

# LAW LICENSE RECIPROCITY'S DISCRIMINATORY EXCLUSION OF WORKING MOTHERS

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## *Abstract*

Law license reciprocity standards exclude working mothers and push women from the practice of law. Reciprocity standards require that the attorney seeking admission to a new jurisdiction's bar engage in the active practice of law for a set number of years prior to eligibility for licensure in the new jurisdiction. Reciprocity is a time-based standard intended to protect citizens from improper or unethical lawyering and to ensure the state's citizens receive proper treatment when seeking to leave the state. The time-based standard, however, serves less to maintain competence levels and instead results in regulatory exclusion.

This Article analyzes the numerous jurisdiction-specific approaches to reciprocity, including the varied definitions of the "active practice" of law. This Article then presents the discriminatory impact of time-based reciprocity on working mothers, focusing on the lack of consideration for maternity leave in reciprocity requirements. Although time-based reciprocity is designed to protect from incompetent lawyering, it instead pushes working mothers from the profession and implies that an attorney loses their competence to practice law after becoming a mother.

But how does a state protect its citizens from improper lawyering without discriminating against working mothers? This Article argues that a remedy for this disparate treatment already exists in the Military Spouse Exception. Extending the Military Spouse Exception more broadly is both administratively feasible and removes the discriminatory impact of law license reciprocity on working mothers. Young, mothering attorneys deserve the opportunity to make decisions in the best interest of their children and family without losing their ability to practice law.

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*Introduction*

Women leave the practice of law at disproportionate rates when compared to their male counterparts.<sup>1</sup> Employers, foundations, and organizations dedicate significant resources to initiatives to retain women in

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1. See ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, AM. BAR ASS’N, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE, at i (2019), [https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor\\_online\\_042320.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf).

the legal profession.<sup>2</sup> Yet efforts to retain women overlook the systemic cultural dynamics involved in the decision-making of heterosexual, cisgender married women.<sup>3</sup> Decision-making for members of this group disproportionately involves the consideration of spouses, family, and pervasive cultural expectations.<sup>4</sup> Significant research attributes women's attrition to the disproportionate impact of child-rearing responsibilities, normative structures, and marital decision-making on their professional pursuits.<sup>5</sup> The retention efforts taken by employers often respond to the results of research studies and serve as a reactive—rather than proactive—means for change.<sup>6</sup> These remedies overlook the burdensome structural sexism that remains unaddressed in state bar licensure requirements—an available proactive remedy. The current structure of state licensure requirements detrimentally impacts mothers and is an unaddressed leak in the pipeline of female lawyer retention.

Modern legal licensure is a state-by-state regulatory act.<sup>7</sup> Despite the fact that the study of law is based on a nationally regulated educational model

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2. For examples of inclusion efforts from individual employers, search any law firm's name and the term "diversity and inclusion" for information on panels, committees, and initiatives created internally at most employers. *See, e.g., Mission and Purpose of OWLS Foundation*, OR. WOMEN LAWS. FOUND., <https://owlsfoundation.org/about/> (last visited Dec. 22, 2022); *SidleyWomen*, SIDLEY, <https://www.sidley.com/en/us/diversitylanding/sidleywomen/> (last visited Dec. 22, 2022). Many member organizations of mother lawyers seeking to support each other exist in larger cities. *See, e.g., About Us*, MOTHER ATT'Y MENTOR ASS'N OF AUSTIN, [https://www.mamasAustin.org/about\\_us](https://www.mamasAustin.org/about_us) (last visited Dec. 22, 2022).

3. *See* Megan Elizabeth Gray, 'Ask the Women': *If You Want to Retain More Women in Law Firms, Find Out What They Need*, ABA J., Feb.–Mar. 2022, at 28; Madeline E. Heilman & Suzette Caleo, *Gender Discrimination in the Workplace*, in *THE OXFORD HANDBOOK OF WORKPLACE DISCRIMINATION* 73 (Adrienne J. Colella & Eden B. King eds., 2018).

4. *See* Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 10 UC IRVINE L. REV. 799, 803–05 (2020).

5. *See id.*

6. Anne Brafford, *New Strategies for Engaging and Retaining Women Lawyers*, LAW PRAC. TODAY (Feb. 14, 2017), <https://www.lawpracticetoday.org/article/engaging-retaining-women-lawyers/> ("The reasons why women leave law firms are complex. Firms efforts to retain women often do not match this complexity.").

7. *See* MODEL RULES OF PRO. CONDUCT pmb. & scope ¶ 15 (AM. BAR ASS'N 2020); *Hawkins v. Moss*, 503 F.2d 1171, 1175 (4th Cir. 1974) ("The power of the courts of each state to establish their own rules of qualification for the practice of law within their jurisdiction, subject only to the requirements of the due process or equal protection clauses of the Fourteenth Amendment, is beyond controversy . . .").

administered by the American Bar Association (“ABA”),<sup>8</sup> the practice of law is a self- and state-regulated profession.<sup>9</sup> As such, the practice of law is interpreted by the regulating authority of each state or territory, resulting in up to fifty-five different definitions<sup>10</sup> or interpretations of “the practice of law.”<sup>11</sup> No matter what definition jurisdictions use, a written test (“the bar exam”) is used almost universally to gain initial entry to the profession and “ensure that new lawyers are minimally competent to practice law.”<sup>12</sup> Prospective practitioners must show that they meet minimum educational requirements, hold sufficient moral character, and possess the minimum competence to practice law.<sup>13</sup> Minimum competence is demonstrated through passage of the “bar exam.”<sup>14</sup> If a prospective attorney meets these three baseline elements, the regulating state will likely grant licensure.<sup>15</sup> Once licensed, experienced attorneys periodically renew their competence

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8. AM. BAR ASS’N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–23, at v (2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf).

9. See *Hawkins*, 503 F.2d at 1175–76; see MODEL RULES OF PRO. CONDUCT pmbl. & scope ¶ 11. After law school graduation, the ABA relinquishes control of lawyers to the states and transitions to a voluntary membership model, producing aspirational rules of professional conduct and advocating for necessary advancements in the profession. See *The American Bar Association*, AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) (last visited Dec. 23, 2022).

10. This number is calculated by including the fifty states in the United States, Washington D.C., and the United States territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. See *Listing by Jurisdiction*, LEGAL INFO. INST., <https://www.law.cornell.edu/states/listing> (last visited Dec. 23, 2022).

11. See MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (“The definition of the practice of law is established by law and varies from one jurisdiction to another.”).

12. See *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447 (2002). The State of Wisconsin does not require graduates of its law schools (University of Wisconsin and Marquette University) to pass the bar exam in Wisconsin. These students practice law under diploma privilege in the State of Wisconsin, can practice law while studying for the bar exam of another jurisdiction, and can practice before most federal agencies without passing a bar exam. *Diploma Privilege*, UNIV. OF WIS.-MADISON L. SCH., [https://law.wisc.edu/current/diploma\\_privilege/](https://law.wisc.edu/current/diploma_privilege/) (last visited Dec. 23, 2022).

13. NAT’L CONF. OF BAR EXAM’RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021, at vii (2021), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2021-comp-guide.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf) [hereinafter NCBE COMPREHENSIVE GUIDE].

14. *Id.*

15. *Bar Admissions Basic Overview*, AM. BAR ASS’N (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/).

and qualifications to practice law by paying fees, participating in Continuing Legal Education (“CLE”) programming, and engaging in self- and peer-monitoring for adherence to ethical standards.<sup>16</sup>

In addition to the traditional means of licensure through bar exam passage, most states participate in reciprocity programs with other states. Reciprocity, or admission on motion, awards licensure to practitioners licensed in a different state using a time-based measurement which grants licensure based on the number of years in practice.<sup>17</sup> State-by-state variances include differences among states in the type of practice,<sup>18</sup> length of practice,<sup>19</sup> and requisite engagement in practice<sup>20</sup> necessary to meet reciprocity requirements. These differing policies make any general definition for “the practice of law” vague and imprecise.

It is incongruent that a lawyer seeking to move across state lines must demonstrate minimum competence not by passage of a bar exam—which purports to test as much—but by proof of active practice. Even assuming that the bar exam accurately tests legal ability,<sup>21</sup> once this exam is passed, minimum competence should not disappear simply because the attorney has crossed state lines.

A time-based requirement, which is defined vaguely by most states and not at all in others, especially discriminates against young working mothers.<sup>22</sup> These women are at risk of not meeting reciprocity standards

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16. See, e.g., *FAQs*, N.C. STATE BAR, <https://www.ncbar.gov/for-lawyers/faqs/> (last visited Dec. 23, 2022) (stating that to remain active in the North Carolina Bar a lawyer must “[p]ay the annual membership fees, fulfill the CLE and IOLTA requirements, and comply with the Rules of Professional Conduct”); *License Renewal: 2023 License Renewal*, WASH. STATE BAR ASS’N, <https://www.wsba.org/for-legal-professionals/license-renewal> (last updated Aug. 26, 2022).

17. See NCBE COMPREHENSIVE GUIDE, *supra* note 13, at 44–46.

18. See discussion *infra* Section II.B.1.

19. See discussion *infra* Part II.

20. See discussion *infra* Section II.B.2.

21. Critical legal scholars have questioned the relationship between time-intensive multiple choice bar exam testing and real-world legal skills. See Jessica Williams, *Abolish the Bar Exam*, CALIF. L. REV. BLOG (Oct. 2020), <https://www.californialawreview.org/abolish-the-bar-exam/> (“The NCBE is developing tests for testing’s sake rather than for efficacy in cultivating a competent, ethical, and diverse legal profession.”).

22. The author acknowledges that not all uterus having persons choosing to reproduce through use of their uterus are mothers and may identify differently despite this reproductive choice. The author also acknowledges that some non-birthing parents are also mothers. This paper will use “motherhood” to mean the person serving as the primary caretaker of the newborn. That is, the person who takes leave from work following the birth of a child and

since many states do not consider maternity leave in the calculation of “active practice.”<sup>23</sup> As a result, time-based reciprocity punishes women for their reproductive choices.

This Article explores the leaky pipeline of women in law through the discriminatory effect of time-based reciprocity standards. Part I of this Article presents an overview of the current state of women’s participation in practice and licensure. After examining the high rate of attrition of women in law, Part II addresses the legal framework of professional licensing. This Part includes an overview of states’ interest in licensure, the scope of admission on motion requirements for licensing in the legal profession, and the various standards of “active practice” required in each state. Part III presents the burdens that time-based reciprocity policies place on license mobility, including the exclusionary effect of licensure. Then, Part IV analyzes the specific impact of time-based reciprocity on working mothers. It also presents a viable policy solution. This Article concludes that the failure to accommodate maternity leave within reciprocity standards significantly impacts the reproductive rights of the women trained in, and practicing within, the legal profession and provides a path forward to patch this leaky pipeline.

### *I. The Leaky Pipeline of Women in Law*

Women have been participating in legal practice in large numbers for over forty years.<sup>24</sup> Despite a long presence in law, women are not advancing or staying in the profession.<sup>25</sup> The ABA frequently researches such retention issues. The ABA often segregates this research by area of practice, type of practice, or certain demographic features.<sup>26</sup> The research

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the need to care for the child as outlined in the Family Medical Leave Act at 29 U.S.C. § 2612(a)(1)(A).

23. See discussion *infra* Section II.B.2.

24. LIEBENBERG & SCHARF, *supra* note 1, at 1.

25. *Id.* at 1, 17 (“It is undeniable and unfortunate that experienced women lawyers are simply not moving up the ladder to senior levels at the same rate as men.”). Recently, Hogan Lovells, LLP made national news when it announced a new partner class that was 58% women. Vivia Chen, *The Future of Hogan Lovells—and Maybe Big Law—Is Female*, BLOOMBERG LAW (Feb. 1, 2023, 11:10 AM), <https://news.bloomberglaw.com/business-and-practice/the-future-of-hogan-lovells-and-maybe-big-law-is-female>. Hogan Lovells, however, is unique in that it sets “specific numeric goals” for diversity and remains the anomaly in female partners compared to national statistics. *Id.*

26. See, e.g., DESTINY PEERY ET AL., AM. BAR ASS’N, LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR

trends, however, remain consistent. A recent ABA report on the retention of women in private practice observed that “biases in favor of traditional gender roles directly impact the advancement of experienced women lawyers,”<sup>27</sup> a statement that impacts all women in law, not just women working in law firms.<sup>28</sup>

In 2021, women represented 55.29% of law school enrollees, while men made up 44.39%.<sup>29</sup> Women, however, move from a majority representation in law schools to a minority in practice almost instantly. After making up a slight majority of law students, women enter a professional space that is only 38% female.<sup>30</sup> Looking specifically at law firms, women are a slight minority in their first year of work (45-50% of first-year associates) but represent only 20% of law firm equity partners.<sup>31</sup> The representation of women in partnership positions remains low with women accounting for only 29% of newly minted equity partners in 2017.<sup>32</sup> Law schools are

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WOMEN OF COLOR, at iii (2020), <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf> (analyzing women of color); LIEBENBERG & SCHARF, *supra* note 1 (analyzing women in private practice).

27. LIEBENBERG & SCHARF, *supra* note 1, at 13. The ABA has a strong and vested interest in the advancement and retention of women and has conducted numerous studies on women in private practice, women of color in law, and women in law generally. *See id.* at i–iv.

28. *Id.* at 13; *see also* PEERY ET AL., *supra* note 26; STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR ASS’N, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 14 (2015), [https://www.americanbar.org/content/dam/aba/administrative/women/first\\_chairs\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/first_chairs_final.pdf); AMY J. ST. EVE & JAMIE B. LUGURI, AM. BAR ASS’N, HOW UNAPPEALING: AN EMPIRICAL ANALYSIS OF THE GENDER GAP AMONG APPELLATE ATTORNEYS 6 (2021), [https://www.americanbar.org/content/dam/aba/administrative/women/how-unappealing-f\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/women/how-unappealing-f_1.pdf).

29. *Law School Rankings by Female Enrollment (2021)*, ENJURIS, <https://www.enjuris.com/students/law-school-women-enrollment-2021/> (last visited Dec. 23, 2022). The study noted that .32% of enrollees identified as “other.” *See id.*

30. *Women in the Legal Profession*, ABA PROFILE OF THE LEGAL PRO. 2022, <https://www.abalegalprofile.com/women.php#anchor1> (last visited Jan. 16, 2023).

31. LIEBENBERG & SCHARF, *supra* note 1, at iv; Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 872 (2018) (“Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the work force or on part-time schedules.”).

32. LIEBENBERG & SCHARF, *supra* note 1, at 1 (citing VAULT & MCCA, 2018 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 6 (2018), <https://mcca.com/wp-content/uploads/2018/11/2018-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf>). These variables are controlled to account for time.

getting women in the door of the profession and law firms are hiring in relatively balanced numbers, yet women are vanishing.

Women have no better representation on the federal judiciary than in equity partnership; the courtroom is no more diverse than the law firm. On the bench, 27% of federal district court judges are women.<sup>33</sup> A female judge is more than likely to hear the advocacy of a male attorney, as women serve as the first chair at trial only 25% of the time.<sup>34</sup> At the appellate level, female advocacy hovers between 22% and 35%, depending on the courthouse.<sup>35</sup> The Supreme Court of the United States hears from only one woman for every four men.<sup>36</sup>

In a case study of the Seventh Circuit, the ABA found that only 28% of advocates before the court were women.<sup>37</sup> The study found women were more likely to represent criminal defendants than civil defendants, and most commonly argued agency and habeas cases (reaching 42% representation for both).<sup>38</sup> Additionally, women are twice as likely to represent the government than a private party in litigation.<sup>39</sup> Further, the largest variances show that women argue only 4% of antitrust cases in the Seventh Circuit.<sup>40</sup>

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33. CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 3 (Feb. 2020), <https://www.americanprogress.org/wp-content/uploads/2020/02/Judicial-Diversity-Circuit-District-Courts.pdf>.

34. SCHARF & LIEBENBERG, *supra* note 28, at 11.

35. *See* ST. EVE & LUGURI, *supra* note 28, at 6.

36. *Id.* at 6 (noting that women represented 18% of advocates in the 2020–21 term).

37. *Id.* at 10. This figure from 2019 reflects only a 4% increase over the 24% of women advocates at the Seventh Circuit in 2009. *Id.*

38. *Id.* at 12.

39. *Id.* at 14. Higher rates of women representing government entities is likely related to childcare responsibilities discussed throughout this Article. If a mother does not want to leave her profession but must balance childcare, she may opt for a “lighter” workload in a government position. The perception that government jobs offer lighter workloads is strong. *See* Daniel June, *Why Law Grads Should Consider Government Work*, LAW CROSSING <https://www.lawcrossing.com/article/900049869/Why-Law-Grads-Should-Consider-Government-Work> (last visited Dec. 28, 2022) (“Whereas at a big firm you might be expected to work 80–100 hours per week, federal government jobs are more modest in what they expect of you.”). Yet, government jobs often compress workloads and may not actually achieve the work-life balance sought. *See id.*

40. ST. EVE & LUGURI, *supra* note 28, at 12. It is unclear why this disparity exists within types of cases argued. In their ABA study, St. Eve & Luguri noted that this disparity showed that “cases that are often perceived to be more complex . . . had a lower percentage of women taking the lead at oral argument.” *Id.* at 13. It is unclear whether that perceived complexity leads to steering women away from those cases due to other cultural and societal factors, including those discussed in this Article. *See infra* notes 184–205.

The gender difference in trial representation based on perceived complexity of the case works in tandem with societal and familial factors to hinder women's professional advancement.<sup>41</sup>

Additional research studies reinforce the ABA's findings on the disparate gender representation in law. Recent reports show an impact on career advancement specifically for women of childbearing age. For example, 30% of female attorneys between thirty-five and forty are unemployed or underemployed, compared to only 4% of male attorneys in the same age bracket.<sup>42</sup> The issue of retention and advancement of women in law is stark. And the issue is exacerbated by license reciprocity's discriminatory exclusion of childbearing women.

## *II. Professional Licensing's Legal Framework*

Since the ubiquitous implementation of professional licensing requirements began, licensing requirements have been defended as a route for "reducing consumer uncertainty about the quality of the licensed service,"<sup>43</sup> and a means to protect public health and safety.<sup>44</sup> Law licensure is no different.

Law licensure has a strong historical basis and began earlier than most other professional licensing in the United States. By 1860, all but two states required bar examinations for admission to practice.<sup>45</sup> Licensing bodies initially only enforced vague and informal requirements but increased the stringency of the requirements in the early twentieth century when licensure spread nationwide.<sup>46</sup> Legal licensure took on its modern role by 1941 when formal education at a three-year accredited law school became mandatory to take the written bar exam.<sup>47</sup> This was a drastic change from the original

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41. *See infra* notes 184–205 and accompanying text.

42. Bambauer & Rahman, *supra* note 4, at 807.

43. OFF. OF ECON. POL'Y, U.S. DEP'T OF TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 22 (White House 2015) [hereinafter 2015 WHITE HOUSE REPORT], [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

44. *Id.* at 7.

45. LISA G. LERMAN & PHILIP G. SHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 45 (2d. ed. 2008) (citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 3, 11 n.9 (1983)).

46. *Id.*

47. *Id.* at 19.

requirements to practice law: one year of study at the non-graduate level followed by an oral exam.<sup>48</sup>

State licensing authorities have “broad power to establish licensing standards,”<sup>49</sup> and a prospective practitioner only acquires the right to engage in a licensed profession in a state once they demonstrate competence to practice within that state.<sup>50</sup> These standards establish the limits of a lawyer’s practice, vesting only the ability to practice law in a state where the practitioner receives a license.<sup>51</sup> Most often, this requires either the passage of a bar exam or compliance with a time-based reciprocity standard.<sup>52</sup> This Article concerns the later.

Time-based reciprocity standards are an administrative quagmire. Consider, initially, the variable time requirements for admission on motion.<sup>53</sup> In most jurisdictions,<sup>54</sup> the state provides a time range to applicants, requiring practice for three of the last five years,<sup>55</sup> four of the last five years,<sup>56</sup> four of the last six years,<sup>57</sup> or five of the last six,<sup>58</sup> seven,<sup>59</sup>

48. *Id.*

49. *In re Conner*, 917 A.2d 442, 446 (Vt. 2006).

50. *See Ricci v. State Bd. of L. Exam’rs*, 427 F. Supp. 611 (E.D. Pa. 1977), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978).

51. State-specific licensure ensures that licenses “have no extraterritorial effect or value and can vest no right in the holder to practice law in another state.” *Lowrie v. Goldenhersh*, 521 F. Supp. 534, 537 (N.D. Ill. 1981) (quoting *Hawkins v. Moss*, 503 F.2d 1171, 1175–76 (4th Cir. 1974)).

52. *Society of American Law Teachers Statement on the Bar Exam*, *supra* note 12, at 446. *See* discussion *supra* Part I; *Hawkins*, 503 F.2d at 1176 (“To acquire a right to practice in another state one must satisfy the requirements for qualification established by that state.”); *In re Yanni*, 697 N.W.2d 394, 398 (S.D. 2005) (“Our court rules were adopted to protect the public from those unfit to practice the law . . .”).

53. This Article cites to several state-specific professional responsibility rules. These citations reflect the most current version of the rules available on Westlaw.

54. *See* NAT’L CONF. OF BAR EXAM’RS, *supra* note 13, at 44–46 for information on jurisdictions that do not allow admission on motion.

55. ARK. RULES GOVERNING ADMISSION TO THE BAR r. XVI(1)(c) (2022); ARIZ. SUP. CT. r. 34(b)(1)(D) (2022); COLO. RULES GOVERNING ADMISSION TO THE BAR r. 203.2(1)(c) (2021); IDAHO BAR COMM’N RULES r. 206(a)(3) (2022); ILL. SUP. CT. r. 705(e) (2022); ME. BAR ADMISSION RULES r. 11A(a)(2) (2022); MD. RULES ATT’YS r. 19-215(d) (2022); MICH. RULES FOR THE BD. OF L. EXAM’RS. r. 5(A)(5) (2022); MINN. RULES FOR ADMISSION TO THE BAR r. 7(A)(1) (2022); NEB. SUP. CT. r. 3-119(B)(3) (2022); OKLA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. 2, § 1 (2022); S.D.C.L § 16-16-12.1(c) (2022); UTAH RULES SUP. CT. r. 14-705(a)(7) (2022); VA. SUP. CT. r. 1A:1(c)(3) (2022); WASH. ADMISSION TO PRAC. RULES r. 3(c)(1)(B) (2022); WIS. SUP. CT. RULES r. 40.05(1)(b) (2022).

56. N.D. ADMISSION TO PRAC. RULES r. 7(A)(1)(c) (2022).

or ten<sup>60</sup> years. Mississippi does not have a “years-within-years” requirement and mandates a flat five years before a foreign lawyer can receive reciprocity.<sup>61</sup> The District of Columbia was previously a polar opposite to Mississippi, and prior to 2022 did not have a time-based requirement for reciprocity.<sup>62</sup> However, Washington D.C. added a three-year time-based reciprocity requirement in 2021 which comports with Mississippi’s strict five-year requirement.<sup>63</sup> Except in rare cases, states allow license mobility through a years-in-practice time-based measure. This approach tests longevity rather than competence, does not count maternity leave in the measure of time, and, as a result, discriminates against women of childbearing age.

#### *A. State Protectionist Interests Support State-Specific Licensure*

State boards of bar examiners adopt a protectionist stance when implementing license requirements.<sup>64</sup> The protectionism effort is two-fold.

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57. N.C. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. .0502(3) (2022).

58. ALA. RULES GOVERNING ADMISSION TO THE BAR r. III(A)(1)(c) (2022).

59. ALASKA BAR RULES r. 2(2)(a)(2) (2022); GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. C, § (2)(e) (2022); IND. RULES FOR ADMISSION TO THE BAR & DISCIPLINE OF ATT’YS r. 6(1)(a) (2022); IOWA CT. RULES r. 31.12(3) (2022); KAN. SUP. CT. r. 719(a)(4) (2022); KY. RULES OF THE SUP. CT. r. 2.110(1) (2022); MASS. SUP. JUD. CT. RULES r. 3:01, § 6.1.1 (2022); MONT. RULES FOR ADMISSION TO THE BAR r. V(A)(2) (2022); N.H. SUP. CT. r. 42(XI)(a)(1)(B), (C)(ii) (2022); N.J. RULES OF CT. r. 1:24-4(a) (2022); N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(A)(1) (2022); N.Y. CT. APP. RULES FOR THE ADMISSION OF ATT’YS & COUNS. AT L. r. 520.10(a)(2)(i) (2022); OR. RULES FOR ADMISSION OF ATT’YS r. 15.05(1) (2022); PA. BAR ADMISSION RULES r. 204(5) (2022); TENN. RULES OF THE SUP. CT. r. 7, § 5.01(a)(3) (2022); TEX. RULES GOVERNING ADMISSION TO THE BAR r. 13, § 2 (2022); W. VA. RULES FOR ADMISSION TO THE PRAC. OF L. r. 4.0(b) (2022); V.I. SUP. CT. r. 204(j)(1)(vi) (2022) (reflecting bar admission rules for the U.S. Virgin Islands).

60. CONN. RULES FOR THE SUPERIOR CT. § 2-13(a)(2) (2022); MO. RULES GOVERNING ADMISSION TO THE BAR r. 8.10(a)(4) (2022); OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR r. 1, § 10(A)(2)(b) (2022); VT. RULES OF ADMISSION TO THE BAR r. 15(a) (2022).

61. MISS. RULES GOVERNING ADMISSION TO THE BAR r. VI, § 1(A) (2022).

62. *See* D.C. CT. APP. RULES OF CT. r. 46(e) (2021).

63. D.C. CT. APP. RULES OF CT. r. 46(e)(3)(A) (2022); *see also* Jeremy Conrad, *Court Adopts Permanent Amendments to District Bar Admission Rules*, DC BAR (May 20, 2021), <https://www.dcbar.org/news-events/news/court-adopts-permanent-amendments-to-district-bar> (noting the 2021 change to DC Bar Rule 46, including “the elimination of the provision allowing admission for persons who had attained a score of 133 or better on the Multistate Bar Examination (MBE) in another jurisdiction”).

64. *See* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 288 (1985) (stating that a state can discriminate against out of state residents “only where its reasons are ‘substantial,’ and the

First, licensure protects citizens served by the lawyer from improper or unethical lawyering. Second, licensure protects the lawyer's ability to relocate across state lines. Each of these protectionist values significantly impacts individuals in licensed occupations. Although these justifications for time-based reciprocity meet the constitutional minimum, in practice time-based reciprocity still discriminates.

*1. The States' Interest in Protecting State Citizens*

The first state interest supporting legal licensure is the belief that licensing protects state citizens. States take particular concern with the competency of "alien practitioner[s] seeking admission without taking the bar examination."<sup>65</sup> This concern increases the perceived need for protectionist measures. Licensing serves this protective function and provides citizens with certain assurances. Granting a license gives states a mechanism to "ensure[] quality or help[] consumers to identify high-quality providers."<sup>66</sup> Further, licensure assuages concerns that a nonresident attorney "might be less likely to keep abreast of local rules and procedures,"<sup>67</sup> "would disserve his clients by failing to familiarize himself with the rules,"<sup>68</sup> and may harm the public through competency failures.<sup>69</sup>

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difference in treatment bears a close or substantial relation to those reasons"); *Ricci v. State Bd. of L. Exam'rs*, 427 F. Supp. 611, 619 (E.D. Pa. 19 D.C. R. App. Ct. 4677), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978) ("Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals . . . (C)onstitutional limitations form no impediment . . . where the regulation is reasonable and bears a fair relationship to the object sought to be attained." (alterations in original)); *Salibra v. Sup. Ct. of Ohio*, 730 F.2d 1059, 1063 (6th Cir. 1984) ("A state's interest in regulating the practice of law within its borders is compelling, because lawyers are essential to the primary governmental function of administering justice."); *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992) ("As a general matter, economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest.'" (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976))).

65. *Shapiro v. Cooke*, 552 F. Supp. 581, 586 (N.D.N.Y. 1982).

66. 2015 WHITE HOUSE REPORT, *supra* note 43, at 34.

67. *See Piper*, 470 U.S. at 285; *see also Attwell v. Nichols*, 608 F.2d 228, 231 (5th Cir. 1979) ("It seems clear that there is no constitutional guarantee of the right to practice law without examination. The Constitution proscribes only those qualifications or requirements which have no rational connection with an applicant's fitness or capacity to practice law.").

68. *Piper*, 470 U.S. at 285.

69. *See Ricci*, 427 F. Supp. at 618.

To achieve this regulatory objective, states use time-based reciprocity requirements.<sup>70</sup> Proponents of time-based reciprocity argue that time is a holistic assessment, measuring “more than merely working with legally-related matters.”<sup>71</sup> It also measures the “exercise of professional judgment, bringing to bear all of the lawyer’s education, experience, and skill to resolve a specific legal problem for a particular client or case in controversy.”<sup>72</sup> Time-based reciprocity ensures that practicing attorneys have the competence to sustain themselves in the profession and to do so without ethical violations, demonstrating that the lawyer “necessarily possess[es] the skills required to practice law within” the state.<sup>73</sup>

Some perceive the legal license as losing its weight as a valuable state interest due to modern advances in consumer access to information on the professionals they hire.<sup>74</sup> That is, “the growth of online consumer information and review websites has made it easier for consumers to find information on the quality of firms and practitioners.”<sup>75</sup> This means that the protectionist justification may be outdated and may no longer “reflect this new access to information.”<sup>76</sup>

Even so, licensing fills an important role in consumer protection. Internet reviews can contain inherent biases, and, in professions such as law, “[q]uality may not always be apparent even after the service has been received.”<sup>77</sup> Modern access to information and the function of the bar exam

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70. *Shapiro*, 552 F. Supp. at 587 (“[T]he state can look for alternative methods to insure that an applicant is competent. The . . . requirement that an alien practitioner have practiced for an extended period of time in his licensing state provides for a reasonable means to discover factors bearing upon his competency.” (quoting *Lowrie v. Goldenhersh*, 521 F. Supp. 534, 539 (N.D. Ill. 1981), *aff’d*, 716 F.2d 401 (7th Cir. 1983)); *see also Lowrie*, 521 F. Supp. at 539 (holding that the Illinois rule requiring active practice for five of the seven years preceding an application for admission without examination “provides for a reasonable means to discover factors bearing upon [applicant’s] competency”).

71. *In re Conner*, 917 A.2d 442, 447 (Vt. 2006) (quoting Att’y Grievance Comm’n v. Shaw, 732 A.2d 876, 882 (Md. 1999)).

72. *Id.*

73. *Id.* at 557.

74. Clifford Winston, Opinion, *Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES (Oct. 24, 2011), <https://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-exams-necessary.html> (“Third-party providers of legal services information could do a service similar to that provided by Consumer Reports and Zagat Survey and effectively regulate the legal profession by monitoring the law firms’ performance and effectiveness.”).

75. 2015 WHITE HOUSE REPORT, *supra* note 43, at 34.

76. *Id.*

77. *Id.* at 35.

as a marker of minimum competence each independently weaken the state interest. Yet the interest and need for licensure remains. A test for *access* to the powers and influence of a profession is a valuable consumer protection. In the legal profession, the initial bar exam serves this role.

## 2. *Protecting Professionals Leaving the State*

The second state interest permitting discrimination in licensing is the concern for fair treatment of practitioners leaving the state. Courts recognize this considerable state interest as an attempt to “secure for [the state’s] citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant.”<sup>78</sup> The Ninth Circuit held in *National Ass’n for the Advancement of Multijurisdictional Practice v. Berch* that Arizona has a “considerable interest in regulating its state bar and in ensuring that attorneys licensed in Arizona will be treated equally in states having reciprocity with Arizona.”<sup>79</sup> Likewise, the Fourth Circuit recognized in *Hawkins v. Moss* that a “state’s undertaking . . . [t]o secure for her citizens the reciprocal rights and advantages obtained under [other states’] statutes or rules is manifestly a legitimate interest and goal on the part of a state.”<sup>80</sup>

The state, then, is highly concerned with protecting the ability of current citizens to move outside the state. The state interest in equality for citizens moving out-of-state, and the assurance of equal treatment in the new state, is no more apparent than in northern New England. Vermont and New Hampshire each require persons seeking reciprocity to engage in the “active practice” of law for five years. But these states have agreed to lower the requirement to three years of practice if an attorney relocates from one state to another.<sup>81</sup> As a result, an attorney relocating two hours down the road

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78. *Ricci v. State Bd. of L. Exam’rs*, 427 F. Supp. 611, 618 (E.D. Pa. 1977), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978); *see also* *Schumacher v. Nix*, 965 F.2d 1262, 1270 (3d Cir. 1992) (“As the district court observed, the Rule is intended to ‘secure[] for Pennsylvania attorneys who decide to relocate, the advantage of favorable terms of admission to another state’s bar by offering that same advantage to attorneys of such other states that will reciprocate.’ And it is established that such reciprocity provisions are a valid exercise of state power, because they help ease the burdens of relocation for resident attorneys seeking admission to the bars of other states.” (alteration in original)).

79. 773 F.3d 1037, 1046 (9th Cir. 2014).

80. 503 F.2d 1171, 1177 (4th Cir. 1974); *see also* *Morrison v. Bd. of L. Exam’rs.*, 453 F.3d 190, 193 (4th Cir. 2006).

81. *See, e.g.*, VT. RULES OF ADMISSION TO THE BAR r. 15(a)(2) (2022); N.H. SUP. CT. r. 42(XI)(b), (c) (2022).

from the capital of Vermont (Montpellier) to the capital of New Hampshire (Concord) need only have three years of legal experience. But an attorney relocating from the capital of Massachusetts (Springfield) to the capital of New Hampshire (Concord)—also a two-hour distance—must have five years of experience for reciprocity and immediate licensure.<sup>82</sup> This policy in no way protects citizens from inept lawyering, but instead protects the portability of law licenses for lawyers licensed in, and moving within, those states. This is a fairness protection for people who *leave*, with no consideration for the people who *enter*.

Both state interests supporting the structure of legal license reciprocity hinder mobility. In turn, time-based reciprocity's impact on mobility perpetuates structural sexism by creating heightened burdens for childbearing individuals. By excluding them from access to the “benefit” of reciprocity,<sup>83</sup> these burdens serve to push mothering lawyers from the profession. A license should provide—and not hinder—access to the fundamental right to travel,<sup>84</sup> the fundamental right to control the upbringing of the child<sup>85</sup> (which can include the location of that upbringing), and the fundamental right to live together as a family.<sup>86</sup> Licensing structures should avoid unnecessary discrimination and exclusion. As it stands today, law licensure hinders this ability for attorney-mothers.

### B. The “Active Practice of Law” Reciprocity Standard

Publications often view the reciprocity requirement for previous legal practice as a uniform standard, stating that “jurisdictions [permitting admission on motion] consider whether the applicants have been ‘primarily engaged in the active practice of law’ for a certain period of time.”<sup>87</sup> The ABA’s Model Rule for Admission on Motion suggests this exact

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82. N.H. SUP. CT. r. 42(XI).

83. See discussion *infra* Section III.B.2 (analyzing assertion of reciprocity as a “benefit” and not a burden).

84. See *Saenz v. Roe*, 526 U.S. 489, 498–500 (1999).

85. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

86. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality).

87. Sherry M. Hieber, “Primarily Engaged in the Active Practice of Law”: Are We Keeping Up with the Times?, BAR EXAM’R (Fall 2018), <https://thebarexaminer.ncbex.org/article/fall-2018/primarily-engaged-in-the-active-practice-of-law-are-we-keeping-up-with-the-times/>.

language.<sup>88</sup> Further, the ABA's Comprehensive Guide to Bar Admission considers only if admission on motion is permitted, what the time requirement is, and if the definition of practice includes professions such as law teaching and judicial clerking.<sup>89</sup> The ABA publications *do not consider* that jurisdictions vary their standards for the level of engagement required in practice. That is, each jurisdiction individually defines what qualifies toward the time requirement for reciprocity—an important and often overlooked issue.

*1. Types of Employment Applicable to “Active Practice”*

The ABA's Model Rule for Admission on Motion lists six types of employment which may be considered active practice, and which can count toward the time-based requirement. These are:

- (1) Representation of one or more clients in the private practice of law;
- (2) Service as a lawyer with a local, state, or federal agency, including military service;
- (3) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
- (4) Service as a judge in a federal, state, or local court of record;
- (5) Service as a judicial law clerk; or
- (6) Service as corporate counsel.<sup>90</sup>

Many states have adopted this standard.<sup>91</sup> Others have modified this list by expanding (often to clarify) the above requirements, while others have

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88. Comm'n on Multijurisdictional Prac., *Proposed Model Rule on Admission by Motion Section of Legal Education and Admissions to the Bar*, AM. BAR ASS'N (Dec. 1, 2001), [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission-on-multijurisdictional-practice/comm2\\_leab2/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/comm2_leab2/).

89. See NAT'L CONF. OF BAR EXAM'RS, *supra* note 13, at 44–45.

90. Comm'n on Multijurisdictional Prac., *supra* note 88.

91. See, e.g., ALA. RULES GOVERNING ADMISSION TO THE BAR r. III(A)(2) (2020); ALASKA BAR RULES r. 2(2)(c) (2022); ARIZ. SUP. CT. r. 34(f)(2) (2022); ARK. RULES GOVERNING ADMISSION TO THE BAR r. XVI(2) (2020); COLO. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. 203.2(2) (2021); CONN. RULES FOR THE SUPERIOR CT. § 2-13(b) (2022); GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. C(3)(a) (2022); IDAHO BAR

condensed or combined the six categories.<sup>92</sup> Some states have not defined the types of employment necessary for active practice at all.<sup>93</sup>

Twenty-one states have adopted vague rules, or, more commonly, no rule at all. This creates choice of law questions as to whether the reciprocity rule of the state of current licensure or the state of sought-licensure will apply.<sup>94</sup> For example, a Connecticut lawyer seeking reciprocity in Iowa may wonder if Connecticut's or Iowa's rules apply. Iowa offers no definition of which career paths qualify as active practice. Conversely, Connecticut has expanded their acceptance of "teaching at a law school" to include individuals who supervise clinics and practicums.<sup>95</sup> If a clinic supervisor moves to Iowa from Connecticut and seeks reciprocity, it is impossible to know for certain if reciprocity will be granted. Attorneys seeking to move

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COMM'N RULES r. 206(a)(3) (2022); IOWA CT. RULES r. 31.12(6) (2022); KAN. SUP. CT. r. 719(b) (2022); ME. BAR ADMISSION RULES r. 11A(a)(2) (2022); MISS. RULES GOVERNING ADMISSION TO THE BAR r. VI(7) (2022); MONT. RULES FOR ADMISSION TO THE BAR r. V(D)(1) (2022); NEB. SUP. CT. r. 3-119(B)(3) (2022); N.H. SUP. CT. r. 42(XI)(d) (2022); N.C. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. .0502(3) (2022); OKLA. RULES GOVERNING ADMISSION THE TO PRAC. OF L. r. 2, § 1(A) (2022); S.D. RULES AND REGULS. FOR ADMISSION TO PRAC. L. r. 16-16-12.1(c) (2022); W. VA. RULES FOR ADMISSION TO THE PRAC. OF L. r. 4(c) (2022); WIS. SUP. CT. r. 40.05(2), (2m), (3) (2022).

92. Some states combine certain elements of the Model Rule, such as North Dakota, which excludes some explicit elements, like government work and in-house counsel, to require "the performance of legal work in a legal capacity" instead. *See* N.D. ADMISSION TO PRAC. r. 7(A)(1)(c) (2022). Tennessee similarly combines representation of one or more clients and service as a government attorney to read "full-time private or public practice." TENN. SUP. CT. r. 7(5.01)(c)(1)(A) (2022). Utah has added an element by explicitly stating that the unauthorized practice of law does not constitute the active practice of law. UTAH CODE OF JUD. ADMIN. r. 14-701(b)(7) (2022). Some add additional aspects to the ABA Model Rule, such as Connecticut's inclusion of supervising law school clinics as "teaching" to meet element 3 of the Model Rule. CONN. RULES FOR THE SUPERIOR CT. § 2-13(b) (2022). Further, some states add disclaimers that practice prior to admission (as a third year or under practice privileges) shall not count to the time requirements. *See, e.g.*, ARK. RULES GOVERNING ADMISSION TO THE BAR r. XVI(2) (2022); ALA. RULES GOVERNING ADMISSION TO THE BAR r. III(A)(2) (2022).

93. Maryland, Massachusetts, New Jersey, Texas, and Virginia do not define the occupations that qualify as "active practice of law." *See* MD. RULES ATT'YS r. 19-215 (2022); MASS. SUP. JUD. CT. RULES r. 3:01, § 6.1.1 (2022); N.J. RULES OF CT. r. 1:24 (2022); TEX. RULES GOVERNING ADMISSION TO THE BAR r. 13, § 2 (2022); VA. SUP. CT. r. 1A:1 (2022).

94. This choice of law issue is outside the scope of this Article. For further information, see MODEL RULE OF PRO. CONDUCT r. 8.5 (AM. BAR. ASS'N 2020).

95. CONN. RULES OF SUPER. CT. REGULATING ADMISSION TO THE BAR r. 2-13(b)(3) (2022).

who currently work in the gray areas of the ABA model rule, or who work in states that do not define the occupations applicable to active practice, have no concrete guidance as to whether their work will “count” as the practice of law in their new jurisdiction. If neither jurisdiction has a rule, there is nothing for the legal professional to rely on, and the lawyer may relocate without the guarantee of an immediate ability to economically contribute to their new community.

While ambiguity allows each state bar association to conduct a case-by-case assessment, the lack of certainty for lawyers seeking mobility is cumbersome. As such, an attorney who seeks mobility may do so with little to no assurance that they will be able to support themselves or their family, let alone contribute to their new community. This uncertainty surrounding viable “countable” career paths, however, is barely the pinnacle of concern. The true uncertainty lies in what each state board of law examiners deems “active.”

## 2. *The Superlatives of “Active Practice”*

State-by-state variation in the seemingly simple requirement for “active practice” is enough to make any lawyer’s head spin. The most frequently cited standard for admission on motion—that the applicant has “engaged in the active practice of law”—is required in some variation by twelve jurisdictions.<sup>96</sup> Nine jurisdictions add the qualifier that the lawyer must have been “primarily engaged” in their “active practice,”<sup>97</sup> while two

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96. ALASKA BAR RULES r.2(2)(a)(2) (2022); IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATT’YS r. 6(1)(a) (2022) (“actively engaged in the practice of law”); KY. SUP. CT. r. 2.110(1) (2022); MASS. SUP. JUD. CT. RULES r. 3:01, § 6.1.1 (2022); MISS. RULES GOVERNING ADMISSION TO THE BAR r. VI(7) (2019); MONT. RULES FOR ADMISSION TO THE BAR r. V(A)(2) (2022); N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(A)(1) (2022); N.D. ADMISSION TO PRAC. RULES r. 7(A)(1)(c) (2021) (requiring that the lawyer must be “actively engaged, to an extent deemed by the Board to demonstrate competency in the practice of law”); VT. RULES OF ADMISSION TO THE BAR r. 15(a) (2022); WASH. STATE CT. ADMISSION AND PRAC. RULES r. 3(c)(1)(B) (2020) (requiring “present satisfactory proof of active legal experience”); W. VA. RULES FOR ADMISSION TO THE PRAC. OF L. r. 4.0(b) (2022); WYO. RULES & PROCS. GOVERNING ADMISSION TO THE PRAC. OF L. r. 302(f) (2021).

97. ALA. RULES GOVERNING ADMISSION TO THE BAR r. III(A)(1)(c) (2020); ARIZ. SUP. CT. r. 34(f)(1)(A) (2022); ARK. RULES GOVERNING ADMISSION TO THE BAR r. XVI(1)(c) (2020); COLO. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. 203.2(1)(c) (2022); GA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. pt. C(2)(e) (2022); ME. BAR ADMISSION RULES r. 11A(a)(2) (2022); N.H. SUP. CT. r. 42(XI)(a)(1)(B), (C)(ii) (2022); TENN. SUP. CT. r. 7(5.01)(a)(3) (2022); V.I. SUP. CT. r. 204(j)(1)(vi) (2022).

require that the lawyer have been “substantially engaged in the active practice of law.”<sup>98</sup>

Many states go beyond just one adverbial definition and combine these requirements. Nebraska, North Carolina, and Texas, for example, require the lawyer to have “actively and substantially engaged.”<sup>99</sup> Illinois requires the lawyer to have engaged in an “active, continuous, and lawful” practice, much like Oklahoma’s “actual and continuous” requirement.<sup>100</sup> No more clarifying is Iowa’s requirement that the lawyer have “regularly engaged in the practice of law.”<sup>101</sup> Minnesota and New Jersey do not assign superlative language to the practice required and merely require that the practice have been lawful.<sup>102</sup> Further, Virginia does not have a requirement for engagement levels and merely requires the person to “have practiced,”<sup>103</sup> a standard similar to New York’s requirement that the person have “actually practiced.”<sup>104</sup>

Is there a difference between “primary” and “substantial” engagement in the practice of law? One could argue that there is, relying on Merriam-Webster’s definition of substantial as “considerable” while primary is “of first rank, importance, or value.”<sup>105</sup> This implies that primary is greater engagement than substantial. But are attorneys “primarily” practicing law more competent or practicing more often than attorneys “substantially” practicing law? What about those who practice “continuous[ly]”?<sup>106</sup> Does one group have more legitimate experience relevant to their competence level than another?

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98. IDAHO BAR COMM’N RULES r. 206(a)(3) (2022); WIS. SUP. CT. r. 40.05(1)(b) (2022) (removing “active” from the qualifier so the requirement reads as “substantially engaged in the practice of law”).

99. NEB. SUP. CT. r. 3-119(B)(3) (2022); N.C. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. .0502(3) (2022); TEX. RULES GOVERNING ADMISSION TO THE BAR r. 13, § 2 (2022).

100. ILL. SUP. CT. r. 705(e) (2022).

101. IOWA CT. RULES r. 31.12(3) (2022).

102. MINN. RULES FOR ADMISSION TO THE BAR r. 7(A)(1)(c) (2022); N.J. RULES GOVERNING THE CTS. r. 1:24-4(a) (2022).

103. VA. SUP. CT. r. 1A:1(c)(3) (2022).

104. N.Y. CT. APP. RULES FOR THE ADMISSION OF ATT’YS & COUNS. AT L. r. 520.10(a)(2)(i) (2022).

105. *Substantial*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/substantial> (last updated Feb. 3, 2023); *Primary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/primary> (last updated Jan. 30, 2023).

106. *See, e.g.*, ILL. SUP. CT. r. 705(e) (2022); OKLA. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. 2, § 1 (2022).

Some state standards attempt to answer these questions by veering away from vague adverbs and providing a more specific reciprocity standard in their governing rules. Connecticut, for example, requires that the engagement in the practice of law be done as the lawyer's "principle means of livelihood,"<sup>107</sup> a standard also followed by Michigan and South Dakota.<sup>108</sup> Pennsylvania requires an "active status" signified by a "major portion of time and energy" spent on legal practice.<sup>109</sup> There is no guidance provided as to what amount of time is major, or what level of energy is sufficient to expend on practice in order to gain reciprocity. Maryland, Missouri, Ohio, Tennessee, and Utah attempt to answer this question and clearly establish that the practice must have been "full-time."<sup>110</sup>

Other states recognize the issue of defining "active" status and clarify their requirements for active practice with specific quantifiable measures. When this occurs, the most common standard requires practice for 1,000 hours/year,<sup>111</sup> or twenty hours a week on a traditional forty-hour-a-week schedule. Pennsylvania's requirement is convoluted, requiring twenty hours per week but also stating in guiding documents that it "interprets the phrase 'devoted a major portion of time and energy to the practice of law' to mean that the applicant spent *more than* fifty percent of his/her time engaged in the practice of law."<sup>112</sup> On its face, then, Pennsylvania actually requires more than twenty hours per week on a standard forty-hour work week schedule to be eligible for reciprocity. Vermont, more clearly than

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107. CONN. RULES FOR THE SUPERIOR CT. § 2-13(a)(2)(A) (2022).

108. MICH. RULES FOR THE BD. OF L. EXAM'RS r. 5(a) (2022) ("principal business or occupation"); S.D. RULES & REGULS. FOR ADMISSION TO PRAC. L. r. 16-16-12.1(c) (2021) ("principal occupation").

109. PA. BAR ADMISSION RULES r. 204(2), (4) (2022).

110. MD. RULES ATT'YS r. 19-215(b) (2022); MO. RULES GOVERNING ADMISSION TO THE BAR r. 8.10(4) (2022); OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR r. 1(10)(A)(2)(c) (2022); TENN. SUP. CT. r. 7 § 5.01(c)(1)(A) (2022); UTAH CODE OF JUD. ADMIN. r. 14-705(a)(7) (2022). *But see* MINN. BD. L. EXAM'RS, REPORT AND RECOMMENDATION: ADMISSION ON MOTION BASED ON YEARS OF PRACTICE STUDY 15 (2018) [hereinafter MINN. ADMISSION ON MOTION REPORT], <https://www.ble.mn.gov/wp-content/uploads/2018/06/MN-Board-of-Law-Examiners-Report-on-Rule-7A.pdf> ("Very few states that require full-time practice define what constitutes full-time practice of law for admission on motion.")

111. ILL. SUP. CT. r. 705(h) (2022); IOWA CT. RULES r. 31.4(2)(b) (2022); MINN. RULES FOR ADMISSION TO THE BAR r. 7(A)(1)(c) (2022); MONT. RULES FOR ADMISSION TO THE BAR r. V(D)(2) (2022); N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(D)(2) (2022).

112. *See Interpreting Rule 204--Tips for a Successful Application*, PA. BD. L. EXAM'RS [hereinafter *Interpreting Rule 204*], [https://www.pabarexam.org/non\\_bar\\_exam\\_admission/204\\_interpretation.htm](https://www.pabarexam.org/non_bar_exam_admission/204_interpretation.htm) (last updated Jan. 6, 2023) (emphasis added).

Pennsylvania, seeks to have lawyers practice at just over part-time levels, requiring twenty-five hours per week.<sup>113</sup> New Mexico requires both a minimum of 1,000 hours a year *and* that the applicant “derived at least fifty percent (50%) of , , , [their] non-investment income from such activity or activities.”<sup>114</sup> Thus, an applicant for reciprocity in New Mexico can be a part-time attorney but only if their other part-time work paid less than their legal work.<sup>115</sup> Illinois sets both a monthly and yearly hour benchmark, necessitating that the attorney have practiced a minimum of eighty hours per month *and* 1,000 hours per year.<sup>116</sup>

Providing hours requirements to the overall time-based requirements still causes gray areas in predictability and application. If a young attorney seeking reciprocity in Illinois has worked part time for three years but took a week off each year for family vacation, they would not meet the standards for reciprocity in the state.<sup>117</sup> Yet time off is encouraged by many office policies, creating an obvious conflict between rule and practice.

The gray areas within hours-based requirements are seen in hypotheticals provided by the State of Pennsylvania to explain their policies:

The Board will calculate an applicant’s practice time by weeks. The Board will count every week in which an applicant practiced law more than 20 hours. The Board does not deduct from the counted practice time vacations and leave time earned and taken in accordance with an employer’s standard policy, so long as the applicant returned to the position after the vacation or leave. . . . [T]he Board will not count time, other than leave time, in which the applicant was not practicing. Thus, if a hypothetical applicant worked 80 hours a week for 13 weeks (1040 hours), she would get credit for 13 weeks. On the other hand, if that hypothetical applicant worked 1,040 hours in a year by working 21 hours in each of 52 weeks, she would get credit for 52 weeks.<sup>118</sup>

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113. VT. RULES OF ADMISSION TO THE BAR OF THE VT. SUP. CT. r. 2(a) (2022).

114. N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(D)(2) (2022).

115. *See id.* One thousand hours is the equivalent of twenty hours a week on a standard forty-hour-a-week schedule. As such, twenty-hour work weeks may be considered part-time work. Glassdoor Team, *Exactly How Many Hours Is Considered Part Time?*, GLASSDOOR, <https://www.glassdoor.com/blog/guide/how-many-hours-is-part-time/> (last updated June 21, 2021).

116. ILL. SUP. CT. r. 705(h) (2022).

117. *See id.*

118. *Interpreting Rule 204, supra* note 112.

Pennsylvania's policy provides a prime example of the issues embedded within time-based reciprocity standards for minimum competence. An applicant working long hours for three months is not practicing less law than an applicant working part time for a year. Surely, the part-time worker engages with more cases and legal issues over the course of a year. But that experience cannot be equivalent to competence. If it were, applicants would need time in supervised practice to pass the bar exam and be licensed for the first time.

State reciprocity standards are not universal. Even those that have similar time- or superlative-based standards vary. A part-time lawyer seeking reciprocity will have an easier time doing so in Pennsylvania than in Illinois.<sup>119</sup> That same lawyer cannot gain reciprocity in Vermont.<sup>120</sup> A lawyer who has substantially practiced in Virginia may gain reciprocity in Wisconsin after three years.<sup>121</sup> But despite meeting Texas's substantial practice standard, the attorney licensed in Wisconsin cannot move to Texas for another two years (without being subject to the burdens of another bar exam).<sup>122</sup> Overall, these standards show that the required time period for active practice is not necessary to demonstrate competence. Rather, this time requirement serves as an exclusionary tool to hinder the professional engagement and advancement of mobile lawyers. This practice is especially burdensome on childbearing women.

### *III. Reciprocity Standards Limit Mobility and Exclude Legal Professionals*

Licensure's benefits do not outweigh reciprocity's costs. Although defenders of licensure requirements claim that the requirements reinforce the states' interests to protect the public by keeping the quality of services consistent,<sup>123</sup> empirical evidence supports the inverse. Research consistently

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119. Compare PA. BAR ADMISSION RULES r. 204 (2022) with ILL. SUP. CT. r. 705(h) (2022) (requiring eighty hours a month and 1,000 hours a year). Of note, while a part time lawyer will have an easier time qualifying for reciprocity in Pennsylvania based on each state's interpretation of "part-time," that same lawyer will have to wait longer to gain reciprocity in Pennsylvania. Because Pennsylvania requires five years of active practice while Illinois only requires three, the benefit to part time attorneys seeking reciprocity may be negated by the variance in years-of-practice requirements.

120. See VT. RULES OF ADMISSION TO THE BAR r. 14, 15(a) (2022).

121. Compare VA. SUP. CT. r. 1A:1 (2022) with WIS. SUP. CT. r. 40.05(1)(b) (2022).

122. Compare WIS. SUP. CT. r. 40.05(1)(b) (2022) with TEX. RULES GOVERNING ADMISSION TO THE BAR r. 13, § 2 (2022).

123. *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) ("Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably

shows that licensing requirements serve less to protect the public and more to ensure that “incumbents in the profession” are insulated from marketplace challenges.<sup>124</sup> These laws “often have nothing to do with protecting the public from incompetence or fraud and everything to do with protecting politically powerful economic interests from competition in the marketplace.”<sup>125</sup>

Preventing mobile professionals from entering the competitive marketplace of their choosing because of a mere failure to meet certain arbitrary time- and superlative-based requirements insulates the market. Yet courts support time-based reciprocity requirements even when the licensing restraint blatantly protects one group over another.<sup>126</sup> In legal practice, the exclusionary effect of time-based reciprocity on childbearing mothers perpetuates the male-dominated profession. This discrimination should not continue.

#### *A. State Reciprocity Requirements Unreasonably Restrict Mobility*

The licensing process for any profession is notably cumbersome. The process includes “various procedural hurdles, such as paying fees, filling out administrative paperwork, and submitting an application and waiting for it to be processed.”<sup>127</sup> Because regulations are done at the state level and each jurisdiction can create its own requirements, movement across state lines with a license is especially onerous.<sup>128</sup>

Professionally licensed workers may encounter requirements for “new qualifications [such as education, experience, training, testing, etc.]” before gaining access to a license in a new jurisdiction.<sup>129</sup> The disparate

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believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State . . .”).

124. David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287, 298 (2016).

125. Evan Bernick, Essay & Response, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 479 (2016).

126. Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111, 1146 (2019) (“Licensing gives courts the kinds of extreme examples that should fail rationality review, or put courts in the position of even asking whether naked economic protectionism is a legitimate state interest.”); *Salibra v. Sup. Ct. of Ohio*, 730 F.2d 1059, 1065 (6th Cir. 1984) (“Requiring Salibra to sit for and pass a bar examination to obtain admission to the Ohio bar does not amount to a denial of a basic necessity of life or a fundamental right.”).

127. 2015 WHITE HOUSE REPORT, *supra* note 43, at 13, 64.

128. *See id.* at 13.

129. *Id.* at 13, 64.

policy inherent in reciprocity standards and the increased cost of moving can discourage licensed professionals from moving across state lines<sup>130</sup> or push them out of their occupation completely.<sup>131</sup> As a result, the presence of more restrictive licensing requirements decreases the interstate mobility of professionals.<sup>132</sup>

This restriction applies to all levels of licensure. Comparing different white-collar licensed professions shows that the immobility of licensed professionals directly correlates with the stringency of licensure. For example, dentists and lawyers—whose state licensure requirements are a stringent barrier to interstate mobility—are less mobile than doctors, who can more easily transport their license.<sup>133</sup> Further, the restrictiveness of a professional license decreases with age, making the impacts of strict license transportability “much larger for younger licensed workers.”<sup>134</sup> Although licensed and unlicensed workers move within states at the same rate, the interstate movement of unlicensed workers is twenty percent higher than that of licensed workers, suggesting that “licensing constitutes a significant barrier to relocation” out of state.<sup>135</sup>

State licensure restrictions may lead a worker, or a law student, to choose an initial job in a specific location. Yet, life events can intervene, which state licensure restrictions do not anticipate:

[E]vents – like a local disaster or a health crisis for a parent – may mean that workers who had never planned to move across State lines after receiving a license suddenly find themselves needing to do so. In such cases, the need to re-license is an important concern. If States don’t offer a temporary license to

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130. *Id.* at 64–65.

131. *See id.* at 61–62.

132. *Id.* at 65. *But see Ricci v. State Bd. of L. Exam’rs*, 427 F. Supp. 611, 618 (E.D. Pa. 1977), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978) (“State reciprocity provisions tend to facilitate an individual attorney’s ability to relocate.”).

133. 2015 WHITE HOUSE REPORT, *supra* note 43, at 15 n.29; *see also* B. Peter Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals*, 22 J.L. & ECON. 1 (1979) (providing a study analyzing the mobility of the legal profession compared to the dental and medical professions).

134. 2015 WHITE HOUSE REPORT, *supra* note 43, at 15–16; *see also* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 81 (2017) (“But today, the number of Americans who leave home for new opportunities is in decline. A series of studies shows that the interstate migration rate has fallen substantially since the 1980s.” (footnote omitted)).

135. 2015 WHITE HOUSE REPORT, *supra* note 43, at 39.

practice (while re-certifying), then the financial barriers of licensing are even more significant.<sup>136</sup>

Impeding the economic contribution of licensed workers through restrictive reciprocity requirements prevents the economic contribution of skilled workers to their new labor market.<sup>137</sup> Necessary relocation is met with unnecessary barriers to continued professional employment.

Before creating licensing structures, limits to mobility should “be weighed against the goals of promoting consumer health and safety as well as other professional objectives that groups may seek with licensing.”<sup>138</sup> In many instances—including law license reciprocity—these costs and benefits are not appropriately weighed, and occupational licensing requirements become a heavier burden than the protection they feign to promote.

Recent legal and academic arguments challenging licensure, often raised by progressive advocates for occupational liberty, focus primarily on limiting the licensure burdens for occupations that do not impact the public well-being.<sup>139</sup> This argument often juxtaposes attorneys and doctors with professions such as casket-selling.<sup>140</sup> Many courts have agreed with these arguments and entered judgment against licensing authorities on grounds that the stringent license requirements for casket-selling or other similar professions violate Due Process.<sup>141</sup> These cases reflect a rejection of the unreasonable burdens imposed by “expensive, time-consuming, and broadly unrelated barriers to entry.”<sup>142</sup> But excluding those who “impact

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136. *Id.*

137. *Id.* at 4.

138. *Id.* at 41.

139. *See* Bernstein, *supra* note 124, at 297, 302–03.

140. *Id.* at 297–98.

141. *See, e.g.,* *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (holding that Tennessee’s licensure requirement for casket selling was not rationally related to a legitimate state interest and thus violated the Due Process Clause); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (“The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none.”).

142. Bernstein, *supra* note 124, at 297–98 (“It is one thing to require a great deal of training and government certification for someone to work as a physician or attorney — occupations where the well-being of the public can reasonably be thought to be at stake. It is quite another for potential florists, African hair-braiders, or casket-sellers — all of whom have sued over occupational restrictions, and none of whom present risks to public well-being — to face expensive, time-consuming and broadly unreasonable barriers to entry.”); *see also* Bernick, *supra* note 125, at 480 (“To receive permission to work in a licensed

well-being” from the need to alleviate burdensome barriers to entry misses the mark.

Lawyers seeking mobility of their law license are faced with the same “expensive, time consuming, and broadly unrelated barriers to entry”<sup>143</sup> that litigants have argued apply to common professions. First, the state’s interest in licensing is assuring the public that the attorney providing services is minimally competent to provide such services. This assurance is exactly what the bar exam markets itself to evaluate. Taking multiple bar exams imposes an “expensive, time-consuming, and broadly unrelated barrier[] to entry”<sup>144</sup> on lawyers seeking reciprocity. The ability to take the bar exam requires, among other things, graduation from an ABA-accredited law school (generally a three-year, full-time commitment costing an average of \$206,180.)<sup>145</sup> Studying for the bar exam is also time consuming and expensive. Most commercial prep courses require a full-time study period of eight to ten weeks and can cost more than \$4,000, not including lost wages due to full-time study schedules.<sup>146</sup>

Much like barriers to other occupations, the bar exam can be considered a “broadly unrelated barrier to entry” based on consistent commentary that the exam does not actually assess the ability to practice law.<sup>147</sup> Even

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vocation, aspiring entrepreneurs must clear various hurdles: earn a certain amount or type of education, complete specialized training, pass an exam, attain a certain grade level, pay fees, and more.”).

143. Bernstein, *supra* note 124, at 298.

144. *Id.*; Harriet O’Neal, *The Military-Spouse Attorney Fight for Licensing Accommodations Merits National Attention*, AM. BAR ASS’N: TYL, Spring 2020, at 6, 6 (“Enduring a bar exam every two to three years is not a viable option. The time required to study for a bar examination, coupled with the time it takes for results to be posted, makes this option even more implausible.”).

145. Melanie Hanson, *The Average Cost of Law School*, EDUC. DATA INITIATIVE (Nov. 14, 2022), <https://educationdata.org/average-cost-of-law-school>.

146. *See, e.g., Which BARBRI Bar Prep Course Fits You Best?*, BARBRI, <https://www.barbri.com/bar-review-course/> (last visited Jan. 24, 2022) (stating that the traditional course is an 8–10-week full-time program); *Self-Pay Options*, BARBRI, <https://www.barbri.com/bar-review-course/bar-review-course-details/#compare> (last visited Jan. 12, 2022) (detailing three different passes at three different price points: (1) the Self Pass for \$1,999, (2) the Guided Pass for \$2,699, and (3) the Ultimate Pass for \$4,199).

147. Logan Cornett & Zachariah DeMeola, *The Bar Exam Does More Harm Than Good*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 2, 2021), <https://iaals.du.edu/blog/bar-exam-does-more-harm-good> (“[T]here are vast discrepancies between what the data tells us minimum competence consists of and what the bar exam actually tests. In short, despite claims to the contrary, the bar exam is not—and has never been—a valid measure of minimum competence and, therefore, cannot be defended as a mechanism for

accepting that the bar exam *does* rightly assure protection of the public by *actually* testing legal ability, minimum competence should not disappear simply because a practitioner has crossed state lines after passing the exam.

Imposing additional testing fees and study burdens on practitioners to take a test unrelated to their ability to actually practice law does more harm than good. A lawyer seeking reciprocity is not seeking to avoid expensive, time-consuming barriers to entry altogether. They merely seek reasonable transportability once they gain entry to the profession.

*B. States' Interests in Reciprocity Are Mere Smoke and Mirrors for Exclusion*

Licensing requirements are set and influenced by members already within the profession which only intensifies the gate-keeping nature of licensed professions.<sup>148</sup> As a result, licensing “reduces opportunities for workers without improving the quality of services.”<sup>149</sup> This limited ability to transport a license across state lines leads to increased legal burdens on low-income citizens.<sup>150</sup>

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consumer protection.”); George Leef, *True or False: We Need the Bar Exam to Ensure Lawyer Competence*, FORBES (Apr. 22, 2015, 12:00 PM EDT), <https://www.forbes.com/sites/georgeleef/2015/04/22/true-or-false-we-need-the-bar-exam-to-ensure-lawyer-competence/?sh=5136ead8631f> (“Instead of ensuring that all legal practitioners are competent, the bar exam (and its long prelude, law school) merely creates an artificial barrier that keeps many people from competing in the market for legal services.”); Stephanie Francis Ward, *A Better Bar Exam? Law Profs Weigh in on Whether Test Accurately Measures Skills Required for Law Practice*, A.B.A. J. (Jan. 8, 2020, 10:09 AM CST), <https://www.abajournal.com/web/article/building-a-better-bar-exam> (“[T]here are still concerns about whether the test accurately evaluates skills needed to practice law.”). *But see* Lowrie v. Goldenhersh, 716 F.2d 401, 413 (7th Cir. 1983) (“After all, the written bar examination is a well-accepted prerequisite to bar admission for the majority of applicants in nearly every state in our Union.”).

148. See discussion *infra* Section III.B.2; see also 2015 WHITE HOUSE REPORT, *supra* note 43, at 22 (“[P]ractitioners have a greater interest in licensing and may be better able to influence policy through their active professional associations. Empirical work suggests that licensed professions’ degree of political influence is one of the most important factors in determining whether States regulate an occupation.”).

149. Bernick, *supra* note 125, at 485.

150. See Morris M. Kleiner, *Reforming Occupational Licensing Policies* 15 (Hamilton Project, Brookings, Discussion Paper 2015-01, 2015), [https://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/reforming\\_occupational\\_licensing\\_morris\\_kleiner\\_final.pdf](https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf).

The ability to transport a license increases the options for a licensed practitioner, including the chance to flee areas of economic depression.<sup>151</sup> In the same way, license immobility hinders the ability of service professionals, including public interest and pro bono-focused lawyers, to provide services to economically depressed areas.<sup>152</sup> The Supreme Court recognized this concern in *Supreme Court of New Hampshire v. Piper*, and noted that representation by an out-of-state lawyer may be the only avenue for a citizen to “raise unpopular federal claims.”<sup>153</sup> As a result, these time-based requirements restrict the “serving the underserved” professional purpose of many lawyers<sup>154</sup> and fail to recognize the universal nature of legal ethics or the insularity that reciprocity standards create.

*1. Ethical Standards, Not Reciprocity Standards, Protect Citizens from Improper Lawyering*

When states first implemented reciprocity standards, one of the first issues to arise was whether out-of-state attorneys could gain licensure within a state. In *Piper*, a citizen of Vermont sought to remain a citizen of Vermont while attaining a law license in New Hampshire.<sup>155</sup> The State of New Hampshire defended its prohibition on the licensure of out-of-state lawyers by raising protectionist concerns.<sup>156</sup> The state asserted that the policy protected citizens from an out-of-state attorney who may be less likely to learn and respect local rules.<sup>157</sup> The Supreme Court was not persuaded by the state’s interest in citizen protection, finding “no reason to believe” that a nonresident lawyer would be more likely to engage in dishonest practices.<sup>158</sup>

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151. See 2015 WHITE HOUSE REPORT, *supra* note 43, at 13, 65.

152. Kleiner, *supra* note 150, at 15.

153. 470 U.S. 274, 281–82 (1985) (“In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the ‘maintenance or well-being of the Union,’ as was the fisherman in *Toomer*, or the pipeline worker in *Hicklin*.” (citations omitted)).

154. See Kenneth Townsend, *Preconditions of Leadership in Law*, 56 WAKE FOREST L. REV. 859, 863–72 (2021) (recognizing the value of purpose in legal education and career opportunities).

155. *Piper*, 470 U.S. at 275–76.

156. *Id.* at 285–87.

157. *Id.* at 285.

158. *Id.* at 285–86.

The Court relied on the self-policing nature of the legal profession to note that the out-of-state lawyer has the same “professional duty and interest in his reputation” as an in-state lawyer.<sup>159</sup> Likewise, the Court noted that that reputational interests create the same “incentive to maintain high ethical standards [for out-of-state lawyers] as they do for resident lawyers.”<sup>160</sup> Specifically, the Court noted that reputation attaches to a lawyer no matter where they reside or practice and recognized that that state regulatory authorities maintain the ability to discipline a lawyer licensed in their state even if the lawyer does not reside in that state.<sup>161</sup> As such, the state’s interest in protecting citizens can be served just as well by residents of the state as by residents from another state. Ethical standards and interests in reputation are universal and do not deplete when a lawyer crosses a state line.

This holding presents important implications for reciprocity. A lawyer entering the state with a license from a different state “is still compelled to satisfy reasonable standards for competency and character as fixed by the new state in which he seeks the right to practice.”<sup>162</sup> Circuit courts have reiterated *Piper*’s holding that a “nonresident’s interest in practicing law” is a privilege protected by the Privileges and Immunities Clause.<sup>163</sup> Accordingly, a state interest in protecting citizens is not substantially related to a state bar’s discrimination against out-of-state residents.<sup>164</sup> If in-state and out-of-state members of the bar serve a state’s interest equally well, it can surely be served just as well by a licensed professional from another state who seeks to be an upstanding member of the new state’s bar.

This is not limited to federal cases. The Supreme Court of Alaska has reinforced the conclusion that ethical standards cross state lines and indicate fitness to practice law. In *Application of Brewer*, the court reasoned that Alaska’s five-year reciprocity requirement had “no rational connection with [an attorney’s] fitness to practice law in Alaska.”<sup>165</sup> Even so, Alaska retains a reciprocity requirement.<sup>166</sup>

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159. *Id.* at 286.

160. *Id.*; see also *Sup. Ct. of Virginia v. Friedman*, 487 U.S. 59, 67–69 (1988).

161. *Piper*, 470 U.S. at 286.

162. *Hawkins v. Moss*, 503 F.2d 1171, 1176 (4th Cir. 1974).

163. See, e.g., *Tolchin v. Sup. Ct. of N.J.*, 111 F.3d 1099, 1111 (3d Cir. 1997) (citing *Piper*, 470 U.S. at 279–83).

164. *Id.*

165. 506 P.2d 676, 679 (Alaska 1973).

166. See ALASKA BAR RULES r. 2, § (2)(a)(2) (2022).

At minimum, an attorney who seeks to practice law in a state where they simultaneously seek to become a citizen has an equal interest in protecting citizens of their new state. Relocating professionals are themselves citizens of the state, making their interest in protecting citizens much more substantial than the interest held by someone seeking licensure from out of state. States, however, assert that the ability to regulate reciprocity through time-based requirements is an important reflection of a state's interest. Not so. Looking to *Piper*, if reputation and ethics are universal and attach to the lawyer no matter where they reside, it does not follow that those ethics and reputation concerns are only carried across state lines once the attorney has practiced for a pre-determined number of years.

It is incongruous that a young attorney's desire to be a resident of a new state is not a sufficient indication that they will protect the state's citizens. And to be sure, an attorney seeking admission to a state before the time-based requirement is met may instead sit for that state's bar exam. But if a state's interest in protecting citizens is served just as well by a citizen residing in the state as one residing outside of the state,<sup>167</sup> and lawyers travel with their ethical and reputational standard intact,<sup>168</sup> then reciprocity need not be time-based. This result is especially so because the citizens protected by the state interest are the relocating lawyer's new neighbors, their family, and themselves.

*2. Regulatory Capture and Reciprocity as a "Benefit" Do Not Outweigh the Mobile Nature of Ethics Obligations*

License reciprocity requirements can be interpreted as a form of regulatory capture through which a state can protect its interest in its own citizens' economic advantage.<sup>169</sup> Reciprocity is proffered as protection of citizens, even though states asserting this interest overlook that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."<sup>170</sup> As noted by scholars, "These burdens act as barriers to entry that secure rents for the existing members of the occupation."<sup>171</sup> Existing members of state bar associations have a special interest in maintaining barriers to entry to prevent competition. Legal

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167. See *Piper*, 470 U.S. at 285.

168. *Id.* at 286.

169. Sean E. Mulholland & Andrew T. Young, *Occupational Licensing and Interstate Migration*, 36 CATO J. 17, 19 (2016), <https://perma.cc/QTW5-95TH>.

170. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

171. Mulholland & Young, *supra* note 169, at 19.

licensure provides the initial barrier to entry through high educational costs, high examination fees, and cumbersome testing. Following the passage of a bar exam and a grant of an initial license, the burden of state-specific licensure erects a second barrier within the profession—a barrier that prevents interstate movement and excludes practitioners who must relocate.

A state may defend the discrimination it employs toward attorneys seeking license reciprocity by framing the ability to avoid the bar exam as a benefit.<sup>172</sup> In this instance, the state portrays the reciprocity rule not as a time-based burden, but rather as a “preference [for] the migrant attorney, a preference which one who has been a life-long citizen of [the state] could not avail himself of.”<sup>173</sup> For example, in *Lowrie v. Goldenhersh* the Seventh Circuit considered whether the requirement to take a bar exam before gaining access to a license in Illinois violated an attorney’s right to travel.<sup>174</sup> The court noted that requiring Lowrie “to sit for and pass the bar examination [did] not amount to a denial of a basic necessity of life.”<sup>175</sup> The voluntary interstate travel Lowrie undertook to move away from his state of original licensure did “not prevent him from taking the Illinois bar examination.”<sup>176</sup> Finding that Lowrie was denied reciprocity but still had access to the benefit of his legal practice by sitting for the bar exam led the court to reject the claim that “requiring him to sit for and pass the Illinois bar examination constitute[d] a penalty on his right to interstate travel.”<sup>177</sup>

According to the Seventh Circuit, the burden of the bar exam is not unreasonable but merely treats lawyers entering the state the same as lifelong residents.<sup>178</sup> The Vermont Supreme Court has stated similarly, holding in *In re Conner* that “the admission-on-motion rule imposes no greater burden on nonresident attorneys than resident attorneys, and

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172. *Hawkins v. Moss*, 503 F.2d 1171, 1176 (4th Cir. 1974) (“[T]he Rule confers a preference on the migrant attorney, a preference which one who has been a life-long citizen of South Carolina could not avail himself of. But simply because the plaintiff cannot qualify for this preference but must qualify on the same terms as the life-long citizen of South Carolina gives him no right to complain.”).

173. *Shapiro*, 552 F. Supp. at 588; see also *Ricci v. State Bd. of L. Exam’rs*, 427 F. Supp. 611, 618 (E.D. Pa. 1977), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978).

174. 716 F.2d 401, 404 (7th Cir. 1983).

175. *Id.* at 412.

176. *Id.*

177. *Id.*

178. See *id.* at 412–13; see also *Hawkins*, 503 F.2d at 1180.

provides no differential treatment favoring in-state interests over out-of-state interests.”<sup>179</sup>

This framing fails to consider the purpose of the bar exam and of legal ethics. Lowrie’s contention was not merely that he would have to take the bar exam, but that he would have to take it a *second* time. The incurred expenses and fees, not to mention time to study for the test,<sup>180</sup> are burdens placed on a migrant that are not placed on a lifelong resident. The lifelong resident need only take the bar exam and incur the actual and labor expenses once.

The Vermont Supreme Court’s finding that reciprocity rules “facilitate” mobility and commerce “by easing the admission of out-of-state practitioners to the Vermont bar and thereby encouraging cross-state practice”<sup>181</sup> is similarly flawed. Research studies consistently report that licensing restricts mobility—a finding contrary to the Vermont state court’s perceptions.<sup>182</sup> Further, assessing reciprocity as a standard licensing arrangement neglects to consider that the attorneys seeking reciprocity have *already* met the minimum requirements for licensing. The bar has—literally—been passed. Raising the threshold standard because a practitioner crosses state lines ignores the reality that legal ethics and concern for reputation travel with the lawyer.<sup>183</sup> But the house of cards that supposedly justifies these rules collapses with a closer look at exceptions to these rules—namely the reciprocity exception for military spouses.

### *C. The Military Spouse Exception Invalidates States’ Interests in Time-Based Reciprocity Requirements*

Generally, the “mere fact that [licensing rules] ‘affect some groups of citizens differently than others’ or that they ‘result in incidental individual inequality’ will not render such statutes or rules invalid.”<sup>184</sup> This argument fails to account for the actions of many states that invalidate the rationale of their own reciprocity requirements by adopting a military spouse exception.

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179. 917 A.2d 442, 448–49 (Vt. 2006) (“The rule applies across the board to attorneys licensed in other jurisdictions without distinction as to whether they are residents or nonresidents of Vermont. Out-of-state attorneys are deprived of no privilege otherwise afforded Vermont residents for admission on motion.”).

180. O’Neal, *supra* note 144.

181. *Conner*, 917 A.2d at 450.

182. *Contra* discussion *infra* Section III.A.

183. *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 286 (1985).

184. *Hawkins v. Moss*, 503 F.2d 1171, 1177 (4th Cir. 1974) (quoting *Martin v. Walton*, 368 U.S. 25, 26 (1961)).

Since 2012, forty jurisdictions have adopted military spouse licensing accommodations.<sup>185</sup> These accommodations generally follow the Military Spouse J.D. Network (“MSJDN”) Model Rule of Military Spouse Attorneys.<sup>186</sup> The MSJDN Model Rule allows an attorney who is admitted to practice in another jurisdiction, has graduated from an ABA-accredited law school, and has good character and fitness to file paperwork with the Board of Bar Examiners in the state where their military spouse has been transferred.<sup>187</sup> This paperwork certifies that minimum requirements are met and attests to the fact that the lawyer is the “spouse of an active duty service member.”<sup>188</sup> Under this exception, passing the bar exam in another jurisdiction demonstrates to the new jurisdiction that the attorney has the minimum competence to practice law, no matter how long they have practiced.<sup>189</sup>

This exception is profound for two reasons. First, even states that do not permit reciprocity and require attorneys to pass the bar exam regardless of the number of years they have been in practice have adopted military spouse exceptions.<sup>190</sup> California, which does not permit reciprocity, will allow an attorney with one year of experience who happens to be married to a military service member to practice law in the state without taking the bar exam.<sup>191</sup> But an attorney with twenty years of experience in the legal profession who is either unmarried or whose spouse is not in the military must study for, sit for, and incur the costs of the California Bar Exam.

Second, the exception undermines the state interests consistently advanced in support of bar reciprocity requirements. States seeking to protect their citizens from unethical or unqualified lawyers often assert that reciprocity standards ensure that the attorney “necessarily possess[es] the skills required to practice law within the [s]tate.”<sup>192</sup> Yet, under the military

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185. Eric Cervone, *Bar Reciprocity for Military Spouses*, AM. BAR ASS’N: AFTER THE BAR, [https://www.americanbar.org/groups/young\\_lawyers/publications/after-the-bar/professional-life/bar-reciprocity-for-military-spouses/](https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/professional-life/bar-reciprocity-for-military-spouses/) (last visited Dec. 23, 2022).

186. See MODEL RULE FOR ADMISSION OF MILITARY SPOUSE ATTORNEYS r. 2(a)-(c) (MIL. SPOUSE J.D. NETWORK, Draft F, 2016), <https://www.msjdn.org/wp-content/uploads/2016/03/MSJDNModelRule02-13-2016.pdf>.

187. *Id.* r. 2.

188. *Id.* r. 1.

189. See *id.* r. 1–4.

190. See NCBE COMPREHENSIVE GUIDE, *supra* note 13, at 44, 50 (noting that the states include California, Delaware, Florida, Hawaii, Nevada, Rhode Island, and South Carolina).

191. CAL. RULES OF CT. r. 9.41.1(c)(1) (2022).

192. *E.g., In re Conner*, 917 A.2d 442, 446 (Vt. 2006).

spouse exception, one of the two elements of reciprocity (reasonable standards for competency) can simply be satisfied through marriage. Although a character and fitness review of the attorney's moral and ethical standards is still required for the military spouse exception, states use marriage to cosign competency.

The military spouse exception is undoubtedly necessary. Spouses of military service members consistently report that constant relocation negatively impacts their ability to advance in their professions.<sup>193</sup> Half of military spouse lawyers have lived separately from their spouse to maintain a career, and two percent of military spouse attorneys are licensed in five or more jurisdictions.<sup>194</sup> The argument here is not that the military spouse exception is unnecessary. It is profoundly necessary. But the military spouse exception provides a model for broader change. Not only does the exception support those it is intended to protect, it also demonstrates the feasibility of allowing a single bar exam to test for minimum competence. And in the process, the exception shows that eliminating time-based reciprocity requirements is possible. Specifically, removing the time-based requirement will allow lawyers who are mothers a chance for reciprocity without being punished for taking maternity leave.

#### *IV. The Unequal Burden of Licensure on Mothers*

Licensing protects a profession's in-group and serves to further exclude the minority. Women, the gender-binary minority in law, leave law at a higher rate than their male counterparts.<sup>195</sup> Reasons for this disparity are widespread. Broadly, women are lost to "high level systemic structural and cultural problems" and are equally lost to more narrow issues such as "unequal access to opportunities, conscious and unconscious biases, and non-inclusive workplaces."<sup>196</sup> The issue of female retention in law is found

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193. *Military Spouses Fact Sheet*, U.S. DEP'T OF LABOR: WOMEN'S BUREAU, <https://www.dol.gov/sites/dolgov/files/WB/mib/WB-MilSpouse-factsheet.pdf> (last visited Jan. 12, 2022) ("[M]ilitary spouses find it difficult to transfer licenses from state to state, delaying their return to the workforce.").

194. O'Neal, *supra* note 144, at 6.

195. Gray, *supra* note 3, at 28.

196. *Id.*; Stephanie Schnurr et al., 'It's Not Acceptable for the Husband to Stay at Home': Taking a Discourse Analytical Approach to Capturing the Gendering of Work, 27 GENDER, WORK & ORG. 414, 417 (2020) ("[C]omplex gender hierarchies' continue to create gender inequalities and uphold traditional gendered images of women, men and work which are continuously built and reinforced.").

in one of women's most distinguishing features: women often become mothers.

Many women try to stay in the legal profession. They *want* to stay. However, women who become mothers disproportionately take on the “full-time mom” role, even while remaining full-time lawyers.<sup>197</sup> Researchers attribute this to many factors, including cultural biases, workplace biases, and assortative mating.<sup>198</sup> Each of these factors can be demonstrated statistically. Research assessing cultural and workplace biases shows that 63% of women report being perceived as less committed to their career<sup>199</sup> and that 60% of women report leaving law firms due to caretaking commitments.<sup>200</sup>

Additionally, assortative mating—the phenomenon in which professional women are more likely to marry men of high earning potential—“creates an opportunity” for one member of the marriage to “stop working for a prolonged period of time while still enjoying a high quality of life.”<sup>201</sup> Often, the partner who “takes this opportunity” is the woman.

A study of University of Michigan Law School graduates demonstrates this phenomenon. Over 30% of Michigan Law alumnae took time off from full-time work for childcare responsibilities, compared to only 3% of Michigan Law alumni.<sup>202</sup> Research further shows that couples “unconsciously organize” their family structure so that “the father’s identity as the career leader is not threatened by the wife’s success.”<sup>203</sup> This leaves women as the agents of the home and the takers of leave-time for childcare responsibilities. It also disproportionately assigns women to the role of

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197. Molly Jong-Fast, *What Working Mothers Heard in Judge Jackson’s Words*, ATLANTIC (Mar. 23, 2022), <https://www.theatlantic.com/family/archive/2022/03/ketanji-brown-jackson-hearing-working-mom-guilt/627595/> (discussing the delicate balance of motherhood and career). In her confirmation hearings for the Supreme Court, then-Judge Ketanji Brown Jackson made a statement to her daughters about the struggles of work life balance:

I know it has not been easy as I have tried to navigate the challenges of juggling my career and motherhood. And I fully admit that I did not always get the balance right. But I hope that you have seen that with hard work, determination, and love, it can be done . . .

*Id.*

198. Bambauer & Rahman, *supra* note 4, at 829–30.

199. LIEBENBERG & SCHARF, *supra* note 1, at 8.

200. *Id.* at 10.

201. Bambauer & Rahman, *supra* note 4, at 804.

202. *Id.* at 808–09.

203. *Id.* at 828.

“trailing spouse,” those who follow a spouse to a new job across state lines.<sup>204</sup>

Even if the woman stays in full-time employment, she still disproportionately bears the weight of family obligations. These women must work to negotiate motherhood and their practice, shouldering both billable hours requirements and children’s needs.<sup>205</sup> In the balancing of parenthood and law, 54% of female lawyers report that arranging childcare is their full responsibility, compared to 1% of males.<sup>206</sup> In California, 20% of women in law report that their workplace’s response to childcare needs and their number of hours worked are each “dissatisfying.”<sup>207</sup> Further, one in four female attorneys in California are dissatisfied with their careers due to issues with maternity leave policies.<sup>208</sup> As demonstrated in the ABA’s

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204. Schnurr et al., *supra* note 196, at 415. Women are more likely to be a “trailing spouse” or a “tied mover.” Terra McKinnish, *Spousal Mobility and Earnings*, 45 DEMOGRAPHY 829, 829 (2008), <https://link.springer.com/content/pdf/10.1353/dem.0.0028.pdf?pdf=button>. Research has shown that controlling analysis of trailing spouses by occupation (separating out only members of a certain profession), does not reduce the “negative effect of migration on the employment and earnings of wives.” *Id.* at 832. Likewise, research highlights that “[w]omen who move for a spouse’s career and those who move to advance their own careers get penalized no matter what.” Dina El Boghdady, *Why Couples Move for the Man’s Job, but Not a Woman’s*, WASH. POST (Nov. 28, 2014, 9:12 AM EST), <https://www.washingtonpost.com/news/wonk/wp/2014/11/28/why-couples-move-for-a-mans-job-but-not-a-womans/>. This is not a new phenomenon. See Felicia B. LeClere & Diane K. McLaughlin, *Family Migration and Changes in Women’s Earnings: A Decomposition Analysis*, 16 POPULATION RSCH. & POL’Y REV. 315, 316 (1997) (“[F]amily migration decisions including the reluctance to move are predicated on sex role orientation and decision-making processes that often operate independently of individual economic contributions to the family economic position. Regardless of the criteria upon which the migration decision is made within the family, the empirical evidence suggests that married men are likely to be [the job-location anchors] and married women to be tied movers.” (citations omitted)). The considerations between spouses of the importance of the other’s profession is also telling of this phenomenon. Research has shown that 68% of men “consider their own career more important than that of their partner” yet “less than one-third of women” said the same. Lindsay Bernhagen, *What the “Trailing Spouse” Teaches Us About the Stickiness of Gender Inequality*, SLATE (Nov. 30, 2017, 2:36 PM), <https://slate.com/human-interest/2017/11/trailing-spouses-what-female-ph-d-s-teach-us-about-lasting-workplace-gender-inequality.html>.

205. LIEBENBERG & SCHARF, *supra* note 1, at 12.

206. *Id.*

207. OFF. OF ACCESS & INCLUSION, STATE BAR OF CAL., DIVERSITY & INCLUSION PLAN: 2019 – 2020: BIENNIAL REPORT TO THE LEGISLATURE 18 (2019), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000026393.pdf>.

208. *Id.*

research, “women lawyers bear a disproportionate brunt of responsibility for arranging for care, leaving work when needed by the child, children’s extracurricular activities, and evening and daytime childcare.”<sup>209</sup> These tasks at home and work must be considered in the aggregate. While “any *one* of these factors affects the time and effort expected for a successful law practice, . . . the combination competes all the more for a lawyer’s time.”<sup>210</sup>

These burdens are not met with willing workplace accommodations. A law firm may bend requirements, but requests for fixed hours, part-time work, or decreased workloads are often met as breaking points for both firm and attorney.<sup>211</sup> Women frequently leave law practice in response to the disproportionate burdens of motherhood (as compared to fatherhood).<sup>212</sup>

The problem has only worsened, despite increased attention to the issue. In the late 1980s, family pressures were the reason that 31.9% of women left law, compared to 39.6% of women thirty years later.<sup>213</sup> These women “become a statistic, joining all the other women who also [feel] they have no choice but to leave their law firms[.]”<sup>214</sup> Child-care leave, regardless of the reason, has “lasting effects on the careers of the people (mostly women) who take” child-care leave.<sup>215</sup> The loss of access to the legal profession when out-of-state relocation accompanies a leave is one of these lasting effects.

#### *A. Legal Licensure Policies Disproportionately Impact Mothers*

Courts “recognize the importance of leaving [s]tates free to select their own bars.”<sup>216</sup> But, “it is equally important that the State not exercise this

209. LIEBENBERG & SCHARF, *supra* note 1, at 12.

210. *Id.*

211. *See* Gray, *supra* note 3, at 29. Our society and cultural expectations have “failed” American mothers by requiring them to tend to childcare needs, and then “log in” after bedtime to finish their workload. This model has “set them up to fail.” Letter from Marie-Amelie George et al. to the New York Times, *in* Opinion, *Pandemic Moms: Long Days, Short Fuses*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/opinion/letters/covid-pandemic-mothers.html>.

212. LIEBENBERG & SCHARF, *supra* note 1, at 1.

213. Bambauer & Rahman, *supra* note 4, at 809.

214. Gray, *supra* note 3, at 29; *see also* Kenneth Dau-Schmidt et al., *The Kid Factor*, AM. LAW. (Apr. 1, 2008, 12:00 AM), <https://www.law.com/americanlawyer/almID/900005507498/?slreturn=20220407083059>.

215. Bambauer & Rahman, *supra* note 4, at 809.

216. *Brown v. Sup. Ct. of Va.*, 359 F. Supp. 549, 552 (E.D. Va. 1973) (per curiam) (quoting *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957)), *aff’d*, *Titus v. Sup. Ct. of Va.*, 414 U.S. 1034 (1973).

power in . . . [a] discriminatory manner . . . .”<sup>217</sup> Yet, that is exactly what time-based reciprocity does to working mothers.

A new attorney gains access to the privilege to practice law in the state where the attorney has been duly licensed after a showing of competence and character. This new attorney is also subject to license restrictions, preventing the lawyer’s practice beyond state borders. But, as discussed in Part III, the burden on attorneys created by state-specific license requirements outweighs the states’ interests licensure feigns to support.<sup>218</sup> Law license reciprocity requirements pose special problems to mobility, which are further exacerbated for mothers who practice law.

### *1. Reciprocity Does Not Accommodate Maternity Leave*

The average law school graduate is twenty-seven years old,<sup>219</sup> and the average American college-educated female has her first child at thirty years old.<sup>220</sup> It is, therefore, statistically likely that a female attorney will have her first child in her first few years of practice. The three years between these two important life events aligns exactly with the low-end of state bar reciprocity standards: three to five years of active practice.<sup>221</sup>

The calculation of the active practice of law requires the attorney seeking reciprocity to have been “actively engaged” in the practice of law.<sup>222</sup> Active practice, however, varies from jurisdiction to jurisdiction, and one state’s “actual practice of law” is quite different from another’s “full-time continuous practice of law.”<sup>223</sup> Taking a permissible maternity leave may nonetheless prevent mother-attorneys from meeting reciprocity requirements if they seek to move across state lines.

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217. *Id.* (quoting *Konigsberg*, 353 U.S. at 273).

218. See discussion *supra* Section III.A.

219. A majority of law school applicants are between 22 and 24 years old. Generally, applicants apply the year before they matriculate, meaning entering first year students are generally between twenty-three and twenty-five, and graduate the three-year program at between twenty-six and twenty-eight. See Jessica Tomer, *Should You Go to Law School Immediately After Undergrad?*, ABA FOR L. STUDENTS (Aug. 21, 2018), <https://abaforlawstudents.com/2018/08/21/should-you-go-to-law-school-immediately-after-undergrad/>.

220. Quoc Trung Bui & Claire Cain Miller, *The Age That Women Have Babies: How a Gap Divides America*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/interactive/2018/08/04/upshot/up-birth-age-gap.html>.

221. See discussion *supra* notes 51–58.

222. See discussion *supra* Section II.B.2.

223. See discussion *supra* Section II.B.2.

Consider a hypothetical. Kate graduated from law school and was admitted to the Illinois Bar in late-2013. During her practice in Illinois, she gained additional admission to practice before the federal courts in the Northern District and Central District of Illinois. After a few years, she and her husband decided it was best for their growing family to move back to their hometown in Ohio to raise their two children near their grandparents. In early 2019 Kate sought reciprocity in Ohio, five years and three months after taking her oath in Illinois. She was denied. The State Bar of Ohio noted that Kate's two three-month-long absences for maternity leave meant she had only "engaged in the practice of law . . . on a full time basis"<sup>224</sup> for four years and nine months—three months short of Ohio's reciprocity requirement of "five full years."<sup>225</sup> Kate was required to study for, pay for, and sit for the July 2019 bar exam to continue her profession, contribute to her community, and support her family.

Consider, too, Elizabeth's experience.<sup>226</sup> Elizabeth passed the Texas bar exam.<sup>227</sup> After two years as a federal clerk and a few years in full-time practice, she took a leave of absence to raise her family.<sup>228</sup> Elizabeth returned to part-time practice following the birth of her second child.<sup>229</sup> She and her family moved from Texas to Virginia after Elizabeth had been back in practice for two years.<sup>230</sup> The Virginia Bar requires prior practice for three of the last five years and denied Elizabeth reciprocity based on her immediately preceding two years of practice.<sup>231</sup> Elizabeth sat for and passed the Virginia Bar.<sup>232</sup> Elizabeth soon learned that her Virginia firm's close proximity to the Tennessee border necessitated attaining a Tennessee bar license.<sup>233</sup> But Tennessee reciprocity standards require "full time" practice for five of the last seven years.<sup>234</sup> Elizabeth had less than Tennessee's required five years of continuous practice, and much of that practice was

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224. OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR r. 1, § (10)(A)(2)(c) (2022).

225. *Id.* § 10(A)(2)(b).

226. Karin A. Lips, *Qualified but Barred*, CITY J. (Feb. 16, 2022), <https://www.city-journal.org/occupational-licensing-rules-for-lawyers>.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

part-time. She was ineligible for reciprocity in Tennessee and was left with the choice of a third bar exam or the inability to practice in the state.<sup>235</sup>

The bar exam intends to ensure that applicants are competent to practice law.<sup>236</sup> Kate's four years and nine months of full-time practice (as calculated by the Ohio Board of Bar Examiners) in Illinois demonstrated her competence to practice law. Her two maternity leaves should not have made her less competent than an attorney in Ohio with the same (or less) experience. Both Kate and a newly licensed Ohio attorney, each having passed the bar exam, could demonstrate the "minimum competency" that the bar exam proclaims to test. Similarly, Elizabeth would not have become a better lawyer by taking a third bar exam. Passing the Tennessee bar would not tell the Tennessee State Board of Bar Examiners anything more about Elizabeth's minimum competence than the evidence that she had already passed two bar exams.

Recent reporting shows that most young attorneys plan to change jobs within their first five years of practice.<sup>237</sup> This statistic brushes directly against the time-based reciprocity standards of most states. And when coupled with the statistical likelihood that a woman will take maternity leave in her first few years of practice, it leaves young mother attorneys in an untenable position.

Women are statistically likely to take maternity leave early in their law career and at a time when they are on the borderline of meeting time-based reciprocity requirements.<sup>238</sup> These same women are likely to be the trailing spouse<sup>239</sup> and, through assortative mating, are likely to be forced to choose between overcoming a burdensome hurdle to entry in a new state or leaving the profession completely. A time-based reciprocity requirement does not accommodate maternity leave, imposes a heightened burden on reproducing women, and discriminates against mothers for their reproductive choice. This structural sexism is a major—yet reparable—leak in the retention pipeline.

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235. *See id.*

236. *Society of American Law Teachers Statement on the Bar Exam*, *supra* note 12, at 447.

237. LEGAL POL'Y & RSCH. UNIT, INT'L BAR ASS'N, IBA YOUNG LAWYERS' REPORT 18 (2022), <https://www.courthousenews.com/wp-content/uploads/2022/01/IBA-Young-Lawyers-Report.pdf>.

238. *See supra* notes 214–16 and accompanying text.

239. McKinnish, *supra* note 204, at 847 (“[T]he careers of wives receive less weight than the careers of husbands in the location choices of couples.”).

Reciprocity standards create an unattended leak in the retention of women in law.<sup>240</sup> Law firms focus on inherent biases and lack of opportunities for women at their firm. They implement diversity committees, offer staff trainings, and discuss equity for women in the workplace. These actions and efforts should continue because the need for equality of access and opportunity remains. Yet remedies beyond individual law firms must also be addressed. State licensing requirements place women in unnecessarily difficult situations, giving them no choice but to “vote with their feet by leaving the practice of law”<sup>241</sup> or incur unnecessary cost and time burdens to remain in the profession. Mothering attorneys are further neglected simply because state licensing boards deem competency to disappear when state lines are crossed.

*2. Time-Based Reciprocity Burdens Women for Their Reproductive Choice Without State Interest Justification*

As explained above, state boards of bar examiners defend reciprocity on the ground that reciprocity requirements ensure a practitioner meets “standards of professional competence.”<sup>242</sup> Competence is demonstrated either by a test or time, but tests do not cross state lines. The minute a Kansas attorney with three years of experience practicing law in Kansas moves to Texas, she becomes less competent (according to bar reciprocity standards) than a Texas-licensed first-year associate on her first day of work.<sup>243</sup> Surely, the state’s interest in protecting citizens from incompetent lawyers is not served by preventing an experienced lawyer from practicing within the state.

Even more so, maternity leave punishes women who later seek reciprocity. Most jurisdictions have never addressed the issue of maternity leave when calculating time in “active practice.”<sup>244</sup> Of those that have, six do not permit parental leave—or any type of leave under the Family and Medical Leave Act<sup>245</sup>—to count toward time-based reciprocity

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240. ST. EVE & LUGURI, *supra* note 28, at 6 (“The policies, practices, and culture that lead to this leaky pipeline damage women, clients, and the legal profession generally.”).

241. LIEBENBERG & SCHARF, *supra* note 1, at 2.

242. Ricci v. State Bd. of L. Exam’rs, 427 F. Supp. 611, 618 (E.D. Pa. 1977), *vacated on other grounds*, 569 F.2d 782 (3d Cir. 1978).

243. See TEX. RULES GOVERNING ADMISSION TO THE BAR r. 13, § 2 (2022) (requiring active practice for five out of the last seven years as the minimum time requirement).

244. MINN. ADMISSION ON MOTION REPORT, *supra* note 110, at 16.

245. See 29 U.S.C. § 2612.

calculations.<sup>246</sup> Six others have considered maternity leave and follow varying policies. In Pennsylvania, maternity leave is counted as long as the mother returns to work after her leave.<sup>247</sup> New Jersey and Washington are the most permissive, and count leave time toward the minimum requirements for reciprocity.<sup>248</sup> New Mexico, Maine, and Massachusetts follow a case-by-case analysis.<sup>249</sup> New Mexico states that it will count maternity leave as practice time only if there is “sufficient practice over the entire seven-year period.”<sup>250</sup> Therefore, New Mexico will count a mother’s three months “off,” but only if she works an additional two years, which is not exactly a victory for women taking maternity leave or those seeking license mobility.

Consider, again, Kate. The difference between Kate and an Ohio law school graduate who has recently passed the bar exam is simple: Kate has five years of experience practicing law and the Ohio law school graduate has none. Yet, the state bar’s measures of competence dictate that Kate’s decision to give birth and care for her children removes her competence when she seeks to move across state lines. The recent law graduate is considered more competent to practice law in Ohio than the mid-level associate with licensure in, and practice experience before, two federal district courts in Illinois. This incongruous result indicates the inequitable impact of time-based reciprocity on women of childbearing age.

The state’s interest in fairness for those leaving the state is equally untenable. For many, reciprocity does not ensure fair treatment in their new state. An attorney with four years of experience choosing to move across state lines from Arizona to New Mexico will not meet reciprocity standards (and will not be competent to practice law without sitting for another test).<sup>251</sup> Conversely, an attorney with three years of experience choosing to move from New Mexico to Arizona will meet reciprocity standards and be able to practice immediately.<sup>252</sup> Reciprocity standards, therefore, do not serve the state’s interest of ensuring fair treatment for persons leaving the

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246. MINN. ADMISSION ON MOTION REPORT, *supra* note 110, at 16. The jurisdictions are Alaska, Colorado, Oregon, Texas, Utah, and Virginia. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Compare ARIZ. SUP. CT. r. 34(b)(1)(D) (2022) with N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(A)(1) (2022).

252. Compare ARIZ. SUP. CT. r. 34(b)(1)(D) (2022) with N.M. RULES GOVERNING ADMISSION TO THE BAR r. 15-107(A)(1) (2022).

state when the person leaving the state receives *less* benefit than the person entering.

When considered through a maternity lens, fairness for those leaving the state engenders even less clarity. Consider again Elizabeth. When Elizabeth sought to gain licensure in Tennessee after a few years of practicing law in Virginia—and after passing two bar exams—reciprocity requirements did not treat her “fairly” when she sought to gain licensure outside Virginia. In fact, she received worse treatment than a Tennessee attorney seeking to do the same in Virginia,<sup>253</sup> and all because she worked part time to care for her children. Surely a woman who has passed two bar exams, worked for two law firms, and clerked for a federal court is no *less* competent than a twenty-five-year-old recent law school graduate with no work experience.

The state’s interests proffered to support time-based reciprocity fail. They fail further when considered in light of other strongly protected interests. The Constitution protects the sanctity of the family, and “any regulation that affects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.”<sup>254</sup> An attorney who crosses state lines to move closer to their family—a decision which may be made in the best interests of the child—should not then be prevented from economically contributing to the state in which they move. Even more so, they should not be prevented from earning an income in their profession of choice due to a license requirement based exclusively on arbitrary time-based standards.

Time-based reciprocity standards do not serve the state interests that advocates assert support them, and they detrimentally harm young working mothers compared to other groups. If anything, time-based reciprocity merely reinforces societal notions of gender bias. Conforming to the unfortunate role of licensure to protect incumbents in the profession, reciprocity allows the legal profession to “keep the status quo. And the status quo is male.”<sup>255</sup>

#### *B. The Remedy for This Disparate Treatment Already Exists*

The means to disrupt this status quo already exist. The military spouse exception shows that non-time-based reciprocity options are available.

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253. Lips, *supra* note 226.

254. See *Amdt5.4.6.7 Family Autonomy and Raising Children*, CORNELL L. SCH: LEG. INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-5/family-autonomy-and-raising-children> (last visited Jan. 12, 2023).

255. Gray, *supra* note 3, at 29.

Under this exception, states generally require passage of the bar exam in any jurisdiction, a state-specific CLE course, passage of a character and fitness screening, and certification that the person is a spouse of a military service member.<sup>256</sup> This exception was enacted to benefit military spouses who must uproot due to work assignments, and strongly benefits women, who are 92% of military spouses.<sup>257</sup> Thus, under the military spouse exception, states accept a passing bar score in the original jurisdiction coupled with a marriage license as proof of competence. No one should lose their competence when they cross state lines, and the military spouse exception upholds that ideal.

Adoption of the military spouse exception invalidates the state's interests in upholding time-based reciprocity. Consider, for example, two female attorneys practicing law in Virginia. One practices law for a year before her husband is transferred to a naval base in San Diego. When the couple moves, she fills out a few forms and takes a state law CLE with the State of California—a state that, under all other circumstances, does not permit reciprocity. She may now practice law in California. She is given the privilege of demonstrating competence to practice law that California only recognizes if it comes with an enlisted wedding band. Another woman, a fifth-year associate at the same Virginia firm, was raised in Atlanta. Her mother, a widow, has recently developed Parkinson's and dementia. After monitoring her mother's health from afar, she deems it best to move her family closer to her mother. She transfers to the firm's Atlanta office. Upon arrival in Atlanta, she will likely be incompetent to practice law in the eyes of the Georgia Bar because her three months of maternity leave is likely “a part-time practice [that] may not be sufficient”<sup>258</sup> to meet the five-years of active practice required for reciprocity in Georgia.

Both women in the above example passed a test of minimum competence. Both women have ethical standards attached to them and

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256. See, e.g., MODEL RULE FOR ADMISSION OF MILITARY SPOUSE ATTORNEYS r. 2(a), (e)–(f), 5 (MIL. SPOUSE J.D. NETWORK, Draft F, 2016), <https://www.msjdn.org/wp-content/uploads/2016/03/MSJDNModelRule02-13-2016.pdf>; see, e.g., COLO. RULES GOVERNING ADMISSION TO THE PRAC. OF L. r. 204.4 (2022); IDAHO BAR COMM'N RULES r. 229 (2022); N.J. RULES GOVERNING THE CTS. r. 1:27-4 (2022).

257. *Military Spouses Fact Sheet*, *supra* note 193.

258. *Information & Applications: Admission on Motion Without Examination*, SUP. CT. OF GA.: OFF OF BAR ADMISSIONS, <https://www.gabaradmissions.org/appinfo.action?id=3#:~:text=Admission%20on%20Motion%20in%20Georgia%20requires%20the%20submission%20of%20two,of%20Fitness%20to%20Practice%20Law> (last visited Jan 13, 2023).

reputations that follow them.<sup>259</sup> A woman does not lose competence because she births and cares for a child. Nor does a woman retain competence because of whom she marries.

The willingness of jurisdictions to recognize the unique concerns of mobility placed on military families<sup>260</sup> is commendable. This recognition shows, however, that a more uniform policy of accepting one minimum test for competence is feasible. The military spouse exception walks a fine line by addressing competence and character for practice without imposing an unnecessary burden. The military spouse exception permits a certification that the military spouse has passed a bar exam elsewhere.<sup>261</sup> It still, however, requires a character and fitness check<sup>262</sup> to certify nothing substantial has occurred since the first jurisdiction of licensure conducted a character check for the bar exam. As such, the military spouse exception serves the state's interests without discriminating.

A time-based standard does not adequately ensure that an attorney will behave properly: it merely certifies the time a person has practiced law. Assurance of ethical behavior is the explicit purpose of a character and fitness evaluation, which is still required under the military spouse exception. Citizens can remain protected from unethical lawyer behavior if all attorneys are required to have passed a bar exam and must then pass subsequent character and fitness examinations and attend jurisdiction-specific CLE's for each new state in which they seek licensure.

Universal adoption of the approach exemplified by the military spouse exception assists more than just mothers. To simply serve mothers, state boards of bar examiners could consider maternity leave in reciprocity calculations. However, in the forty years that women have been actively engaged in the practice of law, only six jurisdictions have accepted this as an option, while six additional jurisdictions have rejected this opportunity.<sup>263</sup> Conversely, forty jurisdictions have adopted the military spouse exception.<sup>264</sup> The clear majority of jurisdictions have accepted and tested the viability of the military spouse exception. Administrative feasibility points to this approach as the better accommodation of professionals seeking mobility on a larger scale.

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259. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 286 (1985).

260. O'Neal, *supra* note 144, at 6.

261. See MODEL RULE FOR ADMISSION OF MILITARY SPOUSE ATTORNEYS r. 2(a).

262. *Id.*

263. MINN. ADMISSION ON MOTION REPORT, *supra* note 110, at 1, 16.

264. Cervone, *supra* note 185.

Universal adoption of reciprocity standards modeled after the military spouse exception fills structurally discriminatory policies left by the Uniform Bar Exam (“UBE”). Forty-one jurisdictions have adopted the UBE,<sup>265</sup> yet each carry different testing benchmarks for their jurisdiction, and in many circumstances still limit the transferability of UBE scores subject to time requirements.<sup>266</sup>

The UBE demonstrates that jurisdictions are moving towards a “national” bar exam while simultaneously failing to fix the discriminatory underpinnings of time-based reciprocity. The adoption of the UBE demonstrates an effort to establish, and the almost universal acceptance of, a nationwide baseline bar exam. However, states adopting the UBE still act in an exclusionary fashion by applying their own time-based standards to UBE score transfer, despite promoting and advancing a “national” testing model. For example, an attorney seeking reciprocity in Massachusetts must have taken the UBE in the last thirty-six months or have “active[ly] practice[d]” law for five of the last seven years.<sup>267</sup> These two time-based policies exclude the lawyer seeking reciprocity who took the UBE more than thirty-six months ago; their UBE score has expired, yet they are not yet eligible for time-based reciprocity in the state. Thus, the UBE does not remedy the inherent discrimination of time-based reciprocity and still limits mobility after maternity leave.

Finally, universal adoption of the military spouse exception mirrors the license renewal process for non-mobile lawyers. License renewal for non-mobile lawyers requires attendance at CLE courses, payment of a fee, and active monitoring of themselves and their peers according to state ethical standards.<sup>268</sup> A model of reciprocity fashioned after the military exception and more parallel to license renewal procedures is administratively feasible. It serves the state’s interests and has already been adopted on a small scale in the states with a military spouse exception. The smaller-scale test run over the last ten years shows that reciprocity based on recurrent character and fitness evaluations and CLE attendance is workable on a larger scale.

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265. *List of UBE Jurisdictions*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/ube/list-ube-jurisdictions> (last visited Jan. 13, 2023).

266. NAT’L CONF. OF BAR EXAM’RS, *supra* note 13, at 19.

267. *See* MASS. SUP. Jud. CT. RULES r. 3:01, §§ 1.2.6, 6.1.1 (2022).

268. *See, e.g., Annual Reporting Requirements*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/opr/attorneys/attorney-practice/attorney-annual-reporting-requirements> (last visited Feb. 25, 2023).

All lawyers should be required to be licensed in the state where they practice. All lawyers should behave ethically. And all lawyers should remain up to date on the laws of the state where they practice. Receiving additional state licensure after initial bar exam passage through a character and fitness review, fees paid, and state-specific CLE courses serves these goals. Additionally, under this proposed model, discrimination against mothers in reciprocity decisions will disappear. All practicing attorneys will be provided access to the same playing field of economic competition. A wife is not punished for following her husband across state lines to keep the family unit together. And a mother is not punished for building that family.

### *Conclusion*

The legal profession, like all professions requiring licensing, limits the mobility of practitioners. Technology and globalization, paired with recent public health crises, show that law need not, and often cannot, be practiced on a narrow, state-specific level. Law schools have known this for years, tailoring instruction to federal systems.<sup>269</sup> This tailoring prepares future lawyers for practice in any jurisdiction, and the location of legal training does not significantly impact bar exam passage. In 2020, New York Bar Exam takers from top-ten New York law schools had an equal pass rate on the New York bar as testers educated at top-ten law schools elsewhere.<sup>270</sup> The result of requiring state-specific time-based reciprocity, then, is a limit on the economic contributions of equally capable law school graduates.

The legal profession is seeking to retain women and conducting consistent reviews of female presence in the profession, but it has been short-sighted in its consideration and implementation of remedies for this disparity. When the ABA stresses the need for change, it looks to access and support points. The ABA examines entry into law schools and entry into employment as the necessary pioneers of change to increase the representation of women in law. The ABA advocates for law practice to be more inclusive, continually championing women-oriented programs and

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269. Pashigian, *supra* note 133, at 27 (noting that if the bar tested state specific topics, the curriculum of local law schools would focus on state law—which is not the case).

270. New York University, Columbia University, Harvard, Yale, and Stanford all had substantially equivalent bar passage rates on the New York State Bar Exam in 2021. *See Individual School Bar Passage Reports*, AM. BAR ASS'N, <https://www.abarequiredisclosures.org/barpassageoutcomes.aspx> (last visited Jan. 13, 2022) (select the name of one of the five schools from the “Select School” dropdown and “2022” from the “Select Year” dropdown).

other diversity initiatives.<sup>271</sup> And of course diversity initiatives in individual law offices are and remain important.

But licensing boards have failed to recognize the impact of time-based reciprocity on working mothers. License requirements, too, must become non-discriminatory agents of change. A desire to keep the profession open to women necessitates that licensing authorities consider the impact of their actions on the women—the mothers—the profession seeks to retain. States' interests simply do not hold water against this discrimination, and they further hinder the economic contributions of women to their communities of choice within their profession of choice. The military spouse exception demonstrates the tenuous nature of these proffered state interests and provides a path forward for licensing boards to permit mobility while ensuring continued moral character.

Young, mothering attorneys deserve the opportunity to make decisions in the best interest of their children and family without losing their ability to practice law or incurring additional financial and time burdens not imposed on other groups. The legal profession can serve its interest of increasing “women in law” by addressing the impact of licensing on mothers. Increasing economic contributions of women and preserving family decision-making are interests that states should seek to protect, not thwart. A lawyer does not lose competence merely by crossing state lines, nor does a lawyer lose competence by becoming a mother.

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271. See, e.g., *Commission on Women in the Profession: Resources*, AM. BAR ASS'N, <https://www.americanbar.org/groups/diversity/women/resources/> (last visited Feb. 25, 2023).