

AN INCLUSIVE MODEL FOR LICENSING NEW LAWYERS

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I. INTRODUCTION

The American system of licensing new lawyers is irretrievably broken.¹ Law school graduates seeking licensure are put through an intrusive and ineffective “character and fitness” evaluation² before taking a high-stakes test that bears little relation to either what they learned in law school, or what they will do as practicing attorneys.³ This process, costing an average of \$6,700,⁴ is solely funded by the applicants, many of whom already carry oppressive student loan debt and have no secure offer of

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¹ See Deborah Jones Merritt, *Validity, Competence, & the Bar Exam*, ASS’N AM. L. SCHS. NEWS, <https://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [<https://perma.cc/7GFJ-SMHK>]; William J. Carney, *Curricular Change in Legal Education*, 53 IND. L. REV. 245, 245 (2020); Christine A. Corcos, *Legal Uncertainties: COVID-19, Distance Learning, Bar Exams, and the Future of U.S. Legal Education*, 8 CAN. J. COMPAR. CONTEMP. L. 71, 115–16 (2022).

² Joseph A. Valerio, *The Impact of the Character and Fitness Honesty and Financial Responsibility Requirements on Underprivileged Groups*, 30 GEO. J. LEGAL ETHICS 1093, 1095 (2017).

³ Merritt, *supra* note 1.

⁴ Kenneth W. Boyd, *Bar Exam Costs & Fees*, CPA ACCT. INST. FOR SUCCESS, <https://www.ais-cpa.com/bar-exam-costs-and-fees/> [<https://perma.cc/52AU-6PKM>] (Jan. 19, 2023) (explaining this figure includes registration, exam fees, background checks, bar preparation courses, and lost wages during the bar study period).

future employment.⁵ The process disadvantages applicants from communities of color, applicants with disabilities, and applicants from economically disadvantaged backgrounds, perpetuating the lack of diversity in the legal profession.⁶

A growing movement to re-imagine new-lawyer licensing has taken place on several fronts. There is a movement to re-imagine the bar exam, to make it more reflective of legal education and the tasks of a practicing attorney,⁷ and more uniform across jurisdictions.⁸ There is also a movement to abolish the bar exam altogether in favor of “diploma privilege,” wherein law school graduates (or at least those from certain schools or with a certain grade point average) would automatically be licensed in the state in which they attended law school.⁹ Finally, there is a movement to provide alternative pathways to licensing that do not involve standardized testing.¹⁰ All of these models have looked to the licensing

⁵ Allen Mendenhall, *Razing the Bar*, FOUND. FOR ECON. EDUC. (Apr. 14, 2015), <https://fee.org/articles/razing-the-bar/> [<https://perma.cc/4CJE-MAPL>].

⁶ Valerio, *supra* note 2, at 1107.

⁷ See DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR ADVANCEMENT AM. LEGAL SYS, BUILDING A BETTER BAR EXAM: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 5–12 (2020), <https://iaals.du.edu/publications/building-better-bar> [perma.cc/X82V-77HH].

⁸ Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 5 (2019).

⁹ MERRITT & CORNETT, *supra* note 7, at 81–82; Karen Sloan, *COVID-19 Blew up the Bar Exam. Even Bigger Changes are Coming*, NAT’L L.J. (Apr. 1, 2021), <https://www.law.com/nationallawjournal/2021/04/01/covid-19-blew-up-the-bar-exam-even-bigger-changes-are-coming/> [<https://perma.cc/9J4P-HU4J>].

¹⁰ Karen Sloan, *Oregon Becomes First State to Weigh Permanent Bar Exam Alternatives Following Pandemic Upheaval*, NAT’L L.J. (June 30, 2021, 3:40 PM), <https://www.law.com/2021/06/30/oregon-becomes-first-state-to-weigh-permanent-bar-exam-alternatives-following-pandemic-upheaval/> [<https://perma.cc/H4D2-6UYF>].

systems employed by other professions—medicine,¹¹ accountancy,¹² engineering¹³—for models upon which to base this reform.

This article focuses on the first movement—bar exam reform—but uses a new professional model: social work. Although it is a relatively new profession,¹⁴ social work provides a workable and inclusive model for improving new-lawyer licensing. Social workers, like lawyers, are entrusted with their clients' most personal and important information.¹⁵ Social workers, like lawyers, use systems to help their clients solve problems.¹⁶ Social workers and lawyers have similar requirements related to ethics and professionalism.¹⁷ But social work differs from the legal profession in how it welcomes new practitioners to the field.¹⁸ Social work uses an inclusive model, designed to increase participation in the field by applicants from all walks of life.¹⁹ This inclusive model integrates social work education into the social work licensing process, eliminating

¹¹ Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 423–24 (2019).

¹² Debra Moss Curtis, *Licensing and Discipline of Fiscal Professionals in the State of Florida: Attorneys, Certified Public Accountants, and Real Estate Professionals*, 29 NOVA L. REV. 339, 353–54 (2005).

¹³ Howarth & Wegner, *supra* note 11, at 424–25.

¹⁴ *Social Work History*, NAT'L ASS'N OF SOC. WORKERS, <https://www.socialworkers.org/News/Facts/Social-Work-History> [<https://perma.cc/LKC6-7QYK>].

¹⁵ Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131, 150–51 (2001).

¹⁶ *Id.* at 137.

¹⁷ See MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N, Discussion Draft 1983); CODE OF ETHICS OF THE NAT'L ASS'N OF SOC. WORKERS (NAT'L ASS'N OF SOC. WORKERS 1996).

¹⁸ See discussion *infra* Section IV–V.

¹⁹ See discussion *infra* Section III.

expensive exams and intrusive character checks that needlessly lengthen the licensing process and increase the applicant's expense, while still protecting the public and preserving the reputation and quality of the profession.²⁰

Part II of this Article outlines the historical and current models of lawyer licensing in the United States and the obstacles this system presents for new and diverse applicants. Part III explains the social work licensing model and how it integrates education and licensing to reduce barriers to entry. Part IV explores what a system of new-lawyer licensing based on the social work model could look like, and the results expected to be achieved. This Article concludes, although not a perfect match, the social work model provides a framework that could improve the broken system of new-lawyer licensing.

II. NEW-LAWYER LICENSING

Congratulations! You have graduated from law school, but all the effort and expense you put in over the last three years will amount to nothing if you are not able to overcome the final hurdle to becoming an attorney: obtaining a license to practice law. Without this credential, law school graduates are unable to practice the profession they trained for over the past three years, and are unlikely to earn enough to repay their large law school student debt²¹ in a timely manner.

Unfortunately, the process of licensing new lawyers is expensive, burdensome, and time-consuming.²² It grew out of a system designed to exclude certain segments of the population from the legal profession and bears little relation to actually measuring competence and protecting the public.²³

²⁰ See discussion *infra* Section III.

²¹ Melanie Hanson, *Average Law School Debt*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-law-school-debt> [<https://perma.cc/3Y32-WZML>] (Nov. 7, 2022) (“The average law school graduate owes \$180,000 in student loan debt.”).

²² See Boyd, *supra* note 4.

²³ Mendenhall, *supra* note 5.

A. A History of Exclusion

Although often cited as a measure to protect the public, new-lawyer licensing has actually been a way to protect the profession from admitting “undesirable[s],” and market saturation.²⁴ History shows new-lawyer licensing is less about public protection and more about limiting access to the profession.²⁵ This exclusionary history overshadows today’s new-lawyer licensing, resulting in a costly, burdensome process that unfairly discriminates against candidates from economically disadvantaged backgrounds and communities of color.²⁶

Graduates of early law schools were admitted to practice with no examination (i.e., diploma privilege) or with a perfunctory interview.²⁷ Courts, charged with determining who could practice before them, assumed individuals who completed a multi-year study of the law to the satisfaction of their school were qualified to practice law.²⁸ Of course, these graduates were almost all wealthy, white, and male.²⁹ Prospective attorneys who did not have the means to attend law school often entered

²⁴ LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 24–25 (5th ed. 2020).

²⁵ Cassandra Burke Robertson, *How Should We License Lawyers?*, 89 *FORDHAM L. REV.* 1295, 1296, 1299–1300 (2020).

²⁶ *Id.* at 1299, 1303–04.

²⁷ Joan Howarth, Visiting Professor & Interim Assoc. Dean for Experiential Legal Educ., Boyd Sch. of L., Morning Keynote Address at the Brigham Young University Law & Leadership Conference: A Short History of Attorney Licensing: Tales of Protection, Prestige, Exclusion, & Good Faith (Jan. 29, 2021) (video available at <http://proxlaw3.byu.edu/2021Lc/LeadershipConference-morningkeynote/LeadershipConference-morningkeynote.html>) [<https://perma.cc/N9BU-4HCW>].

²⁸ Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 *J. LEGAL EDUC.* 124, 125 (1976).

²⁹ See Charles Summer Brown, *The Genesis of the Negro Lawyer in New England*, 22 *NEGRO HIST. BULL.* 171, 176 (1959) (explaining George Lewis Ruffin, the first Black American to graduate from an American law school, graduated from Harvard Law School in 1869).

the profession via “reading the law,” serving as an apprentice to an experienced lawyer while reading cases and statutes to learn the law.³⁰ These candidates, who did not possess a law school degree, were still largely white and male, though usually less wealthy than their counterparts who attended law school.³¹ They were often required to pass some sort of oral examination to ensure their apprenticeship prepared them for practice and they possessed the requisite moral character for the practice of law.³²

These oral bar examinations were usually perfunctory; there is a famous apocryphal story of Abraham Lincoln asking a candidate a few basic questions in a hotel room while drawing a bath.³³ However, exams for candidates from marginalized backgrounds tended to be more intense.³⁴ Clara Shortridge Foltz, the first woman admitted to the California Bar, endured a three-hour examination.³⁵ Macon B. Allen, the first African American admitted to the Maine Bar, sat for a “careful, and protracted” examination, which he passed, but still faced opposition to his admission from members of the committee who refused to attend his examination.³⁶

³⁰ McKirdy, *supra* note 28, at 127–28.

³¹ See Brown, *supra* note 29, at 176; ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 157 (1953) (explaining it became more popular for wealthier parents to send their *sons* to the Inns of the Court to study law rather than learn from “read[ing] [the] law”).

³² Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 *GEO. J. LEGAL ETHICS* 359, 374 (1996).

³³ Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Exam and Proposed Alternatives*, 45 *CASE W. RES. L. REV.* 1191, 1196 (1995).

³⁴ Oday Yousif Jr., *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> [perma.cc/K3NY-4J44].

³⁵ Barbara Allen Babcock, *Clara Shortridge Foltz: “First Woman”*, 30 *ARIZ. L. REV.* 673, 697 (1988).

³⁶ Daniel Hinchey, *Passing the Bar: America’s First African American Attorney*, *THE BEEHIVE* (May 7, 2019), <https://www.masshist.org/beeiveblog/2019/05/passing-the-bar>

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The first written bar examination was used in Massachusetts in 1855, when the Massachusetts Court of Common Pleas required any applicant who could not show they had completed three years of legal education to pass a “written test of competence.”³⁷ States slowly began to require a written examination, but only for those applicants who had trained in a law office.³⁸ Law school graduates were largely exempt from this new requirement.³⁹ As they had before, the regulators of the legal profession deferred to the “expertise” of the law school faculty in assessing a graduate’s qualifications to practice law.⁴⁰

As the number of law schools in the United States increased,⁴¹ more lawyers came from law schools rather than apprenticeships, and lawyers admitted through diploma privilege began to outnumber lawyers admitted through a bar exam. This concerned the newly-formed American Bar Association,⁴² which in 1878 issued its first statement encouraging more

americans-first-african-american-attorney/ [https://perma.cc/5EMN-QJ6P]. See also J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1078–79 (1994).

³⁷ Howarth, *supra* note 27 (noting attorneys who graduated from a recognized law school were granted diploma privilege, or admission without examination).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ In 1860, there were twenty-one law schools in the United States; by 1880 there were fifty-one. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 21 (1983); Erwin N. Griswold, *Legal Education: 1878–1978*, 64 A.B.A. J. 1051, 1051 (1978).

⁴² Howarth, *supra* note 27 (explaining the ABA openly opposed diploma privilege in 1892, 1908, 1918, and 1921); *History of the American Bar Association*, UPCOUNSEL, <https://www.upcounsel.com/lect1-history-of-the-american-bar-association> [https://perma.cc/KER5-QLQP] (“The original ABA constitution . . . defined the purpose of the ABA as being for ‘the advancement of the science of jurisprudence, the promotion of the administration of justice and a uniformity of legislation throughout the country.’”).

uniform requirements for admission to the practice of law and opposing diploma privilege for law school graduates.⁴³ The ABA feared allowing diploma privilege would shift control of the profession to law schools and away from bar associations.⁴⁴ An attendee at the first ABA meeting in Saratoga Springs, New York in 1878 called for “restrictions upon the admission of persons to practice law” and expressed concern that “[t]he large proportion of unnecessary and frivolous litigation grows out of the licensing of incompetent practitioners.”⁴⁵ The American Association of Law Schools (AALS) also opposed diploma privilege.⁴⁶ By 1917, most jurisdictions required written bar exams for all applicants, and jurisdictions began to form their own Boards of Bar Examiners (BOE), similar to the system we have today.⁴⁷

As interest in law school attendance grew, a new type of law school began to develop: part-time and night school programs arose to accommodate students who did not have the financial wherewithal to devote three years solely to the study of law (or who were not eligible for admission at the mostly all-white institutions that existed).⁴⁸ The YMCA, a leading organization in creating non-traditional educational opportunities

⁴³ ALFRED Z. REED, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEARS 1926 AND 1927, at 3 (1928). At an ABA meeting in 1921, the following language was drafted as one of the key principles behind the “standard requirements for admission to the bar”: “The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.” *Id.*

⁴⁴ RICHARD L. ABEL, AMERICAN LAWYERS 62 (1989).

⁴⁵ Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A. J. 658, 688 (1917).

⁴⁶ REED, *supra* note 43, at 4.

⁴⁷ ABEL, *supra* note 44, at 63.

⁴⁸ Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Schools, 1890–1940*, 55 J. LEGAL EDUC. 208, 210, 220–21 (2005).

for urban and working-class people,⁴⁹ established nineteen law schools across the country to meet this need.⁵⁰

YMCA law schools were different from the Langdellian programs offered at traditional law schools like Harvard or even law schools affiliated with state land-grant universities. Rather than employing the Socratic case-based method of “thinking like a lawyer,” the YMCA law schools favored practice-oriented training.⁵¹ Professors were practicing lawyers who taught in their spare time.⁵² “Courses often required students to assist the professor in the trial of an actual case.”⁵³ The night law school programs and YMCA-funded law schools “aimed to produce well-equipped lawyers from the diverse ethnic groups in the community.”⁵⁴

⁴⁹ Steven C. Bahls & David S. Jackson, *The Legacy of the YMCA Night Law Schools*, 26 CAP. U. L. REV. 235, 235–36 (1997).

The first YMCA night law school was founded by the Cincinnati YMCA in 1893, and [was] approved to grant law degrees in Ohio by 1900. YMCA sponsors in major cities throughout the United States soon emulated the Cincinnati model. Those sponsors established YMCA schools, which today are known as the Northeastern University School of Law in Boston, Detroit College of Law, the Southern Methodist University School of Law, in Dallas, South Texas College of Law, in Houston, and the Golden Gate University School of Law in San Francisco.

Id. at 236. The YMCA-established Detroit College of Law was later fully integrated into Michigan State University in 2018. *History*, MICH. ST. UNIV. COLL. OF L., <https://www.law.msu.edu/about-msu-law/history.html> [perma.cc/5ENC-KE2V].

⁵⁰ Finnegan, *supra* note 48, at 209 n.6.

⁵¹ Bahls & Jackson, *supra* note 49, at 236.

⁵² *Id.* at 237.

⁵³ *Id.* at 236 (“These courses were the forerunners of today’s clinical educational programs.”).

⁵⁴ *Id.*

Also, at a time when most law schools were unwilling to admit Black students and women,⁵⁵ the YMCA schools welcomed them.⁵⁶

Unsurprisingly, the development of these non-traditional law schools alarmed the already-established law schools.⁵⁷ The ABA began to pressure state boards of bar examiners to require law schools in their jurisdictions be accredited by the ABA.⁵⁸ Of course, ABA accreditation required resources not possessed by these non-traditional law schools, like full-time faculty and vast library holdings.⁵⁹ In the 1920s, the ABA brokered a compromise, allowing part-time law schools to continue to operate while placating the traditional law schools: (1) all law schools were required to increase their admission prerequisite to at least two years of post-secondary education; (2) part-time programs were extended to at least four years of study; and (3) graduates of all law schools were required to pass a bar exam before they could be admitted to practice.⁶⁰ However, ABA-accredited law schools were prohibited from offering any courses “intended to prepare [students] to succeed on bar exams.”⁶¹ While ostensibly protecting the public, the bar exam requirement (and the prohibition on bar exam preparation) also served a second, more insidious function—keeping the graduates of the night schools (who were of lower socio-economic status and often racial or ethnic minorities) out of the legal profession.⁶²

⁵⁵ *Id.* at 237.

⁵⁶ *Id.* at 236 (“[T]he YMCA established the greatest number of its night law schools . . . in Ohio. Those institutions evolved into the present-day University of Toledo School of Law, the Salmon P. Chase College of Law (which is now affiliated with Northern Kentucky University), and . . . Capital University Law School.”).

⁵⁷ See Howarth, *supra* note 27.

⁵⁸ *Id.*

⁵⁹ Bahls & Jackson, *supra* note 49, at 237.

⁶⁰ Howarth, *supra* note 27.

⁶¹ *Id.* A version of this rule was in place until 2006. See *id.*

⁶² *Id.*

State bars also developed other methods of limiting access to the profession. For example, Pennsylvania required applicants to find a mentor for a six-month post-graduate clerkship.⁶³ Not surprisingly, it was difficult for Black and Jewish graduates to find mentors.⁶⁴ Virginia required (and still requires, for no obvious reason) applicants taking the bar exam to wear “courtroom attire,” defined as a “a suit or jacket, with collared shirt, dress pants, or a dress, skirt and jacket or pant suit.”⁶⁵

These escalating licensing requirements were effective at keeping graduates of the night schools out of the legal profession.⁶⁶ Between 1900 and 1940, only 0.6% to 0.8% of licensed lawyers in the United States were Black.⁶⁷ Applicants of color, immigrants, and religious minorities were admitted at far lower rates than white applicants.⁶⁸ Between 1927 and 1947, the Louisiana Bar rejected every Black applicant.⁶⁹ In Pennsylvania, a yearly average of four Black candidates were admitted to the bar between 1930 and 1970, and no Black applicants were admitted between 1933 and 1943.⁷⁰ Between 1927 and 1935, the proportion of Jews admitted to the Pennsylvania Bar dropped sixteen percentage points.⁷¹

⁶³ *Id.*

⁶⁴ *Id.* Howarth contends the stated purpose of the clerkship requirement was to keep Jewish candidates from being admitted to the profession. *Id.*

⁶⁵ *Mandatory Dress Code*, VA. BD. OF BAR EXAM’RS, <https://barexam.virginia.gov/bar/barmdc.html> [<https://perma.cc/WED7-7U7P>].

⁶⁶ Howarth, *supra* note 27.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1217 (1971).

⁷¹ Deborah J. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 501 (1985). Minority admissions in Pennsylvania during this time period were also affected by a new “character and fitness” system which prioritized social connections and personal

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Enter the National Conference of Bar Examiners (NCBE) in 1931. Founded “with the aim of increasing the efficiency of state bar admission boards,”⁷² the NCBE sought “to provide ‘a national organization through which state boards of bar examiners could cooperate with each other, the law school community, and the organized bar.’”⁷³ However, other, more nefarious, motives were at play in the NCBE’s founding, such as preventing “overcrowding” in the legal profession at the tail end of the Great Depression.⁷⁴ “We know, for instance, that the Bar, today, is overcrowded, and is becoming more so,” a 1931 editorial explained.⁷⁵ The NCBE chairman noted, “[T]he main emphasis of the bar [in 1931] was on limitation, [and] on overcrowding.”⁷⁶

As the Civil Rights Movement grew in the 1950s, state boards of bar examiners were forced to confront accusations that the bar exam was biased against people of color, leading to disparities in the availability of legal services to those “who were [B]lack, poor, or both.”⁷⁷ “Racial bias suits were brought in . . . ten [southern] states in an effort to end the discriminatory practices of bar examiners.”⁷⁸ However, courts held boards

interviews. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 127 (1977).

⁷² *NCBE Testing Milestones*, NEXTGEN BAR EXAM, <https://nextgenbarexam.ncbex.org/about/ncbe-testing-milestones/> [<https://perma.cc/3BU5-DM84>].

⁷³ Jarvis, *supra* note 32, at 378 (quoting Arthur Karger, *The Role of the NCBE in the Bar Admission Process: Its First Fifty Years*, 50 BAR EXAM’R 3, 7 (1981)).

⁷⁴ Michael Ariens, *The NCBE’s Wrong-Headed Response to the COVID-19 Pandemic*, 1 (Apr. 28, 2020) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.3587751> [<https://perma.cc/BT7P-HVPK>].

⁷⁵ Philip J. Wickser, *Ideals and Problems for a National Conference of Bar Examiners*, 7 AM. L. SCH. REV. 286, 288 (1931).

⁷⁶ SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 38 (1993).

⁷⁷ AUERBACH, *supra* note 71, at 263.

⁷⁸ *Id.* at 294.

of bar examiners were not subject to Title VII of the Civil Rights Act,⁷⁹ thereby greatly reducing the boards' incentives to develop non-discriminatory means of admission to the practice of law.

As law school enrollment increased in the 1960s and 1970s,⁸⁰ state BOEs were overwhelmed with developing, administering, and scoring the increased number of bar exams.⁸¹ Looking at other professions—medicine, engineering, accounting, pharmacy—bar officials noted these professions used national, uniform tests for licensing.⁸² This reduced the workload for state licensing boards who, freed from the onus of test development, could concentrate on setting minimum standards and administering the test.⁸³ The NCBE, which had originally been more of a consultant to state BOEs, stepped in to become a bar exam developer, administrator, and scorer.⁸⁴

In 1972, the NCBE introduced the Multistate Bar Examination (MBE), a six-hour, 200-question multiple choice examination designed to “assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.”⁸⁵ The MBE was

⁷⁹ *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975); *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 533 F.2d 942, 949 (5th Cir. 1976); *Richardson v. McFadden*, 540 F.2d 744, 748 (4th Cir. 1976), *aff'd on reh'g*, 563 F.2d 1130 (4th Cir. 1977); *Woodard v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) (per curiam).

⁸⁰ J. Gordon Hylton, *Looking at the Increase in the Number of Law Schools and Law Students, 1950–2010*, MARQ. UNIV. L. SCH. FAC. BLOG (July 25, 2012), <https://law.marquette.edu/facultyblog/2012/07/looking-at-the-increase-in-the-number-of-law-schools-and-law-students-1950-2010/> [<https://perma.cc/J39M-49EN>].

⁸¹ John Eckler & Joe E. Covington, *The New Multistate Bar Examination*, 57 A.B.A. J. 1117, 1118 (1972).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1117.

⁸⁵ *Multistate Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/> [<https://perma.cc/6Y83-YR9M>].

developed by the NCBE as a way to both “increase efficiency of grading and aid in ensuring as much fairness as possible.”⁸⁶ The MBE was developed in cooperation with the Educational Testing Service, which at the time administered the Law School Admissions Test (LSAT) and other national admissions examinations.⁸⁷ Twenty states initially adopted the MBE,⁸⁸ and today it is used by bar examiners in every jurisdiction but Louisiana and Puerto Rico.⁸⁹ Most jurisdictions initially used the MBE in combination with state-specific tests, usually assessing applicants’ knowledge of state law through questions requiring essay answers.⁹⁰

Over the next thirty years, the NCBE continued to develop standardized tests adopted by many jurisdictions, either in combination with other NCBE products or with state-specific tests.⁹¹ Ultimately, these products were combined to create the Uniform Bar Exam (UBE), which is used by forty-one jurisdictions today.⁹²

B. How We License New Lawyers

In most U.S. jurisdictions,⁹³ new-lawyer licensing is a three- or four-part process. First, all candidates for admission to the bar must undergo a

⁸⁶ Mehran Ebadolahi, *The Bar Exam: A Brief History*, BARMAX, <https://testmaxprep.com/blog/bar-exam/the-bar-exam-a-brief-history> [<https://perma.cc/FJM2-NVTW>].

⁸⁷ Eckler & Covington, *supra* note 81, at 1118.

⁸⁸ *Id.* at 1117.

⁸⁹ *Multistate Bar Examination*, *supra* note 85.

⁹⁰ See Griggs, *supra* note 8, at 51–52.

⁹¹ *Id.* at 3, 14–15.

⁹² *Id.* at 14; *List of UBE Jurisdictions*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> [<https://perma.cc/Q349-U9QT>].

⁹³ Wisconsin is the only United States jurisdiction that does not require a bar exam. See *Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., <https://www.wicourts.gov/services/attorney/bar.htm#:~:text=The%20applicant%20who%20applies%20for,to%20filing%20application%20for%20admission> [perma.cc/HA97-6BCM] (Nov. 2, 2022). Graduates of the two law schools in Wisconsin are not required to take a bar exam to be admitted to practice in the state, however, they do have to meet certain academic qualifications and pass a character and fitness evaluation.

(continued)

“character and fitness” evaluation.⁹⁴ Most BOEs conduct the character and fitness portion of the process while candidates are still in law school.⁹⁵ Only those candidates who pass the character and fitness portion of the admission process are permitted to sit for the bar exam.⁹⁶

While the term “bar exam” used to mean a single test, today’s bar exam is made up of several components.⁹⁷ Most jurisdictions use the UBE as their main method of deciding whether a candidate is qualified to practice.⁹⁸ Every jurisdiction (except Wisconsin and Puerto Rico) also requires the separately-administered Multistate Professional Responsibility Exam (MPRE), which tests applicants’ knowledge of the legal profession’s

See Diploma Privilege, UNIV. OF WIS.-MADISON L. SCH., https://law.wisc.edu/current/diploma_privilege/ [<https://perma.cc/PC7B-UJ5G>]; *Diploma Privilege*, MARQ. UNIV. L. SCH., <https://law.marquette.edu/prospective-students/diploma-privilege> [perma.cc/QX4D-5N7B].

⁹⁴ *See, e.g., Office of Bar Admissions*, THE SUP. CT. OF OHIO, <https://www.supremecourt.ohio.gov/AttySvcs/admissions/default.aspx> [<https://perma.cc/4BRS-C7K2>]; Rebecca S. Mick, *Making the Mark: Fitness, Character and Integrity for Admission to the Bar*, 19 GA. BAR J. 82, 82 (2013).

⁹⁵ *See, e.g., Summary of Character and Fitness Process in Ohio*, THE SUP. CT. OF OHIO, available at <https://www.supremecourt.ohio.gov/Boards/characterFit/CFProcess.pdf> [perma.cc/V2GR-PUX9].

⁹⁶ *See, e.g., OHIO GOV. BAR R. I(1)(D)*.

⁹⁷ Griggs, *supra* note 8, at 7, 14.

⁹⁸ Carol L. Chomsky et al., *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L.J. 883, 885 n.7 (2021).

ethical rules.⁹⁹ Finally, many jurisdictions require a third exam or mandatory course focused on the specific laws of that jurisdiction.¹⁰⁰

1. *The Character and Fitness Investigation*

Every jurisdiction requires a character and fitness evaluation before bar admission.¹⁰¹ Jurisdictions state the reason for this requirement is to protect the public from unscrupulous or dishonest attorneys who might take advantage of their clients.¹⁰² After all, “[a] certificate of admission to the bar is a representation made by [the Supreme Court] that the possessor is worthy of the confidence of clients entrusting their interests to his care.”¹⁰³ The process assumes, with little evidence, those who are in

⁹⁹ *About the MPRE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpre> [<https://perma.cc/3MLB-HEFU>] (explaining how Connecticut and New Jersey require either the MPRE or “successful completion of a law school course on professional responsibility”).

¹⁰⁰ Griggs, *supra* note 8, at 52. See, e.g., *The Massachusetts Law Component (MLC)*, MASS. CT. SYS., <https://www.mass.gov/how-to/the-massachusetts-law-component-mlc> [<https://perma.cc/82BN-WJWX>] (explaining candidates must also pass a fifty question multiple choice examination on Massachusetts state laws and procedures to be admitted to practice in Massachusetts); *Frequently Asked Questions*, TEX. BD. OF L. EXAM’RS, <https://ble.texas.gov/faq.action#723> [<https://perma.cc/RKS5-R7T4>] (demonstrating other states, like Texas, do not require a separate test, but require that candidates complete an online course about that jurisdiction’s laws). See also discussion *infra* Section II.B.4.

¹⁰¹ George L. Blum, Annotation, *Criminal Record as Affecting Applicant’s Moral Character for Purposes of Admission to the Bar*, 3 A.L.R. 6th 49, § 2 (2005).

¹⁰² See, e.g., *Character and Fitness Overview*, PA. BD. OF L. EXAM’RS, https://www.pabarexam.org/c_and_f/cfoverview.htm [<https://perma.cc/H9AQ-8RJK>] (Nov. 29, 2022); Johari Menelik Frasier, *Changing Character and Fitness in New York State*, 46 N.Y.U. REV. OF L. AND SOC. CHANGE 1, 1 (2021). See also NAT’L CONF. OF BAR EXAM’RS & A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS, at vii, viii (Judith A. Gundersen & Claire J. Guback eds., 2021), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf [<https://perma.cc/U7CQ-JR82>].

¹⁰³ *In re W.D.P.*, 91 P.3d 1078, 1082 (Haw. 2004) (first alteration in original) (quoting *Akinaka v. Disciplinary Bd.*, 979 P.2d 1077, 1081 (Haw. 1999)).

financial trouble, have a history of mental illness, or have committed any type of crime, are more likely to behave dishonestly in the practice of law.¹⁰⁴ In reality, the character and fitness evaluation makes the process more burdensome for a portion of applicants, especially people of color or those from disadvantaged backgrounds.¹⁰⁵

The character and fitness process usually begins with the applicant filling out an extensive questionnaire that requires disclosure of their educational, employment, criminal, litigation, and financial histories.¹⁰⁶ Most U.S. jurisdictions use the NCBE's Character and Fitness Application,¹⁰⁷ which is thirty-six pages long and inquires about an applicant's citizenship, legal education, and practice history. The NCBE form asks applicants to list every permanent or temporary address at which they have resided since age eighteen or for the past ten years, whichever period is shorter.¹⁰⁸ Applicants must disclose any legal proceedings they have been involved in, any outstanding or defaulted financial debt, and their employment history for the past ten years (as well as every law-related job they have ever held).¹⁰⁹ Applicants are required to list six references who have known the applicant for a minimum of five years and who are not related to or living with the applicant.¹¹⁰ To make this even

¹⁰⁴ Frasier, *supra* note 102, at 1.

¹⁰⁵ *Id.*

¹⁰⁶ Thomas K. Byerley, *A Lawyer's First Experience with Professional Regulation: The Character and Fitness Process*, 79 MICH. BAR J. 1388, 1388 (2000) (discussing Michigan's character and fitness process).

¹⁰⁷ Penelope J. Gessler & Kellie R. Early, *NCBE's Character and Fitness Investigation Services: A Look at the Present—A Vision of the Future*, 86 BAR EXAM'R 26, 26 n.4 (2017), (explaining twenty-nine jurisdictions use the NCBE Character Application for at least some of their applicants).

¹⁰⁸ *NCBE Character & Fitness Sample Application*, NAT'L CONF. OF BAR EXAM'RS (Jan. 12, 2021), <https://www.ncbex.org/dmsdocument/134> [<https://perma.cc/5GBA-RHU5>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

more challenging (and more like an LSAT logic question), the listed six references cannot be former employers, and the NCBE prefers applicants list “one reference from every locality where you have lived during the last ten years.”¹¹¹

Applicants must sign the questionnaire under oath and inform the board of bar examiners of any changes in their answers once the form is submitted.¹¹² Applicants in most states are also required to submit their fingerprints (for criminal background checks) with their application.¹¹³

The BOE sends the completed character and fitness documents to the NCBE, which verifies background information provided in the application, contacts the applicant’s references, conducts police checks, provides additional background investigation, and issues a report to the jurisdiction’s BOE.¹¹⁴ The BOE reviews the report, and may require the candidate to sit for an interview, as well.¹¹⁵ In some states, this interview by members of the local bar or the character and fitness committee is a mandatory part of the admissions process,¹¹⁶ while in other states

¹¹¹ *Id.*

¹¹² See e.g., *Character and Fitness Instructions*, VA. BD. OF BAR EXAM’RS, <https://barexam.virginia.gov/cf/cfinst.html> [perma.cc/8DC4-MSVQ]; *Amending a Bar Application*, PA. BD. OF L. EXAM’RS (Nov. 30, 2022), https://www.pabarexam.org/online_file_info/supp_forms_requests/amendment.htm [perma.cc/JA25-MXBX].

¹¹³ *NYS Bar Information Sessions*, COLUM. L. SCH. (2021), <https://www.law.columbia.edu/academics/registration-services/bar-exam-and-certification/bar-information-sessions> [perma.cc/U8RZ-AKUT].

¹¹⁴ *Summary of Character and Fitness Process in Ohio*, SUP. CT. OF OHIO, available at www.supremecourt.ohio.gov/Boards/characterFit/CFProcess.pdf [https://perma.cc/6PV3-6EEL].

¹¹⁵ *Id.*

¹¹⁶ *Id.* (explaining Ohio requires two members of the Admissions Committee of the Ohio Bar Association to interview the applicant and make a recommendation based on the interview).

interviews are requested only if something in the questionnaire or NCBE report raises a red flag about a candidate's background.¹¹⁷

While it is rare for a BOE to deny admission to the bar outright based just on character and fitness concerns,¹¹⁸ issues raised in the character and fitness examination can result in a time-consuming investigation, "which may significantly delay licensing and require an applicant to hire a lawyer to represent her in possible hearings."¹¹⁹

In addition to being intrusive and time-consuming, the character and fitness process is expensive for applicants. The NCBE application alone can cost from \$275–\$925.¹²⁰ This fee covers just the initial application, and character report—applicants are charged additional fees to sit for the other components of the bar exam.¹²¹

2. *The Uniform Bar Exam*

After completing the character and fitness process, either through their state BOE or the NCBE (or some combination of both), successful applicants are permitted to sit for the bar exam. In forty-one U.S.

¹¹⁷ See Byerley, *supra* note 106, at 1388.

¹¹⁸ *But see In re Application of Rodgers*, 159 Ohio St. 3d 502 (Ohio 2020) (per curiam). Ohio's Board of Commissioners on Character and Fitness initially denied a law student's application to sit for the bar based on her student loan and consumer debt. *Id.* at 502. The Supreme Court of Ohio reversed the Board's decision and permitted Rodgers to sit for the bar exam, *id.* at 503, which she passed. *Bar Exam Results, July 2022*, SUP. CT. OF OHIO, available at <https://www.supremecourt.ohio.gov/AttySvcs/admissions/Results/20220726.pdf>.

¹¹⁹ Mary Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, ABA FOR L. STUDENTS (Dec. 1, 2013), <https://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement/> [<https://perma.cc/K9UN-BCB3>].

¹²⁰ *Fee Schedule*, NAT'L CONF. OF BAR EXAM'RS (July 1, 2022) [hereinafter *NCBE Fee Schedule*], <https://www.ncbex.org/dmsdocument/303> [<https://perma.cc/EYC8-MBK3>].

¹²¹ *NCBE Exams*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/> [perma.cc/3CDU-MSRE].

jurisdictions, applicants take the Uniform Bar Exam (UBE), also administered by the NCBE.¹²²

The Uniform Bar Exam is a two-day test administered twice a year (in February and July). The exam consists of multiple-choice questions, short essays, and a practical skills test to simulate an activity a new lawyer is likely to do in practice, like drafting a memo or a court brief.¹²³ Because of its universal administration, the UBE does not focus on the law of any specific jurisdiction and instead tests examinees on “general principles of law, legal analysis and reasoning, factual analysis, and communication skills.”¹²⁴ The NCBE scores the exams, and each jurisdiction determines the score it will accept for admission to its bar.¹²⁵ Minimum passing scores for admission range from as low as 260 to as high as 280.¹²⁶

The UBE’s primary benefit is the portability of its scores. An applicant who takes the UBE in one jurisdiction can transfer their score to another jurisdiction and be admitted if (1) their score meets the new jurisdiction’s passing score; and (2) the UBE score was earned recently.¹²⁷ But even if an applicant’s recent score meets the minimum for transfer to a new jurisdiction, admission to the practice of law in the new jurisdiction is not guaranteed—applicants are still subject to all the other requirements of the new jurisdiction, including character and fitness examinations and tests on state-specific law.¹²⁸

The UBE is not without its critics. Some fret over states losing control of what is tested on their bar exams; the “general principles” tested by the

¹²² *Jurisdictions That Have Adopted the UBE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/> [<https://perma.cc/3CEX-BQFK>].

¹²³ *Id.*

¹²⁴ *Understanding the Uniform Bar Examination*, NAT’L CONF. OF BAR EXAM’RS (Nov. 7, 2022) <https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209> [perma.cc/4HZQ-FQRR].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

UBE may actually contradict the law of the examining state.¹²⁹ Critics contend the UBE's promise of mobility is illusory, given the different passing scores required by different states, the limited time that scores remain portable, and the cost of transferring scores.¹³⁰ Many legal educators decry the UBE's focus on memorization of broad legal principles at the expense of testing what lawyers actually do in practice.¹³¹

Despite these criticisms, commentators predict that in a few years, the UBE will be administered in all U.S. jurisdictions as the primary, national licensing exam for attorneys.¹³² There is simply too much pressure from state high courts and the ABA for any other outcome.

3. MPRE

The MPRE purports to measure candidates' "knowledge and understanding of established standards related to the professional conduct of lawyers" and judges.¹³³ The MPRE is a two-hour, sixty-question multiple choice exam and is administered three times a year, separate from the rest of the bar exam, and, like the MBE, states set their own passing scores.¹³⁴ Except for Florida, all jurisdictions permit candidates to take the MPRE while they are still in law school.¹³⁵ Most candidates take the exam during their third year of law school, and a few take the exam after graduation, taking the main bar exam in July followed by the August administration of the MPRE.

¹²⁹ TASK FORCE ON THE TEX. BAR EXAMINATION, RECOMMENDATIONS AND REPORT: FINAL REPORT TO THE TEXAS SUPREME COURT 7 (2018).

¹³⁰ Griggs, *supra* note 8, at 43–44.

¹³¹ Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 961–62 (2020).

¹³² Griggs, *supra* note 8, at 3.

¹³³ *About the MPRE*, *supra* note 99.

¹³⁴ *Id.*

¹³⁵ Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1302 (2003).

The MPRE tests “the law governing the conduct and discipline of lawyers and judges,” as established by the ABA’s Model Rules of Professional Conduct and Model Code of Judicial Conduct, as well as “controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules.”¹³⁶ Even the MPRE’s proponents admit the MPRE is in no way a comprehensive test of ethical knowledge.¹³⁷ Its limited format—a short set of multiple-choice questions—can only do so much to assess a candidate’s knowledge of legal ethics and professional responsibility.¹³⁸ Passing the test does not guarantee the candidate will be an “ethical practitioner,”¹³⁹ but merely demonstrates the candidate has been exposed to the general rules governing a lawyer’s ethical duties.

4. State-Specific Requirements

Nineteen U.S. jurisdictions have additional requirements for bar admission beyond the character and fitness evaluation, the bar exam, and the MPRE.¹⁴⁰ Seven states where the UBE was adopted also require passage of an additional course or test covering the state’s specific laws for admission to the bar.¹⁴¹ For example, New York requires the New York Law Course (NYLC), “an online, on-demand course which reviews

¹³⁶ *Preparing for the MPRE*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpre/preparing/> [https://perma.cc/8PQU-JJHX].

¹³⁷ Hayden, *supra* note 135, at 1336.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Chart 13: Additional Pre- or Post-Admission Requirements and Continuing Legal Education*, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS [hereinafter *Chart 13*], <https://reports.ncbex.org/comp-guide/charts/chart-13/#1610142352111-e56b1dc2-06b5> [https://perma.cc/34PT-G3CM].

¹⁴¹ *Id.*

important and unique aspects of New York law.”¹⁴² Course participants watch approximately seventeen hours of recorded lectures and correctly answer embedded questions to continue viewing the lecture.¹⁴³ After completing the NYLC, bar candidates must pass the New York Law Exam (NYLE).¹⁴⁴ This is a fifty item, two-hour, open book, multiple choice test administered online that tests New York rules.¹⁴⁵ The NYLE is offered four times a year and it must be completed up to one year prior to or three years after passing the UBE.¹⁴⁶ The NYLE is administered with ExamSoft, to which candidates pay a \$29 fee to take the exam.¹⁴⁷ Other jurisdictions, like Ohio and the U.S. Virgin Islands, require an open-book, multiple choice online test and provide state-specific study materials in advance.¹⁴⁸

Other states, like Texas, require the completion of a state-specific law course, but do not require a separate state-specific exam. The Texas Law Component (TLC) is a twelve-hour online video lecture series with “hurdle questions” that must be answered at the end of each lecture to proceed with the course.¹⁴⁹ Candidates must complete the TLC during the year before they take the bar, or within two years after passing a bar exam.¹⁵⁰

¹⁴² *Frequently Asked Questions and General Information Guide for Taking the Uniform Bar Examination (UBE) in New York State*, N.Y. ST. BD. OF L. EXAM’RS 11 (Mar. 30, 2022), available at <https://www.nybarexam.org/thebar/NYBarExamInformationGuide.pdf> [perma.cc/BGA4-Q3H7].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Uniform Bar Examination, New York Law Course & New York Law Exam*, N.Y. ST. BD. OF L. EXAM’RS, <https://www.nybarexam.org/UBE/UBE.html> [https://perma.cc/ZS3T-4JVC].

¹⁴⁸ OHIO GOV. BAR R. I(7)(A); V.I. SUP. CT. R. 204(e).

¹⁴⁹ *Frequently Asked Questions*, *supra* note 100.

¹⁵⁰ *Frequently Asked Questions (FAQs): When Do I Take the Texas Law Component?*, TEX. BD. OF L. EXAM’RS, <https://ble.texas.gov/faq.action#1462> [https://perma.cc/ZR9V-YKKN].

In Montana, candidates for bar admission must attend the Montana Law Seminar (MLS), which is offered the Thursday following the February and July bar exam.¹⁵¹ The MLS is a Supreme Court-required course focused on “the structure of the legal system in Montana, the unique aspects of Montana law and the accepted mores and culture of practicing law in Montana.”¹⁵² Applicants pay an additional \$155 to attend the MLS.¹⁵³ Although the MLS was originally intended to be offered in person, the last few seminars have been held on Zoom due to the COVID-19 pandemic.¹⁵⁴

Vermont and Delaware are the only U.S. jurisdictions that require a clerkship or mentorship for bar admission.¹⁵⁵ Delaware requires applicants to work “under the direct and constant supervision of a member of the Bar of this State” for twelve weeks.¹⁵⁶ This period need not be continuous, but must have been served after the applicant began law school.¹⁵⁷ During this time, candidates are required to attend a variety of proceedings (such as civil and criminal trials, family court, and ADR proceedings) and review

¹⁵¹ MONT. SUP. CT., RULES FOR ADMISSION TO THE BAR OF MONT., R. VIII(A) (2018).

¹⁵² *Admissions Information*, STATE BAR OF MONT. [hereinafter *Montana Admissions Information*], <https://montanabar.site-ym.com/page/AdmissionInfo> [perma.cc/65ZW-HUZY].

¹⁵³ Memorandum from Kathie Lynch, Bar Admissions Adm’r, State of Mont. Bd. of Bar Exam’rs, to the Applicants for the Feb. 2022 Mont. Bar Examination 2, https://montanabar.site-ym.com/resource/resmgr/admissions/!feb-2022_mt_adm_&_exam_info.pdf [perma.cc/4ASG-A9XF].

¹⁵⁴ See *Montana Admissions Information*, *supra* note 152.

¹⁵⁵ *Chart 13*, *supra* note 140.

¹⁵⁶ DEL. SUP. CT. R. 52(a)(8) (amended 2023) (defining a “week” as a forty-hour work week). Before the COVID-19 pandemic, Delaware required the clerkship to be five months (twenty-one weeks). See Memorandum from the Bd. of Bar Exam’rs, Del. Sup. Ct., to J. Gary F. Traynor 3 (Feb. 15, 2023), <https://courts.delaware.gov/forms/download.aspx?id=183418>.

¹⁵⁷ *Id.*

legal documents including incorporation papers and complaints.¹⁵⁸ The supervisor (called a “preceptor”) also plays a supporting role in the character and fitness investigation process.¹⁵⁹ In response to the COVID-19 pandemic, the Delaware Supreme Court issued a temporary order permitting remote work done outside the state to count for some of the clerkship requirements.¹⁶⁰

Vermont’s required six-month mentorship is a post-admission requirement, which must be completed within the first year after admission.¹⁶¹ Newly admitted lawyers meet at least ten times with a judge or attorney who practices in Vermont and has been admitted to the Vermont bar for at least three years.¹⁶² The newly admitted lawyers engage in at least forty hours of activities on the mentorship program list, such as attending bar activities, litigation activities, transactional activities, and access to justice activities.¹⁶³

C. Problems with the Current Licensing System

The UBE is just one part of the problem with new-lawyer licensing. As states cede control of their attorney admissions processes to the NCBE, it gains an immense amount of power over the legal profession, especially the newest and most vulnerable members. As the burden of bar exams on admitting authorities has lessened, thanks to the NCBE’s ubiquity, the

¹⁵⁸ Memorandum from the Bd. of Bar Exam’rs, Del. Sup. Ct., to All Preceptors 4 (July 14, 2015), <https://courts.delaware.gov/bbe/preceptor.aspx> [perma.cc/TXQ6-3AZW] (click the “Preceptor Duties and Clerkship Requirements” to download a Word document of the Memorandum).

¹⁵⁹ *Id.* at 2.

¹⁶⁰ Order Modifying the Requirements Under Supreme Court Rule 52(a)(8), (Del. 2022), [https://courts.delaware.gov/rules/pdf/BBE-Modification-52\(a\)\(8\)-2-7-22.pdf](https://courts.delaware.gov/rules/pdf/BBE-Modification-52(a)(8)-2-7-22.pdf) [<https://perma.cc/CC2R-5ZXC>].

¹⁶¹ VT. R. BAR ADMISSION, R. 12(a)(2).

¹⁶² *Id.* R. 12(a)(2)(A).

¹⁶³ *Mentorship Program List and Certification of Attending Approved Activities*, VT. SUP. CT. (June 2020), available at https://www.vermontjudiciary.org/sites/default/files/documents/900-00012_1.pdf [<https://perma.cc/PP6G-HSNB>].

burden bar exams place on examinees has increased substantially. This might be bearable if the current bar examination actually tested the minimum competence necessary to successfully practice law. Unfortunately, the sacrifices made by bar examinees are in service of an examination that is fundamentally unable to do what it promises.

1. Control by an Unanswerable Body

Almost every jurisdiction in the United States relies on the NCBE for at least part of its new-lawyer licensing process. The NCBE is “tasked with ‘developing and producing the licensing tests used by most U.S. jurisdictions for admission to the bar.’”¹⁶⁴ This instills an enormous amount of power in the NCBE to regulate admission to the profession of law across the country. However, “[t]he NCBE is not a member-regulated entity, and it is not answerable to any governmental regulatory body.”¹⁶⁵ Although the NCBE avers it merely “help[s] jurisdiction bar admissions processes run well from start to finish,” in reality it controls the admissions process largely ceded to it by the states.¹⁶⁶ Further exacerbating the issue, the NCBE has a reputation of not being forthcoming with its procedures or methods.¹⁶⁷

The July 2020 bar exam, scheduled to be administered in the midst of the COVID-19 pandemic, exposed even more problems with the UBE¹⁶⁸ and revealed just how much power the NCBE wields over new attorney

¹⁶⁴ Jessica Williams, *Abolish the Bar Exam*, CAL. L. REV. BLOG (Oct. 2020) (internal brackets omitted), <https://www.californialawreview.org/abolish-the-bar-exam> [https://perma.cc/NV22-GL2Y].

¹⁶⁵ Griggs, *supra* note 8, at 14.

¹⁶⁶ NCBE MEDIA KIT, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/about/media-kit/> [perma.cc/Q2JH-J6GW].

¹⁶⁷ See Suzanne Darrow-Kleinhaus, *A Reply to the National Conference of Bar Examiners: More Talk, No Answers, So Keep on Shopping*, 44 OHIO N.U. L. REV. 173, 198 (2018).

¹⁶⁸ See Emma Goldberg, *Bar and Medical Exam Delays Keep Graduates in Limbo*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/us/bar-exam-coronavirus.html> [https://perma.cc/UAV8-8BGK].

licensing. As COVID-19 rates rose and large public gatherings were discouraged or forbidden, most states that adopted the UBE were unable to make their own decisions about postponing or canceling the bar exam scheduled for July 2020.¹⁶⁹ Having ceded their ability to modify the exam, state BOEs had nothing to offer their July bar examinees until the NCBE decided it would offer exams in July and September (some of which were later pushed back until October).¹⁷⁰ This led to widespread confusion, panic, and hardship among examinees, who had to make alternate plans and take out additional loans to pay their bills while unable to work during the extended admissions process.¹⁷¹

Meanwhile, states that had not adopted the UBE, or only recently disassembled their mechanisms for designing and scoring exams, were able to quickly pivot to offering alternative assessments, most of which were administered remotely.¹⁷² Although these alternate assessments were not perfect, examinees in states offering them had more predictability and reassurance about the bar exam, and as a result were able to take the bar exam in a safe and timely manner.¹⁷³

Not only does the NCBE have control of the majority of new attorney licensing in the country, but it also has a vested interest in holding on to that control. With over \$100 million in cash reserves,¹⁷⁴ the NCBE has

¹⁶⁹ Marsha Griggs, *An Epic Fail*, 64 How. L.J. 1, 48 (2020).

¹⁷⁰ *Id.*

¹⁷¹ 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/A9M8-G5MG>].

¹⁷² Griggs, *supra* note 169, at 48–49.

¹⁷³ Joe Patrice, *Indiana Orders Remote Bar Exam in Fit of Reasonableness*, ABOVE THE L. (May 8, 2020, 1:13 PM), <https://abovethelaw.com/2020/05/indiana-orders-remote-bar-exam-in-fit-of-reasonableness/> [<https://perma.cc/929T-S65W>].

¹⁷⁴ Beth Karp, *There Is No Ascertainable Proof That the Bar Exam and the MPRE Protect the Public*, JURIST (Aug. 28, 2020, 7:28 PM), <https://www.jurist.org/commentary/2020/08/beth-karp-bar-exam-mpre-data/> [<https://perma.cc/WM3L-BYCK>].

significant power behind it. And the “decisions and recommendations of the NCBE (a private, unregulated entity that makes millions of dollars each year from the sale of bar exams, and bar related services and products) may not necessarily be in the best interest of the state or the bar applicants.”¹⁷⁵ The NCBE has a financial interest not only in the administration of bar exams, but in bar preparation and study aids, as well.¹⁷⁶ The NCBE’s bar examination products (and accompanying study aids) provide a substantial revenue stream.¹⁷⁷ The NCBE’s Form 990 for the fiscal year ending June 2019 listed \$22 million in program service revenue.¹⁷⁸ That year the NCBE spent about \$10 million for salaries and benefits, netting a surplus of \$4.5 million.¹⁷⁹ The NCBE’s net assets that year totaled just under \$120 million.¹⁸⁰ It is not surprising that when some states suggested alternatives to the July 2020 bar exam (such as diploma privilege¹⁸¹ or provisional

¹⁷⁵ Griggs, *supra* note 169, at 49.

¹⁷⁶ See *NCBE Study Aids Store*, NAT’L CONF. OF BAR EXAM’RS, <https://store.ncbex.org/> [<https://perma.cc/8F3B-YEXV>].

¹⁷⁷ See Nat’l Conf. of Bar Exam’rs, *IRS Form 990: Return of Organization Exempt from Income Tax*, at 1, pt. I (OMB No. 1545-0047), available at https://projects.propublica.org/nonprofits/display_990/362472009/01_2020_prefixes_34-36%2F362472009_201906_990_2020011617038295 [<https://perma.cc/45HJ-FLS4>].

¹⁷⁸ *Id.*

¹⁷⁹ Ariens, *supra* note 74, at 2.

¹⁸⁰ *Id.* at 2–3.

¹⁸¹ See Williams, *supra* note 164.

Wisconsin, the only state that still consistently honors diploma privilege, is where NCBE President and CEO Judith A. Gundersen attended law school. Although she never sat for a bar examination, she was admitted to practice in her jurisdiction and is responsible for overseeing the development, production, and administration of the bar exam across the United States.

Id.

licensing), the NCBE issued a policy paper reinforcing the bar exam's purported public protection purpose and opposing new-lawyer licensing procedures that did not require taking an NCBE-produced exam.¹⁸²

2. *Huge Burden on Examinees*

The modern system of attorney licensing is needlessly complicated, expensive, and ineffective. Law students who wish to sit for the bar after their third year of law school must begin complying with their jurisdiction's bar examination requirements in their second year—almost a full year before their exam will be administered. Examinees must apply to take the bar and, once approved, submit documentation of their character and fitness to practice law. This process takes nine to twelve months and costs the applicants hundreds of dollars.¹⁸³ But this is only the beginning of the mountain candidates must climb to be admitted to the practice of law.

Once applicants have been accepted and have been found fit to sit for the bar, the real fun begins. Most law schools offer some sort of bar preparation course to third-year students, to allow them time to become accustomed to, and practice for, the idiosyncrasies of the UBE or their state bar exam. But even this two- or three-credit course is not enough to prepare examinees for the bar exam. Once law school ends, preparation begins in earnest for a bar exam not to be taken until the end of July.

Most third-year law school students graduate in May. Only a few days later, those graduates, who have just successfully completed three years of intense legal study (and accumulated an average six-figures of student debt doing so), begin the special circle of hell known as “bar prep.”

Most law school graduates enroll in a commercial bar preparation course.¹⁸⁴ These courses, which usually cost between \$1,500 and

¹⁸² NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 3–4 (2020), https://thebarexaminer.ncbex.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf [<https://perma.cc/RA6F-VY6Y>] (“It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic.”).

¹⁸³ *NCBE Fee Schedule*, *supra* note 120.

¹⁸⁴ *When Should I Sign Up For Bar Prep?*, JD ADVISING, <https://jedadvising.com/when-should-i-sign-up-for-bar-prep/> [perma.cc/BEU3-CSZT].

\$3,000,¹⁸⁵ begin shortly after graduation, and require an average of eight hours a day of work, five or six days a week, for eight to ten weeks.¹⁸⁶ During this time, students watch recorded lectures, answer practice questions, and take simulated exams.¹⁸⁷ These courses are designed to help students memorize the vast amount of “general legal principles” they will be tested on.¹⁸⁸ Remember that UBE states test applicants on no state or local law; in fact, the “general legal principles” tested on the UBE may even directly contradict the law of the jurisdiction administering the exam.¹⁸⁹

Students studying for the bar are strongly discouraged from taking on other paid work during this time.¹⁹⁰ Instead, many rely on additional loans to afford the commercial bar prep courses and to pay their rent and other

¹⁸⁵ *Ohio Bar Exam Dates/Details*, UNIV. OF AKRON SCH. OF L., <https://www.uakron.edu/law/current-students/bar-details.dot> [https://perma.cc/QJK7-2ZG].

¹⁸⁶ See *BARBRI Bar Review FAQs*, BARBRI, <https://www.barbri.com/barbri-bar-review-faq/> [https://perma.cc/9AVH-ZDT8] (click on “When does the BARBRI Bar Review course start? How long is the course? How much time should I plan to study during the course?”); Mae Flenoy & Erik Huey, *Evolution of the Bar Exam: Three Generations of Bar Members Reflect on the Bar Exam, Then and Now*, 11 NEV. L. 19, 21 (2003) (“[T]he four months of studying prior were torture. I think a lot of people underestimate how difficult it is. I have mixed emotions. Even though it was challenging, it made me work harder than I’ve ever worked for anything in my life.”).

¹⁸⁷ See, e.g., *BARBRI Bar Review*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details/> [perma.cc/4UXR-SMJ6] (click on “Interactive expert lectures” for recorded lecturers; “2500+ curated multiple-choice practice questions” for practice questions, or “Simulated MBE + Pass Predictor” for simulated exams).

¹⁸⁸ *Id.* (click on “2500+ curated multiple-choice practice questions”).

¹⁸⁹ See Myron T. Steele, *Winds of Change: The Challenges Facing State High Courts in Regulating the Practice of Law*, 52 JUDGES J. 22, 23–24 (2013).

¹⁹⁰ Christen Morgan, *Should I Get a Side Hustle While Studying for the Bar?*, BAR EXAM TOOLBOX (Nov. 15, 2017), <https://barexamtoolbox.com/get-side-hustle-studying-bar/> [perma.cc/9AR6-TVXJ].

bills during the two and a half months they are unable to work.¹⁹¹ Some lucky students who have already secured jobs with large law firms will have these bar prep courses and living expenses covered (or at least reimbursed) by their firm.¹⁹² But around half of all law school graduates do not graduate with a job already offered to them,¹⁹³ and are unable to secure paid legal employment until after they have passed the bar.

This adds another hardship for examinees—jurisdictions release bar exam results anywhere from ninety days¹⁹⁴ to fifteen weeks¹⁹⁵ after the test is administered. That is another three-plus months examinees are unable to work in a legal job earning an attorney's salary. Meanwhile, their student loan grace periods are near expiration, and they will soon be expected to begin repaying their six-figure debt.¹⁹⁶

¹⁹¹ See *Frequently Asked Questions: Bar Loans*, UNIV. BALT. L. SCH., available at <https://law.ubalt.edu/academics/academic-support/barexam/FAQ%20Bar%20Study%20Loans.pdf> [perma.cc/ES7X-BBNR].

¹⁹² Debra Cassens Weiss, *Big Firms Often Pay Bar Exam Costs, Sometimes Pay Signing Bonuses*, ABA J. (Apr. 28, 2008, 5:46 PM), https://www.abajournal.com/news/article/big_firms_often_pay_bar_exam_costs_sometimes_pay_signing_bonuses [perma.cc/VWS9-A7DN]. See, e.g., *Frequently Asked Questions*, GJERSET & LORENZ LLP, <https://www.gl-law.com/employment-opportunities/frequently-asked-questions/> [perma.cc/K6SS-Q6HV] (reporting a \$7,500 bar stipend for incoming associates).

¹⁹³ See *Law School Job Outcomes*, L. SCH. TRANSPARENCY, <https://www.lawschooltransparency.com/trends/jobs/the-job-search> [https://perma.cc/AG89-XZE9].

¹⁹⁴ *February 2021 Bar Exam Results Release Dates by State*, JD ADVISING, <https://jdadvising.com/february-2021-bar-exam-results-release-dates-by-state/> [https://perma.cc/L8EH-6ZNB] (listing release dates for Alaska).

¹⁹⁵ *Id.* (listing release dates for California).

¹⁹⁶ *Student Loan Repayment*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/repayment#grace> [https://perma.cc/8LRV-JYKM].

3. *Disconnect from Practice and Education*

One of the primary justifications for the bar exam is that it protects the public from incompetent attorneys.¹⁹⁷ Despite requiring bar exams for over 100 years, the legal profession has never had a clear, explicit understanding of the minimum competence needed to practice law and how it should be tested on the bar exam.¹⁹⁸ Without this understanding, it is impossible to know if the bar exam is a valid measure for licensing new lawyers or an artificial barrier to entering the legal profession.¹⁹⁹

Recent research shows the bar exam in its current form (i.e., the UBE), is not a good measure of minimum competency.²⁰⁰ “The NCBE offers no evidence why certain legal subjects are tested while others are not, nor why the form of the UBE (half of one’s score is based on multiple-choice questions, with the remainder evenly split between two performance test questions and six essay questions) is essential to testing competence.”²⁰¹ Additionally, the NCBE cannot explain the relationship between the speed, legal competence, and skills that the test requires.²⁰²

The UBE is based on knowledge of substantive law and, as a timed test, values speed over thoughtful reflection.²⁰³ However, recent surveys of practicing attorneys show that quick thinking is not required for minimum competence.²⁰⁴ Because “[k]nowledge of specific legal principles is much

¹⁹⁷ Bell, *supra* note 70, at 1215.

¹⁹⁸ MERRITT & CORNETT, *supra* note 7, at 3.

¹⁹⁹ *Id.* at 6.

²⁰⁰ Donna Saadati-Soto, et. al, *Does the Bar Exam Measure Competence? The Answer: We Have No Idea*, JURIST (Apr. 21, 2020, 10:44 PM), <https://www.jurist.org/commentary/2020/04/saadati-soto-escontrias-sarkar-bar-exam/> [<https://perma.cc/Z7CT-NJZQ>].

²⁰¹ Ariens, *supra* note 74, at 7.

²⁰² *Id.*

²⁰³ MERRITT & CORNETT, *supra* note 7, at 64.

²⁰⁴ *Id.* at 12 (“[C]ognitive skills like communication, research, legal analysis, and critical thinking are central to minimum competence.”).

less important,” there is little value in requiring memorization of those principles.²⁰⁵ In fact, the timed nature of the UBE components is in direct contradiction to the practice of law, which requires careful, nuanced reflection.²⁰⁶ New attorneys rarely provide immediate answers to clients, and certainly do not provide answers in the 1.8 minutes allotted to answer a multiple choice question on the MBE.²⁰⁷ As one senior attorney remarked, “I’ve never hired someone because they’re very fast at answering 60 questions.”²⁰⁸

The current new-lawyer licensing system is historically exclusionary, excessively burdensome, and generally unrelated to what new lawyers actually do in practice. But an inclusive, burden-reducing, and practice-related model for professional licensing exists in the field of social work.

III. SOCIAL WORK LICENSING

Social work as a profession seeks to develop systemic solutions to poverty and other social ills.²⁰⁹ Like the legal profession, social work uses established systems to assist clients, self-regulates admission to the profession, and requires adherence by its practitioners to a code of ethics.²¹⁰ However, unlike the legal profession, social work education and licensing is based on a model of inclusion, rather than exclusion.²¹¹ The need to train social workers quickly to meet societal challenges and the need for “buy-in” from the communities being served required social work

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 64.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Read the Code of Ethics*, NAT’L ASS’N OF SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English> [perma.cc/39E7-TBS3].

²¹⁰ *Id.* See generally NAT’L ASS’N OF SOC. WORKERS, NASW PROCEDURES FOR PROFESSIONAL REVIEW (2012), <https://www.socialworkers.org/LinkClick.aspx?fileticket=E6Gsz89w0rw%3D&portalid=0> [perma.cc/7XQ9-M5PG].

²¹¹ See discussion *infra* Section V.

to adopt a training and licensing model that was welcoming and reduced barriers to entry.²¹²

A. A History of Inclusion

Individuals and agencies practiced social work long before there were training programs, licensure, or even a general concept of social work as a profession.²¹³ Social work grew out of early attempts to address poverty, child welfare, family relations, malnutrition and health care, infant mortality, waves of new immigrants and internal migration and other challenges associated with the country's industrial shift from rural to urban living.²¹⁴

By the early nineteenth century, help for children, the poor, and the ill was provided at local levels through town and county offices.²¹⁵ Charitable organizations, usually run by religious societies or groups of wealthy women, supplemented these early, often limited, public initiatives, developing settlement houses and charity organization societies.²¹⁶ Settlement houses “derived their name from the fact that the resident workers ‘settled’ in the poor neighborhoods they sought to serve, living there as friends and neighbors.”²¹⁷ Because these efforts were largely volunteer- and resident-led, there was no initial need for specialized

²¹² See discussion *infra* Section III.

²¹³ Timothy B. Dyeson, *Social Work Licensure: A Brief History and Description*, 16 HOME HEALTH CARE MGMT. & PRAC. 408, 408 (2004).

²¹⁴ June Gary Hopps & Tony B. Lowe, *Social Work Profession*, ENCYCLOPEDIA OF SOC. WORK, <https://doi.org/10.1093/acrefore/9780199975839.013.622> [perma.cc/F9S8-Q2 YG] (Dec. 22, 2021).

²¹⁵ MORLEY D. GLICKEN, *SOCIAL WORK IN THE 21ST CENTURY: AN INTRODUCTION TO SOCIAL WELFARE, SOCIAL ISSUES, AND THE PROFESSION* 20 (2007).

²¹⁶ *Id.* at 21–22.

²¹⁷ Margaret E. Berry, *The Settlement Movement 1886–1986: One Hundred Years on Urban Frontiers*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/settlement-houses/settlement-movement-1886-1986/> [https://perma.cc/T9UE-6NXU].

education or certification.²¹⁸ In fact, requiring special education or credentials was the opposite of what the social work movement strove to do: to include the served community in the management of their own care.²¹⁹

Early social work efforts were fragmented according to location and the communities being served.²²⁰ The charitable organizations providing assistance tended to focus on one set of people in one geographic area, to the exclusion of other groups that could have benefitted from the assistance these groups provided.²²¹ For example, the New York Society for the Relief of Poor Widows with Small Children described the limited group it worked with right in its name.²²² And we know the Society mainly served white women and children, because organizations that assisted African Americans would have said so in the organization's name.²²³

After the Civil War, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands in 1865, as part of its plans for Reconstruction.²²⁴ The "Freedmen's Bureau" (Bureau) was the nation's first federal social welfare agency, responsible for aiding four million formerly enslaved individuals and hundreds of thousands of impoverished southern

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA*, at x (1986).

²²¹ *See id.* at 14; ANNE M. BOYLAN, *ORIGINS OF WOMEN'S ACTIVISM: NEW YORK AND BOSTON, 1797–1840*, at 41–42 (2002).

²²² BOYLAN, *supra* note 221, at 219.

²²³ *See* *ENCYCLOPEDIA OF SOCIAL WORK* 145–46 (Terry Mizrahi & Larry E. Davis eds., 20th ed. 2008) (discussing the Philadelphia Free African Society, founded in 1787, and the Shelter for Colored Orphans in Philadelphia, founded in 1822).

²²⁴ *Freedmen's Bureau*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/federal/freedmen%e2%80%99s-bureau/> [https://perma.cc/RPC2-QM65].

whites.²²⁵ The Bureau provided food, shelter, medical care, and land to displaced southerners, including many newly emancipated African Americans.²²⁶ The Bureau was also a source of legal representation for former soldiers and sailors, assisting them in obtaining pensions and back pay.²²⁷

The Freedmen's Bureau was led by General Oliver Otis Howard, who ran the nation's first social welfare effort more like a military operation than a social service endeavor.²²⁸ His military leadership was necessary, however, given the agency was charged with securing the safety and freedom of formerly enslaved African Americans, in an American South which never completely acknowledged it did not lose the war.²²⁹ Due to political opposition to the Land Act and other Reconstruction legislation, the Bureau, and the nation's first attempt at establishing a social work infrastructure, lasted for only a few years before Congress dismantled the Freedmen's Bureau in 1872.²³⁰

Although not an unequivocal success, the Bureau demonstrated the possibility of employing a larger system to promote social welfare. This led to the idea of "scientific charity," a systemic, organized approach to

²²⁵ *Id.*; Freedmen's Bureau Act of 1865, ch. 90, §§ 2, 4, Pub. L. No. 38-90, 13 Stat. 507, 508-09 (1865).

²²⁶ *The Freedmen's Bureau Records*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/initiatives/freedmens-bureau-records> [https://perma.cc/8ZME-MB2L].

²²⁷ *Id.*

²²⁸ See *Freedmen's Bureau*, *supra* note 224.

²²⁹ *Freedmen's Bureau*, HISTORY.COM (Oct. 3, 2018), <https://www.history.com/topics/black-history/freedmens-bureau> [https://perma.cc/WH5Y-TP7E].

²³⁰ *Id.* General Howard, disillusioned by this early attempt at social work, turned his focus to education, founding Howard University, where he served as president from 1869 to 1874. *Oliver Otis Howard, the Mainer who Founded Howard University*, NEW ENG. HIST. SOC'Y (2021), <https://www.newenglandhistoricalsociety.com/oliver-otis-howard-the-mainer-who-founded-howard-university/> [https://perma.cc/6TWU-ZNP7].

identify and determine needs and to deliver services effectively.²³¹ Under this theory, the various groups already providing services to the poor coordinated their efforts under a central office, called the Charity Organization Society (Society).²³² The Society recruited “friendly visitors” to collect information about the individuals and families receiving assistance.²³³ This information was used to determine a recipient’s “worthiness” for assistance, and also to create a centralized registry of every person in the city who was receiving charitable assistance.²³⁴ Those who were found “worthy” received aid, supervised by the friendly visitors who continued to visit the recipient to provide advice and supervision.²³⁵ The goal of this system was to ensure relief was provided only to the “deserving” poor, while letting natural selection take care of the undeserving.²³⁶ Although the scientific charity movement improved and streamlined the processes for assisting those in poverty, its strategy of “helping people help themselves” and its focus on the “deserving” poor meant not everyone who needed help received it.²³⁷

²³¹ Linda S. Stuhler, *Scientific Charity Movement and Charity Organization Societies*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/mental-health/scientific-charity-movement-charity-organization-societies/> [<https://perma.cc/4K64-W9UA>].

²³² *Id.*

²³³ John E. Hansan, *Charity Organization Societies: 1877–1893*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/charity-organization-societies-1877-1893/> [<https://perma.cc/CNT8-ZV2D>].

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ This usually resulted in women and children receiving assistance, while those with disabilities, mental illness, or addiction, were left to the consequences of natural selection. *Id.*

²³⁷ See generally Stuhler, *supra* note 231 (discussing the importance of organizing pauperism to help those who were truly deserving).

In the late 1800s, Charity Organization Societies began to develop informal training programs for their workers.²³⁸ The nascent profession realized that to gain acceptance from the communities they served they had to staff the programs with members of that community.²³⁹ This served two functions—providing a low-cost workforce and enabling the profession to meet the served population where they were.²⁴⁰ In 1898, the New York Charity Organization Society and Columbia University established the first Summer School in Philanthropic Work on the University's campus.²⁴¹ The program, which combined “lectures, classroom discussions, visits to institutions, social research, and practical training,”²⁴² was soon replicated in Boston, Chicago, St. Louis, and Philadelphia.²⁴³

As more trained social workers entered the field, they began to demand a more structured and professional credentialing system. To distinguish itself as a profession, social workers claimed they had the “beginning of a scientific knowledge base, as well as specialized skill, technique and function that differentiated them from the layman or volunteer.”²⁴⁴ Training programs also began to develop specializations in social casework, child welfare, medical, and psychiatric work.²⁴⁵

²³⁸ *See id.*

²³⁹ Berry, *supra* note 217.

²⁴⁰ *See id.*

²⁴¹ *Historical Timeline*, COLUMBIA SCH. OF SOC. WORK, <https://socialwork.columbia.edu/about/historical-timeline/> [https://perma.cc/Z6N6-QGPS].

²⁴² Linda M. Shoemaker, *Early Conflicts in Social Work Education*, 72 SOC. SERV. REV. 182, 183 (1998).

²⁴³ *The Road to 1952: AASSW and NASSA*, COUNCIL ON SOC. WORK EDUC., <https://www.cswe.org/about-cswe/cswe-a-brief-history/the-road-to-1952/> [https://perma.cc/7TAK-LFMP].

²⁴⁴ ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 223, at 146 (quoting MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALIZATION: A SOCIOLOGICAL ANALYSIS* 181 (1977)).

²⁴⁵ *Id.*

The development of these training programs highlighted an early conflict in the profession: What was the most effective way to educate social workers?²⁴⁶ One school of thought based in university schools of social work demanded a rigorous, academic course of study that encompassed economics and sociology.²⁴⁷ The other faction, which developed out of the training programs run by social service organizations, demanded a more practical training regimen focused on casework theory and practice.²⁴⁸ This conflict was based in differing understandings of poverty and other social ills.²⁴⁹ The academic faction believed society's problems were systemic and structural, necessitating an understanding of how these larger systems functioned to be able to change them.²⁵⁰ The practical skills faction believed these problems were rooted in individual and psychological factors, which required training focused on working with individuals, rather than systems.²⁵¹

These factions began coordinating in 1919 with the founding of the Association of Training Schools of Professional Social Work (ATSPSW)²⁵² The organization established formal accreditation procedures for social work education in 1932 but focused mainly on graduate education.²⁵³

²⁴⁶ Shoemaker, *supra* note 242, at 185.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 186. This tension between academic and practical courses of study would be mirrored in the legal profession a few years later with the development of the YMCA law schools, which prioritized practical skills training over the Langdellian case method. *See* discussion *infra* Section I.A.

²⁴⁹ Shoemaker, *supra* note 242, at 186.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Dyeson, *supra* note 213, at 408.

²⁵³ *The Road to 1952: AASSW and NASSA*, *supra* note 243.

The Great Depression, triggered by the stock market crash of 1929, caused a nationwide epidemic of poverty, which increased the need for social workers.²⁵⁴ The Social Security Act of 1935, part of the New Deal, expanded the social welfare net through a series of programs focused on housing, rural poverty, child welfare, and social insurance.²⁵⁵ The vast scope of the Act required an influx of state workers who needed to be trained to run these programs.²⁵⁶ Assisted by federal funding,²⁵⁷ many state universities began offering undergraduate training programs in social work to meet this growing need.²⁵⁸ Within a decade after the Act's passage, the number of social workers in the United States doubled from 40,000 to 80,000.²⁵⁹ The addition of undergraduate social work education had an unintended effect: men and women from lower-income families and from diverse ethnic and cultural backgrounds now had the opportunity to pursue social work education at a greatly reduced cost,²⁶⁰ creating a more diverse workforce that began to look like the clients that it served.

Two organizations, representing the two schools of thought on social work education, emerged to govern the rapidly growing educational landscape: the National Association of Schools of Social Administration (NASSA), which represented undergraduate education, and the ATSPSW, which renamed itself the American Association of Schools of Social Work

²⁵⁴ Jerry D. Marx, *American Social Policy in the Great Depression and World War II*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/great-depression/american-social-policy-in-the-great-depression-and-wwii/> [perma.cc/7HEJ-WYJK].

²⁵⁵ *Id.*

²⁵⁶ See ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 223, at 160.

²⁵⁷ SOCIAL WORK AT THE MILLENNIUM: CRITICAL REFLECTIONS ON THE FUTURE OF THE PROFESSION 29 (June Gary Hopps & Robert Morris eds., 2000) [hereinafter SOCIAL WORK AT THE MILLENNIUM].

²⁵⁸ ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 223, at 160.

²⁵⁹ GLICKEN, *supra* note 215, at 25.

²⁶⁰ SOCIAL WORK AT THE MILLENNIUM, *supra* note 257, at 29.

(AASSW),²⁶¹ and still limited membership to graduate programs.²⁶² Since social work was not yet a licensed profession, and a degree was the only qualification required to practice social work, both agencies sought to standardize and professionalize social work education, although the tension between practice-based and theoretical education remained.²⁶³ Graduate programs continued to emphasize theory, while undergraduate programs emphasized casework.²⁶⁴

As the work undertaken by social workers continued to expand along with the social welfare net, questions arose as to the type of training required to perform the work: What competencies and preparation were required for service providers in the new public welfare system? What belonged in undergraduate education, and what belonged in graduate programs?²⁶⁵ To answer these questions, NASSA and AASSW formed a National Council on Social Work Education in 1946 to explore professional and educational unification.²⁶⁶ By the early 1950s, NASSA and AASSW merged to form the Council on Social Work Education (CSWE).²⁶⁷ The CSWE standardized social work education as a graduate field, making the Master of Social Work degree the required credential for independent social work practice.²⁶⁸ The CSWE also serves as the leading

²⁶¹ *The Road to 1952: AASSW and NASSA*, *supra* note 243.

²⁶² ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 223, at 160 (noting the AASSW had restricted membership to graduate social work programs).

²⁶³ *Manual for New Board Members*, ASS'N OF SOC. WORK BDS. 5, available at <https://www.aswb.org/wp-content/uploads/2021/02/Your-Association-2021.pdf> [perma.cc/7FLB-RFPF].

²⁶⁴ GLICKEN, *supra* note 215, at 84–86.

²⁶⁵ Arlien Johnson, *Social Work Education in the United States: The Hollis-Taylor Report as Seen From the Viewpoint of a Social Work Educator*, 33 SOC. WORK J. 132, 132 (1952).

²⁶⁶ *The Road to 1952: AASSW and NASSA*, *supra* note 243.

²⁶⁷ ENCYCLOPEDIA OF SOCIAL WORK, *supra* note 223, at 161.

²⁶⁸ *Id.*

accrediting body for social work education programs, currently accrediting 858 bachelors, masters, and fellowship programs.²⁶⁹

As the profession continued to grow, states began to regulate social work practitioners. California's journey to licensure illustrates the difficulty of imposing regulation on a rapidly growing and diverse profession. The California Conference of Social Welfare (CCSW), a professional social work organization, had been exploring registration of case workers with a professional education since 1920.²⁷⁰ An early attempt to pass a statute requiring registration in 1929 was met with resounding defeat due to the "sudden, violent opposition from social workers, who rallied to overwhelm the bill."²⁷¹ Many social workers who did not have professional degrees were afraid the proposed bill would eventually shut them out of the profession²⁷² (which is, in fact, what happened). Following that defeat, the CCSW instead turned to a voluntary registration system while it regrouped for another attempt at professional licensure.²⁷³

California's voluntary registration acted as a placeholder until 1933, when the Conference formed the Board of Social Work Examiners.²⁷⁴ Having learned from its earlier legislative defeat, the Board instead drafted a set of organizational bylaws, which included a "blanketing-in" provision that allowed "any case-worker or executive . . . who has lived in California for a period of two years and who has graduated from a High School and who has had at least three years of experience in an accredited California social agency" to register as a social worker.²⁷⁵ This one-time allowance

²⁶⁹ *Accreditation*, COUNCIL ON SOC. WORK EDUC., <https://www.cswe.org/accreditation/> [<https://perma.cc/5G7W-Y7SV>].

²⁷⁰ Martha Chickering, *Why California Registers Its Social Workers*, 22 SOC. SERV. REV. 498, 498 (1948).

²⁷¹ *Id.*

²⁷² *The Registration of Social Workers in California*, 8 SOC. SERV. REV. 140, 141 (1934).

²⁷³ Chickering, *supra* note 270, at 499.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

for social workers without professional degrees calmed the previous opposition²⁷⁶ and allowed the Board to eventually require registration for all social workers in 1945.²⁷⁷

To be fully recognized as a professional field, social work also needed to develop a code of ethics for its practitioners.²⁷⁸ This task fell to the National Association of Social Workers (NASW), founded in 1955 as a membership organization for professional social workers.²⁷⁹ In 1960, the organization's Delegate Assembly approved the first edition of the NASW Code of Ethics²⁸⁰ The original Code defined the social work profession and outlined fourteen responsibilities for social workers.²⁸¹ That initial version has been updated several times to address issues such as non-

²⁷⁶ *See id.* at 500.

²⁷⁷ Dyeson, *supra* note 213, at 408.

²⁷⁸ *Id.* at 409.

²⁷⁹ *About*, NAT'L ASS'N OF SOC. WORKERS, <https://www.socialworkers.org/About> [https://perma.cc/PX7T-GT46].

²⁸⁰ *History of the NASW Code of Ethics*, NAT'L ASS'N OF SOC. WORKERS, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/History> [https://perma.cc/8MZ9-NPRC].

²⁸¹ *NASW Code of Ethics*, NAT'L ASS'N OF SOC. WORKERS 170 (1960), available at <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/g/LinkClick.aspx?fileticket=IPpjaxmAsCTs%3d&portalid=0> [https://perma.cc/9DTV-2Z6T].

discrimination,²⁸² solicitation of clients, fee setting,²⁸³ litigation, and media publicity.²⁸⁴

The Association of Social Work Boards (ASWB)²⁸⁵ was founded in 1979 “to develop an effective examination to measure minimum competency of entry-level social work practitioners to help social work regulatory boards carry out their mission of public protection.”²⁸⁶ In 1983, 464 social workers in New York, Oklahoma, and Virginia took the ASWB’s first licensure exam.²⁸⁷ Since that first exam, the ASWB has expanded across the United States and into Canada, and now administers over 50,000 licensing exams annually in sixty-four American and Canadian jurisdictions.²⁸⁸

Since 1991, all U.S. jurisdictions have statutes that regulate the use of the title social worker and provide for an examination board, continuing education policies, and disciplinary hearing procedures.²⁸⁹ In short, these

²⁸² *NASW Code of Ethics*, NAT’L ASS’N OF SOC. WORKERS (1967), available at <https://www.socialworkers.org/LinkClick.aspx?fileticket=9PxSwiQrItA%3d&portalid=0> [https://perma.cc/42K4-4YMS].

²⁸³ *NASW Code of Ethics*, NAT’L ASS’N OF SOC. WORKERS 6 (1990), available at <https://www.socialworkers.org/LinkClick.aspx?fileticket=BeXGHRrpDig%3d&portalid=0> [https://perma.cc/E8BW-4V6S].

²⁸⁴ *NASW Code of Ethics*, NAT’L ASS’N OF SOC. WORKERS 11 (1996), available at <https://www.socialworkers.org/LinkClick.aspx?fileticket=YkFrOi8Vu-0%3d&portalid=0> [https://perma.cc/5Z5K-P3FX].

²⁸⁵ Initially called the American Association of Social Work Boards, the organization changed its name in 1999 to reflect its growing international membership. *History*, ASS’N OF SOC. WORK BDS., available at <https://www.aswb.org/wp-content/uploads/2021/02/ASWB-history.pdf> [https://perma.cc/BF4Z-FQAM].

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Dyeson, *supra* note 213, at 409.

statutes provide for the licensure (sometimes called certification) of social workers.²⁹⁰ Every jurisdiction's certification or licensure scheme requires graduation from a bachelor's or master's program that is accredited by CSWE.²⁹¹

ASWB exams are developed from a regularly updated survey of the actual practice of social workers across the United States and Canada who work in a variety of settings and represent demographic diversity.²⁹² The results of the survey shape the questions that appear on the examinations and establish the need for a particular examination within a specific scope of practice.²⁹³ Exam questions are written by item writers who have been selected to reflect racial, ethnic, gender, geographic, and practice-setting diversity.²⁹⁴ The Examination Committee—a group composed of content experts from a variety of practice settings and balanced for diversity—reviews and selects questions to be placed on the ASWB examinations.²⁹⁵

B. How We License New Social Workers

A license is required in all U.S. jurisdictions to practice social work, although jurisdictions vary in the categories of practice they license.²⁹⁶ Because of the cooperation between social work education and its accrediting bodies, licensing requirements for social workers are similar in almost all U.S. jurisdictions.²⁹⁷ Unlike with legal licensure, where one

²⁹⁰ *Id.* at 408–09 (emphasis omitted).

²⁹¹ *Id.* at 409.

²⁹² *ASWB Examination Guidebook*, ASS'N OF SOC. WORK BDS. 9 (2022), available at <https://www.aswb.org/exam/getting-ready-for-the-exam/aswb-examination-guidebook/> [<https://perma.cc/LB3D-UX4V>].

²⁹³ *Id.*

²⁹⁴ *Id.* at 10.

²⁹⁵ *Id.* at 11.

²⁹⁶ *How to Get a License*, ASS'N OF SOC. WORK BDS., <https://www.aswb.org/licenses/how-to-get-a-license/> [<https://perma.cc/H7ET-6ZBR>].

²⁹⁷ Celia Goble, *Social Workers to the Rescue?: An Urgent Call for Emergency Response Reform*, 48 *FORDHAM URB. L.J.* 1021, 1034 (2021).

exam admits a candidate to all facets of the profession, most states offer multiple categories of licensure, recognizing graduated experience levels and different scopes of practice.²⁹⁸ Although a Bachelor of Social Work (BSW) is sufficient in most jurisdictions for initial licensure, a Master of Social Work (MSW) is required for any type of unsupervised or advanced practice, and in some states is the minimum degree required for licensure.²⁹⁹ In most jurisdictions, licensing requires a background check and a national examination.³⁰⁰ But no matter how jurisdictions license their social workers, the process is less intrusive, less expensive, and less exclusionary than the process of licensing new lawyers.

1. *Background Check*

Before they can sit for their initial licensing exams, graduates of BSW or MSW programs must complete an application process that inquires about the applicant's criminal background.³⁰¹ All states have rules prohibiting the granting of licenses to applicants with criminal histories that could indicate an inability to practice social work safely, but states have different ways of obtaining this information.³⁰² Ohio, for example, requires applicants to complete a background check that encompasses violations reported to FBI and state databases, including a fingerprint check.³⁰³ Idaho, on the other hand, requires applicants to self-disclose any

²⁹⁸ *Getting Your First License*, ASS'N OF SOC. WORK BDS., <https://www.aswb.org/licenses/how-to-get-a-license/getting-your-first-license/> [perma.cc/UK8A-Z9N8].

²⁹⁹ *Compare License Requirements*, ASS'N OF SOC. WORK BDS., <https://www.aswb.org/regulation/laws-and-regulations-database/> [perma.cc/KVM4-Y36S] (click on the "Compare now" hyperlink corresponding to "Compare licensing requirements"; then click "Select All Jurisdictions" and "Generate Report").

³⁰⁰ *Social Work Licensure Requirements by State*, SLIPPERY ROCK UNIV. (2018), available at <https://www.sru.edu/documents/academics/online-learning/Social%20Work%20Licensure%20Requirements%20by%20State.pdf> [perma.cc/37NM-GF7M].

³⁰¹ *See id.* (providing a compilation of state laws and regulations governing the licensing and practice of social work).

³⁰² *Id.*

³⁰³ OHIO REV. CODE ANN. § 4776.02(A) (LexisNexis 2022).

previous criminal convictions.³⁰⁴ Failing to report a conviction could result in the denial of licensure.³⁰⁵

Jurisdictions have varying requirements regarding how criminal offenses impact licensure.³⁰⁶ Some boards follow laws and rules that outline specific disqualifying convictions,³⁰⁷ while others have a standard open to interpretation based on the facts and circumstances of the conviction.³⁰⁸

2. Exam

Almost every U.S. jurisdiction uses a graduated system of licensing for social workers. Unlike the “one and done” bar exam, where one high-stakes test grants an unlimited license to practice (although, as Section II shows, most bar exams require multiple steps),³⁰⁹ social workers can take several licensing exams throughout their career, depending on their level of expertise and the practice areas they want to pursue.³¹⁰

³⁰⁴ *Disclosure Statement Regarding Criminal Conviction*, IDAHO BD. OF SOC. WORK EXAM’RS, available at <https://apps.dopl.idaho.gov/DOPLPortal/SWO/Forms/Criminal%20Conviction%20Disclosure%20Form.pdf> [<https://perma.cc/7YW7-2ZM3>].

³⁰⁵ *Id.*

³⁰⁶ See *Social Work Licensure Requirements by State*, *supra* note 300.

³⁰⁷ See, e.g., *Frequently Asked Questions About How Having a Criminal Conviction Could Affect Getting a Social Worker or Clinical Social Worker License*, ILL. DEP’T OF FIN. & SOC. REG., <https://idfpr.illinois.gov/FAQ/DPR/2019%20SW%20CC%20FAQs.pdf> [<https://perma.cc/VT4A-DRFH>] (noting offenses requiring registration under the Sex Offender Registration Act or criminal battery against a patient in the course of care or treatment result in an automatic denial of a license application).

³⁰⁸ See, e.g., W. VA. CODE § 30-30-16(a)(7)–(8) (2022) (explaining any felony within five years preceding the application or any felony or misdemeanor “related to the practice of social work,” regardless of how long ago it was committed, disqualifies an applicant).

³⁰⁹ See discussion *infra* Section II.C.

³¹⁰ *About the Social Work License*, HUMANSERVICESEDU.ORG, <https://www.humanservicesedu.org/social-work-license/> [<https://perma.cc/EV57-ZSWM>].

a. Types of Exams

Most candidates obtain an initial license shortly after graduating from an accredited social work program.³¹¹ This initial license usually limits the social worker's practice to non-clinical³¹² or supervised practice. After obtaining a higher degree and more experience, the social worker can take one or more additional exams to permit more independent or clinical practice.³¹³

The Association of Social Work Boards administers the social work examination process in all U.S. jurisdictions.³¹⁴ The ASWB offers four examination levels states can use in the licensing process for graduates of a social work program.³¹⁵ States are free to require some or all of the offered

³¹¹ *Getting Your First License*, *supra* note 298.

³¹² *Clinical vs. Direct Practice Social Work*, SOCIALWORKLICENSURE.ORG, <https://socialworklicensure.org/articles/clinical-vs-direct-services-social-work/#:~:text=The%20main%20difference%20between%20clinical,workers%20can%20provide%20counseling%20treatments> [https://perma.cc/6JGG-N8HC]. Direct practice (also called "non-clinical practice") social workers help clients navigate complex social relief systems and find appropriate resources, while clinical social workers are able to diagnose and treat their client's mental health conditions. *Id.* For this reason, clinical social work usually requires a higher level of training and experience. *Id.*

³¹³ *Id.*

³¹⁴ Dyeson, *supra* note 213, at 409.

³¹⁵ ASS'N OF SOC. WORK BDS., 2017 ANALYSIS OF THE PRACTICE OF SOCIAL WORK: FINAL REPORT 2 (2017) [hereinafter 2017 FINAL REPORT] (explaining the ASWB also offers an Associate's exam for use as a licensure requirement by member boards that issue licenses to applicants without a degree in social work, who generally work in paraprofessional positions).

exams.³¹⁶ Some states also offer limited-scope licenses that require no exam.³¹⁷

The Bachelors Examination is used for those with a bachelor's degree.³¹⁸ This level of licensure permits the social worker to perform basic, non-clinical social work functions while supervised by an agency or a more highly licensed social worker.³¹⁹ This level of licensure is available in all but nine jurisdictions.³²⁰

The Masters Examination is designed for use by candidates holding an MSW.³²¹ Some states require this exam for recent MSW graduates with no practice experience.³²² This level of licensure permits the same scope of practice as the Bachelors Examination.³²³ Nine jurisdictions require the completion of a set amount of supervised hours or a minimum number of years in practice before social workers who have passed the Masters exam can practice independently.³²⁴ Other jurisdictions require an additional

³¹⁶ See *Bachelor of Social Work Licensure Requirements by State*, REGIS COLL., <https://www.regiscollege.edu/academics/majors-and-programs/social-work-bsw/bachelor-social-work-licensure-requirements-state> [perma.cc/UM83-9JNV].

³¹⁷ See, e.g., MICH. COMP. LAWS § 333.18507(2) (2022) (offering a Limited Social Service Technician license to any candidate with at least two years of college education or one year of social work experience).

³¹⁸ 2017 FINAL REPORT, *supra* note 315.

³¹⁹ Dyeson, *supra* note 213, at 409.

³²⁰ *Bachelor of Social Work Licensure Requirements by State*, *supra* note 316 (illustrating California, Colorado, Connecticut, Florida, Georgia, New York, Rhode Island, Vermont, and Washington do not license BSW graduates).

³²¹ Dyeson, *supra* note 213, at 409.

³²² *Id.*; see, e.g., N.Y. EDUC. LAW § 7704.(1)(d) (Consol. 2022).

³²³ Dyeson, *supra* note 213, at 409.

³²⁴ Alabama, Idaho, Nevada, and Texas require completion of at least 3,000 hours. Compare *License Requirements*, *supra* note 299. Georgia, Kentucky, and the Northern Mariana Islands require two years of supervised practice. *Id.* Montana requires 2,000

(continued)

exam, such as the Advanced Generalist or Clinical exams, before permitting independent practice.³²⁵

The Advanced Generalist examination is used for candidates holding an MSW or higher and possessing the required number of supervised practice hours.³²⁶ The Advanced Generalist license is usually sought by social workers in non-clinical positions like administrators or consultants.³²⁷ Nineteen states offer this exam—most to candidates with at least 3,000 hours of experience.³²⁸

The highest level of licensure, which permits the most independent forms of practice, is attained by passing the Clinical exam.³²⁹ Only social workers holding clinical licensure are allowed to provide direct counseling treatments to clients.³³⁰ In most situations, this is the only type of licensure that makes a social worker eligible to receive third-party payments (i.e., insurance) for services to clients.³³¹ Every jurisdiction offers at least one version of a clinical license.³³²

hours for full licensure but will grant restricted licensure to successful exam takers with no previous experience. *Id.*

³²⁵ See, e.g., D.C. CODE § 3-1208.03(a) (2022) (requiring an “examination process at the independent level”); OHIO REV. CODE ANN. § 4757.27(B)(3) (West 2022) (requiring an additional examination before obtaining a LISW license).

³²⁶ Dyeson, *supra* note 213, at 409.

³²⁷ *Id.*

³²⁸ Compare License Requirements, *supra* note 299.

³²⁹ Dyeson, *supra* note 213, at 409–10.

³³⁰ *Clinical vs. Direct Practice Social Work*, *supra* note 312.

³³¹ Dyeson, *supra* note 213, at 409. See, e.g., N.Y. EDUC. LAW § 7707(3) (2022); N.Y. INS. LAW § 3221(1)(4)(A) (2022).

³³² See *Occupational Outlook Handbook: Social Workers*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/ooh/community-and-social-service/social-workers.htm#> (last visited Jan. 5, 2023).

To illustrate how a social worker can use this graduated licensing system to develop expertise and advance throughout their career, consider “Anne,” a hypothetical social worker in Ohio. Anne took her first licensing test after completing her undergraduate BSW program. This initial Licensed Social Worker (LSW) license³³³ allowed her to work in an agency, non-profit, or governmental setting under the supervision of a senior social worker or other mental health professional.³³⁴ Two years later, after earning her MSW and working for 3,000 supervised hours,³³⁵ Anne became eligible to take the Clinical or Advanced Generalist exam to become a Licensed Independent Social Worker (LISW). With the LISW license, she was able to work in her agency without supervision.³³⁶ She was also free to set up her own independent social work practice or become a partner in a group practice.³³⁷ And if she passed the Clinical exam, she would also be able to diagnose and treat mental health conditions in her clients.³³⁸ Should Anne wish to gain further credentials in social work, she could take additional training to earn a Supervisory

³³³ *LSW License Instructions*, OHIO COUNS., SOC. WORKER, & MARRIAGE & FAM. THERAPIST BD., <https://cswmft.ohio.gov/get-licensed/social-workers/lsw+license+instructions> [<https://perma.cc/7G97-BAB4>].

³³⁴ OHIO REV. CODE ANN. § 4757.26(C) (West 2014).

³³⁵ OHIO ADMIN. CODE ANN. § 4757-19-02 (2014).

³³⁶ OHIO REV. CODE ANN. § 4757.26(B) (West 2014). *See also* Dyeson, *supra* note 213, at 409.

³³⁷ OHIO REV. CODE ANN. § 4757.26(B) (West 2014). *See also* Dyeson, *supra* note 213, at 409.

³³⁸ OHIO REV. CODE ANN. § 4757.26(B) (West 2014); MODEL SOC. WORK PRACTICE ACT § 106 (ASSOC. OF SOC. WORK BDS. 2018), <https://www.aswb.org/wp-content/uploads/2020/12/Model-law-for-web.pdf> [perma.cc/4GL3-4TUE] (stating Clinical Social Workers are qualified to diagnose and treat using the *Diagnostic and Statistical Manual of Mental Disorders* (DSM)).

designation on her license (LISW-S), which would permit her to act as a supervisor for LSWs.³³⁹

b. Exam Administration

All of the ASWB's social work exams consist of 170 multiple-choice questions.³⁴⁰ One hundred and fifty of the questions are actually used to assess competency; the remaining twenty questions are "pretest items" that will not be counted in the score.³⁴¹ The pretest items will be analyzed by the ASWB to determine whether they can be used as scored items on future versions of the exam.³⁴² Exam takers have four hours to complete the exam.³⁴³ All exams are administered electronically at PearsonVue testing centers.³⁴⁴

Because the exams are scored automatically, exam takers know immediately at the end of the exam if they have passed or failed.³⁴⁵ Candidates who are unsuccessful on an exam face a ninety-day waiting period before they can retake the exam, although in many jurisdictions they can apply for a waiver to reduce their waiting time.³⁴⁶ If a candidate passes the exam, their results are sent automatically to their licensing board,

³³⁹ LISW-S License Instructions, OHIO COUNS., SOC. WORKER, & MARRIAGE & FAM. THERAPIST BD., <https://cswmft.ohio.gov/get-licensed/social-workers/lisw-s+license+instructions> [https://perma.cc/GN27-JMP8].

³⁴⁰ ASS'N OF SOC. WORK BDS., ASWB EXAM CANDIDATE HANDBOOK 3 (2022) [hereinafter ASWB EXAM CANDIDATE HANDBOOK], <https://www.aswb.org/wp-content/uploads/2020/11/Candidate-handbook-06-2021.pdf>.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 20.

³⁴⁶ *If You Fail the Exam*, ASS'N OF SOC. WORK BDS., <https://www.aswb.org/exam/exam-scoring/if-you-fail-the-exam/> [https://perma.cc/7Q8G-CUUB].

which usually takes under two weeks to certify the results and issue the candidate's license.³⁴⁷ The new social worker can begin working immediately once the license is issued.³⁴⁸

C. Why Social Work Licensing is Better

Social work licensing is superior to new-lawyer licensing in several ways. First, the licensing process for new social workers is not controlled by an unanswerable body that has exceeded the limited task it was originally designed to do. Second, new social workers are not unduly burdened by the licensing process. Finally, social work education and practice collaborate with the national licensing body to ensure the licensing process accurately reflects the practice of social work.

1. Responsive Licensing Body

Unlike the NCBE, social work's national licensing body, the ASWB, is a member-regulated entity that operates transparently.³⁴⁹ The ASWB is controlled by its delegate assembly, which elects members to the Board of Directors (Board) and amends the association's bylaws as necessary.³⁵⁰ The Board of Directors consists of at least six licensed social workers with licenses in good standing.³⁵¹ A review of the Board's website shows at least five of the eleven members are Black.³⁵² The Board's racial makeup reflects the demographics of the profession—in 2017–2019 “more than 22% of new social workers were Black/African American, and 14% were

³⁴⁷ ASWB EXAM CANDIDATE HANDBOOK, *supra* note 340, at 20.

³⁴⁸ *LSW License Instructions*, *supra* note 333.

³⁴⁹ ASS'N OF SOC. WORK BDS., BYLAWS 1 (2022) [hereinafter ASWB BYLAWS], <https://www.aswb.org/wp-content/uploads/2022/07/Bylaws-2022-as-amended.pdf> [https://perma.cc/FB99-XVAB].

³⁵⁰ *Id.*

³⁵¹ *Id.* at 5.

³⁵² *Board of Directors*, ASS'N OF SOC. WORK BDS, <https://www.aswb.org/about-aswb/aswb-leadership-and-operations/board-of-directors/> [https://perma.cc/6HS4-6ZC3].

Hispanic/Latino.”³⁵³

The ASWB governs transparently. The organization’s bylaws are available to the public on the organization’s website,³⁵⁴ and one of the organization’s main objectives is to “[e]ngage with stakeholders to educate and increase transparency around the licensing exams.”³⁵⁵ ASWB regularly conducts “practice analyses,” which are surveys of what social workers must be able to do and what they must know on their first day on the job, and which inform the content of the licensing exams.³⁵⁶ In 2016, the most recent survey examined more than 23,000 practicing social workers.³⁵⁷

The responsiveness of the ASWB during the COVID-19 pandemic illustrates the agency’s willingness to work with, rather than against, its constituents and the people it is designed to serve.³⁵⁸ Early in the pandemic, the licensing (ASWB), education (CSWE), and professional (NASW) organizations issued a joint statement calling all of social work’s interested parties to action.³⁵⁹ The statement recognized the need for cooperation among the agencies to ensure social workers were able to

³⁵³ EDWARD SALSBERG ET AL., *THE SOCIAL WORK PROFESSION: FINDINGS FROM THREE YEARS OF SURVEYS OF NEW SOCIAL WORKERS 12* (2020).

³⁵⁴ See generally ASWB BYLAWS, *supra* note 349.

³⁵⁵ *Strategic Framework 2022–2023*, ASS’N OF SOC. WORK BDS., available at <https://www.aswb.org/wp-content/uploads/2020/12/strategic-framework.pdf> [<https://perma.cc/Q8D9-ADAJ>].

³⁵⁶ *Practice Analysis*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/exam/measuring-social-work-competence/practice-analysis/> [<https://perma.cc/8KGQ-EUGF>].

³⁵⁷ *Id.*

³⁵⁸ See *Social Work in This Unprecedented Time*, GLOBENEWSWIRE (Mar. 20, 2020, 5:15 PM), <https://www.globenewswire.com/news-release/2020/03/20/2004335/0/en/Social-work-in-this-unprecedented-time.html> [<https://perma.cc/F8BU-V7KZ>].

³⁵⁹ *Id.*

continue practicing, studying, and licensing in the face of the global pandemic.³⁶⁰ ASWB acknowledged its exams, which are administered at PearsonVue testing facilities, may be impacted by lockdowns and social distancing, and encouraged state licensing bodies to be flexible with time frames for acquiring and maintaining social work licenses.³⁶¹ ASWB also maintained a COVID-19 page on its website, which collected “information about changes to exam processes and regulatory provisions.”³⁶² Even though there were still complaints the examination process was delayed in some cases,³⁶³ overall, social work licensing ran more smoothly than new-lawyer licensing.

2. *Low Burden on Examinees*

In contrast to the huge burden the bar exam places on licensing candidates, social work licensing asks much less of the profession’s newest members. Although the two main components (i.e., background check and licensing exam) exist in both professional licensing schemes, the social work process takes less time, costs less, and has a lower penalty for failure.³⁶⁴

For most new social work graduates, licensing preparation begins in their final semester of study. Depending on their jurisdiction, candidates

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² Lavina Harless, *Putting Social Work Values to the Test—ASWB’s Commitment to Diversity, Equity, and Inclusion*, SOC. WORK TODAY, May–June 2020.

³⁶³ Letter from Angelo McClain, Chief Exec. Officer, Nat’l Ass’n Soc. Workers, to Dwight Hymans, Chief Exec. Officer, Ass’n of Soc. Work Bds. (Aug. 11, 2020), www.socialworkers.org/LinkClick.aspx?fileticket=CAypKyJX2LE%3D&portalid=0 [<https://perma.cc/H57E-HWAQ>].

³⁶⁴ *Compare Ohio Social Work Licensing Requirements*, SOC. WORK GUIDE (Apr. 30, 2020), <https://www.socialworkguide.org/licensure/ohio/>, with *Application to Take the Bar Examination*, THE SUP. CT. OF OHIO, <https://www.supremecourt.ohio.gov/attorneys/admission-to-the-practice-of-law-in-ohio/admission-applications/application-to-take-the-bar-examination/> [perma.cc/DK3E-BMWZ].

apply for their license and agree to a background check.³⁶⁵ In most jurisdictions, this background check is carried out by the FBI or a state law enforcement agency.³⁶⁶ The background check focuses only on criminal history; unlike the character and fitness examination for the bar exam, it does not ask intrusive questions about finances, living arrangements, previous employment, or mental health.³⁶⁷

Preparation for the licensing exam also mainly occurs during the candidate's last semester of study. Most university social work programs offer exam preparation classes for their students who are preparing to graduate.³⁶⁸ The ASWB provides study materials, including sample questions and practice exams, at a reasonable cost.³⁶⁹ With these resources available, recent social work graduates are not forced into an expensive, summer-long preparation program for their professional licensing exam. In fact, a social work graduate can take their licensing exam right after graduation.³⁷⁰ In a few jurisdictions, candidates can take the licensing

³⁶⁵ Brian Carnahan, *Background Checks—Getting the Past Right*, SOC. WORK TODAY, https://www.socialworktoday.com/news/pp_100517_1.shtml [perma.cc/H3AB-NXTL].

³⁶⁶ See, e.g., N.J. REV. STAT. § 45:1-29(2)(a) (2005).

³⁶⁷ Carnahan, *supra* note 365.

³⁶⁸ See, e.g., *MSW Course Descriptions*, OHIO ST. UNIV. (Mar. 26, 2019), available at <https://csw.osu.edu/wp-content/uploads/2019/06/2019-2020-MSW-Course-Descriptions.pdf> [perma.cc/SAM9-MMBD].

³⁶⁹ *ASWB Examination Guidebook*, *supra* note 292, at 16, 44. The ASWB Examination Guidebook is free to download on the organization's website, and the online practice test costs \$85. See *id.*

³⁷⁰ Unlike the bar exam, which is offered only twice a year (and sometimes only in one location per state), social work licensing candidates can strategically select the date, time and location that is most convenient for them. See *Helpful Resources for Test-Takers*, PEARSONVUE, <https://home.pearsonvue.com/Test-takers/Resources.aspx#what-to-expect> [perma.cc/CPC5-HMMY].

exam before they graduate, although their license will not be issued until the Board receives their final transcript.³⁷¹

Additional test preparation materials are available from private companies for students who want to use them. For example, the Association for Advanced Training in the Behavioral Sciences (AATBS) offers licensing exam preparation materials for social work and other mental health professions.³⁷² A self-study program from AATBS includes study materials, flashcards, practice questions, practice exams, and online study groups, and costs \$239 for three months of access.³⁷³

Compared to law school graduates, social work graduates pay much less to prepare for and take their profession's licensing exam. An entry-level licensing exam (BSW or MSW) costs \$230.³⁷⁴ Licensing jurisdictions usually add fees for the license application and background check.³⁷⁵ In Ohio, the background check application fee is \$83.50.³⁷⁶ In Michigan, the fee is \$97.20,³⁷⁷ and in Pennsylvania it is \$75.00.³⁷⁸ Social

³⁷¹ *Degrees & Programs: Licensing Requirements*, OHIO ST. UNIV., <https://csw.osu.edu/degrees-programs/undergraduate/curriculum/licensing-requirements/> [perma.cc/43HM-5UR4].

³⁷² *About AATBS*, AATBS: A TRIAD COMPANY, <https://aatbs.com/company/about-us> [https://perma.cc/2LAJ-N3N6].

³⁷³ *Clinical Social Work Study Packages*, AATBS: A TRIAD COMPANY, <https://aatbs.com/social-work/clinical/packages> [perma.cc/3XGZ-DGYH]; *Self-Study Packages—Select Your Access Length*, AATBS: A TRIAD COMPANY, <https://aatbs.com/social-work/clinical/select-self-study-packages> [perma.cc/TR93-PHCT].

³⁷⁴ *ASWB Examination Guidebook*, *supra* note 292, at 15.

³⁷⁵ *Id.* at 14.

³⁷⁶ *LSW License Instructions*, *supra* note 333.

³⁷⁷ *Bachelor's Social Work Licensing Guide*, LICENSING AND REGUL. AFF.: BUREAU OF PRO. LICENSING, www.michigan.gov/lara/-/media/Project/Websites/lara/bpl/Social-Worker/Licensing-Info-and-Forms/Bachelors-Social-Worker-Licensing-Guide.pdf?rev=c7c5739764484e67916ae691c1fecf1c&hash=34DF3711DCDFAE49A258611C9CBB7DFA [https://perma.cc/DQY5-YAL6].

work graduates are not forced to take out loans in order to prepare for their licensing exam.

So “Anne,” the Ohio social worker in the previous section, would pay \$85 for exam preparation materials, \$83.50 for the application and background check, and \$230 for the licensing exam, for a total of \$398.50.³⁷⁹ Even if she purchased a commercial test preparation package, for \$239, her entire licensing investment would cost \$637.50.³⁸⁰ While that’s not an inconsequential amount of money, especially for a new graduate, it is significantly less that a new law school graduate would pay to prepare for and take the bar exam.

Compare Anne with “Zachary,” a hypothetical new law school graduate in Ohio. Zachary paid \$75 during his 2L year to apply to take the Ohio bar examination³⁸¹ and \$275 to the National Conference of Bar Examiners for the preparation of a “Character and Fitness Report.”³⁸² Before his bar exam journey is finished, he will pay \$330 to take the UBE (plus an additional \$121 if he elects to take the exam on a laptop) and \$95 to take the MPRE.³⁸³ At this point Zachary has paid \$896, over \$250 more than Anne paid. But while Anne has taken her exam, received her license, and started working as a social worker, Zachary is still shelling out money

³⁷⁸ *Social Worker Pennsylvania Licensing Requirements*, PA. DEP’T OF ST., <https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/SocialWorkersMarriageandFamilyTherapistsandProfessionalCounselors/Pages/Social-Worker-Licensure-Requirements-Snapshot.aspx> [<https://perma.cc/6WEE-WZGZ>].

³⁷⁹ *ASWB Examination Guidebook*, *supra* note 292, at 14, 16; *LSW License Instructions*, *supra* note 333.

³⁸⁰ *Self-Study Packages—Select Your Access Length*, *supra* note 373.

³⁸¹ The bar exam application costs \$75 if the candidate registers before mid-November of their second year of law school. *Ohio Bar Exam Dates/Details*, *supra* note 185. If a candidate decided later than that to take the Ohio Bar Exam (possibly because of a change in family circumstances or an unexpected local job offer), the fee would increase to \$275. *Id.*

³⁸² *NCBE Fee Schedule*, *supra* note 120.

³⁸³ *Ohio Bar Exam Dates/Details*, *supra* note 185.

to become licensed as an attorney. Over the summer he will pay between \$1,500–\$3,000 for a commercial test preparation course³⁸⁴ to improve his odds of passing the bar, because he does not want to go through the stress or expense of this process ever again. The bar prep course will require him to study up to eight hours per day, precluding his ability to work during the bar preparation period.³⁸⁵ Zachary will have to rely on family finances, a bar loan, or the kindness of strangers to pay his bills during the bar preparation period. Bar preparation expenses are so high that in recent years, bar applicants have even set up Twitter campaigns,³⁸⁶ GoFundMe sites,³⁸⁷ or relied on the charity of donors to programs like the “Community Fund for Black Bar Applicants”³⁸⁸ for living expenses during bar prep.

Even if Zachary purchases the least expensive bar preparation program and is able to live at home with his parents during bar prep, his expenses now total \$2,396, and they will go even higher during the week of the bar exam. Ohio offers the exam in one location—Wilmington, Ohio,³⁸⁹ about sixty-five miles from Columbus, fifty miles from Cincinnati, and 204 miles from Cleveland. Depending on where Zachary lives, he will have to either commute at least an hour each way or pay for a hotel and meals for the two days of the bar exam. Bar exam experts estimate this travel and lodging

³⁸⁴ *Id.*

³⁸⁵ *BARBRI Bar Review Schedules*, BARBRI, <https://www.barbri.com/locations/> (last visited Jan. 7, 2023) (noting bar prep should be treated “like a full-time job.”).

³⁸⁶ Miy Mahran (@MiyMiyy), TWITTER (Apr. 27, 2021, 11:00 PM), <https://twitter.com/MiyMiyy/status/1387240268848578563> [<https://perma.cc/D7VB-UU9V>].

³⁸⁷ Irma Ramirez, *Irma’s Bar Prep & Bar Exam Expenses*, GOFUNDME (May 14, 2022), <https://www.gofundme.com/f/irmas-bar-prep-and-bar-exam-expenses> [<https://perma.cc/2632-N8H2>].

³⁸⁸ *About Us: Our Story*, CMTY. FUND FOR BLACK BAR APPLICANTS, <https://www.blackbarapplicantfund.com/about-us> [<https://perma.cc/U76T-CU8B>].

³⁸⁹ *Ohio Bar Examination*, SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/attysvcs/admissions/barexam.asp> [<https://perma.cc/D4JL-DL8Z>].

costs bar applicants an additional \$600,³⁹⁰ bringing Zachary's grand total to just under \$3,000³⁹¹—almost five times what Anne paid. And Zachary still must wait until October for his exam results.³⁹² Meanwhile, Anne has been working as a licensed social worker—and earning a salary—for four months.

3. *Practice and Education Work Together*

Unlike the bar exam, which does not reflect the actual practice of law, social work licensing exams are grounded in “practice analysis,” the study of what social workers actually are required to do and know in their early years on the job.³⁹³ Social work agencies and educational institutions work together to ensure the material tested on the licensing exams is the same material taught in accredited social work education programs, which in turn is the same material new social workers need to know to be successful early in their career.³⁹⁴

Since 1981, the ASWB has performed practice analyses every five to seven years to assess what new social workers are doing in practice.³⁹⁵ These practice analyses are used to refine the licensing exams, to ensure they are testing competencies new social workers actually need.³⁹⁶

³⁹⁰ *Ohio Bar Exam Dates/Details*, *supra* note 185.

³⁹¹ This figure is on the low end of costs for bar applicants, as it does not include Zachary's cost of living (such as rent, utilities, groceries, etc.), his potential bar loans and their interest over time, or his opportunity cost of foregoing working to study for eight weeks or more.

³⁹² *Important Dates*, SUP. CT. OF OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/attorneys/admission-to-the-practice-of-law-in-ohio/office-of-bar-admissions/important-dates/> [perma.cc/DN5E-63TZ].

³⁹³ *Practice Analysis*, *supra* note 356.

³⁹⁴ See, e.g., *Curriculum Principles*, OHIO ST. UNIV. COLL. OF SOC. WORK, <https://csw.osu.edu/about/curriculum-principles-2/> [perma.cc/8MBZ-UQ8U].

³⁹⁵ 2017 FINAL REPORT, *supra* note 315, at 1.

³⁹⁶ *Id.*

Practice analysis involves gathering and integrating multiple sources of data about the social work profession from a wide range of practitioners.³⁹⁷ The practice analysis is critical for ensuring the content of each exam is relevant to current professional practice and reflects the opinions and expertise of a diverse group of stakeholders.³⁹⁸

Social work educators (represented by the CSWE) and accreditors (represented by the ASWB) have begun working together to support the use of competency-based assessment in education and licensing.³⁹⁹ Competency-based education is less focused on content delivery (what students should be taught) and more focused on outcomes (the skills students are able to demonstrate at the end of the educational process).⁴⁰⁰ Social work students are assessed in their coursework using the same competencies that will be evaluated on their licensing exams.

The three leading organizations in social work—CSWE, ASWB, and NASW—collaborated on the most recent curricular guide for social work licensing and regulation.⁴⁰¹ The guide outlines nine competencies expected of recent social work graduates, which substantially overlap with the competencies assessed on the Bachelors and Masters social work exams, and suggests curriculum content and resources that support training in the required competencies.⁴⁰²

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ COUNCIL ON SOC. WORK EDUC., CURRICULAR GUIDE FOR LICENSING AND REGULATION, at xvii, xix (2018) [hereinafter CURRICULAR GUIDE FOR LICENSING AND REGULATION].

⁴⁰⁰ COUNCIL ON SOC. WORK EDUC., 2015 EDUCATIONAL POLICY AND ACCREDITATION STANDARDS FOR BACCALAUREATE AND MASTER'S SOCIAL WORK PROGRAMS 6 (2015).

⁴⁰¹ See CURRICULAR GUIDE FOR LICENSING AND REGULATION, *supra* note 399 (demonstrating the collaboration between ASWB, CSWE, and NASW).

⁴⁰² *Id.*

Finally, the ASWB offers the “Path to Licensure” program, free of charge, to CSWE-accredited social work programs.⁴⁰³ Path to Licensure provides resources to educators that help students understand the licensing exam and reduce anxiety about the licensing experience.⁴⁰⁴ The program includes exam passage statistics broken down by educational institution, demographic subgroups, and question topic so educators can identify areas of improvement for instruction.⁴⁰⁵ The program materials include an “Educator Guide” with retired ASWB exam questions and a free licensing handbook for all ASWB jurisdictions.⁴⁰⁶ The program also includes training for social work educators on how to write multiple-choice questions according to ASWB standards, so students gain early familiarity with this mode of assessment.⁴⁰⁷

IV. APPLYING THE SOCIAL WORK MODEL TO NEW-LAWYER LICENSING

Law and social work licensing have the same stated goals: ensuring minimum competence for practitioners and protecting the public from unprofessional services. The two professions, however, go about achieving this goal very differently, as the above sections demonstrate. The legal profession seems determined to achieve these goals by increasing

⁴⁰³ *Path to Licensure*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/licenses/path-to-licensure/> [https://perma.cc/LM8W-VVLX].

⁴⁰⁴ *Exam Resources for Educators*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/exam/getting-ready-for-the-exam/exam-materials-for-faculty/> (last visited Jan. 7, 2023).

⁴⁰⁵ *Exam Performance Reports for Social Work Schools and Programs*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/exam/contributing-to-the-conversation/exam-performance-reports-for-social-work-schools-and-programs/> [perma.cc/HNY7-88HU].

⁴⁰⁶ *Educator Guide to the Social Work Exams*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/exam/getting-ready-for-the-exam/exam-materials-for-faculty/educator-guide-to-the-social-work-exams/> [perma.cc/TC2W-W3VS].

⁴⁰⁷ *Educator Training*, ASS’N OF SOC. WORK BDS., <https://www.aswb.org/exam/getting-ready-for-the-exam/exam-materials-for-faculty/educator-training-2/> [perma.cc/W7QW-BATY].

barriers to entry, while social work seeks to minimize unnecessary barriers while still ensuring competence and professionalism.

This section suggests three ways new-lawyer licensing can be improved by incorporating elements of social work licensing. First, all parties involved in new-lawyer licensing should commit to reducing barriers to entry to the profession. Second, state BOEs, the ABA, and the NCBE should develop a cooperative plan to align licensing procedures with actual minimum competence and increase transparency around the new-lawyer licensing process. Finally, new-lawyer licensing should move to a graduated licensing model that reduces the burden on examinees while still protecting the public (and the Bar Industrial Complex's profits).

A. Reduce Barriers to Entry to the Profession

First and foremost, new-lawyer licensing needs to transform from an exclusive model, designed to keep people out of the profession, to an inclusive model, designed to welcome the newest members of the profession while still impressing upon them the importance of competence and professionalism. The current new-lawyer licensing process takes over two years from start to finish.⁴⁰⁸ Students begin the process at the outset of their second year of law school and do not finish until the fall of their graduation year.⁴⁰⁹ During this time, candidates for licensure incur thousands of dollars in expenses related to new-lawyer licensing.⁴¹⁰ Both of these barriers to entry could be reduced with the adoption of a social work model.

Decreasing the intensity of the character and fitness process is the first step to reducing the time and expense of new-lawyer licensing. A simple law enforcement background check like those used by social work licensing boards, including submission of fingerprints to a state or federal law enforcement organization, will reveal candidates' criminal histories.

⁴⁰⁸ See *Bar Preparation Timeline*, CLEV.-MARSHALL COLL. OF L., <https://www.law.csuohio.edu/lawlibrary/bar/timeline> [perma.cc/YFM7-JRZE]. Ironically, a Top Secret security clearance from the U.S. government takes only six to nine months to process. *Security Clearances for Law Enforcement*, FBI, <https://le.fbi.gov/informational-tools/security-clearances-for-law-enforcement> [https://perma.cc/7CJZ-5CGR].

⁴⁰⁹ See *Bar Preparation Timeline*, *supra* note 408.

⁴¹⁰ See *Ohio Bar Exam Dates/Details*, *supra* note 185.

BOEs would then be free to investigate further into the backgrounds of candidates whose background checks raised red flags. The majority of applicants would not require further investigation.

A less-intrusive character and fitness process would also save candidates money. Currently, Ohio candidates pay a minimum of \$300 for an NCBE character and fitness report, while Ohio social work candidates pay \$83.50 for an FBI/BCI criminal background check.⁴¹¹ Around 900 applicants sit for the Ohio bar exam every July; reducing the cost of background checks for all of them from \$300 to \$83.50 would collectively save over \$194,000.

If BOEs continue to insist on lengthy, expensive, and intrusive background checks for bar applicants, they should be required to provide evidence these procedures actually protect the public. On the contrary, research indicates the character and fitness factors that bar authorities consider when making admission decisions do not strongly predict who will later be disciplined.⁴¹²

While the savings from a less-intrusive character and fitness process is not inconsequential, it pales in comparison to the savings potentially obtained by eliminating the need for lengthy commercial bar preparation courses that prevent candidates from working for months at a time. By moving to a system of graduated licensing,⁴¹³ we could reduce the stranglehold commercial bar preparation has on new-lawyer licensing and reduce monetary and temporal costs on applicants.

B. Increase Cooperation Between Education and Licensing Entities

Social work's cooperation between its education, professional, and licensing entities can serve as a model for the legal profession. In fact, such cooperation in new-lawyer licensing should be easier, since it would only involve two entities, rather than three.⁴¹⁴ This cooperation between

⁴¹¹ *Id.*; *LSW License Instructions*, *supra* note 333.

⁴¹² Leslie C. Levin, *Rethinking the Character and Fitness Inquiry*, 22 *PRO. LAW.* 19, 20–21 (2014).

⁴¹³ See discussion *infra* Section IV.C.

⁴¹⁴ The American Bar Association is both the leading legal professional organization for lawyers and the accrediting body for legal education. *About Us*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/ [perma.cc/NN4R-GGE9].

educational, professional, and licensing entities would involve aligning licensing exams with minimum competence, increasing transparency between educational accreditation and licensing, and providing stakeholders—namely, state BOEs—more opportunities for representation within the licensing process.

For too long, the legal profession has tolerated the disconnect between the actual minimum competency needed to practice law and the material and methods comprising the legal field's licensing exams. The constituencies of the legal profession have struggled to develop what “minimum competence” for entry-level lawyers might mean.⁴¹⁵ This struggle was then reflected in the NCBE's inability to justify the large amount of material candidates are required to memorize in order to be successful on the UBE.

Thankfully, after the “barpocalypse” caused by the COVID-19 pandemic in 2020, legal educators and licensing bodies have begun to investigate a definition of minimum competence, which led to proposed changes to the UBE: the development of the NextGen Bar Exam.⁴¹⁶ This new bar exam, which will replace the UBE as the principal licensing instrument for the legal profession, is projected to be implemented in 2026.⁴¹⁷

To develop the NextGen Bar Exam, the NCBE and other educators performed a practice analysis⁴¹⁸ similar to that which has been performed by the ASWB since the early 1980s. The practice analysis survey asked respondents to rate the job tasks typically performed by new lawyers, as well as the “knowledge, skills, abilities, and other characteristics required

⁴¹⁵ Howarth & Wegner, *supra* note 11, at 399, 406.

⁴¹⁶ See *Update From the NCBE's Testing Task Force*, RAISING THE BAR (AccessLex Inst., West Chester, Pa.), Apr. 1, 2021, at 2–7.

⁴¹⁷ Stephanie Farne, *Is This Our Moment? Legal Research & the Next Gen Bar Exam*, RIPS L. LIBR. BLOG (June 2, 2022), <https://ripslawlibrarian.wordpress.com/2022/06/02/is-this-our-moment-legal-research-and-the-next-gen-bar-exam/> [<https://perma.cc/DVX6-3W6L>].

⁴¹⁸ See NAT'L CONF. OF BAR EXAM'RS TESTING TASK FORCE, FINAL REPORT OF THE TESTING TASK FORCE 1–2 (2021) [hereinafter FINAL REPORT OF THE TESTING TASK FORCE].

to effectively perform those tasks.”⁴¹⁹ Based on that analysis, as well as other studies seeking to define minimum competence,⁴²⁰ the NCBE identified eight “foundational concepts and principles”⁴²¹ and seven “foundational skills”⁴²² to be tested on the NextGen Exam.

While this movement to align the bar exam with actual minimum competence is a welcome one, other aspects of the NextGen Bar Exam simply replicate the problems already identified with the UBE. The NextGen Exam will still be administered just two times a year, as a single, summative exam at or near the point of licensure.⁴²³ Jurisdictions will still be free to set their own pass scores, decreasing the portability of the exam results.⁴²⁴ And there is no indication the NextGen Exam will eliminate the need for expensive bar prep courses or reduce the time required to prepare for the exam. The legal profession still has a long way to go before achieving true cooperation between education and licensing.

C. Develop a Graduated Licensing System

Social work’s post-graduation, multiple-step licensing system would probably not transfer effectively to the legal profession. New social work

⁴¹⁹ NAT’L CONF. OF BAR EXAM’RS TESTING TASK FORCE, TESTING TASK FORCE PHASE 2 REPORT: 2019 PRACTICE ANALYSIS 8 (2020).

⁴²⁰ See generally Logan Cornett, et al., *Foundations for Practice*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <https://iaals.du.edu/projects/foundations-practice> [<https://perma.cc/9BPE-GKY8>].

⁴²¹ NAT’L CONF. OF BAR EXAM’RS TESTING TASK FORCE, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 4 (2021) [hereinafter OVERVIEW OF RECOMMENDATIONS FOR THE NEXTGEN BAR] (listing civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property as foundational concepts and principles).

⁴²² *Id.* (listing legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management as foundational skills).

⁴²³ *Id.* at 2–3.

⁴²⁴ *Id.* at 5.

graduates take an initial licensing exam that allows them to practice under supervision, then, after completing a minimum amount of supervised practice, they take another exam to be licensed for independent practice.⁴²⁵ Because of the supervision requirements, it is not clear this model could be scaled up to meet the supervisory needs of the 60,000 candidates who take the bar exam each year. However, the general idea of an initial basic exam followed by a more specialized exam could work in new-lawyer licensing, as it has already been proven effective in other professional fields.

Under this type of graduated licensing model, the bar exam could be broken up into two parts: a “national boards” type exam administered at the end of the first or second year of law school, and an MPT-type practical exam administered following graduation.

1. *Initial In-School Examination*

Many scholars have advocated for an initial licensing exam that takes place while candidates are still in law school.⁴²⁶ A number of professions already use staged licensing, recognizing that learning in professional education happens in stages.⁴²⁷ The initial stages of the exam focus on the basic educational foundation, or “book learning” while the later stages focus on practical competence.⁴²⁸

Medicine provides another example of a stepped or graduated licensing model. Medical students take “Step 1” of the United States Medical Licensing Examination at the end of their second year of medical school.⁴²⁹ Step 1 is a one-day, multiple choice test that assesses basic scientific knowledge and its application to the practice of medicine.⁴³⁰ Medical

⁴²⁵ *Social Work License Requirements*, SOCIALWORKLICENSURE.ORG (Nov. 4, 2020), <https://socialworklicensure.org/articles/social-work-license-requirements/> [perma.cc/FV8C-7ECW].

⁴²⁶ See, e.g., Howarth & Wegner, *supra* note 11, at 415–20.

⁴²⁷ *Id.* at 423.

⁴²⁸ *Id.*

⁴²⁹ *What Is the USMLE?*, THE PRINCETON REV., <https://www.princetonreview.com/med-school-advice/usmle> [perma.cc/AH38-65F8].

⁴³⁰ *Step 1*, U.S. MED. LICENSING EXAMINATION, <https://www.usmle.org/step-exams/step-1> [https://perma.cc/6HPR-P8J6].

students must pass Step 1 in order to continue with their medical studies.⁴³¹ The “Step 2” examination, which tests more advanced practice concepts and their clinical applications, is taken in the fourth year of medical school.⁴³²

There is some precedent for an early-stage legal licensing exam: the California First-Year Law Students’ Examination (FYLSX), or “Baby Bar.” California allows students who attend non-ABA-accredited law schools or who participate in the Law Office Study Program to sit for the California bar exam, but first these students must pass the FYLSX after their initial year of study.⁴³³ The FYLSX is a one-day test given twice a year, consisting of 100 multiple choice questions and four one-hour essay questions.⁴³⁴ The FYLSX tests applicant’s knowledge of contracts, criminal law, and torts.⁴³⁵

California requires the FYLSX in the interest of public protection—ensuring students at non-ABA-accredited law schools are acquiring the necessary knowledge and skills to become competent attorneys.⁴³⁶ However, the FYLSX also protects the exam-takers by assessing their law school’s capacity to provide a meaningful and useful legal education.⁴³⁷ A similar exam would make sense for all new-lawyer licensing. The exam could be administered at the end of 1L or 2L year, and could test the “foundational concepts and principles” identified by the NCBE Testing

⁴³¹ See *What Is the USMLE?*, *supra* note 429.

⁴³² *Id.*

⁴³³ *First-Year Law Students’ Examination*, ST. BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations/First-Year-Law-Students-Examination> [<https://perma.cc/7MNZ-P2S2>].

⁴³⁴ *Examinations*, ST. BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Examinations> [<https://perma.cc/B7PR-CFBF>].

⁴³⁵ *Id.*

⁴³⁶ Howarth & Wegner, *supra* note 11, at 439.

⁴³⁷ *Id.*

Task Force for the NextGen Exam.⁴³⁸ Like social work licensing exams, the first phase lawyer licensing exam could be administered at conveniently located commercial testing centers, reducing the need to gather large groups of people together and lessening the burden of travel and lodging on examinees.

2. *Post-Graduation Practical Skills Examination*

If a post-1L exam finds applicants have the requisite “book knowledge” about the law, a post-graduation exam could assess other competencies, such as the seven “foundational skills” identified by the NCBE Testing Task Force for the NextGen Exam.⁴³⁹ This exam could ask candidates to research legal issues, draft common legal documents, or perform an advisory or advocacy task. Because this exam would test skills, rather than rote knowledge, candidates would not need to spend twelve weeks of full-time preparation and study before taking the exam. The exam could be only one day (or less than a full day) and could be given remotely or at a commercial testing center. The exam could be offered shortly after graduation and be scored by the end of the summer, letting new graduates start their employment sooner and reducing their post-graduation financial burden.

The expertise for developing this exam already exists within the NCBE. In the proposal for the NextGen Bar Exam, the agency proposed two separate bar exams: one testing “knowledge” and one testing “skills.”⁴⁴⁰ Although the NCBE ultimately rejected this test design in favor of a combined test, the practice analysis and other information-gathering remains available to develop a stand-alone skills test.

3. *A Role for the Bar Industrial Complex*

The above ideas for new-lawyer licensing reform, like so many others that have gone before, will all be for naught unless they include roles for the Bar Industrial Complex—commercial test prep companies and the

⁴³⁸ If the exam were given at the end of 1L year, it would test only 1L subjects, excluding business associations, constitutional law, and evidence. See OVERVIEW OF RECOMMENDATIONS FOR THE NEXTGEN BAR, *supra* note 421.

⁴³⁹ *Id.*

⁴⁴⁰ FINAL REPORT OF THE TESTING TASK FORCE, *supra* note 418, at 20.

NCBE. The test prep and bar exam lobbies are too entrenched in the system, and make too much money for their stakeholders, to just give up and go away when new-lawyer licensing is reformed. Fortunately, there is room for these entities in a post-UBE world.

Post-1L and post-graduate exams would still require some level of preparation by candidates. In a social-work-based model, educational institutions (law schools) and licensing entities (the NCBE and state BOEs) would collaborate to prepare students to take the exam. The NCBE currently provides test preparation materials for the bar exam that law schools can use in the bar preparation courses they offer their students; the NCBE could continue to do this for the post-1L and post-graduate exams. And any time there's a high stakes test in any field, commercial entities will offer additional preparation materials for those who are willing and able to pay, so it's conceivable that the commercial test preparation companies would develop preparation courses for these exams. Ideally, though, these commercial courses would be additional, rather than essential, preparation for the exam.

Finally, the NCBE is in the best position to develop and administer the post-1L and post-graduation exams. State BOEs have effectively abdicated their role in developing licensing exams to the NCBE, so they would presumably have no interest in developing these new exams themselves. The NCBE does have experts in test design and administration who should be able to use the information they gathered for the NextGen Bar Exam to construct an instrument that adequately measures minimum competence.

However, state BOEs and other interested entities (i.e., law schools and the ABA) should make sure the NCBE keeps the costs for these exams reasonable. With a lower-cost character and fitness process and reasonable exam fees, law school graduates would not be forced into more debt than necessary as they prepare for licensure.

If the NCBE and commercial test preparation companies want to continue to increase their profits, they should focus on advanced practice exams for specialization. A number of states offer specialized credentials in areas like family law, labor & employment, and workers' compensation, usually through state bar associations.⁴⁴¹ These credentials are designed

⁴⁴¹ See *State Sources of Certification*, AM. BAR ASS'N, <https://www.americanbar.org/groups/specialization/state-sources-of-certification/> [https://perma.cc/ASG3-NJVX].

for experienced attorneys,⁴⁴² who usually can receive some kind of financial incentive or reimbursement for pursuing certification. The NCBE and commercial test preparation companies should work with the state and local bars to standardize these credentials and provide support for education and testing. It is more fair and equitable for the Bar Industrial Complex to profit from established attorneys, rather than the vulnerable newest members of our profession.

V. CONCLUSION

It is not possible to pick up the social work licensing model and transplant it directly on new-lawyer licensing; there are too many differences between the professions. But there are also enough similarities that some transfer of an inclusive licensing model could, and should, be implemented in new-lawyer licensing.

While this article makes suggestions on how to implement some aspects of social work licensing into the legal profession, the focus of re-imagining new-lawyer licensing should not be on the methods used, but on the goal behind the licensing system: to not only protect the public, but to treat potential new members of the profession like colleagues, rather than cash cows. Utilizing the cooperation seen in social work between licensing, education, and professional organizations will reduce the burdens on new licensees and make the profession more inclusive, equitable, and welcoming.

New-lawyer licensing, especially the bar exam, is big business, but it makes its profits off the newest and most vulnerable members of the profession. “A licensing system that imposes unnecessary barriers to admission may exacerbate the justice gap.”⁴⁴³ Furthermore, “a system that fails to screen for key competencies may subject clients, especially the most vulnerable, to poor representation.”⁴⁴⁴ Social work demonstrates a model that accounts for both of these concerns while maintaining the dignity of both the profession and of its newest members.

⁴⁴² *Id.*

⁴⁴³ MERRITT & CORNETT, *supra* note 7, at 6.

⁴⁴⁴ *See id.*

