://www.facebook.com/groups/525722401118558> (last visited Nov. 12, 2023) (describing the popular Facebook group that posts multiple memes about bar preparation companies); *Themis Memes for Should-Be-Studying Teens*, FACEBOOK, <https://www.facebook.com/groups/597283074087717> (last visited Nov. 12, 2023) (discussing another group that also posts regularly during the 10 weeks of bar study making jokes about the level of service provided and about the popularity (or not) of certain lecturers and programming features); see also, ExcellencePerSe, *Bar July 2022*, REDDIT, [https://www.reddit.com/r/barexam/comments/srer4z/bar\\_july\\_2022/](https://www.reddit.com/r/barexam/comments/srer4z/bar_july_2022/) [<https://perma.cc/UV7F-3J6T>] (last visited Nov. 12, 2023) (showing Reddit users post

Bar applicants, without a law license, many of whom are also without a job over the summer to support themselves, are in a poor position to hold their commercial bar preparation companies accountable.<sup>276</sup>

BARBRI isn't the only privately-held commercial operator in the bar preparation space.<sup>277</sup> Similarly, Themis Bar Review, LLC (Themis) is a privately-held commercial bar preparation provider founded in 2008, that was acquired by privately-held UWorld in 2020 for an undisclosed amount.<sup>278</sup> According to RocketReach, Themis has a revenue of \$2 million.<sup>279</sup> Themis costs bar applicants paying full price \$2,795 for its bar review course, and users are also governed by an extensive set of terms and conditions, which do not limit them to arbitration like BARBRI, but which do limit challengers to the laws of the State of Illinois.<sup>280</sup> Themis gives a nod to the ethical duties owed by bar applicants in its terms and conditions, but the duty is owed by the bar applicants themselves.<sup>281</sup> Themis reserves the right to report

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in r/barexam each season, sharing tips and gallows humor memes expressing frustration with the bar exam industrial complex and the bar exam in general).

276. See Amara Omeokwe, *Rising Bar Tab Draining New Law School Grads*, CNBC (Aug. 19, 2013, 8:06 AM), <https://www.cnbc.com/id/100958832> [<https://perma.cc/3JG4-H8MB>].

277. See *UWorld Acquires Themis Bar Review to Expand Online Learning Offerings*, BUSINESSWIRE (July 21, 2020, 11:08 AM), <https://www.businesswire.com/news/home/20200721005087/en/UWorld-Acquires-Themis-Bar-Review-to-Expand-Online-Learning-Offerings> [<https://perma.cc/QX9B-MKU5>].

278. See *id.*

279. See *Themis Bar Review: Contact Details and Business Profile*, ROCKETREACH, [https://rocketreach.co/themis-bar-review-profile\\_b5c579acf42e0e01](https://rocketreach.co/themis-bar-review-profile_b5c579acf42e0e01) [<https://perma.cc/CTC4-KJDB>].

280. See *General Questions About Themis*, THEMIS BAR REV., <https://www.themisbar.com/faq> [<https://perma.cc/64F3-ZPKV>] (last visited Nov. 12, 2023) (stating commercial bar preparation companies like Themis offer several discounts for certain fraternity members, military spouses and offer public interest discounts); see also *BARBRI Bar Review Public Interest Scholarships*, BARBRI, <https://www.barbri.com/bar-review-course/public-interest-scholarship> [<https://perma.cc/9YXU-7MXA>] (last visited Nov. 12, 2023) (finding Barbri offers Public Interest Scholarships to help defray the full cost of its commercial programs); *Bar Review Scholarships*, DUQUESNE UNIV., <https://www.duq.edu/academics/schools/law/academics/bar-studies/bar-review-scholarships> [<https://perma.cc/BBT3-K62C>] (last visited Nov. 12, 2023) (describing Duquesne's policy to offer commercial bar preparation scholarships to assist takers in paying for the programming); *Terms of Use*, THEMIS BAR REV., <https://www.themisbar.com/terms> [<https://perma.cc/V6CR-BP7M>] (last visited Nov. 12, 2023).

281. See generally *Terms of Use*, *supra* note 280.

bar applicant misconduct to the character and fitness board or attorney registration office in the offender's jurisdiction.<sup>282</sup>

While BARBRI and Themis are two of the most well-known commercial bar preparation providers, there are many others that have flooded the market in recent years because these test preparation courses have become essential for law school graduates seeking licensure, even as law schools are increasingly offering in-house bar preparation courses both optional and for-credit.<sup>283</sup> Current competitors include privately-held companies BarMax Prep Course, Quimbee Bar Review Course, Crushendo Bar Review Course, Bar Prep Hero Review, and Adaptibar.<sup>284</sup> One of the newest bar preparation providers to hit the market in 2021 was Helix Bar Review by AccessLex, which is owned by the AccessLex Institute, a nonprofit company based in Pennsylvania that began as a private loan provider in 1983 and transitioned in 2010 to a nonprofit.<sup>285</sup> The Helix program

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282. See *id.* ("In addition to subjecting you to criminal and civil liability, misuse of the Portal and violation of this TOU is a violation of professional ethics, and Themis may report any misconduct to the attorney registration and character and fitness board in your jurisdiction.").

283. See Aleatra P. Williams, *The Role of Bar Preparation Programs in the Current Legal Education Crisis*, 59 WAYNE L. REV. 383, 385, 405, 414 (2013).

284. At the time of this Article, Bar Max is owned by AP Max Test Prep, LLC, a private company, based in La Verne, California. See *Business Search*, CAL. SEC'Y STATE, <https://bizfileonline.sos.ca.gov/search/business>. Quimbee is owned by Sellers International, LLC, based in Charlotte, North Carolina, but registered as a foreign LLC incorporated in Delaware. See *Entity Details*, DEL. SEC'Y STATE, <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; see also *Limited Liability Company*, N.C. SEC'Y STATE, [https://www.sosnc.gov/online\\_services/search/Business\\_Registration\\_Results](https://www.sosnc.gov/online_services/search/Business_Registration_Results). Crushendo is owned by Crushendo, LLC, and is an LLC registered in Provo, Utah. See *Utah Business Search*, UTAH SEC'Y STATE, <https://secure.utah.gov/bes/displayDetails.html>. Bar Prep Hero is owned by Elegant E-Learning, Inc., based in Sarasota, Florida, but owned by Hamilton, Ontario-based company Elegant E-Learning, Inc. See *Reinventing E-learning for the 21st Century*, ELEGANT E-LEARNING, [https://elegantlearning.com/\[https://perma.cc/7LZU-HM2N\]](https://elegantlearning.com/[https://perma.cc/7LZU-HM2N]). Adaptibar is owned by Minnesota-based AdaptiGroup, LLC, which was acquired by West Academic in 2019 for an undisclosed amount, and BARBRI Global announced it acquired West Academic from private equity firm, Levine Leichtman Capital Partners, for an undisclosed amount in January, 2022. See Deborah Heller, *West Academic Acquires AdaptiBar*, AM. ASS'N L. LIBRS. (Nov. 4, 2019), [https://perma.cc/5TKR-N7UN](https://crivblog.com/2019/11/04/west-academic-acquires-adaptibar/); see also Cole Lipsky, *Barbri Acquires West Academic*, MIDDLE MKT., <https://www.themiddlemarket.com/latest-news/barbri-acquires-west-academic> [https://perma.cc/B2CU-4AR4].

285. See *Leading Nonprofit AccessLex Institute Launches New Bar Review With Donation of \$5 Million in Free Courses*, ACCESSLEX INST. (Oct. 13, 2021),

for the UBE costs \$1,199 for individual law students, and the nonprofit donated \$5 million in free courses to students graduating from ABA-accredited law schools this year.<sup>286</sup> In an October 2021 press release, AccessLex President and Chief Executive Officer Christopher Chapman said one of the main goals for launching the program was to create a program, “[f]ree from the constraints imposed by the profit-driven model that dominates the bar preparation marketplace.”<sup>287</sup> In its most recently filed 990N from 2019, the AccessLex Institute reported net revenue of \$28.9 million, with \$135 million in total revenue from its student loan program.<sup>288</sup> The nonprofit gave grants and other assistance to domestic organizations and individuals totaling more than \$2.2 million, and Chapman received over \$970,000 in compensation.<sup>289</sup> Its terms and conditions includes a code of conduct applicable to bar applicants who use the program and limits choice of law and venue for disputes to the Commonwealth of Pennsylvania.<sup>290</sup> AccessLex is a well-capitalized nonprofit, and it is impossible to tell from the filing how much it spent developing its Helix product.<sup>291</sup>

As illustrated above, it is nearly impossible to get a reliable and confirmable number on the total revenue commercial bar preparation courses earn because these companies are either privately-held or

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<https://www.accesslex.org/accesslex-institute-launches-new-bar-review> [<https://perma.cc/7SV8-YMU5>] [hereinafter *Leading Nonprofit AccessLex*]; *Mission and History*, ACCESSLEX INST., <https://www.accesslex.org/about/mission-and-history> [<https://perma.cc/HMM2-VL4P>]; see also Karen Sloan, *A Longer, Cheaper Bar Exam Prep Program Looks to Upend the Industry*, REUTERS (Sept. 7, 2021, 5:21 PM), <https://www.reuters.com/legal/legalindustry/longer-cheaper-bar-exam-prep-program-looks-upend-industry-2021-09-07/> [<https://perma.cc/ZH6D-WH5G>].

286. See *Leading Nonprofit AccessLex*, *supra* note 285. Pricing for Helix program is current as of December 2023. See *Our Pricing*, HELIX BAR REV., <https://www.helixbarreview.org/pricing> [<https://perma.cc/2N8B-3Q6G>] (last visited Dec. 18, 2023).

287. See *id.*

288. See IRS, 2019 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX FOR ACCESSLEX INSTITUTE 1 (2019), [https://apps.irs.gov/pub/epostcard/cor/232719985\\_202003\\_990\\_2021021817718301.pdf](https://apps.irs.gov/pub/epostcard/cor/232719985_202003_990_2021021817718301.pdf) [<https://perma.cc/5B8J-DA2K>].

289. See *id.*

290. See *Privacy Policy and Terms of Use*, HELIX BAR REV., <https://www.helixbarreview.org/privacy-policy-and-terms-of-use> [<https://perma.cc/T9FE-XKMA>] (last visited Nov. 12, 2023). These terms include prohibitions against actions that are disruptive to the learning environment, acting in a manner that shows a lack of dignity or respect for others, and a prohibition against engaging in misconduct such as cheating, violating the confidentiality of others, or violating the TOU. Unauthorized use of the program can subject violators to criminal and civil penalties. See *id.*

291. See IRS, *supra* note 288, at 1.

nonprofit organizations that change hands frequently.<sup>292</sup> Only Kaplan, Inc., as a subsidiary of The Graham Holdings Co., is a publicly traded company, and it reported operating income of \$20.4 million for the first quarter of 2022, up from \$18.9 million for the first quarter of 2021.<sup>293</sup> If bar applicants wanted to discover information about these companies, it would take hours of detailed research and as illustrated above, there are limited venues for them to seek redress even if they had the time or resources to pursue any claims that might arise.<sup>294</sup> Most bar preparation companies are also in undisclosed contractual relationships with the NCBE to license practice MBE, MEE, and MPT questions, making this thicket a dense and nearly impenetrable one for bar applicants who owe contractual duties, financial duties, and in many cases ethical duties such confidentiality as part of their terms and conditions of use.<sup>295</sup> They are limited to posting their cries on social media outlets from anonymized accounts on Twitter, “Screaming into the void here, but what was the point of spending three years in law school if I didn’t learn enough to pass the bar without a prep course?”<sup>296</sup> And receiving replies such as, “The point of spending three years in law school is to generate income for a gatekeeper to the profession. The point to the bar exam is . . . the same for a different gatekeeper.”<sup>297</sup> Bar applicants can spot the issues but are powerless against this profession’s watchmen.<sup>298</sup>

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292. See *Exchange Act Reporting and Registration*, SEC (Apr. 6, 2023), <https://www.sec.gov/education/smallbusiness/goingpublic/exchangeactreporting> [https://perma.cc/82PL-M3H3].

293. See *Graham Holdings Company Reports First Quarter Earnings*, BUSINESSWIRE (May 4, 2022, 8:30 AM), <https://www.businesswire.com/news/home/20220502005885/en/Graham-Holdings-Company-Reports-First-Quarter-Earnings> [https://perma.cc/UY2X-5G5F].

294. See *Terms of Use*, *supra* note 271.

295. See *id.*

296. See @bmorelegal1, TWITTER (Jun. 15, 2022, 7:12 PM), <https://twitter.com/bmorelegal1/status/1537256666059755521> [https://perma.cc/XD24-FN5E].

297. See @DumbApe69420, TWITTER (Jun. 16, 2022, 12:51 PM), <https://twitter.com/DumbApe69420/status/1537477980053819392> [https://perma.cc/UTQ9-KVMQ].

298. See Oday Yousif, Jr., *Commentary: The Bar Exam is Stained with Inequality and Racism. It Needs to Be Abolished.*, SAN DIEGO UNION TRIB. (Dec. 7, 2020, 5:45 PM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-12-07/abolishing-the-bar-exam-bias> [https://perma.cc/83ZL-2C9F].



#### IV. REMEDYING THE ETHICAL DUTY GAP: PARTNERSHIPS NOT SECRET SOCIETIES

Can we really expect the newest members of the legal profession to value the ethical rules espoused as essential to setting the practice of law apart as self-regulating now that they have seen and experienced the duty gap that exists between when they graduate and when they receive their license to practice?<sup>299</sup> A gap that put their health at risk during a pandemic, employed untested technologies to administer exams never designed to be taken on a small computer screen, and in some cases denied them access to academic accommodations, bathroom breaks, and menstrual products?<sup>300</sup> This gap ultimately led the newest generations of lawyers to create and support a national movement calling for abolishing the bar exam completely.<sup>301</sup>

The legal profession may maintain the status quo, but staying static would be contrary to the continual development and amendment of the professional regulations governing lawyers.<sup>302</sup> While many lawyers might assert the profession as a whole is slow to change, in the area of professional regulation and the development of the rules of

299. See, e.g., GILLERS, *supra* note 19, at 8.

300. See Marcy L. Karin et al., *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1, 18 n.75, 20 n.84, 34 (2021).

301. The Abolish the Bar Exam movement calls for the abolition of the bar for a number of reasons including financials, discrimination, racism, inequality, post-pandemic public health, and whether the exam actually measures a potential lawyer's competency. See Jessica Williams, *Abolish the Bar Exam*, CALIF. L. REV. (Oct. 2020), <https://www.californialawreview.org/online/abolish-the-bar-exam> [<https://perma.cc/WW5L-2454>]; Valerie Strauss, *Why this Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASH. POST (Jul. 13, 2020, 2:45 PM), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/> [<https://perma.cc/3LM5-VTXJ>]; Yousif, *supra* note 298; Ilya Somin, *The Case for Replacing the Bar Exam With "Diploma Privilege,"* VOLOKH CONSPIRACY (Jul. 29, 2020, 3:47 PM), <https://reason.com/volokh/2020/07/29/the-case-for-replacing-the-bar-exam-with-diploma-privilege/> [<https://perma.cc/KN8H-6NDB>]; Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. SOC. JUST. 287, 315–16 (2021).

302. See *Model Rules of Professional Conduct*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct) [<https://perma.cc/PZ6F-P928>] for timeline of changes made to the ABA's Model Rules of Professional Conduct. The most recent amendments were made to Rule 1.8(e) in August 2020, and the ABA maintains a Standing Committee on Ethics and Professional Responsibility that routinely suggest changes and amendments to the rules. See *id.* (showing the addition of Rule 1.8(e)).

professional conduct, the opposite is true.<sup>303</sup> When it comes to making changes in the ethical rules governing the conduct of the profession, revisions have been undertaken by the ABA at regular intervals from 1928 to today.<sup>304</sup> Scandals too can effect changes to the way lawyers govern themselves, as they did after the Watergate scandal when the ABA made professional responsibility classes mandatory at all accredited law schools in the country.<sup>305</sup> The 2016 revision of Model Rule 8.4 to include paragraph (g) prohibiting harassment and discrimination in a lawyer's conduct "relat[ing] to the practice of law"<sup>306</sup> has also led to a new interpretation of the Standard 303 that requires all ABA-accredited law schools to include and document training in bias, cross-cultural competency, and racism in Professional Responsibility courses.<sup>307</sup>

The duty gap revealed by the pandemic may be the catalyst necessary to effectuate substantial changes in the lawyer licensure process.<sup>308</sup> The lack of transparent oversight of this gateway exercise into the legal profession could begin to be remedied utilizing existing frameworks like the Code of Ethical Conduct for Bar Examiners, by the existing bar associations working in tandem with the judiciary in each district to commit to greater transparency, responsiveness to applicants and law schools, by jurisdictions adopting alternative pathways to licensure, and even amendments to the rules of professional conduct.<sup>309</sup> Rolling back the dense fog covering the watchmen and working together could serve the interest in protecting the public from incompetent lawyers, while also protecting the newest members of the legal profession.<sup>310</sup> Changes are being called for and,

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303. See Baude, *supra* note 94, at 652–53; *Ethics 2000 Commission*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_report\\_home/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home/) [<https://perma.cc/BB9Y-QAGD>] (last visited Nov. 12, 2023).

304. See ABEL, *supra* note 50, at 142.

305. See *id.* at 142–43.

306. See Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), [www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2019/spring/model-rule-8-4/](http://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/).

307. See Memorandum from The Standards Committee on Final Recommendations: Standards 205, 303, 507, and 508, American Bar Association (Aug. 16, 2021) (on file with author).

308. See Gil, *supra* note 7, at 2.

309. See, e.g., *Mission Statement and Code of Ethics*, *supra* note 121; Rizzardi, *supra* note 30, at 423; ABEL, *supra* note 50.

310. See Griggs, *supra* note 7, at 2.

in limited cases, already on the horizon.<sup>311</sup> A new generation of lawyers both demands and deserves better.<sup>312</sup>

#### A. Add Reciprocal Duties for Bar Examiners to Rule 8.1—Bar Admission & Disciplinary Matters

As illustrated above, the current lawyer licensing process and its watchmen are not governed in any direct or meaningful fashion by the professional self-regulation provisions embedded in the rules of professional conduct.<sup>313</sup> Model Rule 8.1 sets forth a mandatory duty for bar examinees to not knowingly make a false statement of material fact, to correct any misapprehensions that later arise, and to respond to all lawful demands for information made by the admissions authority.<sup>314</sup> But there is no reciprocal duty there for bar examiners (who in many instances are licensed attorneys) to timely respond, communicate, or provide competent services.<sup>315</sup> Because applicants to

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311. See Williams, *supra* note 301.

312. See *id.*

313. See, e.g., Macey, *supra* note 76, at 1081.

314. See MODEL RULES OF PRO. CONDUCT r. 8.1 (AM. BAR ASS'N 1983).

315. Author's note: The routine failure and glitches caused by the widespread and continued use of ExamSoft software to administer the bar examination across the country provides a concrete example of raising the question of competence as applied to bar examiners and the NCBE. See David Lat, *The Biggest Bar Exam Disaster Ever? ExamSoft Makes Everyone's Life Hard*, ABOVE THE LAW (July 29, 2014, 10:56 PM), [https://abovethelaw.com/2014/07/bar-exam-disaster-examsoft-makes-everyones-life-hard/?\\_ga=2.26191551.346820957.1660318106-2020565163.1660318106](https://abovethelaw.com/2014/07/bar-exam-disaster-examsoft-makes-everyones-life-hard/?_ga=2.26191551.346820957.1660318106-2020565163.1660318106) [<https://perma.cc/7P7D-Z3NY>]. Model Rule 1.1, comment 8, discusses that to maintain knowledge and skill requires lawyers to keep abreast of the “benefits and risks of associated with relevant technology.” See MODEL RULES OF PRO. CONDUCT r. 1 cmt. 8 (AM. BAR ASS'N 1983). Serious concerns about technical problems with the use of this program have existed since 2014 when ExamSoft crashed leaving thousands of exam takers without recourse. See “*The Biggest Bar Exam Debacle in History*” Brought to You by ExamSoft, JD ADVISING, <https://jdadvising.com/biggest-bar-exam-debacle-history-examsoft/> [<https://perma.cc/PCZ5-JHXS>] (last visited Nov. 12, 2023). The program's limitations came to national attention again in 2020 and 2021 during the online COVID administrations of the bar exam as examinees reported computers crashing during the examination, cameras not working, freezing screens, and failures to upload. See Sam Skolnik, ‘Devastating’ Anxiety as Remote Bar Exam Tech Crashes Again, BLOOMBERG LAW: NEWS (July 30, 2021), <https://news.bloomberglaw.com/business-and-practice/devastating-anxiety-as-remote-bar-exam-tech-crashes-again> [<https://perma.cc/5YZR-DWXC>]; Jay Reeves, *Remote Bar Exams Plagued by Glitches*, LAWYERS MUTUAL: BYTE OF PREVENTION BLOG (Nov. 15, 2021), <https://www.lawyersmutualnc.com/blog/remote-bar-exams-plagued-by-glitches> [<https://perma.cc/3KXG-Z4ZC>] (outlining for details on COVID-administration crashes). These issues were never formally addressed by the

take the bar exam are not yet licensed attorneys, and also do not meet the definition of what it means to be a client for purposes of application of the rules, this allows bar examiners to exercise great agency over a vulnerable population.<sup>316</sup> Similar to clients, bar applicants entrust confidential matters and a great deal of money to bar examiners, but unlike clients they do not also have any authority over the bar examiners or a mechanism to lodge a complaint.<sup>317</sup> Applicants are assured of confidentiality, but the confidentiality inexplicably extends to the inner workings of the boards of law examiners making the relationship incredibly unequal.<sup>318</sup> The only time a bar examinee can challenge the determination of a bar examiner is through an appeals process, and in many instances, they must hire a lawyer to do so.<sup>319</sup> Lawsuits against boards of law examiners have also proven to be a largely unsuccessful endeavor from actions relating to rescoring, failure to grant disability accommodations, and claims of violations of due process and equal protection.<sup>320</sup> If Rule 8.1 can apply

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NCBE or the participating jurisdictions that continue to use the ExamSoft product for administering the bar examination. *See id.*

316. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. L. INST. 2000).

317. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, intro. (AM. L. INST. 2000).

318. *See* Rizzardi, *supra* note 30, at 432–24.

319. *See* PA. BAR ADMISSION 222(b); *see also* 42 PA. CONS. STAT. § 725(5) (1978); *Article 78 Proceedings — How to Appeal an Agency Decision*, LEGAL ASSISTANCE OF W.N.Y., INC. (June 16, 2023), <https://www.lawny.org/node/62/article-78-proceedings-%E2%80%93-how-appeal-agency-decision> [<https://perma.cc/8K3H-8MCQ>] (explaining how, in New York, applicants seeking to appeal a decision by the board of law examiners must file an Article 78 proceeding with the New York State Supreme Court, and it is recommended that a lawyer help file the Notice of Petition and Petition); STATE BAR OF CAL. 4.47 (allowing California Bar applicants to appeal an adverse determination of moral character and request a hearing with the State Bar Court).

320. *See In re McCarroll*, 327 S.E.2d 880, 881–82 (N.C. 1985) (affirming the trial court’s denial of the pro se applicant’s motions for a jury trial and to sue in forma pauperis after he appealed the North Carolina Board of Law Examiners’ denial of his application to take the February 1984 Bar Examination); *Scullion v. Mich. State Bd. L. Exam’rs*, 302 N.W.2d 290, 291 (Mich. Ct. App. 1981) (holding that the circuit court did not have jurisdiction to review the Michigan State Board of Law Examiners’ decision to deny applicant’s request for reconsideration after she appealed her failing Michigan Bar Exam essay scores because the Board is a judicial agency and under the Supreme Court’s jurisdiction); *T.W. v. N.Y. State Bd. L. Exam’rs*, 996 F.3d 87, 89 (2d Cir. 2021) (holding that the New York State Board of Law Examiners is immune from actions brought under Section 504 of the Rehabilitation Act after the Board denied T.W. appropriate disability accommodations for the bar examination);

a duty of candor and cooperation to non-lawyer bar applicants, it could be revised to apply to non-lawyer bar examiners, and even more to those bar examiners who are licensed.<sup>321</sup>

In a majority of cases, violations of Rule 8.1 are add-on charges to the disciplinary actions already being pursued.<sup>322</sup> However, in one Mississippi case in 2019, an applicant who was awaiting her bar exam results was charged with violating Rule 8.1 by failing to supplement her bar application to acknowledge she allegedly forged a court order, thereby creating a “misapprehension about [her] character and fitness to practice law.”<sup>323</sup> The Mississippi Supreme Court suspended the applicant from practicing law for three years, required her to apply later for reinstatement, and assigned a special Committee on Character and Fitness to monitor her after reinstatement.<sup>324</sup> This case is illustrative of how complaints for violations of Rule 8.1 against bar examiners could be similarly handled if a reciprocal duty is added, and provides a way to bring increased oversight of the watchmen by a self-regulating profession.<sup>325</sup>

Complaints against bar examiners for violations of duties in an amended Rule 8.1 would go first to the existing disciplinary boards of each jurisdiction for investigation and remediation which are primarily comprised of licensed attorneys and judges.<sup>326</sup> The ABA Standards for Imposing Lawyer Sanctions provide for a wide range of available sanctions for misconduct, from a public disbarment to private admonitions.<sup>327</sup> These disciplinary boards could review the

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Hampton v. Tenn. Bd. L. Exam'rs, 770 S.W.2d 755, 756–757 (Tenn. Ct. App. 1988) (affirming the trial court's dismissal of the applicants' action, alleging the Board failed them as part of a scheme to determine who would fill a quota of passing applicants in violation of their equal protection rights, that they were denied procedural due process, and their right to anonymity was violated, because the state board and related individuals had absolute immunity for acts determining qualifications for state bar admissions).

321. See ELLEN J. BENNET & HELEN GUNNARSSON, ANNOTATED RULES OF PROFESSIONAL CONDUCT 674 (A.B.A., 9th ed. 2019).

322. See, e.g., *id.*

323. See *Miss. Bar v. Johnson*, 326 So.3d 382, 386 (Miss. 2019).

324. See *id.* at 387.

325. See, e.g., *id.*

326. See MODEL RULES OF PRO. CONDUCT r. 8.5 (Am. Bar Ass'n 1983); see, e.g., MICH. CT. R. 9.110(B).

327. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 2.1–2.8 (AM. BAR ASS'N 1992) (stating that lawyer disciplinary actions can include sanctions, disbarment, interim suspension, a term of suspension, public reprimand, private admonition, probation, restitution, assessment of costs, practice limitation, appointment of a receiver, requirements that a lawyer take continuing legal education

complaints and report issues to the judiciary, who have control over boards of law examiners.<sup>328</sup> While many disciplinary actions are never made known to the public—and transparency would provide another desirable layer of accountability for the watchmen—having an avenue of recourse that brings lawyers back into the licensing process better embodies the purpose of professional self-regulation.<sup>329</sup> While not a perfect scenario, acknowledging boards of law examiners also owe ethical duties to applicants could also help close the duty gap while utilizing existing resources.

## B. Resurrection and Formal Adoption of the Code of Recommended Standards for Bar Examiners

As outlined above, the NCBE, ABA, and the Association of American Law Schools (AALS) adopted a Code of Recommended Standards for Bar Examiners in 1959, and it received minor updates as late as 2019.<sup>330</sup> These guidelines represented an attempt to create uniformity in the objectives and practices of the bar admissions gatekeepers, and had not been formally adopted by individual jurisdictions.<sup>331</sup> It provided a good starting place for reform, and many of its code provisions mirrored suggestions made by the Carnegie Foundation in 2011.<sup>332</sup> Or at least, the guidelines used to before they completely disappeared.<sup>333</sup> In the 2023 edition of the Comprehensive Guide to Bar Admission Requirements, the Code of Recommended

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or retake all or part of a bar examination, and any other requirement deemed “consistent with the purposes of lawyer sanctions”).

328. See, e.g., MICH. COMP. LAWS §§ 600.904, .925.

329. See generally Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1–2, 19–20 (2007) (discussing how many jurisdictions keep lawyer discipline private, a characteristic that has been long criticized for its lack of transparency, but defended on the basis of protecting the integrity of the investigations, and how the privacy of the attorney disciplinary process varies from state to state, with only Florida, New Hampshire, Oregon, and West Virginia treating them as matters of public record).

330. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at vii.

331. See *id.*; cf. Annie Legomsky, *Law Student Debt + Public Interest Career = Character and Fitness Fail*, 46 WASH. U.J.L. & POL’Y 305, 329 n.141 (2015) (explaining how scholars have advocated for a more uniform national standard and to improve upon the Code of Recommended Standards for Bar Examiners, evidencing that no state has formally adopted the Code).

332. See WEGNER, *supra* note 152; see *Foundation History*, CARNEGIE FOUND. ADVANCEMENT OF TEACHING, <https://www.carnegiefoundation.org/about-us/foundation-history/> [<https://perma.cc/S5AU-5KC6>] (last visited Nov. 12, 2023).

333. Compare 2023 COMPREHENSIVE GUIDE, *supra* note 134, at v, with 2022 COMPREHENSIVE GUIDE, *supra* note 124, at iii–vii.

Standards for Bar Examiners has been completely removed without explanation either in the Preface or in the letter that accompanies the delivery of the guide signed by NCBE President Judith Gundersen.<sup>334</sup>

The 2022 Code set forth detailed qualifications for bar examiners including prohibitions on conflicts of interest, and included a suggestion to enforce sufficient rotation of authority on these boards to “bring new views to the authority and to ensuring continuing interest in its work.”<sup>335</sup> It also called for “sufficient funding and staffing” for these boards of law examiners and set forth an investigative process placing the burden on the bar examinee to produce all requested information.<sup>336</sup> It exhorted boards to provide for due process and confidentiality to applicants, and strongly emphasized the “necessity” of written examinations.<sup>337</sup> Of course, this code was written by the NCBE itself, which has a profitable and vested interest in its own written bar examination being used by jurisdictions; a specific state’s code of conduct could be revised to include other valid licensure options and thus better serve the interests of the jurisdictions offering alternative paths to licensure as detailed below.<sup>338</sup>

Section 1 regarded the make-up, tenure, and qualifications of members of boards of law examiners and could have been revised to ensure funding and staffing issues are more transparent for both bar examinees and the lawyers of each jurisdiction.<sup>339</sup> There was no mandatory provision in the Code requiring bar examiners to be licensed lawyers, and membership on the boards of law examiners varies from jurisdiction to jurisdiction, with some mandating all members be attorneys and others including non-attorney members.<sup>340</sup>

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334. See 2023 COMPREHENSIVE GUIDE, *supra* note 134, at v. The NCBE provides law deans with a complimentary copy of this report every year. It can be purchased online from the ABA at <https://www.americanbar.org/products/inv/book/429283272/?login> for \$15 for members, and \$16.50 for non-members, and also <https://store.ncbex.org/bar-admission-requirements-guide/> from the NCBE for \$15.

335. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at iii, vii.

336. See *id.* at viii.

337. See *id.* at viii–ix.

338. See *id.* at vii–x; Services for Attorneys, WISC. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm> [<https://perma.cc/KX67-5WQD>] (last visited Nov. 12, 2023).

339. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at vii.

340. See *id.*; see also *About*, ILL. BD. ADMISSIONS TO BAR, <https://www.ilbaradmissions.org/about> [<https://perma.cc/A3EH-HVAG>] (last visited Nov. 12, 2023) (requiring an all-attorney member board of admissions); PA. BAR ADMISSION RULES 104(a) (2022), <https://www.pabarexam.org/pdf/rules.pdf> [<https://perma.cc/ZG2X-GCUJ>] (requiring all seven members of its board of law

To remedy any confusion or misunderstanding, a provision could be added to a revised Code stating all boards of law examiners could produce public annual reports that detail how they are run, who is on staff, and how the money that bar examinees pay is used.<sup>341</sup> This level of transparency would provide for a greater degree of self-regulation by members of the legal profession itself as well as the members of the public these boards purport to protect from incompetent lawyers.<sup>342</sup> Transparency in the operations of these boards would shed light on issues such as the diversity of the members of these boards, accountability as to how bar application fees are spent, and it would serve to dispel some of the mystery that inevitably causes anxiety for applicants.<sup>343</sup>

Section VI, Administration, of the 2022 Code suggested all jurisdictions engage in periodic studies of the bar exam to determine effectiveness, as well as to discover defects and to make changes to

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examiners be admitted to the Commonwealth's bar); SUPREME COURT OF GEORGIA RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW 2 (2022), <https://www.gabaradmissions.org> [<https://perma.cc/N8YG-K624>] (requiring six attorney members and 3 non-attorney members to determine an applicant's fitness to practice law upon passage of a bar exam).

341. Virginia is an example of a jurisdiction who does produce a public annual report. *See, e.g.*, VIRGINIA STATE BAR 84TH ANNUAL REPORT 25 (2022), <https://www.vsb.org/Site/Site/news/annual-reports.aspx?hkey=7cdbdb3c-cfb0-4be3-afbd-06f440b8b743> [<https://perma.cc/3XPH-PR2M>]. In its code of ethics, one commitment is to "Exercise prudence and integrity in utilizing the resources of the Virginia Board of Law Examiners, ensuring that every dollar collected from applicants is spent efficiently." *See Mission Statement and Code of Ethics, supra* note 121. Minnesota and Maryland also provide similar annual reports. *See, e.g.*, STATE OF MINNESOTA 2022-23 BIENNIAL BUDGET (2021), <https://www.house.leg.state.mn.us/comm/docs/J19y8oszFkaAGKTu4NVdSg.pdf> [<https://perma.cc/GM2T-QCDV>]; *State Board of Law Examiners Budget*, MARYLAND MANUAL ON-LINE, <https://msa.maryland.gov/msa/mdmanual/33jud/html/05lawb.html> [<https://perma.cc/2AU7-8VXT>] (last visited Nov. 12, 2023).

342. *See Mission Statement, PA. BD. L. EXAMINERS*, <https://www.pabarexam.org/> [<https://perma.cc/7AAS-68U6>] (last visited Nov. 12, 2023) ("This mission preserves the integrity of the legal system, and protects all individuals seeking legal representation from unethical or incompetent lawyers.").

343. *See* Langford, *supra* note 48, at 1225 ("[A]pplicants should have full access to the identities of the character committee members who will be determining their moral character. The fact that this information is kept confidential only perpetuates applicant anxiety and the perception of an equal playing field. A mandate that character committees diversify as much as possible to include all types of lawyers, laypersons, and mental health experts will eliminate potential prejudices and biases from coloring admissions decisions.").



the system.<sup>344</sup> With the majority of U.S. jurisdictions now administering the UBE, this type of robust examination of the test itself followed by public disclosures of findings would become even more important for both individual jurisdictions as well as applicants.<sup>345</sup> As of this Article, few jurisdictions have publicly engaged in detailed studies of the efficacy of the UBE for lawyer licensing.<sup>346</sup> One notable exception is New York, where in 2019 the New York State Bar Association launched a Task Force on the New York Bar Examination to review the impact of the UBE on diversity, members of the bar, applicants, newly admitted attorneys, and the courts.<sup>347</sup> The report, released in April 2020, is one of the first and most detailed studies of the effect of the UBE in any jurisdiction, and the findings emerged in three separate reports.<sup>348</sup> Recommendations found in the second report revolved largely around the pandemic administration of the bar exam including eliminating online testing, expanding the use of “student practice orders” to allow graduates to begin practice without delays until the exam is administrated, and a prohibition on the granting of diploma privilege.<sup>349</sup> However, the third report concludes with a stinging indictment of the NCBE and how the nonprofit and the NY Bar Association harbor different “basic perspectives” on how to best determine a pathway to licensure that would benefit new lawyers seeking to practice in the state.<sup>350</sup> If every

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344. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at x.

345. See *Jurisdictions, NAT’L CONF. BAR EXAM’RS*, <https://www.ncbex.org/jurisdictions> [<https://perma.cc/SV48-DSWH>] (last visited Nov. 12, 2023).

346. See, e.g., N.Y. STATE BAR ASS’N, THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAMINATION 1 (2021); Letter from Joanna Perini-Abbott, Chair, Alternatives to the Exam Task Force, to Oregon State Board of Bar Examiners (Jun. 18, 2021) (announcing the creation and implementation of task forces to examine the UBE).

347. See NEW YORK STATE BAR ASS’N, *supra* note 346, at 1.

348. See *id.* at 1–6.

349. See *id.* at 3.

350. See *id.* at 91–92 (“As with BOLE, we are extremely disappointed by the tone and substance of NCBE’s reply to the First Report. Much of the NCBE’s response is unprofessional and inappropriate. This is most unfortunate because we had thought that NCBE’s intent was to provide the best possible exam process for candidates seeking law licensure. Instead, perhaps perceiving that their attempt to monopolize the Bar Examination market was threatened, they reacted, as did BOLE, by attempting to circle the wagons and to refuse to professionally deal with criticism, except by *ad hominem* attack that NCBE would not tolerate from a prospective lawyer.”); *id.* at 97 (“Clearly, the Task Force’s and the NCBE’s basic perspectives are different. The Task Force is concerned with finding a pathway to law licensure in the State of New York that assures the public that its newly admitted attorneys are

jurisdiction formally adopted a Code modeled after the 2022 version of the Code of Recommended Standards for Bar Examiners and engaged in its bar exam licensure process in as much detail as New York, it would show how a self-regulating profession can in fact police its own licensing process and make suggestions to improve the process as a whole for all constituents.<sup>351</sup> It would also go a long way toward closing the existing duty gap.<sup>352</sup>

Finally, the 2022 Code concluded with the suggestion that each jurisdiction set up a committee on cooperation that consists of bar examiners, law schools, judiciary, and the bar to meet annually to consider issues of legal education, eligibility, and admission to the bar.<sup>353</sup> A few states, such as Oregon and Louisiana, do have formal Bar Admission Advisory Committees, but many, like Pennsylvania, West Virginia, Florida, and Maine, do not.<sup>354</sup> Benefits to following this 2022 code provision are already being felt in Oregon. That jurisdiction follows the 2022 version of the Code of Recommended Conduct for Bar Examiners, Section IV Administration, Part 31, by actively engaging in a “Committee on Cooperation,” where the board of bar examiners and the Oregon State Bar meet with the state’s three law schools every other Friday to keep lines of communication and cooperation open.<sup>355</sup> This Code provision comported with the suggestions made by the Carnegie Foundation that bar examiners should tie their assessments to what law schools actually teach, as well

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prepared to practice law in New York that includes New York law, while also assuring the candidates that the bar exam he or she takes is a fair and reliable assessment of that individual’s minimum competency to practice law. NCBE is concerned with the validity and reliability of its exam products and scoring practices.”)

351. See *id.* at 1–22; 2022 COMPREHENSIVE GUIDE, *supra* note 124, at x.

352. See NEW YORK STATE BAR ASS’N, *supra* note 346, at 1–22; 2022 COMPREHENSIVE GUIDE, *supra* note 124, at x.

353. See 2022 COMPREHENSIVE GUIDE, *supra* note 124, at x.

354. Compare LA. SUP. CT. R. XVII § 10(A) (“The dean or chancellor of each law school located in this state shall nominate one member of its full-time faculty to serve on the Bar Admissions Advisory Committee.”), with Mark Dows, *Pennsylvania’s Professor Liaison Program Helps to Build Transparent Bar Admission Process*, Winter 2009, at 5 (explaining that the Pennsylvania Board of Law Examiners solicits feedback from law schools after each administration of the bar exam, and the feedback is conveyed to the bar exam graders during the grading process).

355. See posting of Amy Meyers, Assoc. Professor of L., Willamette U. Coll. of L., [abmeyers@willamette.edu], to [academic-support-and-bar-prep@googlegroups.com] (June 17, 2022) (“This keeps us all communicating the same information to our examiners, helps with the FAQs so the bar isn’t swamped with requests from students, etc. It [has] worked really well, especially during the pandemic exams.”) (on file with author).

as consider whether the current practices used to assess the competence of new lawyers advances or undercuts the quality of legal services new lawyers provide.<sup>356</sup> The way the UBE currently operates, covering a wide variety of topics at a broad but very shallow level, tests baseline knowledge but is often not a reflection of how law students today spend time learning the law in concentrated fields through electives, clinics, and externships.<sup>357</sup> By creating and implementing committees on cooperation, boards of law examiners could work closely with law schools, practitioners, and the judiciary to ensure the newly licensed lawyers in each jurisdiction are being tested on what they are actually being taught, and could help assist law schools in graduating law students who can better meet the needs of both the public and the judicial system in which they will operate.<sup>358</sup> The bar exam itself could become a conduit for competent licensed attorneys, rather than merely a hurdle—once overcome, never considered again.<sup>359</sup>

### C. Alternative Paths to Licensure to Curtail Bar Examiner Monopoly

Creating alternative paths to licensure is another way in which jurisdictions can not only take full control over the lawyer licensing process, but can also call on already existing law schools to fulfill a duty to ensure competent, practice-ready lawyers are prepared upon graduation to serve the profession, their clients, and their communities.<sup>360</sup> Two states—Wisconsin and New Hampshire—already allow graduates to skip the bar exam and to obtain a license to practice through either diploma privilege or through engaging in specialized curriculum while enrolled in law school.<sup>361</sup>

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356. See WEGNER, *supra* note 152, at 17, 21.

357. See generally Curcio, *supra* note 107, at 447, 449–50, 452. The bar exam tests a narrow range of skills and tests them in a way that is not related to the practice of law and therefore does not meaningfully determine who is competent. See *id.* The way it is currently administered negatively impacts the law school admission process and curriculum and course content at law schools in addition to having a deleterious effect on diversity in the legal profession. See *id.*

358. See *id.* at 449–50, 452.

359. See *id.* at 448–49.

360. See *id.*

361. See Ayumi Davis, *Oregon Closer to Becoming Third State to Allow Would-Be Lawyers to Skip Bar Exam*, NEWSWEEK (Jan. 13, 2022, 4:22 PM), <https://www.newsweek.com/oregon-closer-becoming-third-state-allow-would-lawyers-skip-bar-exam-1669220> [<https://perma.cc/TH4Y-YC5T>].

Oregon remains one of the most progressive jurisdictions in the nation, and it has approved one of two proposed new pathways to licensure for future lawyers that does not involve the completion of an NCBE-written exam.<sup>362</sup> In September 2020, the Oregon Supreme Court requested the Oregon Board of Law Examiners form a task force to explore alternative paths to licensure.<sup>363</sup> Two years later, in January 2022, the Oregon Supreme Court unanimously supported two alternatives to the UBE, which are an experiential learning path for law students, and a postgraduate supervised practice pathway that would require out-of-state bar applicants to spend up to 1,500 hours working with a licensed Oregon attorney before becoming licensed themselves.<sup>364</sup> Additionally, the Oregon Board of Law Examiners advanced a report guided by the principles of consumer protection and equity and recommended the adoption of alternative pathways to licensure.<sup>365</sup> Proponents of these alternatives say that if a two-day written exam to measure competence is sufficient to protect the public, these more rigorous pathways requiring more intense supervision and oversight will not lower the bar on attorney competence in the state.<sup>366</sup> In November 2023, the Supervised Practice Portfolio Examination (SPPE) was approved by the Supreme Court and applicants will be able to take advantage of this new assessment starting May 15, 2024.<sup>367</sup>

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362. See *Licensure Pathway Development Committee*, STATE BAR OF OR., <https://lpdc.osbar.org/#:~:text=The%20SPPE%20framework%20and%20its,in%20the%20E2%80%9Cresources%20%80%9D%20tab> [https://perma.cc/MN8Z-9QLY] (last visited Jan. 3, 2024).

363. See Letter from Martha L. Walters, Chief Justice, Or. Sup. Ct., to Troy Wood, Or. State Bar (Sept. 14, 2020), <https://taskforces.osbar.org/files/2021/02/CJLetterReAdmissionsBBXTaskForces.pdf> [https://perma.cc/2UVZ-VDZW].

364. See Meerah Powell, *The Oregon Supreme Court Last Week Unanimously Supported Next Steps Toward Alternative Pathways for Attorney Licensure*, OPB (Jan. 18, 2022, 2:35 PM), <https://www.opb.org/article/2022/01/17/oregon-advances-alternative-routes-to-becoming-a-licensed-lawyer> [https://perma.cc/2SMQ-T4SD].

365. See Letter from Joanna Perini-Abbott, *supra* note 346, at 1.

366. See Davis, *supra* note 361 (“People are comfortable with the two-day exam. Surely they can be comfortable with a two-year exam.’ . . . ‘We’re not lowering the bar to become a lawyer,’ Joanna Perini-Abbott said, outgoing chair of the Oregon Board of Bar Examiners . . . . ‘We feel there are other ways that someone can demonstrate that they are competent to practice law.’”).

367. See *Licensure Pathway Development Committee*, *supra* note 362 (noting that even with the new pathway to licensure, applicants in Oregon will still be able to sit for the UBE in that jurisdiction in order to have a more easily portable score). Oregon has also agreed to be one of the first adopters of the NCBE’s NextGen bar exam beginning in July 2026. *Id.*

The Oregon Experiential Portfolio Pathway (OEPP) is still in the works.<sup>368</sup>

In October 2021, the Minnesota State Board of Law Examiners announced it would undertake a comprehensive study to examine alternative options for licensure, and plans to present its recommendations to the Minnesota Supreme Court in 2023 with the goal of providing new pathways by 2026.<sup>369</sup> New York is considering moving away from the UBE and going back to an exam partially drafted by New York state authorities after the state administered the UBE for just six years.<sup>370</sup> Perhaps the most dramatic turn of events occurred quietly in March 2021, when the West Virginia Legislature introduced House Bill 3190 that would allow anyone with a master's degree, regardless of course of study, to take a bar examination in the jurisdiction to become a lawyer licensed to practice law in the courts of the state.<sup>371</sup>

If actions like creating alternative pathways to law licensure being considered by progressive states are eventually adopted, it would cut into the monopoly-like business created by the NCBE while greatly expanding the oversight of newly licensed attorneys, which could potentially protect the public in a more comprehensive way than a one-time standardized examination where half of the points come

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368. See *id.*

369. See Josh Verges, *Objection Your Honor: Bar Exam Comes Under Further Scrutiny*, U.S. NEWS & WORLD REP. (Oct. 9, 2021, 1:01 AM), <https://web.archive.org/web/20211013015205/https://www.usnews.com/news/best-states/minnesota/articles/2021-10-09/objection-your-honor-bar-exam-comes-under-further-scrutiny> [https://perma.cc/83J7-NCQC].

370. See Susan DeSantis, *New York State Bar Association Calls for State to Withdraw From the Uniform Bar Exam*, N.Y. STATE BAR EXAM (June 12, 2021), <https://nysba.org/new-york-state-bar-association-calls-for-state-to-withdraw-from-the-uniform-bar-exam/> [https://perma.cc/V74S-Z5KA] (suggesting that New York withdraw from the UBE and develop its own exam in order for attorneys to have a better understanding of their state law before going into practice). *New York Adopts the Uniform Bar Examination (UBE)*, NAT'L CONF. BAR EXAM'RS (May 6, 2015), <https://web.archive.org/web/20221228010157/https://ncbex.org/news/new-york-adopts-the-uniform-bar-examination-ube/> [https://perma.cc/KN4R-833N] (explaining that New York City adopted the UBE in May 2015, and began administering the exam in July 2016).

371. See H.B. 3190, 86th Leg., 2022 Reg. Sess. (W. Va. 2022), [https://www.wvlegislature.gov/Bill\\_Status/bills\\_history.cfm?INPUT=3190&year=2022&sessiontype=RS](https://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=3190&year=2022&sessiontype=RS) [https://perma.cc/B3TH-XNJB] (stating House Bill allows anyone with a master's degree to sit for a bar examination and become a licensed attorney in West Virginia).

from a multiple-choice test.<sup>372</sup> The MBE is a component of every state's bar exam that has in recent years come under fire as actually being a tool that better measures a bar applicant's capacity for short-term memorization than of minimum competency to practice law.<sup>373</sup>

### CONCLUSION

In this self-governing profession, all licensed lawyers are charged with watching the watchmen.<sup>374</sup> And with as many shortcomings that exist with the current state of lawyer self-regulation, an open, transparent, and efficient regulatory system would go a long way toward generating respect for the rule of law, especially among the bar applicants who are seeking admittance.<sup>375</sup> It would engender trust in the licensing process instead of suspicion and doubt.<sup>376</sup> An over-emphasis on advancing the narrow interests of maintaining the secrecy of the bar licensing process, of protecting the statistical reliability of a two-day examination over health and safety of hopeful new lawyers, and a lack of process and procedure redress for complaints and concerns, has served only to diminish the respect for the process and emphasize the duty gap between graduation and licensure for bar applicants.<sup>377</sup> Reforming lawyer licensing could be done first by using existing frameworks of discipline and enforcement, and by bringing both lawyers and the rules of professional conduct back into the process.<sup>378</sup> Bar applicants would be protected to a greater extent, but the public would also be protected, reinforcing the very

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372. See Christopher, *supra* note 47, at 2783–84 (detailing the reach of the NCBEX); see also *Jurisdictions*, *supra* note 345 (detailing the NCBE exams used in each of the fifty U.S. states and most of the unincorporated U.S. territories).

373. See generally Steven Foster, *Does the Multistate Bar Exam Validly Measure Attorney Competence?*, 82 OHIO STATE L.J. ONLINE 31, 40–41 (2021), <https://ssrn.com/abstract=3759924> [<https://perma.cc/S4ZW-SEJW>] (claiming that the MBE is not a measure of competence, but a measure of student memorization).

374. See, e.g., MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR. ASS'N 1983).

375. See Macey, *supra* note 76, at 1097 (arguing for the radical deregulation of the profession because a look into the past has illustrated that self-regulation professions can often devolve into self-interested and monopolistic behaviors of lawyers, and suggesting that a well-designed system fosters respect for both the rule of law and respect from lawyer to lawyer).

376. See *id.*

377. See WU, *supra* note 176, at 5.

378. See, e.g., MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR. ASS'N 1983).

reason these gatekeepers supposedly exist.<sup>379</sup> After all, the purpose of enforcing the rules of professional conduct is “to protect the public in its reliance upon the integrity and responsibility of the legal profession.”<sup>380</sup> It can be difficult to hold powerful entities accountable, but that is a function all lawyers are called to perform.<sup>381</sup> How we treat the newest members of our profession is a poor reflection on the profession as a whole.<sup>382</sup> By allowing the duty gap to persist, the legal profession eats away at its position of power and destroys the foundations of self-governance it was built upon.<sup>383</sup> Who then watches the watchmen? In a self-regulating profession, we all do.

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379. See *Mission Statement and Code of Ethics*, *supra* note 121; *Mission Statement*, *supra* note 342; VIRGINIA STATE BAR 84TH ANNUAL REPORT, *supra* note 341, at 25.

380. See *In re Giuliani*, 146 N.Y.S.3d 266, 268 (N.Y. App. Div. 2021) (quoting *In re Nearing*, 229 N.Y.S.2d 567, 569 (N.Y. App. Div. 1962)).

381. See Bobbi Jo Boyd, *Embracing Our Public Purpose: A Value-Based Lawyer Licensing Model*, 48 UNIV. MEMPHIS L. REV. 351, 428–29 (2018).

382. See Macey, *supra* note 76, at 1081, 1096, 1099.

383. See Williams, *supra* note 301; Strauss, *supra* note 301; Yousif, *supra* note 298; Somin, *supra* note 301; Nies, *supra* note 301, at 315–16.