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EVIDENCE-BASED LAWYER REGULATION

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ABSTRACT

The legal profession is losing its authority over the regulation of legal services. Recent changes in antitrust law have put state bar associations under a spotlight. Competition from technology companies and concerns about access to justice have increased political pressure for market liberalization. Independent research is challenging the unique value of lawyers' services, even in formal legal proceedings, and this research is increasingly well-organized and well-funded at the national level. The organized bar is asleep at the wheel and ill-prepared to respond.

This Article argues that the United States is moving toward evidence-based lawyer regulation, and suggests strategies for equipping the bar to contribute to evidence-based policy-making. It focuses specifically on strategies for institutionalizing independent research norms within the profession and promoting research as an essential component of professional self-regulation.

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INTRODUCTION

In May 2017, the South Carolina Bar House of Delegates passed a “Resolution on Court-Centered Regulation of Legal Services,”¹ in which the Bar emphasized the power of state supreme courts to regulate legal services,² adopted the principle that the delivery of legal services must be conducted “under the auspices of lawyers,”³ and petitioned the South Carolina Supreme Court to adopt a rule regulating the delivery of legal forms.⁴ The proposed rule provides, in pertinent part, that “[a]ny legal form available to the public for self-completion or completion with assistance of a scrivener for profit must be prepared or approved by a lawyer authorized to practice law by the Supreme Court of South Carolina.”⁵

What problem is this rule designed to solve? One might imagine that the

1. S.C. BAR, HOUSE OF DELEGATES MEETING MATERIALS 45 (May 18, 2017), https://www.scb ar.org/media/filer_public/38/4f/384f6c75-977f-4bce-8154-f2f2f1fb2b35/may17hodmats.pdf [<https://perma.cc/LH6S-KV7U>] [hereinafter MEETING MATERIALS].

2. *Id.* (“S.C. Code 40-5-10 recognizes the inherent power of the Supreme Court to regulate the practice of law . . .”).

3. *Id.* (“[T]he South Carolina Bar adopts the principle that the delivery of legal services to persons and entities must be conducted under the auspices of lawyers (‘licensed’ or ‘authorized’ or ‘regulated’) by the Supreme Court . . .”).

4. *Id.* at 45–46.

5. Petition at 3, In Re: Court Regulation of Forms for Use in Legal Matters (S.C.) (on file with author).

goal of the rule is consumer protection: that consumers are increasingly vulnerable to the provision of low-quality legal forms by non-lawyers—in particular, by commercial providers such as LegalZoom⁶—thus, the proposed rule is necessary for quality control. Many lawyers in good faith believe that commercial and paraprofessional competitors provide subpar products and services and pose a risk to consumers.⁷ The South Carolina Bar emphasized the need for consumer protection in the final version of its petition.⁸

Alternatively, one might imagine that the goal of the rule is lawyer protection: that lawyers are increasingly vulnerable to competition from alternative providers; thus, the proposed rule is necessary to shore up judicial protection for lawyers' monopoly over legal services. Many commentators in good faith believe that the evidence—if we had it—would show that lawyers' traditional monopoly is overbroad, and that consumers would benefit from increased competition in the legal services market.⁹ The South Carolina Bar questioned this view in its petition.¹⁰

What evidence should state supreme courts consider in assessing the need for anticompetitive regulation? And which side should bear the burden of proof?¹¹ Historically, courts have required little evidence in support of lawyers' monopoly claims.¹² State supreme courts claim broad “inherent

6. See, e.g., *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362 (Oct. 18, 2013) (holding that LegalZoom's self-help document services do not constitute the unauthorized practice of law in South Carolina).

7. See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587, 2593–94 (2014) (discussing lawyers' perceptions of the risks posed to consumers by unauthorized legal practice).

8. Petition, *supra* note 5, at 1–2. The original Resolution did not include any language about consumer protection. See *MEETING MATERIALS*, *supra* note 1, at 45–46.

9. See RICHARD L. ABEL, *AMERICAN LAWYERS* 142 (1989) (arguing that the legal profession has used the privilege of self-regulation to restrict competition); Benjamin H. Barton, *The Lawyers' Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067, 3068–69 (2014) (arguing that deregulation would “work out wonderfully for consumers”); Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 *FORDHAM L. REV.* 2611, 2615 (2014) (stating that “there is little evidence that lawyers are more effective at providing certain legal services or more ethical than qualified nonlawyers”); Rhode & Ricca, *supra* note 7, at 2605 (questioning whether “broad prohibitions on unauthorized practice serve the public” and emphasizing the lack of evidence).

10. Petition, *supra* note 5, at 1 (questioning the desirability of expanding “nontraditional legal services”).

11. See Laurel S. Terry, *An “Issue Checklist” for the ABA Commission on Multidisciplinary Practice*, in *MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE* 129, 131 (Gary A. Munneke & Ann L. MacNaughton eds., 1999) (recommending that those seeking to preserve anticompetitive regulation bear the burden of proof since such regulation restricts client choice and “all lawyer regulation should be justifiable”).

12. See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 *HASTINGS L.J.* 1191, 1214 (2016) (“American

powers” to regulate the practice of law¹³ and have proved to be a friendly forum for lawyers’ claims of exclusive competence.¹⁴ A national survey of the regulation of the unauthorized practice of law found that courts typically “make[] sweeping assertions about the potential for injury” from non-lawyer providers without offering any evidence.¹⁵ Moreover, though state supreme courts play an active role in formal regulatory enforcement, such as lawyer disciplinary proceedings and prosecutions for unauthorized practice, courts have delegated most other regulatory authority to committees of practicing lawyers, who police the boundaries of their own monopoly with little supervision.¹⁶

This practice of unsupervised delegation has drawn increasing antitrust scrutiny from the Department of Justice¹⁷ and finally was upended by the Supreme Court’s 2015 decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.¹⁸ *N.C. Dental* involved an antitrust challenge to the state dental board’s campaign against commercial teeth whitening.¹⁹ The board, made up primarily of dentists, had issued

unauthorized practice enforcement is not dependent on actual client harm. Nor do American discussions of regulatory reform rest on evidence of probabilities and harms.” (citation omitted)).

13. Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 118 (2009) [hereinafter Rigertas, *Legal Bootleggers*] (discussing the expansion of the inherent powers doctrine in the 1930s and 1940s).

14. See BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 133 (2011) (noting that “state supreme courts are uniquely vulnerable to lobbying by lawyers” and “inaccessible to lobbying by the public”); Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 82–83 [hereinafter Rigertas, *Stratification*] (arguing that the exclusion of legislative and public participation in lawyer regulation has stifled innovation in the legal services market).

15. Rhode & Ricca, *supra* note 7, at 2603; see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 33–34 (1981) (reporting the results of a national survey of unauthorized practice enforcement finding that only 11 percent of reported cases involved evidence of consumer injury).

16. BARTON, *supra* note 14, at 137–38 (“State supreme courts have satisfied their own and lawyers’ interests by delegating virtually all their regulatory authority . . . back to lawyers.”); Hadfield & Rhode, *supra* note 12, at 1217 n.88 (“[M]ost regulatory oversight and intervention is carried out by bar committees composed entirely of practicing attorneys who open investigations and send out warnings or cease and desist letters without state court oversight . . .”).

17. See, e.g., U.S. DEP’T OF JUSTICE, COMMENTS TO STATES AND OTHER ORGANIZATIONS, <https://www.justice.gov/atr/public/comments/comments-states.html> [https://perma.cc/8CGX-2B7N] (providing links to comment letters concerning bar regulatory activity); see also Laurel S. Terry, *Putting the Legal Profession’s Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2934 (2014) (discussing the Department of Justice’s growing concern with the scope of the legal profession’s monopoly, as evidenced by a series of comment letters to state bar associations and legislatures).

18. 135 S. Ct. 1101 (2015) (“*N.C. Dental*”).

19. *Id.* at 1104.

cease-and-desist letters to non-dentist teeth whiteners, leading non-dentists to stop offering teeth whitening services in North Carolina.²⁰ The question was whether the board's actions were protected by state-action antitrust immunity,²¹ as defined in a series of cases beginning with *Parker v. Brown*.²² The Court held that the board—though defined by statute as an “agency of the State”²³—was not entitled to state-action immunity, because the board was controlled by active market participants without adequate state supervision.²⁴ *N.C. Dental* thereby narrowed the scope of state-action immunity for professional licensing boards and exposed “vast areas of state regulation to new antitrust scrutiny.”²⁵

N.C. Dental has significant implications for lawyer regulation. Most immediately, it alters the balance of power between lawyers and their competitors, by exposing the lawyers on regulatory committees to “huge potential antitrust liability.”²⁶ Although state supreme courts, acting in their sovereign capacity, are immune from federal antitrust law²⁷—for instance, when they adopt rules of professional conduct²⁸—*N.C. Dental* limits state-action immunity “when the State seeks to delegate its regulatory power to active market participants”²⁹ such as practicing lawyers. To claim state-action immunity after *N.C. Dental*, bar committees must show that their regulatory activities are subject to “active supervision” by the state.³⁰ Thus, in order to shield bar committee members from antitrust liability, *N.C. Dental* requires state supreme courts to provide active supervision of bar regulatory activity,³¹ in effect imposing a signing requirement on what was

20. *Id.*

21. *Id.* at 1107.

22. 317 U.S. 341 (1943) (holding that state regulatory action is immune from federal antitrust law).

23. *N.C. Dental*, 135 S. Ct. at 1120 (Alito, J., dissenting).

24. *Id.* at 1104 (majority opinion).

25. Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1387, 1407–09 (2016).

26. Marcia Coyle, *State AGs Urged to Enforce Licensing Board Decision*, NAT'L L.J., May 6, 2015.

27. *N.C. Dental*, 135 S. Ct. at 1110 (stating that the decisions of a state supreme court, acting legislatively rather than judicially, are an undoubted exercise of state sovereign authority).

28. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (explaining that acts of the sovereign are immune from antitrust scrutiny).

29. *N.C. Dental*, 135 S. Ct. at 1111.

30. *Id.* at 1117 (“If a State wants to rely on active market participants as regulators, it must provide active supervision . . .”).

31. *Id.* at 1105 (“*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.”).

previously informal, interstitial regulation.³²

N.C. Dental also signaled a heightened standard for “active supervision” review.³³ Although the case presented no specific supervisory systems for review,³⁴ in dicta, the Court outlined a substantive, versus merely procedural, standard, stating that “[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.”³⁵ The Court also cited antitrust scholarship calling professional licensing boards “cartels by another name” and urging the Court to put licensing boards “under the Sherman Act’s microscope.”³⁶ Thus, most commentators read *N.C. Dental* as tightening the standard for “active supervision” and signaling the need to produce a record of substantive, evidence-based review.³⁷

The American Bar Association (ABA) also has increased the pressure on state supreme courts to become more proactive and data-driven in assessing the need for anticompetitive regulation. In February 2016, the ABA House of Delegates adopted Model Regulatory Objectives for the Provision of Legal Services to guide courts in their regulation of “non-traditional legal service providers.”³⁸ Viewed by opponents as a subversive effort to recognize non-lawyer providers,³⁹ the move also reflected proponents’ desire to guide the profession’s regulatory authority over non-lawyer competitors—in particular, technology companies and online, commercial

32. *Id.* (explaining that active supervision requires the State “to review and approve interstitial policies made by the entity claiming immunity”).

33. *Id.* at 1116–17.

34. *Id.* at 1116 (“The Board does not claim that the State exercised active, or indeed any, supervision over its conduct . . . and, as a result, no specific supervisory systems can be reviewed here.”).

35. *Id.* (citing *Patrick v. Burget*, 486 U.S. 94, 102–03 (1988)).

36. *Id.* (citing Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014)); Edlin & Haw, *supra* note 36, at 1144.

37. See, e.g., Allensworth, *supra* note 25, at 1413 (stating that “[t]he ‘active supervision’ requirement . . . [was] tightened up . . . by [the] dicta in *NC Dental*”).

38. ABA HOUSE OF DELEGATES RES. 105 (Feb. 2016) (adopted), <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf> [<https://perma.cc/2WHE-3RH9>] [hereinafter Resolution 105].

39. See Lorelei Laird, *ABA House Approves Model Regulatory Objectives for Nontraditional Legal Services*, ABA J. (Feb. 8, 2016), http://www.abajournal.com/news/article/house_approves_proposed_model_regulatory_objectives_for_nontraditional_legal_services [<https://perma.cc/SX85-LYKP>] (discussing opponents’ concerns that the adoption of regulatory objectives would signal an endorsement of non-lawyer providers). The Model Regulatory Objectives were the work of the ABA Commission on the Future of Legal Services, which emphasized the need for innovation in the delivery of legal services. See ABA COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6–7 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [<https://perma.cc/B5D6-HFXC>].

platforms for legal services.⁴⁰ In the words of then-immediate past ABA President William C. Hubbard, who championed the measure, “We’re not going to put the Internet back in a bottle Let’s stand up and lead.”⁴¹

The ABA’s adoption of regulatory objectives invites the production of empirical data and research to assess the costs and benefits of anticompetitive professional regulation. A shift to evidence-based argument already is apparent in calls for “smarter”⁴² regulation as a middle ground between lawyers’ traditional monopoly and unregulated competition. “Evidence-based” regulation has also gained traction in other jurisdictions⁴³ and professions.⁴⁴

But if, as this Article argues, pressure for evidence-based regulation is increasing, the next question is how this plays out. Calling something “evidence-based” does not make it so; it merely shifts the terms of debate. Lawyers tend to view *N.C. Dental* as imposing a burden of production; that is, the need to “make a record that justifies the regulatory action,”⁴⁵ without necessarily evaluating the quality of the data. Researchers, meanwhile, have labored for decades to bring rigorous, independent research to bear on the

40. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 39, at 60 (“[G]iven that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.”).

41. Laird, *supra* note 39 (quoting Hubbard).

42. Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer’s Monopoly and Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 553, 556 (2015) (“Rather than deregulating the market for legal services, . . . the next step ought to involve . . . [s]marter regulations that . . . can protect consumer rights while embracing the democratizing potential of online legal technology.”); *see also* Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 88 (2015) (calling for a regulatory system “that falls somewhere between the United Kingdom approach, where people who lack a law license are afforded considerable freedom to operate without any regulatory oversight, and the United States approach, where such individuals are often forbidden to engage in many kinds of law-related work”).

43. *See, e.g., Evidence-Based Reform*, AUSTRALIAN LAW REFORM COMM’N, <https://www.alrc.gov.au/publications/1-introduction-inquiry/evidence-based-reform> [<https://perma.cc/PXQ2-MFH9>] (“Law reform recommendations cannot be based upon assertion or assumption and need to be anchored in an appropriate evidence base.”); SOLICITORS REGULATION AUTH., RESEARCH AND REPORTS, <https://www.sra.org.uk/sra/how-we-work/reports.page> [<https://perma.cc/QR9A-VHAC>] (last updated May 2019) (providing an index to research and quarterly reports on regulatory activities); *see also* Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT’L L. & BUS. 1, 91 (2009) (discussing the implications of EU initiatives on competition in professional services); Terry, *supra* note 17, at 2904 (noting that regulators face increasing pressure for “comparative benchmarking” with other countries).

44. *See, e.g.,* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. L. & SOC. CHANGE 295 (2009–2010) (discussing the move toward evidence-based practice in medicine, social services, education, and criminal justice).

45. Mark W. Merritt, *Lessons Learned from the NC Dental Board Decision by a State Bar Officer and Antitrust Lawyer*, 24 PROF. LAW. 9 (2017).

regulation of lawyers, and such efforts recently have made a resurgence,⁴⁶ including at some elite law schools.⁴⁷ *N.C. Dental* and the ABA's adoption of model regulatory objectives create new pressure—and a pulpit—for such research and debates about its implications. The choice for the bar is no longer a choice between assessment and no assessment, but rather a choice about the terms of assessment and the profession's authority in that debate.

This Article argues that the profession's authority over the regulation of legal services increasingly will require a commitment to evidence-based regulation, and outlines strategies for institutionalizing that commitment. One set of strategies is aimed at state supreme courts, which play an important hortatory as well as authoritative role. Another is aimed at law schools, particularly professional responsibility and clinical faculty, as those faculty are central to the field; but also deans and the directors of research centers associated with law schools. A final set of strategies is aimed at the ABA and state bar associations, which could play a pivotal role in brokering the terms of assessment for “non-traditional legal service providers”⁴⁸—and thereby for lawyers as well.

Part I explains how *N.C. Dental* and the ABA Model Regulatory Objectives increase legal and political pressure for evidence-based regulation. Part II examines existing research on the costs and benefits of monopoly regulation and recent efforts to promote the rigor and independence of such research. Part III suggests strategies for institutionalizing evidence-based policy-making within the profession and promoting research as an essential component of professional self-regulation.

46. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (discussing the increasing momentum in “Access to Justice (A2J)” research and defining an expanded research agenda); Elizabeth Chambliss et al., *Introduction: What We Know and Need to Know About the State of “Access to Justice” Research*, 67 S.C. L. REV. 193 (2016) (reviewing recent academic and government research on access to justice and urging further investment in the field); D. James Greiner, *The New Legal Empiricism & Its Application to Access-to-Justice Inquiries*, 148 DÆDALUS 64 (2019) (calling for a “new legal empiricism” in access to justice policy-making and research).

47. See, e.g., *Access to Justice Lab Launches at HLS*, CYBERLAW CLINIC (Sept. 16, 2016), <https://clinic.cyber.harvard.edu/2016/09/16/access-to-justice-lab-launches-at-hls/> [<https://perma.cc/8KWK-JZRK>] (stating that the lab will “develop[] evidence-based approaches to help courts and legal services providers understand what works in improving access to justice”); see also Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for “Empirical Legal Studies,”* 71 LAW & CONTEMP. PROBS. 17, 24 (2008) (discussing the importance of associations with elite law schools for the authority of sociolegal research).

48. Resolution 105, *supra* note 38.

I. PRESSURE FOR EVIDENCE-BASED REGULATION

Unlike other U.S. professions, the legal profession is regulated primarily by the judicial, rather than the legislative, branch.⁴⁹ Since the 1930s, state supreme courts have asserted broad, inherent powers to define and regulate the practice of law, reasoning that judicial control over lawyers is necessary to protect the functioning and independence of the courts.⁵⁰ Although numerous scholars have questioned the foundations and boundaries of the inherent powers doctrine,⁵¹ and the doctrine has faced intermittent challenges on both separation-of-powers⁵² and federalism⁵³ grounds, so far,

49. In California, the legislature plays an unusually active role. See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 749 (2015); Rigertas, *Legal Bootleggers*, supra note 13, at 119 n.244 (noting that “California still permits its legislature to carve out exceptions to what might otherwise be considered the practice of law”). But see Rigertas, *Stratification*, supra note 14, at 116 (noting that, in most states, “a legislative act that defined the practice of law . . . would face a successful constitutional challenge”).

50. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22–33 (1986) (discussing the scope and origins of courts’ inherent powers to regulate the practice of law); Rigertas, *Legal Bootleggers*, supra note 13, at 118 (discussing the expansion of the inherent powers doctrine in the 1930s); see also ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201A TO THE HOUSE OF DELEGATES (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf [<https://perma.cc/EA94-TDYB>] (affirming the ABA’s “support for the principle of state judicial regulation of the practice of law”).

51. See Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 553 (1983) (questioning the doctrinal foundations of the inherent powers doctrine); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1208 (2003) (arguing that state supreme courts are subject to regulatory capture by lawyers); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 308 (1992) (referring to the inherent powers doctrine as “a curious and anomalous aspect of the law”); Rigertas, *Legal Bootleggers*, supra note 13, at 71–72 (questioning the constitutional foundation for courts’ exclusive power to define the practice of law); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 857 (1992) (arguing that enforcement of professional norms by other branches of government “poses no credible threat to either a formalist or a functionalist understanding of the separation of powers”); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 4 (1989–90) [hereinafter Wolfram, *Lawyer Turf and Lawyer Regulation*] (arguing that courts’ power to regulate should not be exclusive); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 365 (1994) (rejecting the argument that state ethics rules may not be preempted by federal law).

52. See Rigertas, *Stratification*, supra note 14, at 118 (reviewing early clashes between state legislatures and courts over the power to define the practice of law); Polly Ross Hughes, *Bill to Lay Down the Law on Self-Help Software—Controversial Measure Reversing Statewide Ban is Awaiting Gov. Bush’s Signature*, HOUS. CHRON., June 13, 1999, at 1 (discussing a potential separation of powers challenge to legislation allowing the sale of self-help legal software in Texas).

53. See Cramton & Udell, supra note 51, at 292 (discussing “[t]he clash between the bar and the Justice Department” over the no contact and subpoena rules); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 475 (1996) (discussing the Department of Justice’s 1994 Thornburgh

state supreme courts and competing regulators have avoided a constitutional showdown.⁵⁴

The inherent powers doctrine has two aspects: an affirmative aspect that asserts judicial authority to regulate lawyers even in the absence of enabling language in the state constitution or statutes,⁵⁵ and a negative aspect that treats lawyer regulation as the exclusive prerogative of the courts.⁵⁶ The negative power is more controversial, particularly courts' exclusive power to define the "practice of law."⁵⁷ By controlling the definition of the practice of law, state supreme courts control not only the boundaries of lawyers' market monopoly,⁵⁸ but also the boundaries of courts' regulatory monopoly under the inherent powers doctrine.⁵⁹ Moreover, because courts define the practice of law on a state-by-state, case-by-case basis, these monopoly claims are largely insulated from organized public scrutiny.⁶⁰

Under *Parker*, state regulatory action is immune from federal antitrust law;⁶¹ thus, judicial regulation of lawyers is immune from antitrust scrutiny.⁶² Before *N.C. Dental*, most bar regulatory activity also was treated

Memorandum, which "posed a challenge to the constitutional authority of courts to regulate federal prosecutors").

54. See Barton, *supra* note 9, at 3089 ("Truly aggressive moves would be likely to draw federal antitrust and congressional attention."); Rigertas, *Stratification*, *supra* note 14, at 116 (noting that state legislative efforts to regulate legal services have been "very constrained"); Wolfram, *Lawyer Turf and Lawyer Regulation*, *supra* note 51, at 16 (noting that courts sometimes hold that a statute technically violates the inherent powers doctrine, but "will forebear striking it down because the court agrees with the policy objectives . . . and in the spirit of comity").

55. See WOLFRAM, *supra* note 50, at 25–26 (stating that the origins of the inherent powers doctrine are "not entirely clear").

56. *Id.* at 27–30 (discussing and critiquing the negative inherent powers doctrine).

57. See Rigertas, *Stratification*, *supra* note 14, at 124 (questioning the constitutional basis of courts' exclusive power to define the practice of law); Wolfram, *Lawyer Turf and Lawyer Regulation*, *supra* note 51, at 4 (arguing that courts' authority to define the practice of law should not be exclusive).

58. See Wolfram, *Lawyer Turf and Lawyer Regulation*, *supra* note 51, at 17 (noting that "lawyers, and only lawyers, define the extent to which the legal profession will face economic competition. . . . because only lawyers control the process of defining the unauthorized practice of law").

59. See WOLFRAM, *supra* note 50, at 24 (stating that the negative power "carries obvious risks of judicial abuse" and, carried to the extreme, "asserts that a court is not subject to rules in this area"); Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing To Protect Consumers*, 82 *FORDHAM L. REV.* 2683, 2697 (2014) (noting that "there is no legislative process for outsiders to lobby and seek changes to the scope of the legal profession's monopoly").

60. See BARTON, *supra* note 14, at 134 (discussing "[t]he lack of state supreme court accountability for lawyer regulation"); Rigertas, *Legal Bootleggers*, *supra* note 13, at 68 (arguing that the bar strategically lobbied for judicial regulation in the 1930s as a means of monopoly protection); Wolfram, *Lawyer Turf and Lawyer Regulation*, *supra* note 51, at 18 (stating that, by claiming the exclusive power to define the unauthorized practice of law, the legal profession has "both identified and 'protected' the interests of clients and the public without permitting them to participate in any way").

61. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (holding that state regulatory action is immune from federal antitrust law).

62. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (holding that acts of the

as protected state action, as long as the bar could be viewed as acting pursuant to a delegation from the state supreme court.⁶³ *N.C. Dental*, however, raised the standard for political accountability under *Parker*, signaling a “revolution”⁶⁴ in antitrust federalism that has states scrambling to adjust. The ABA’s passage of model regulatory objectives, likewise, represents an effort to raise the standard of judicial review of professional self-regulation. Taken together, these developments create pressure on state supreme courts to rein in anticompetitive regulation—or defend it through substantive, empirical review.

A. State-Action Antitrust Immunity After *N.C. Dental*

The Supreme Court has struggled to define the boundaries of state immunity from federal antitrust law. The Sherman Act makes “[e]very contract, combination . . . or conspiracy, in restraint of trade” unlawful, and does not expressly mention the states.⁶⁵ Following the New Deal, however, in *Parker*, the Court read a “state action” exemption into the Act to protect state regulatory autonomy.⁶⁶ The Court reasoned that, absent an explicit purpose to “nullify a state’s control over its officers and agents,” the Sherman Act could not be read to apply to the states in light of the “dual system of government in which, under the Constitution, the states are sovereign.”⁶⁷

sovereign are immune from antitrust scrutiny); *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378 (7th Cir. 1992) (rejecting a challenge to anticompetitive provisions of the ABA Model Rules of Professional Conduct because the rules had been adopted by the state supreme court and therefore were protected state action); *Mass. Sch. of Law v. Am. Bar Ass’n*, 107 F.3d 1026, 1036 (3d Cir. 1997) (rejecting a challenge to ABA law school accreditation standards because such standards are only given force through state supreme court requirements for bar admission).

63. See, e.g., *Bates*, 433 U.S. at 361 (rejecting an antitrust challenge to state bar restrictions on lawyer advertising because the Supreme Court of Arizona had approved the advertising restrictions in question); *Hoover v. Ronwin*, 466 U.S. 558, 572 (1984) (affirming the dismissal of an antitrust lawsuit against the members of the state bar examination committee because the members were acting under the authority of the state supreme court). *But cf.* *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (holding that the Virginia State Bar was acting in a private capacity when it encouraged lawyers to adhere to fee schedules, because the Virginia Supreme Court had explicitly directed lawyers not to be controlled by fee schedules).

64. Allensworth, *supra* note 25, at 1389.

65. 15 U.S.C. § 1 (2012).

66. See 317 U.S. at 351 (stating that the Sherman Act “makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state”); see also Allensworth, *supra* note 25, at 1393 (noting that “[i]t has been observed that the Sherman Act . . . ‘cannot mean what it says’” since, read literally, it would threaten state sovereignty (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687 (1978))).

67. *Parker*, 317 U.S. at 351.

What counts as “state” action under *Parker* has proved tricky to define. States legitimately delegate significant regulatory authority to other entities, such as municipalities, state agencies, and state boards and committees dominated by private actors.⁶⁸ Yet, as the *Parker* Court noted, “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”⁶⁹ Subsequent cases made clear that automatic immunity applies only when the state is “acting as a sovereign,”⁷⁰ through its legislature or state supreme court.⁷¹ When the state delegates regulatory authority to non-sovereign actors, those actors must satisfy additional criteria in order to qualify for *Parker* immunity.

The Court introduced the modern framework for *Parker* immunity in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*⁷² *Midcal* held that, in order for non-sovereign actors to qualify for state-action immunity, the regulation in question must be, first, “clearly articulated and affirmatively expressed as state policy” and, second, “actively supervised” by the State.⁷³ This two-prong test is designed to prevent the state from circumventing antitrust law by “casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”⁷⁴ However, public entities, such as municipalities, are only required to satisfy the first prong of the *Midcal* test.⁷⁵ In *Town of Hallie v. City of Eau Claire*,⁷⁶ decided five years after *Midcal*, the Court created a shortcut for municipalities,⁷⁷ reasoning that “[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement.”⁷⁸

68. See Edlin & Haw, *supra* note 36, at 1119–20 (“[S]tates rarely regulate economic activity directly through a legislative act. Rather, states delegate rulemaking and rate-setting to agencies, councils, or boards dominated by private citizens.”).

69. *Parker*, 317 U.S. at 351.

70. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975).

71. See *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984) (explaining that both state legislation and “a decision of a state supreme court, acting legislatively rather than judicially,” are “*ipso facto* exempt from the operation of the antitrust laws”).

72. 445 U.S. 97, 105–06 (1980) (holding that a statutory wine pricing program was not entitled to state-action immunity because “the State simply authorizes price setting and enforces the prices established by private parties”).

73. *Id.* (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

74. *Id.* at 106.

75. See Allensworth, *supra* note 25, at 1400 (discussing the shortcut for sub-state entities); Sina Safvati, Comment, *Public-Private Divide in Parker State-Action Immunity*, 63 UCLA L. REV. 1110, 1116–17 (2016) (discussing the evolution of the public-private divide under *Midcal*).

76. 471 U.S. 34 (1985).

77. *Id.* at 47 (“We further hold that active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party.”).

78. *Id.*

The *Hallie* Court also suggested in a footnote that “[where] the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.”⁷⁹

Before *N.C. Dental*, most courts treated the *Hallie* dicta as law,⁸⁰ holding that professional licensing boards, as state agencies, are exempt from the active supervision requirement, either automatically, based upon their formal designation as state agencies,⁸¹ or in fact, based upon the presence of “government-like attributes” such as open records and the “exercise of governmental functions.”⁸² Thus, before *N.C. Dental*, professional licensing boards were largely assumed to be immune from antitrust scrutiny, even if a majority of the board were active market participants.⁸³

N.C. Dental, however, signaled the end of this laissez-faire approach to professional self-regulation. *N.C. Dental* held that state licensing boards controlled by active market participants are subject to the same active supervision requirement as private trade associations.⁸⁴ As the Court stated:

79. *Id.* at 46 n.10.

80. Edlin & Haw, *supra* note 36, at 1124.

81. *See, e.g., Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998) (holding that the Louisiana Board of Certified Public Accountants, as a state agency, was exempt from the active supervision requirement, citing *Hallie*); *Porter Testing Lab. v. Bd. of Regents for the Okla. Agric. & Mech. Colls.*, 993 F.2d 768, 772 (10th Cir. 1993) (holding that active supervision was unnecessary for a “constitutionally created state board, its executive secretary, and a state created and funded university”); *see also C. Douglas Floyd, Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1063–64 (2000) (“Absent any definitive guidance from the Supreme Court, lower courts generally have assumed that state agencies should be treated like municipalities and other subordinate governmental units . . . [and] not subject to the active supervision requirement . . .”).

82. *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n*, 137 F.3d 1293, 1296 (11th Cir. 1998); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 198 (3d ed. 2006) (reviewing the case law); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 987–88 (2014) (discussing the circuit split between “cursory” and “intermediate” scrutiny of licensing boards); Edlin & Haw, *supra* note 36, at 1095 (“[L]icensing boards have become a massive exception to the [Sherman] Act’s ban on cartels.”).

83. *See, e.g., Earles*, 139 F.3d at 1041 (“Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board’s actions means that there is little danger of a cozy arrangement to restrict competition.”); *Hass v. Or. State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (holding that the Oregon State Bar “is a public body, akin to a municipality for the purposes of the state action exemption,” even though the governing board was comprised primarily of practicing lawyers); *see also* Edlin & Haw, *supra* note 36, at 1125–26 (“Without an opinion squarely holding a licensing board to antitrust scrutiny, case law such as *Hass* and *Earles* has caused scholars to assume away the possibility of an antitrust suit against a licensing board and to deter litigants from pursuing such suits.”).

84. *N.C. Dental*, 135 S. Ct. 1101, 1104 (2015) (holding that “[b]ecause a controlling number of the Board’s decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met”).

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing Midcal's supervision requirement was created to address. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals.⁸⁵

The Court explicitly distinguished state regulatory entities controlled by active market participants, such as bar associations, from municipalities and other "prototypical state agencies," noting that *Hallie* involved "an electorally accountable municipality with general regulatory powers and no private price-fixing agenda."⁸⁶ Agencies controlled by market participants, by contrast, "are more similar to private trade associations."⁸⁷ Thus, the Court concluded:

When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal's active supervision requirement in order to invoke state-action antitrust immunity.⁸⁸

B. Implications for Lawyer Regulation

N.C. Dental has significant implications for lawyer regulation. Most bar regulatory committees are controlled by active market participants with little judicial supervision.⁸⁹ Such committees routinely engage in anticompetitive conduct without seeking judicial review, such as issuing

85. *Id.* at 1114 (citations omitted).

86. *Id.*

87. *Id.*

88. *Id.* (citations omitted).

89. See Brief of the North Carolina State Bar, the North Carolina Board of Law Examiners, the West Virginia State Bar, the Nevada State Bar and the Florida Bar, as *Amici Curiae* in Support of Petitioner, *N.C. Dental*, 135 S. Ct. 1101 (2015) (No. 13-534) (arguing that, without immunity from the active supervision requirement, bar regulatory committees would face constant challenges for unsupervised regulation and lawyers would be unwilling to serve for fear of personal liability); Letter from Robert C. Fellmeth, Exec. Dir., Ctr. for Pub. Interest Law et al., to the Hon. Kamala Harris, Attorney Gen. of the State of Cal. (May 4, 2015) (on file with author) (stating that *N.C. Dental* "renders unlawful what has become the common regulatory practice across all 50 states"); see also *supra* note 16 and accompanying text.

cease-and-desist letters to non-lawyer competitors⁹⁰ and issuing ethics advisory opinions regulating the marketing and delivery of legal services.⁹¹

In some cases, bar committees have strategically avoided judicial review by declining to bring formal action to settle competitive disputes.⁹² In North Carolina, for instance, the state bar for years pursued informal regulatory action against LegalZoom, but declined to seek a judicial decision as to whether LegalZoom's business model constituted the unauthorized practice of law.⁹³ Following the *N.C. Dental* decision, LegalZoom brought a \$10.5 million antitrust lawsuit against the North Carolina State Bar, winning a consent agreement and statutory language authorizing LegalZoom to operate in the state.⁹⁴

TIKD, a technology start-up that offers an app to fight traffic tickets, recently pursued a similar action against the Florida Bar, arguing that the bar's informal campaign against it, coupled with a lack of formal action, constituted anticompetitive activity in violation of the Sherman Act.⁹⁵

90. See, e.g., Brief of LegalZoom.com, Inc. et al. as *Amici Curiae* in Support of Respondent at 17, *N.C. Dental*, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 3895926 (arguing that the dental board's cease-and-desist letter campaign "closely resembled—indeed, was modeled after—the North Carolina State Bar's enforcement practices in the legal services market").

91. See, e.g., Supreme Court of Ohio Bd. of Prof'l Conduct, Op. 2016-3 (2016); South Carolina Bar, Ethics Advisory Op. 16-06 (2016); Notice to the Bar, Lawyer Participation in the Avvo Legal Service Program (June 21, 2017), <https://lalegaethics.org/wp-content/uploads/NJ-Opinion-re-Avvo.pdf?x16384> [<https://perma.cc/5555-LFMM>] (joint opinion by the New Jersey Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and Committee on the Unauthorized Practice of Law); New York State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 1132 (2017); see also Brief of LegalZoom.com, Inc. et al. as *Amici Curiae*, *supra* note 90, at 9 (discussing the use of "informal opinions" as a regulatory tool by state bars).

92. See Brief of LegalZoom.com, Inc. et al. as *Amici Curiae*, *supra* note 90, at 20 (describing the North Carolina bar's informal efforts to regulate LegalZoom and noting that the "bar took no direct enforcement action for five years, avoiding judicial review of its action").

93. *Id.*

94. See Terry Carter, *LegalZoom Resolves \$10.5M Antitrust Suit Against North Carolina State Bar*, ABA J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [<https://perma.cc/6X9J-JS4D>] (discussing the terms of the consent agreement); Unauthorized Practice of Law Changes, H.B. 436 § 84-2.1, Gen. Assemb. Sess. 2015 (N.C. 2015), <https://www.ncleg.gov/Sessions/2015/Bills/House/PDF/H436v0.pdf> [<https://perma.cc/28GV-CWR5>] (stating that the practice of law does not include the operation of a web site offering interactive legal software, provided that specified consumer protection standards are met).

95. See Complaint at 4–5, *TIKD Servs. LLC v. Fla. Bar*, No. 1:17-cv-24103-MGC (S.D. Fla. Nov. 8, 2017), 2017 WL 5180986. The Florida Bar took inconsistent positions as to its status under *N.C. Dental* and the case was dismissed following a settlement. See Debra Cassens Weiss, *Florida Bar Wins Dismissal of Antitrust Suit Filed by Ticket-Fighting Startup*, ABA J. (Dec. 6, 2018, 7:10 AM), http://www.abajournal.com/news/article/florida_bar_wins_dismissal_of_antitrust_suit_filed_by_ticket_fighting_start [<https://perma.cc/MML4-W648>] (reporting the dismissal); Amanda Grau, *Florida Referee Releases Report in Favor of TIKD App*, RESPONSIVE L. (June 19, 2019), <https://www.responsivelaw.org/blog/florida-referee-releases-report-in-favor-of-tikd-app> [<https://perma.cc/5AWQ-55GB>] (discussing the inconsistent positions by the Florida Bar and reporting a settlement between TIKD and the Bar on

Notably, the Department of Justice weighed in on TIKD's behalf.⁹⁶ Bar associations in a number of states have suspended informal regulatory activity to await guidance about what steps are required to avoid antitrust liability.⁹⁷

From a doctrinal standpoint, the next question is what counts as "active supervision" of professional licensing boards. Neither prong of the *Midcal* test was in dispute in *N.C. Dental*. Both parties assumed that the state statute prohibiting the unauthorized practice of dentistry met the "clear articulation" requirement, even though the statute did not specifically mention teeth whitening.⁹⁸ In general, the clear articulation standard has been easy to meet.⁹⁹ Likewise, the dental board did not claim that its activities were actively supervised by the state;¹⁰⁰ the board claimed that, as a state agency, it was exempt from the active supervision requirement.¹⁰¹

the antitrust claims). Additional challenges are sure to follow. In June 2019, a referee appointed by the Florida Supreme Court found that TIKD's operations do not constitute the unauthorized practice of law. Fla. Bar v. TIKD Services LLC, Supreme Court Case No. SC2018-149 (2019), https://www.responsivela.org/uploads/1/0/8/6/108638213/report_of_referee.pdf [<https://perma.cc/E9K4-B8JR>].

96. Press Release, PR Newswire, United States Department of Justice Supports Tech Start-Up TIKD's Antitrust Lawsuit Against the Florida Bar (Mar. 13, 2018) (on file with author) (reporting that the Antitrust Division of the Department of Justice filed a statement of interest supporting TIKD's position that the Florida Bar cannot claim state-action antitrust immunity without proving that it was acting pursuant to a clearly articulated state policy to displace competition and actively supervised by the state).

97. See, e.g., Elizabeth J. Cohen, *Antitrust Liability, Lack of Funding Trouble UPL Regulators*, 33 LAW. MANUAL ON PROF. CONDUCT 661 (2017) (reporting that, after *N.C. Dental*, "cease-and-desist letters make a lot of people nervous" and that many jurisdictions have stopped issuing them); Debra Cassens Weiss, *Washington State Bar Suspends Some Ethics Opinions Because of Antitrust Concerns*, ABA J. (Dec. 21, 2015, 6:15 AM), http://www.abajournal.com/news/article/washington_state_bar_suspends_some_ethics_opinions_because_of_antitrust_con [<https://perma.cc/48E3-PDQZ>] (reporting that the bar has suspended issuing ethics opinions that could be interpreted as anticompetitive); see also Ala. State Bd. of Med. Exam'rs, Chapter 540-X-15 (Aug. 25, 2015), <http://www.albme.org/Documents/Rules/Temp/540-X-15ER%20repealed.pdf> [perma.cc/5M82-8D48] (suspending enforcement of state telehealth rules in light of antitrust litigation brought against the Texas Medical Board).

98. *N.C. Dental*, 135 S. Ct. 1101, 1110 (2015) ("The parties have assumed that the clear articulation requirement is satisfied, and we do the same.")

99. See Edlin & Haw, *supra* note 36, at 1120 ("[T]he Court has made clear that virtually any colorable claim to state authority" can satisfy the clear articulation test); Safvati, *supra* note 75, at 1117 (reviewing the case law). "[A] state need not compel an entity to engage in anticompetitive conduct in order to satisfy the clear-articulation prong. Rather, so long as a policy of anticompetitiveness is reasonably foreseeable from the state's delegation of authority, the clear-articulation standard is satisfied." *Id.* (footnotes omitted).

100. *N.C. Dental*, 135 S. Ct. at 1116 ("The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.")

101. Brief for Petitioner at 6, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 2212529, at *6; see also *N.C. Dental*, 135 S. Ct. at 1117-18 (Alito, J., dissenting) ("Under *Parker*, the Sherman Act . . . [does] not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter.")

Previous cases have largely defined “active supervision” in the negative and provide little guidance as to the recipe for success.¹⁰²

The rationale for requiring supervision, however, is “to ensure the States accept political accountability for anticompetitive conduct they permit and control.”¹⁰³ In dicta, the *N.C. Dental* Court suggested a substantive, versus merely procedural, standard for “active supervision,” identifying the following elements as “constant requirements”:

The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the “mere potential for state supervision is not an adequate substitute for a decision by the State.” Further, the state supervisor may not itself be an active market participant.¹⁰⁴

Thus, most commentators read *N.C. Dental* as tightening the standard for “active supervision” and signaling the need to produce a record of substantive, evidence-based review.¹⁰⁵ Rebecca Allensworth, for instance, characterizes *N.C. Dental* as the culmination of the Supreme Court’s move away from formalist efforts to define the boundaries of “the state,” in favor of an accountability test designed to “address[] the inherent capture [problems] at the heart of modern state regulation.”¹⁰⁶ By the logic of accountability review, she argues, active supervision requires the state to “attempt to identify and quantify” the anticompetitive effects of regulation

102. See, e.g., *Patrick v. Burget*, 486 U.S. 94, 102–03 (1988) (holding that a state-ordered peer review program of physicians was not actively supervised because the state could only overturn peer-review decisions for procedural defects); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (finding supervision inadequate because the state did not exercise its power of review); see also *N.C. Dental*, 135 S. Ct. at 1116 (“[T]he inquiry regarding active supervision is flexible and context-dependent.”); Allensworth, *supra* note 25, at 1400 (reviewing the case law). “The ‘active supervision’ cases following *Midcal* provided little guidance about what steps states must take in supervising regulation, instead merely highlighting what is *not* active supervision.” *Id.*

103. *N.C. Dental*, 135 S. Ct. at 1111; see also *Ticor*, 504 U.S. at 636 (“States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it.”); Allensworth, *supra* note 25, at 1405 (discussing the Court’s emphasis on political accountability as a condition of state-action immunity); Safvati, *supra* note 75, at 1115 (identifying “financial disinterest and political accountability” as the “bedrock principles that have shaped *Parker* immunity doctrine”).

104. *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted) (quoting *Ticor*, 504 U.S. at 638).

105. See, e.g., Allensworth, *supra* note 25, at 1413 (stating that “[t]he ‘active supervision’ requirement . . . [was] tightened up by the holding in *Ticor* and more recently by dicta in *NC Dental*”); Merritt, *supra* note 45 (emphasizing the need to “make a record that justifies the regulatory action”).

106. Allensworth, *supra* note 25, at 1444.

based on “hard data.”¹⁰⁷

The Federal Trade Commission (FTC), likewise, focuses on whether the supervisor has obtained “the information necessary” to “evaluate[] the substantive merits of the recommended action” and whether “[t]he supervisor has issued a written decision” explaining the rationale for regulation.¹⁰⁸ Obtaining the information necessary means that “the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence;” or that the regulatory board itself has “conducted a suitable public hearing and collected the relevant information and data.”¹⁰⁹

The purpose of these evidentiary requirements is not to create a record for de novo federal review, as would occur under antitrust law if state-action immunity were denied.¹¹⁰ The purpose is to show that the *state* has engaged in such review, as a condition for state-action immunity.¹¹¹ Yet lurking behind the heightened standard for active state supervision is the threat of federal substantive review. As Allensworth argues, “the careful reader will find intonations of substantive review in the Court’s antitrust federalism jurisprudence It may be that . . . substantive review is next.”¹¹² David A. Hyman and Shirley Svorny argue that federal courts should be “exceedingly skeptical”¹¹³ about the efficacy of state supervision in the context of licensing boards “[g]iven the ability of state licensing boards to ‘paper the file’ in advance of any antitrust challenge.”¹¹⁴ They argue that courts should begin with “a strong presumption that there was not active supervision” and apply a “quick-look” test, under which the defendant must

107. *Id.* at 1441.

108. STAFF OF THE BUREAU OF COMPETITION, FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS 10 (Oct. 2015), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf [<https://perma.cc/EX7G-98CQ>] [hereinafter FTC STAFF GUIDANCE].

109. *Id.* (noting that “[t]he information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board”).

110. *See* Edlin & Haw, *supra* note 36, at 1144 (discussing the application of the “rule of reason” to professional licensing boards under the Sherman Act).

111. FTC STAFF GUIDANCE, *supra* note 108, at 10 (stating that “a written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board’s action”); *see also* Town of Hallie v City of Eau Claire, 471 U.S. 34, 46 (1985) (stating that active supervision serves an “evidentiary function” of “ensuring that the actor is engaging in the challenged conduct pursuant to state policy”).

112. Allensworth, *supra* note 25, at 1429–30.

113. David A. Hyman & Shirley Svorny, Response, *If Professions are Just “Cartels by Another Name,” What Should We Do About It?*, 163 U. PA. L. REV. ONLINE 101, 111 (2014).

114. *Id.* at 112–13.

identify competitive harms and benefits.¹¹⁵

Thus, *N.C. Dental* has launched a new conversation about the authority of state bar associations to police their own markets—and the role of state supreme courts in policing bar regulatory activity. This conversation is likely to reopen questions about the basis and scope of state courts' inherent powers to regulate the practice of law. From a political standpoint, the organized profession should aim to get ahead of these questions, by making a credible commitment to evidence-based regulation.

C. ABA Model Regulatory Objectives

The ABA's 2016 adoption of Model Regulatory Objectives for the Provision of Legal Services¹¹⁶ represents a potentially pivotal move toward evidence-based regulation. The objectives were drafted by the ABA Commission on the Future of Legal Services,¹¹⁷ and adopted by the ABA House of Delegates after “extended and heated debate.”¹¹⁸ The significance of their adoption is not fully apparent from the text of regulatory objectives themselves.¹¹⁹ Most of the objectives—such as “[p]rotection of the

115. *Id.* at 113 n.64 (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005)); see also Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293 (2018) (suggesting a modified, consumer-based antitrust inquiry akin to the “quick-look” test).

116. See Resolution 105, *supra* note 38 (adopting the ABA Model Regulatory Objectives for the Provision of Legal Services).

117. See ABA COMM'N ON THE FUTURE OF LEGAL SERVS., https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html [<https://perma.cc/L4NY-HBSX>] (providing information about the Commission).

118. Laird, *supra* note 39 (reporting that a voice vote to postpone consideration of the resolution was too close to call, requiring a count). Delegates voted 276-191 against postponing consideration and the resolution ultimately was adopted by a voice vote. *Id.*

119. See Resolution 105, *supra* note 38. The regulatory objectives are as follows:

- A. Protection of the public
- B. Advancement of the administration of justice and the rule of law
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- E. Delivery of affordable and accessible legal services
- F. Efficient, competent, and ethical delivery of legal services
- G. Protection of privileged and confidential information
- H. Independence of professional judgment
- I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs.
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

Id.

public”¹²⁰ and “[i]ndependence of professional judgment”¹²¹—are uncontroversial, although lawyers may differ about the relative importance and wording of different objectives.¹²² Engaging in such discussion is one of the benefits of defining regulatory objectives.¹²³

The full significance of the objectives also was not apparent from the debate leading up to the vote, which focused primarily on the implications for ABA policies prohibiting non-lawyer ownership and provision of legal services.¹²⁴ Factions within the ABA have lobbied repeatedly to relax the rules against non-lawyer ownership,¹²⁵ and opponents were suspicious that the regulatory objectives were a cover for market liberalization.¹²⁶ The Futures Commission included many proponents of market liberalization,¹²⁷ and several of the objectives—such as the call for “[m]eaningful access to justice”¹²⁸ and the “[d]elivery of affordable and accessible legal services”¹²⁹—arguably signal support for this view. Moreover, the objectives were offered to guide “each state’s highest court” in “any . . . regulations they may choose to develop concerning non-traditional legal service providers”¹³⁰—meaning non-lawyers who currently are prohibited from offering legal services under ABA policy. To win enough votes for adoption, proponents had to add an explicit provision stating that “nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms.”¹³¹

But while both sides recognized the market subtext of the regulatory

120. *Id.*

121. *Id.*

122. See Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM L. REV.* 2685, 2744 (2012) (charting differences in language and emphasis among various countries’ regulatory objectives).

123. See Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 *PROF. LAW.* 28, 31 (2013) (stating that a “thorough airing of the issues” is one benefit of defining regulatory objectives).

124. See Laird, *supra* note 39 (reporting that “[t]he heart of the debate was over whether by adopting the resolution the House was endorsing the practice of law by nonlawyers”).

125. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193 (2010) (reviewing the history of debate within the ABA about whether to allow non-lawyer ownership and investment in legal services).

126. See Laird, *supra* note 39.

127. See ABA COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 39, at 61 (“From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures).”).

128. *Id.* at 59.

129. *Id.*

130. *Id.*

131. See Resolution 105, *supra* note 38.

objectives, neither side explicitly recognized the regulatory subtext. Regulatory objectives, by their very nature, create a framework for measurement and assessment. As Laurel S. Terry has written, “without knowing the underlying objectives of lawyer regulation, one cannot meaningfully measure whether the regulation succeeds, or is overbroad.”¹³² Defining regulatory objectives, on the other hand, makes meaningful measurement possible. Thus, by urging state supreme courts to be guided by regulatory objectives, the ABA is effectively urging courts to be guided by factual evidence in assessing the scope and effectiveness of professional regulation.

Assessing the evidence about “how legal services are delivered” was a central purpose of the Futures Commission,¹³³ and pointing to evidence of market changes was integral to its advocacy for the adoption of regulatory objectives. As the Commission emphasized in its report to the House of Delegates:

The legal landscape is changing at an unprecedented rate. In 2012, investors put \$66 million dollars into legal service technology companies. By 2013, that figure was \$458 million. One source indicates that there are well over a thousand legal tech startup companies currently in existence. Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.¹³⁴

By emphasizing the de facto expansion of non-lawyer providers, the Commission sought to motivate state bar associations and courts to be more proactive and data-driven in considering the regulation of “non-traditional legal services providers.”¹³⁵ Commission leaders, such as Andrew Perlman, Vice-Chair of the Commission, have argued that professional regulation that

132. Terry, *supra* note 123, at 28.

133. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 39, at 4, 60 (“The American Bar Association’s Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services.”); see also *What We Know and Need to Know About the Future of Legal Services: White Papers for the ABA Commission on the Future of Legal Services*, 67 S.C. L. REV. 191 (2016) (collection of sixteen white papers assessing recent research about the delivery of legal services); Chambliss et al., *supra* note 46, at 195 (stating that the primary goal of the white papers was to assess “the facts on the ground, insofar as we know them, by presenting the most recent research on issues of relevance to the Commission”).

134. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., *supra* note 39, at 60–61 (citations omitted).

135. *Id.*

applies only to lawyers is in danger of becoming increasingly irrelevant to the regulation of “legal services” more broadly, which demonstrably involves technology companies and other non-lawyer providers.¹³⁶ In England and Wales, market liberalization has come with a loss of professional regulatory control.¹³⁷

But the Commission’s appeal to evidence represents more than a short-term lobbying tactic; it represents a potential paradigm shift in professional self-regulation—and a potential defense to the loss of professional regulatory control. Rather than relying on state supreme courts to define and defend market boundaries based on their “inherent authority” to regulate the practice of law,¹³⁸ the passage of regulatory objectives invites state supreme courts—and bar regulators seeking approval from the courts—to define market boundaries based on measurable professional objectives; that is, based on measurement on the profession’s own terms. Viewed this way, the passage of regulatory objectives, and the evidence-based logic it implies, represents a path to higher ground—a foundation for maintaining, and potentially expanding, the profession’s authority over the regulation of legal services. Moreover, this move from authority-based to evidence-based regulation is precisely what *N.C. Dental* demands.

Of course, it is possible that the Model Regulatory Objectives will have little effect. ABA Commissions come and go and, so far, only three states have adopted regulatory objectives.¹³⁹ It is possible, too, that the federal courts will rein in the muscular approach to “active supervision” signaled by *N.C. Dental*, by accepting pro forma evidence of substantive review, or focusing on structural and procedural, versus substantive, criteria for active supervision.¹⁴⁰

136. Perlman, *supra* note 42, at 51 (calling for the development of a “broader ‘law of legal services’ that authorizes, but appropriately regulates,” new forms of service delivery); *see also* Barton, *supra* note 9, at 3088 (predicting that the regulation of lawyers increasingly will “grow less relevant” given the expanding market for alternative providers).

137. *See* Legal Services Act 2007, c. 29 (Eng. & Wales) (creating the Legal Services Board, an independent body responsible for overseeing the regulation of lawyers in England and Wales); LEGAL SERVS. BD., <http://www.legalservicesboard.org.uk/> [<https://perma.cc/PW5G-YBDE>].

138. *See supra* notes 50–60 and accompanying text.

139. *See* Laurel S. Terry, *Examples of Regulatory Objectives for the Legal Profession* (Mar. 2, 2019), https://works.bepress.com/laurel_terry/89/; *see also* UTAH STATE COURTS, SUPREME COURT TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING 6 (Nov. 18, 2015), http://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf [<https://perma.cc/PSF9-R8A8>] (referencing the ABA Model Regulatory Objectives in considering limited licensure).

140. *See* Richard F. Walker III, Comment, *Cavity Filling or Root Canal? How Courts Should Apply North Carolina State Board of Dental Examiners v. FTC*, 66 EMORY L.J. 443, 451 (2017) (arguing that courts should narrowly construe *N.C. Dental* to avoid trammeling states’ rights, especially in the

But the bar has economic and political incentives to invest in evidence-based policy-making, and the definition of objectives by which the quality of legal services will be measured, even if the regulatory environment is slow to change. The American legal profession is facing profound—some would say existential¹⁴¹—challenges regarding the value of lawyers' services. Corporate clients are turning to alternative providers for work previously performed by large law firms.¹⁴² Law firm revenues from individual clients are declining¹⁴³ and many solo and small law firms are struggling, due in part to competition from commercial providers and do-it-yourself websites and services.¹⁴⁴ Many private practitioners are frustrated with regulators' resistance to new ways of marketing and delivering legal

context of state health care regulation); Allensworth, *supra* note 25, at 1432–33 (noting that, although “[t]he Court is clearly concerned about the substance of state regulation . . . the devil is in the details”); *see also* Christopher James Marth, *Qualified (Immunity) for Licensing Board Service?*, 84 U. CHI. L. REV. 1473, 1476–77 (2017) (arguing that state licensing board members should be entitled to qualified immunity for antitrust violations by the board, in order to encourage professional service on licensing boards).

141. *See* RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 9 (2015) (arguing that “a wide range of increasingly capable systems will, in various ways, displace much of the work of traditional professionals,” including lawyers).

142. *See* David B. Wilkins & Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 LAW & SOC. INQUIRY 981 (2018) (discussing the “reemergence of the Big Four” in the global legal market); David B. Wilkins & Maria J. Esteban, *Taking the “Alternative” out of Alternative Legal Service Providers: Remapping the Corporate Legal Ecosystem in the Age of Integrated Solutions*, in *NEW SUITS: APPETITE FOR DISRUPTION IN THE LEGAL WORLD* (Michele Destefano & Guenther Dobrauz-Saldapenna eds., forthcoming 2020) (arguing that corporate clients increasingly seek “integrated” professional services, putting pressure on traditional law firms); Miriam Rozen, *Brand Rankings Show Law Firm Alternatives’ Growing Clout*, AM. LAW. (Feb. 14, 2018), <https://www.law.com/americanlawyer/2018/02/14/brand-rankings-show-law-firm-alternatives-growin-g-/> (discussing corporate clients’ increasing use of alternative providers, such as media and technology firms).

143. *See* Bill Henderson, *The Decline of the PeopleLaw Sector*, LEGAL EVOLUTION (Nov. 19, 2017), <https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/> [<https://perma.cc/9UKU-47EH>] (discussing the decline in law firm receipts from individual clients); Bill Henderson, *Legal Services and the Consumer Price Index (CPI)*, LEGAL EVOLUTION (Jan. 30, 2018), <https://www.legalevolution.org/?s=cpi> [<https://perma.cc/U2ZY-V6MA>] [hereinafter Henderson, *Legal Services and the Consumer Price Index (CPI)*] (noting that consumer spending on legal services has declined significantly relative to consumer spending on other goods and services, including other professional services).

144. CLIO, 2017 LEGAL TRENDS REPORT 5 (2017), <https://files.goclio.com/marketo/ebooks/2017-Legal-Trends-Report.pdf> [<https://perma.cc/TY4M-XJX7>] (finding that small firm lawyers spend only a fraction of their day on billable tasks and, on average, spend nearly a third of their day on business development); THOMSON REUTERS, 2017 STATE OF U.S. SMALL LAW FIRMS 6 (2017), <https://legalsolutions.thomsonreuters.com/law-products/news-views/small-law-firm/state-of-small-law-study-2017> [<https://perma.cc/7QWT-2SZA>] (finding that small law firms face increasing competition from do-it-yourself legal websites and services); Henderson, *Legal Services and the Consumer Price Index (CPI)*, *supra* note 143 (discussing the DIY law movement).

services, and view existing market regulation as a competitive handicap for lawyers.¹⁴⁵

The bar also faces an increasingly organized political challenge from non-profit providers, researchers, and research foundations concerned about access to legal information and services in housing, family, financial, and other matters affecting basic human needs.¹⁴⁶ State civil courts are packed with litigants attempting to navigate without legal assistance¹⁴⁷—and those are the people who make it to court. The vast majority of people with civil legal problems respond without using lawyers or courts,¹⁴⁸ or do nothing at all.¹⁴⁹

These challenges invite the bar to rethink the contours of anticompetitive regulation even in the absence of regulatory pressure.¹⁵⁰ The bar should welcome comparative research on legal service providers and engage theoretically to ensure that such research is informed by professional regulatory objectives. State court and bar leaders should collaborate with independent researchers to promote new forms of service delivery without sacrificing consumer protection. The profession needs to identify areas where provider quality is transparent to consumers, and where it should be regulated to protect them. For the private bar, the long game in both market and regulatory battles depends on credible quality claims.¹⁵¹ Such claims, in turn, require investment in independent, comparative research.

145. See, e.g., ASS'N OF PROF'L RESPONSIBILITY LAWYERS, THE FUTURE OF LAWYERING, <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/> [<https://perma.cc/FU8J-4XXS>] (developing proposed amendments to lawyer regulation “so that the profession may both embrace evolving technology and increase the delivery of competent legal services to the American public, with full accountability, and without unreasonably restraining competition”).

146. See *infra* Section II.B.

147. NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, at iv, vi (2015) (finding that, in 76 percent of nondomestic civil cases, “at least one party was self-represented” and that “[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion”).

148. See REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11–12 (2014) [hereinafter ACCESSING JUSTICE] (survey of a random sample of Midwestern adults finding that Americans rarely turn to lawyers or courts to handle their civil justice problems); Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 222, 236 (Anthony Duggan et al. eds., 2012) [hereinafter *Money Isn't Everything*] (discussing the “pervasive alequality” of Americans' responses to civil justice problems).

149. See Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112 (Pascoe Pleasence et al. eds., 2007) (finding that the most common response to non-trivial civil justice problems is to do nothing, especially among the poor).

150. See Elizabeth Chambliss, *Marketing Legal Assistance*, 148 DÆDALUS 98, 101 (2019).

151. *Id.* at 102.

II. OVERVIEW OF EXISTING RESEARCH

[I]t is one thing to assert there are net benefits from licensing, and entirely another to prove it.¹⁵²

The theoretical justification for lawyers' monopoly over legal services is the asymmetry of expertise between lawyers and clients, which makes it difficult for clients to evaluate the quality of professional services.¹⁵³ As Talcott Parsons has written:

Among [the] basic characteristics [of the professions] is a level of special technical competence that must be acquired through formal training and that necessitates special mechanisms of social control in relation to the recipients of services because of the "competence gap" which makes it unlikely that the "layman" can properly evaluate the quality of such services or the credentials of those who offer them.¹⁵⁴

Yet existing research does not support the breadth of lawyers' monopoly on these grounds. Corporate clients are sophisticated purchasers of legal services and capable of evaluating the quality of service in the absence of fiduciary regulation.¹⁵⁵ The rules of professional conduct already incorporate a series of carve-outs for "sophisticated clients," allowing lawyers who serve sophisticated clients greater leeway to contract around fiduciary protections, for instance against conflicts of interest.¹⁵⁶

Even in the consumer market, where individuals and small businesses may have less experience finding and evaluating legal service providers,¹⁵⁷

152. Hyman & Svorny, *supra* note 113, at 113.

153. See Talcott Parsons, *Equality and Inequality in Modern Society, or Social Stratification Revisited*, in *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* 670 (David B. Grusky ed., 1994).

154. *Id.* at 679.

155. See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2070–72 (2010) (discussing the sophistication of corporate counsel as purchasers of legal services); Silvia Hodges Silverstein, *What We Know and Need to Know About Legal Procurement*, 67 *S.C. L. REV.* 485 (2016) (discussing the increasing sophistication of legal procurement by corporate clients).

156. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 22 (AM. BAR ASS'N 1983) (regarding advance waivers of conflicts of interest); *id.* r. 1.8 cmt. 14 (regarding prospective limits on liability for malpractice). Some large law firms have lobbied for the formalization of this shadow regulatory regime. See ABA Commission on Ethics 20/20, *Proposals of Law Firm General Counsel*, Mar. 8, 2011; James Podgers, *Ethics 20/20 Pitch: Law Firms That Serve 'Sophisticated' Clients Need Own Regulatory System*, *ABA J.* (Apr. 16, 2011, 11:36 PM), http://www.abajournal.com/news/article/ethics_20_20_pitch_law_firms_that_serve_sophisticated_clients_need_own_regu [<https://perma.cc/HB27-54F9>].

157. See Chambliss, *supra* note 150, at 100 (discussing obstacles to consumer awareness and use

there is little evidence to support a total ban on non-lawyer providers. Most research suggests that non-lawyer specialists are capable of performing competently and effectively in a variety of contexts, including some types of formal proceedings.¹⁵⁸ Other countries that have opened their legal markets to non-lawyer owners and investors, and to alternative providers, such as corporations, technology companies, and authorized non-lawyer specialists, have experienced no demonstrable ill effects.¹⁵⁹ On the contrary, their regulatory systems, which regulate alternative providers directly, may be more effective than the U.S. system, which regulates only lawyers.¹⁶⁰

This Part reviews research challenging the public benefits of lawyers' monopoly over legal services, focusing on the consumer market, and calls upon the bar to respond to this growing evidence-based critique.

A. Lawyers' Monopoly over the "Practice of Law"

Research on the regulation of the unauthorized practice of law (UPL) finds significant evidence of political lobbying and protectionism by the

of legal services).

158. See Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 432 (2016) (reviewing research on UPL enforcement and concluding that broad UPL prohibitions "ill serve the public interest"); Levin, *supra* note 9, at 2613 (reviewing research on the effectiveness of lawyers versus authorized non-lawyer providers and concluding that there is "scant evidence that lawyers are more effective or trustworthy than nonlawyer providers of certain legal services").

159. See DAVID J. MORRIS, REPORT TO THE ATTORNEY GENERAL OF ONTARIO 12 (2012) (reviewing the performance of independent paralegals in Ontario); Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms* 4 (Univ. of Melbourne, Legal Studies Research Paper No. 339, 2008) (arguing that the ethical dangers opponents associate with alternative business structures already exist in traditional law firms); Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 46 (2016) (analyzing the impact of alternative business structures in the United Kingdom and Australia); see also Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008) (arguing that existing anticompetitive regulation imposes high costs on U.S. corporate clients).

160. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 17 (1991) (calling for the regulation of law firms as entities under the Rules of Professional Conduct); Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003) (calling for law firm regulation by designated in-house compliance specialists); Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466 (2010) (finding a significant reduction in consumer complaints as the result of entity regulation).

bar,¹⁶¹ but little evidence of consumer harm from unauthorized practice,¹⁶² outside of a few specific contexts, such as immigration.¹⁶³ Deborah Rhode's 1981 national survey of UPL enforcement found that only 2 percent of UPL investigations arose from consumer complaints and only 11 percent of reported cases involved evidence of consumer injury.¹⁶⁴ A follow-up study, published in 2016, found that, in 75 percent of cases involving non-lawyer providers, courts did not even consider the issue of consumer harm.¹⁶⁵ Over two-thirds of officials in charge of UPL enforcement "could not recall an instance of serious [consumer] injury in the past year."¹⁶⁶ Likewise, most UPL lawsuits filed against internet providers, such as LegalZoom, are brought by lawyers or UPL committees without evidence of consumer harm.¹⁶⁷

Comparative research on the performance of authorized non-lawyer providers finds that non-lawyers are capable of providing competent and effective legal representation in a variety of contexts, including

161. See Rhode, *supra* note 15, at 97 (stating that "[a]lmost from conception, the unauthorized practice movement has been dominated by the wrong people asking the wrong questions"); Rigertas, *Legal Bootleggers*, *supra* note 13, at 67–68 (finding that UPL enforcement activity in the 1930s and 1940s was motivated primarily by the bar's concerns with the "overcrowding of the profession" and competition from non-lawyers).

162. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 203 n.235 (review of 144 UPL cases reported between 1908 and 1969, finding that only twelve involved a "specific injury"); Rhode, *supra* note 15, at 4 (national survey of UPL regulators and analysis of eighty-four UPL cases reported between 1970 and 1980); Rhode & Ricca, *supra* note 7, at 2589, 2599 (national survey of UPL regulators and analysis of 103 UPL cases reported between 2005 and 2015).

163. Rhode, *supra* note 158, at 438 (noting that immigration is "a field characterized by both pervasive fraud and pervasive unmet needs," but calling for regulation versus prohibition of lay providers). "If the goal is to protect clients from incompetence, rather than lawyers from competition, then regulation—not prohibition—of lay specialists makes sense." *Id.*; see also Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425 (2011) (calling for expanded accreditation of immigration consultants).

164. Rhode, *supra* note 15, at 33–34. "Although the bar is actively engaged in unauthorized practice enforcement in all but seven states, the ABA has never published any comprehensive description, let alone evaluation, of these activities. Nor has the profession displayed enthusiasm for any outside scrutiny in this area." *Id.* at 4.

165. Rhode & Ricca, *supra* note 7, at 2604.

166. *Id.* at 2595. Among those who could recall a serious injury, "almost all singled out immigration fraud. In the typical case, an undocumented immigrant paid substantial sums and 'got nothing done.'" *Id.* Only 3 percent of reported cases involved immigration, however, suggesting that such cases may be handled informally, or under fraud and theft statutes. *Id.* at 2599.

167. *Id.* at 2605; see also Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 725 (2012) (noting the "conspicuous lack of alleged harms" in bar complaints against internet legal providers).

administrative agency hearings;¹⁶⁸ labor grievance arbitration;¹⁶⁹ family law matters;¹⁷⁰ and immigration appeals.¹⁷¹ In many contexts, formal legal training is less important than task specialization and experience with the setting.¹⁷² In some studies, non-lawyer specialists significantly outperformed lawyers.¹⁷³

There is also little empirical evidence that clients benefit from lawyers' ethical training or professional regulatory oversight.¹⁷⁴ On the contrary, research on lawyers' ethical conduct in practice is dominated by a critical narrative that focuses primarily on lawyers' departure from the rules of professional conduct and the lack of effective regulatory oversight.¹⁷⁵ Although some researchers have pushed back against this critical narrative

168. See HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS: REPORT TO THE LORD CHANCELLOR 247* (1989) (comparing representation by solicitors and lay specialists in social security appeals, immigration hearings, industrial tribunals, and mental health review tribunals); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 76, 108, 148, 190, 201 (1998) (comparing lawyer and non-lawyer representation in unemployment compensation and state income tax appeals); Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC'Y REV.* 765, 777, 785–87 (2003) (comparing representation by solicitors and non-lawyer specialists in welfare benefits, debt, housing, and employment cases).

169. KRITZER, *supra* note 168, at 171 (comparing lawyer and non-lawyer representation in labor grievance arbitration).

170. See THOMAS M. CLARKE & REBECCA L. SANDEFUR, *PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 3* (2017) (preliminary evaluation of Limited License Legal Technicians in Washington State).

171. Unger, *supra* note 163, at 448 (evaluation of accredited immigration specialists); see also GENN & GENN, *supra* note 168, at 83 (comparing solicitors and non-lawyer specialists in U.K. immigration hearings).

172. GENN & GENN, *supra* note 168, at 245–47 (finding that specialization was more important than licensing for effective representation); KRITZER, *supra* note 168, at 201 (finding that “formal legal training is less important than substantial experience with the setting”); Moorhead et al., *supra* note 168, at 796 (“[S]pecialization is usually more important than legal qualifications in determining the quality of advocacy.”); CLARKE & SANDEFUR, *supra* note 170, at 9 (finding that “[f]amily law task competence was strongly ascribed to specific family law experience as a paralegal”).

173. See Moorhead et al., *supra* note 168, at 788–89, 795 (finding that non-lawyer specialists in nonprofit agencies had higher client satisfaction ratings and got significantly better results than solicitors, at half the cost). *But see* Anna E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 *LAW & SOC. INQUIRY* 1023, 1023 (2017) (studying unemployment insurance appeal hearings and finding that “while experienced nonlawyers can help parties through their expertise with common court procedures and basic substantive legal concepts, they are not equipped to challenge judges on contested issues of substantive or procedural law in individual cases, advance novel legal claims, or advocate for law reform”).

174. See Levin, *supra* note 9, at 2622 (reviewing evidence about the effects of law school socialization, character and fitness review, and lawyer discipline).

175. See Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 47, 48 (Leslie C. Levin & Lynn Mather eds., 2012) (discussing the “corruption narrative” in legal ethics research and arguing that the legal ethics literature is biased toward critical accounts).

in specific contexts,¹⁷⁶ or on theoretical grounds,¹⁷⁷ the evidence base for regulatory benefits to clients and the public is thin.¹⁷⁸

B. *The Impact of Counsel*

The evidence-based critique of lawyers' monopoly over legal services has only sharpened as the methodological rigor and theoretical focus of the research has improved. A new wave of "access to justice" research, in particular, is gaining national traction and funding, and promises to dramatically expand reformers' capacity for evidence-based critique.¹⁷⁹

In 2012, D. James Greiner and others began publishing a series of randomized control trials (RCTs) to assess the impact of representation by counsel on case outcomes in various types of civil proceedings, compared to limited legal assistance, information only, or self-help.¹⁸⁰ Greiner has criticized previous research purporting to show the benefits of counsel

176. See Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 *FORDHAM URB. L.J.* 119, 123 (2005) (arguing that critics of self-regulatory efforts by large law firms rely on "an implicit comparison to a nostalgic, collegial ideal"); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 *N.C. L. REV.* 1515, 1564 (2006) (studying law firm general counsel and finding that "firm counsel serve as a critical resource for many busy but well-intentioned lawyers" who are eager to comply with professional rules).

177. See Chambliss, *supra* note 175, at 55 (calling for the clarification of normative benchmarks in legal ethics research); Dana Remus, *Hemispheres Apart, a Profession Connected*, 82 *FORDHAM L. REV.* 2665, 2666 (2014) (arguing that loosening client protections in the consumer market would "place individual clients at an even greater disadvantage vis-à-vis repeat-player corporate clients").

178. See Levin, *supra* note 9, at 2622 (noting that "the bar's claim that lawyers are *more* trustworthy than nonlawyer legal services providers is exceedingly difficult to test"). "This is not to say that the factors that the legal profession point to as evidence of superior trustworthiness have no influence on lawyers' conduct, but rather that the significance of these factors is unproven—and may be overstated." *Id.*

179. See Albiston & Sandefur, *supra* note 46, at 101 (observing that "Access to Justice (A2J) research is in the midst of a renaissance"); Greiner, *supra* note 46, at 72 (stating that the new empiricism in access to justice research has much to offer "policy-makers, regulators, funders, reformers, and revolutionaries").

180. See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *YALE L.J.* 2118 (2012) (examining the effects of access to representation in unemployment insurance appeals); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901 (2013) [hereinafter *District Court Study*] (examining the effects of access to representation in eviction proceedings); D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* 5–6 (Univ. of Chi. Sch. of Law, Working Paper, 2012), <https://ssrn.com/abstract=1880078> [hereinafter *Housing Court Study*] (examining the effects of access to representation in eviction proceedings); Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 *GEO. J. ON POVERTY L. & POL'Y* 449, 450 (2013) (examining the effectiveness of financial counseling versus a lawyer's assistance for people in financial distress).

because it is based on self-assessment by providers, or after-the-fact observational studies that do not control for selection bias.¹⁸¹ RCTs, by contrast, randomly assign cases to different types of service, so as to “assure (up to statistical uncertainty) that differences observed in the outcomes are due to the difference in conditions” as opposed to client or case characteristics.¹⁸²

Greiner’s research challenges “the bar’s deeply held belief that lawyers always add value” in civil proceedings.¹⁸³ The first study randomly assigned claimants in unemployment insurance appeals to an offer of representation by a law student, versus no offer, and found that an offer of representation significantly delayed the proceedings without increasing claimants’ probability of success.¹⁸⁴ Given that roughly one-third of claimants were erroneously denied benefits as an initial matter, and would eventually have that erroneous denial reversed, the study concluded that claimants “might have been better off not receiving the . . . offer of assistance.”¹⁸⁵

A second set of studies focused on the effects of an offer of representation from a legal aid lawyer for tenants facing eviction. One study examined tenants facing eviction in a Massachusetts district court and found that tenants with access to representation fared better than those randomly assigned to information and self-help.¹⁸⁶ The other study, in a Massachusetts housing court, found that access to representation had no effect on outcomes.¹⁸⁷

Greiner’s RCTs have provoked intense and sometimes negative reactions in the legal services community and contributed significantly to the quality of methodological and theoretical debate.¹⁸⁸ For instance: what

181. See Greiner & Pattanayak, *supra* note 180, at 2118 (stating that previous research “provides virtually no credible quantitative information on the effect of an offer of or actual use of legal representation”).

182. Greiner, *supra* note 46, at 69; see also D. James Greiner, *What We Know and Need to Know About Outreach and Intake by Legal Services Providers*, 67 S.C. L. REV. 287, 293 (2016) (calling for randomized evaluation of legal aid providers’ outreach and intake programs); D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession* (Harvard Public Law Working Paper No. 16-06, 2016), <http://ssrn.com/abstract=2726614> (calling for the use of RCTs to evaluate the effectiveness of legal interventions).

183. Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2221 (2013).

184. Greiner & Pattanayak, *supra* note 180, at 2124.

185. *Id.* at 2125.

186. *District Court Study*, *supra* note 180, at 908.

187. *Housing Court Study*, *supra* note 180, at 5–6.

188. See Meredith J. Ross, *Introduction: Measuring Value*, 2013 WIS. L. REV. 67 (introducing a symposium inspired by Greiner’s research); Charn, *supra* note 183, at 2221–22 (discussing reactions to Greiner’s research).

are the implications of measuring the impact of an *offer* of representation, versus actual representation?¹⁸⁹ What can RCTs tell us about *why* representation matters?¹⁹⁰

Meanwhile, Greiner asks: “What would be the effects of partial deregulation of the U.S. legal profession?”¹⁹¹ Although Greiner states that his research does not “support the idea that legal services are worthless or that funding for legal services should be cut,”¹⁹² his research clearly poses a challenge to the bar. In 2016, Greiner launched the Access to Justice Lab at Harvard Law School, to “combat the resistance within the U.S. Bench and Bar to rigorous empirical thinking.”¹⁹³ Funded by the Arnold Foundation, which champions evidence-based policy-making in other fields,¹⁹⁴ the Access to Justice Lab aims to have twenty-two RCTs completed or in the field by 2022.¹⁹⁵

Rebecca L. Sandefur’s research also challenges professional assumptions about the value of lawyers and the benefits of representation when other variables are controlled.¹⁹⁶ In 2015, Sandefur published a meta-analysis of forty years of research examining the impact of representation on adjudicated civil case outcomes in the United States.¹⁹⁷ The goal of the

189. See Ross, *supra* note 188, at 68 (summarizing criticisms of the research design in the initial RCT); Greiner & Pattanayak, *supra* note 180, at 2129 (explaining that it was neither ethical nor feasible to randomize actual representation). The correspondence between an offer of representation and actual representation varied across the three studies. In the study on unemployment insurance appeals, close to 40 percent of claimants who did not receive an offer of representation in fact were represented by other legal service providers, whereas some claimants who did receive an offer did not make use of it. Greiner & Pattanayak, *supra* note 180, at 2128. In the district court eviction study, 97 percent of tenants who received an offer of representation accepted the offer. *District Court Study*, *supra* note 180, at 905. In the housing court study, over three quarters of the “treated group” experienced full legal representation. *Housing Court Study*, *supra* note 180, at 21.

190. See Albiston & Sandefur, *supra* note 46, at 106 (stating that RCTs “can tell us whether or not representation improves outcomes, but they often provide little information about *why* representation mattered”).

191. Greiner, *supra* note 46, at 72.

192. *Id.*

193. *We Are the A2J Lab*, A2J LAB (Sept. 9, 2016), <http://a2jlab.org/we-are-the-a2j-lab/> [<https://perma.cc/GE89-DPQH>].

194. See EVIDENCE-BASED POLICY, ARNOLD VENTURES, <https://www.arnoldventures.org/work/evidence-based-policy/> [<https://perma.cc/V8Q4-GGXJ>] (describing evidence-based policy initiatives in criminal justice, education, health care, and public finance).

195. *Vision and Mission*, A2J LAB, <http://a2jlab.org/vision-and-mission/> [<https://perma.cc/NW6Y-P6QF>].

196. See Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 AM. SOC. REV. 909 (2015) [hereinafter *Elements of Professional Expertise*].

197. *Elements of Professional Expertise*, *supra* note 196, at 912 (explaining the methodology of meta-analysis).

analysis was to bring clarity to a literature “bedeviled by a lack of clear theory and inconsistencies in research design,” in order to get at the question of *why* legal representation matters.¹⁹⁸

Sandefur found that the impact of representation by a lawyer is “notable when . . . compared to that of nonlawyer advocates and spectacular when compared to lay people’s attempts at self-representation.”¹⁹⁹ However, in the kinds of cases studied, lawyers’ impact came primarily from “managing relatively simple legal procedures” or navigating “rarefied interpersonal” relationships, rather than from substantive legal knowledge.²⁰⁰ Lawyers’ impact was greatest in high-volume, adversarial settings in which cases are typically “treated perfunctorily or in an ad hoc fashion by judges, hearing officers, and clerks.”²⁰¹ In such contexts, the presence of lawyers appears to improve case outcomes primarily by encouraging courts to “follow their own rules.”²⁰² This finding points to state court practices as an important source of the access to justice problem,²⁰³ and challenges the justifications for lawyers’ monopoly over routine litigation.²⁰⁴

Sandefur’s research also challenges conventional wisdom about individuals’ demand for lawyers, and the characterization of the access to justice crisis in terms of access to lawyers.²⁰⁵ Sandefur argues that this characterization “comes from the bar.”²⁰⁶ Her research finds that most people with civil justice problems do not characterize their problems as “legal” and never consider using a lawyer, but rather rely on their own understanding and support networks to deal with the problem, or do nothing,

198. *Id.* at 909, 924.

199. *Id.* at 924.

200. *Id.* at 926.

201. *Id.* at 925.

202. *Id.*

203. See Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 456 (2016) (“Some courts are, frankly, lawless: judges and other court staff behave in ways that are inconsistent with the law’s requirements.”); see also Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, 148 DÆDALUS 128, 130 (2019) (arguing that state civil courts are being asked to address social and economic needs wrought by rising inequality that they are “neither designed nor equipped to address”); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741 (2015) (calling for greater attention to “demand side” reforms in the lower civil courts).

204. *Elements of Professional Expertise*, *supra* note 196, at 926 (“Litigation . . . is at the core of lawyer’s professional jurisdiction. It is striking, therefore, that only modest levels and only some kinds of legal expertise may be required in many kinds of ordinary litigation.”).

205. Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 50 (2019).

206. *Id.* at 50 (“The definition of the crisis as one of unmet legal need comes from the bar. . . . Lawyers’ fundamental interest is in maintaining their rights to define and diagnose people’s problems as legal, and to provide the services that treat them.”).

even when the potential stakes are high.²⁰⁷ Moreover, the cost of legal services plays a surprisingly limited role in such decisions.²⁰⁸ The most common reason that people do not turn to lawyers is that they believe they already understand their situation and the options for handling it.²⁰⁹ Sometimes people are correct in these judgments and sometimes they are “disastrously wrong.”²¹⁰ But Sandefur urges the research community to step back from the bar’s assumption that people need access to *lawyers*, and instead focus on the “empirical question: what assistance do people need?”²¹¹

Sandefur is leading a national effort to advance this research agenda, with collaborators in academia,²¹² government,²¹³ and research institutions, such as the American Bar Foundation,²¹⁴ the National Science

207. ACCESSING JUSTICE, *supra* note 148, at 11–12 (finding that individuals rarely turn to lawyers or courts to handle their civil justice problems); *Money Isn’t Everything*, *supra* note 148, at 236 (discussing the “pervasive alequality” of Americans’ responses to civil justice problems); Sandefur, *supra* note 149, at 112 (finding that the most common response to non-trivial civil justice problems is to do nothing, especially among the poor).

208. ACCESSING JUSTICE, *supra* note 148, at 13 (finding that cost was a reason for not seeking assistance in only 17 percent of cases); *Money Isn’t Everything*, *supra* note 148, at 237 (studying civil justice problems in moderate-income households and finding that cost was a reason for not seeking legal assistance in only 6 percent of cases).

209. Sandefur, *supra* note 205, at 51.

210. *Id.* at 52.

211. *Id.* at 50.

212. See, e.g., Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 85 (2013) (discussing new measurement initiatives in pro bono research); P. Pleasence et al., *Apples and Oranges: An International Comparison of the Public’s Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study*, 13 J. EMPIRICAL LEGAL STUD. 50 (2016) (comparative analysis of civil justice research in fifteen different countries); Albiston & Sandefur, *supra* note 46, at 103 (calling for “a research agenda that steps back from lawyers and legal institutions to explore . . . more radical, but potentially more effective, solutions”).

213. See, e.g., U.S. DEP’T OF JUSTICE, WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE: CIVIL LEGAL AID RESEARCH WORKSHOP REPORT 48 (2016) (calling for a federal civil legal aid research agenda); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295, 303–04 (2016) (identifying strategies for using existing government data to learn more about civil justice issues).

214. See, e.g., REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011) [hereinafter ACCESS ACROSS AMERICA]. Sandefur is a Faculty Fellow at the American Bar Foundation, where she founded and leads the Foundation’s Access to Justice research initiative. See *Faculty Fellows: Rebecca Sandefur*, AM. B. FOUND., <http://www.americanbarfoundation.org/faculty/profile/31> [<https://perma.cc/KHQ9-PK55>].

Foundation,²¹⁵ the National Center for State Courts,²¹⁶ and the American Academy of Arts and Sciences.²¹⁷ The goal of these efforts is to build an evidence base about the most effective and efficient solutions to common civil justice problems, by identifying where lawyers are needed—and where they are not. As Sandefur writes:

Resolving justice problems lawfully does not always require lawyers' assistance. Evidence shows that only some of the justice problems experienced by the public benefit from lawyers' services or other legal interventions, while others do not. That is because such intervention is excessive or because it might be the wrong treatment for the problem. This finding holds true whether the outcome of interest is benefits to society or benefits to a person with a problem.²¹⁸

C. *The Role of the Bar?*

The organized bar is largely absent from this expanding conversation and poorly equipped to contribute. Most state bar associations have no research capacity or function.²¹⁹ Although many collect basic information about their

215. See, e.g., Albiston & Sandefur, *supra* note 46, at 102 (discussing a 2012 joint ABF-NSF workshop convening researchers and legal aid providers to develop an A2J research agenda); *Awards, Access to Civil Justice; June 2019 in Chicago, IL*, NAT'L SCI. FOUND., https://www.nsf.gov/awardsearch/showAward?AWD_ID=1823791&HistoricalAwards=false [<https://perma.cc/A46M-ASXU>] (announcing a grant to promote A2J scholarship naming Rebecca Sandefur principal investigator and Alyx Mark and David Udell co-principal investigators).

216. See REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS (2016) (evaluation of the “appropriateness, efficacy, and sustainability” of New York City’s Navigator programs); Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, 67 HASTINGS L.J. 1467 (2016) (suggesting a framework for evaluating the functioning and impact of non-lawyer assistance programs); CLARKE & SANDEFUR, *supra* note 170 (evaluating the appropriateness, efficacy, and sustainability of Washington State’s limited licensing program). Thomas M. Clarke is Vice President of Research and Technology, National Center for State Courts.

217. In 2018, the American Academy of Arts and Sciences launched a new project, “Making Justice Accessible: Data Collection and Legal Services for Low-Income Americans,” led by Sandefur and political scientist John Mark Hansen. The goals of the project are to “identify the essential facts that should be collected about civil justice activity” and to “develop a set of data access standards to help guide the use of civil justice data for research purposes.” See *Data Collection and Legal Services for Low-Income Americans*, AM. ACAD. ARTS & SCI., <https://www.amacad.org/project/data-collection-and-legal-services-low-income-americans> [<https://perma.cc/7SM7-HXR5>] [hereinafter AAAS Data Project]. The project is one of several related access to justice projects by the Academy. See *Making Justice Accessible: Designing Legal Services for the 21st Century*, AM. ACAD. ARTS & SCI., <https://www.amacad.org/project/making-justice-accessible-designing-legal-services-21st-century> [<https://perma.cc/G3WB-WYPV>].

218. Sandefur, *supra* note 205, at 51.

219. Review of state bar websites (on file with author).

own members, and some publish this information periodically or in annual reports, only California, Michigan, and Texas have dedicated research staff beyond a member database specialist.²²⁰

Most state disciplinary agencies also lack the capacity²²¹—and inclination²²²—to provide systematic data about lawyer disciplinary activity, much less to proactively commission research to inform state regulatory policy.²²³ For instance, while many lawyers view unauthorized practice as posing a threat to consumers,²²⁴ most disciplinary agencies do not collect data about consumer harm from unauthorized practice, or the comparative incidence of harm from various authorized forms of service (such as limited scope services, pro bono services, legal aid, private practice, and so on).

The ABA Standing Committee on Ethics and Professional Responsibility, the primary body responsible for drafting and interpreting the Model Rules of Professional Conduct,²²⁵ likewise has limited research

220. See *Principal Analyst (ORIA) San Francisco/Los Angeles*, ST. B. CAL., <http://www.calbar.ca.gov/About-Us/Jobs-Opportunities/San-Francisco/Principal-Analyst-ORIA> [<https://perma.cc/X9HB-YJWY>] (stating that the office is responsible for “ensuring excellence, efficiency, accountability and compliance in State Bar operations, as well as serving as the Bar’s primary source for research and data analysis”); *Research & Reports*, ST. B. MICH., <https://www.michbar.org/opinions/content> [<https://perma.cc/CJP7-QPKW>] (providing an index of research on state bar demographics and the economics of law practice); *Research & Analysis*, ST. B. TEX., https://www.texasbar.com/AM/Template.cfm?Section=Research_and_Analysis&Template=/CM/HTMLDisplay.cfm&ContentID=39265 [<https://perma.cc/SRU5-C8NW>] (stating that “[t]he Department of Research and Analysis provides research for all State Bar of Texas departments, committees, and the board of directors,” as well as “for many other audiences like the media, the public, and our schools”). The Texas State Bar Department of Research and Analysis also invites “special requests for survey and report generation on data not readily available or normally collected by the State Bar.” *Id.*

221. See ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO HOUSE OF DELEGATES xxii (1991) (finding that disciplinary agencies “have not kept pace with the growth of the profession”); ABA CTR. FOR PROF’L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_results.authcheckdam.pdf [<https://perma.cc/8YBJ-H45H>] (reporting statistics on disciplinary agencies’ caseloads, staffing, and budget).

222. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (“[I]n many jurisdictions, discipline complaints, discipline files, and even many discipline sanctions are private. Even states with relatively ‘public’ disciplinary processes shield much information from the public.”); BARTON, *supra* note 14, at 138 (observing that attorney discipline is underfunded and, in most states, “the process is secret”).

223. See Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 723 (2016) (stating that “it is common for the lawyers who regulate lawyers . . . to define their mission in terms of lawyer discipline, rather than lawyer regulation”).

224. See Rhode & Ricca, *supra* note 7, at 2593–94 (discussing lawyers’ perceptions of risks to consumers).

225. See MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983); ABA STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility

capacity and no organized research agenda, but rather relies on sporadic efforts by other ABA committees and special commissions, which in turn have only incidental attachments to evidence-based policy-making. The ABA Center for Professional Responsibility, which maintains “numerous resources relating to ethics, professionalism, client protection, [and] professional discipline,”²²⁶ including a national data bank on (public) lawyer discipline,²²⁷ does not have a dedicated research function, but rather focuses on aggregating existing information and fostering communication among bar organizations and regulatory agencies.²²⁸

Even the ABA Commission on the Future of Legal Services, which emphasized the importance of data and research in its findings and recommendations,²²⁹ made no effort to institutionalize evidence-based policy-making by the ABA. Instead, it lobbied the ABA to establish a Center for Innovation, to “[e]ncourage and accelerate innovations that improve the affordability, effectiveness, efficiency, and accessibility of legal services.”²³⁰ Although the ABA has highlighted the Center for Innovation in executive reports²³¹ and on social media,²³² recent budget cuts and a “massive restructuring”²³³ of ABA entities mean that future Center initiatives “depend to a significant degree on philanthropic support.”²³⁴

y/committees_commissions/ethicsandprofessionalresponsibility.html [https://perma.cc/VSL2-ZM9G] (discussing the role and activities of the Standing Committee). The ABA House of Delegates has the ultimate authority to adopt and amend model rules and regulations. *See* MODEL RULES OF PROF'L CONDUCT Preface (AM. BAR ASS'N 2018) (discussing the House of Delegates' role).

226. *Resources*, ABA CTR. FOR PROF'L RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/resources/ [https://perma.cc/M5P3-KLEH].

227. *National Lawyer Regulatory Data Bank*, ABA CTR. FOR PROF'L RESPONSIBILITY (Sept. 10, 2018), https://www.americanbar.org/groups/professional_responsibility/services/databank/ [https://perma.cc/569M-CNFG].

228. *Committees and Commissions*, ABA CTR. FOR PROF'L RESPONSIBILITY, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ [https://perma.cc/US89-8YKJ].

229. *See supra* notes 133–134 and accompanying text.

230. *About Us*, ABA CTR. FOR INNOVATION, https://www.americanbar.org/groups/centers_commissions/center-for-innovation/AboutUs/ [https://perma.cc/BRT2-PQF6] (stating the Center's mission).

231. *See, e.g.*, Jack L. Rives, *Embracing Innovation: Adapting to Change is Essential for Law Practitioners*, ABA J. (Feb. 21, 2017, 3:50 AM), http://www.abajournal.com/magazine/article/embracing_innovation_law_practitioners [https://perma.cc/FP2K-GUMD].

232. *See, e.g.*, ABA CTR. FOR INNOVATION (@ABAInnovation), TWITTER, <https://twitter.com/abainnovation>.

233. Lee Rawles, *Massive Restructuring at the ABA Will Rehouse Entities Under 9 Centers*, ABA J. (Apr. 5, 2018, 12:49 PM), http://www.abajournal.com/news/article/massive_restructuring_at_the_aba_will_rehouse_entities_under_9_centers_and [https://perma.cc/9KXJ-LKY] (announcing a “massive restructuring” and staff cuts).

234. ABA CTR. FOR INNOVATION, <http://abacenterforinnovation.org/about> [https://perma.cc/3CLW-LMB2]; *see also* Roger Smith, *ABA Center for Innovation: A New Kid on the Block Struggling for Space?*, LAW, TECH. & ACCESS TO JUST. (Jan. 3, 2018), <https://law-tech-a2j.org/innovation/975/> [https://

Meanwhile, the American Bar Foundation (ABF), whose mission is to conduct “rigorous empirical research on law, legal processes, and legal institutions,”²³⁵ is made up of scholars with their own research agendas that, with the exception of Sandefur’s, only occasionally overlap with questions about lawyer regulation.²³⁶

Yet the bar’s perspective is important for the theoretical development of evidence-based lawyer regulation. Featherbedding aside, the value of lawyers’ services and the benefits of fiduciary regulation are not necessarily intuitive or readily apparent to non-specialists, or even law-trained researchers.²³⁷ Even among lawyers, specialists and non-specialists may have different perspectives about how the quality of legal services should be measured and regulated;²³⁸ and proponents of market liberalization, too, remain concerned about service quality and consumer protection from predatory practices.²³⁹ Indeed, in the face of increasing economic inequality and the use of automated and/or fraudulent processes by lenders and landlords, concerns about predation-at-scale should be at the top of researchers’ lists.²⁴⁰

The bar’s investment is also important for increasing research capacity and access. Researchers benefit enormously from collaboration with legal service providers, who can facilitate field access and help define questions

perma.cc/V48E-74Z3] (discussing the effects of ABA budget cuts on the Center for Innovation). As a result of the restructuring, the Center for Innovation is now part of the Center for Access to Justice and the Profession, along with the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, and Legal Aid and Indigent Defense. Rawles, *supra* note 233.

235. *Our Mission*, AM. B. FOUND., <http://www.americanbarfoundation.org/about/mission.html> [https://perma.cc/QPE7-V8QE].

236. *Research Community*, AM. B. FOUND., <http://www.americanbarfoundation.org/faculty/ResearchCommunity.html> [https://perma.cc/5S5Q-GMWS].

237. See Chambliss, *supra* note 175, at 55–56 (discussing “the benchmark problem” in legal ethics research).

238. *Id.* at 54.

239. See Will Hornsby, *CodeX FutureLaw 2014: Ethics*, ELAWYERING BLOG (May 16, 2014) (cautioning proponents of deregulation to “[b]e careful what you wish for” and raising concerns about industry capture of routine legal services); Perlman, *supra* note 42, at 103 (discussing the need for consumer protections under a liberalized regulatory regime).

240. See, e.g., Frank Pasquale, *The Real Barriers to Access to Justice: A Labor Market Perspective*, LAW & POL. ECON. (Apr. 2, 2018), <https://lpeblog.org/2018/04/02/the-real-barriers-to-access-to-justice-a-labor-market-perspective/> [https://perma.cc/SK26-EZK3] (“Make lawyers as cheap and skilled as you want—they can’t help victims access justice if the laws themselves are systematically slanted against them. The same goes for #legaltech: I expect every innovation to, say, create apps to help the evicted to be overwhelmed by a tsunami of money backing services like ClickNotices.”); Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J.L. & SOC. POL’Y 149 (2019) (discussing the causes and consequences of consumer inaction in residential foreclosure proceedings); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1601–02 (discussing fraudulent practices such as “robo-signing” and “sewer service” by lenders and landlords).

and priorities for research.²⁴¹ Providers and regulators, likewise, have much to gain from independent researchers, who can help define input and outcome measures, identify blind spots, and secure research funding.²⁴²

Critics may be skeptical that the organized bar will embrace independent research, much less comparative research, which threatens some lawyers' economic self-interest.²⁴³ Social scientists, meanwhile, may discount the value of "evaluation research," which takes research questions as given and therefore is a limited vehicle for theoretical development and critique.²⁴⁴ But the pressure for evidence-based lawyer regulation is increasing and the social scientists are at the table. From an advocacy standpoint, the burden of production has shifted to the bar to support claims about the unique value of lawyers, based on evidence that is accessible to others, including competitors and external regulators.

The bar, collectively, has every interest in joining this conversation, by signaling a normative commitment to evidence-based policy-making and building the profession's capacity to contribute to relevant research. Part III suggests strategies for institutionalizing this commitment and overcoming regulatory capture within the profession.

III. INSTITUTIONALIZING EVIDENCE-BASED SELF-REGULATION

This Part calls for a paradigm shift in professional self-regulation, from policy-making based on assumptions about the value of lawyers' services to policy-making based on data and research. The first step is a normative and political one: the profession needs to commit to the *idea* of evidence-based regulation and begin to turn its attention to what types of data and

241. See Chambliss et al., *supra* note 46, at 199 (discussing the benefits of collaboration between researchers and legal service providers and reviewing examples).

242. *Id.*; see also Abel, *supra* note 44, at 305 (discussing the benefits of working with nonlawyer researchers to identify challenges faced by self-represented litigants); SELF-REPRESENTED LITIGATION NETWORK, TOUR GUIDE: A SELF-GUIDED TOUR OF YOUR COURTHOUSE FROM THE PERSPECTIVE OF A SELF-REPRESENTED LITIGANT 5 (Apr. 2008) ("[A] judge or administrator may not even observe barriers that may exist for uninitiated members of the public . . ."); Margaret Middleton et al., *Lessons Learned by an Interdisciplinary Research Team Evaluating Medical-Legal Partnership with the Department of Veterans Affairs*, 68 S.C. L. REV. 311, 312 (2016) (discussing an interdisciplinary study of medical legal partnerships funded by the Bristol-Myers Squibb Foundation).

243. See Greiner & Matthews, *supra* note 182, at 2 (arguing that the U.S. legal profession is "hostile to objective, rigorous, scientific evidence" about the effectiveness of legal services); Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111, 111 (2016) (arguing that the profession has a fundamental conflict of interest in the regulation of the legal services market).

244. See Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97, 97–99 (1988) (urging sociolegal scholars to remain independent from policy makers' definitions and goals when framing research questions); Albiston & Sandefur, *supra* note 46, at 104–05 (calling on access to justice researchers to move beyond evaluation research).

research are needed. This means recognizing and promoting the value of evidence-based policy-making within the institutions responsible for professional socialization and self-regulation, such as state supreme courts, law schools, and bar associations.

The profession's authority over the regulation of legal services also will require material investments and proactive, sustained collaboration between bar leaders, regulators, legal services providers, and researchers. State courts and bar associations are not well positioned to conduct systematic original research (although some law schools may be). But courts and bar leaders can work to improve data collection, facilitate researchers' access to data, serve as subject matter experts, and educate lawyers about research findings and debates. Fortunately, national, coordinated efforts to improve research infrastructure are ongoing and some promising collaborations are underway.

A. State Supreme Courts

Advancing the normative and political project of "evidence-based lawyer regulation" depends most immediately on state judicial leadership. State supreme courts ultimately control the content of professional regulation and the enforcement of lawyers' monopoly over the practice of law. Following *N.C. Dental*, state supreme courts should provide "active supervision" of anticompetitive bar activity²⁴⁵ and, more generally, signal support for an evidence-based, public-spirited approach.

In South Carolina, for instance, while the bar has been aggressive in challenging commercial providers and opining against lawyers' participation in new forms of legal marketing,²⁴⁶ the judiciary has been public-focused in responding to market innovations. In 2012, the South Carolina Bar mounted a UPL campaign against LegalZoom, but a judicial referee held that basic document automation does not constitute the

245. *N.C. Dental*, 135 S. Ct. 1101, 1117 (2015) ("If a State wants to rely on active market participants as regulators, it must provide active supervision . . ."); *see supra* notes 103–115 (arguing that the logic of "active supervision" requires substantive, evidence-based review of anticompetitive regulation).

246. *See, e.g.*, South Carolina Bar, Ethics Advisory Op. 09-10 (2009) (stating that a lawyer who claims a third party profile becomes responsible for its content, including client comments; but noting that "[t]his opinion does not take into consideration any constitutional-law issues regarding lawyer advertising"); South Carolina Bar, Ethics Advisory Op. 16-06 (2016) (stating that a commercial platform's "per service marketing fee" for lawyers violates professional rules against fee-sharing with non-lawyers).

unauthorized practice of law.²⁴⁷ The Supreme Court of South Carolina's most recent UPL decision, concerning the use of document automation in real estate closings, reflects careful, fact-driven analysis of the potential for consumer harm and, in the absence of harm, eschews "unnecessary intrusion in the marketplace."²⁴⁸ In response to the bar's proposal to restrict the commercial delivery of legal forms,²⁴⁹ the Supreme Court sought comments from experts on legal services delivery²⁵⁰ and declined to adopt the proposed rule.²⁵¹

State courts are on the front lines of the access to justice crisis and appear to be increasingly sympathetic to calls for regulatory reform. Cuts in state court funding, coupled with increasing consumer distress, have filled state civil courts with self-represented parties²⁵² and led to experimentation with new forms of legal assistance. In Washington, for instance, Chief Justice Barbara Madsen was an early proponent of limited licensing in the family law context, and provided essential leadership in the creation of a limited licensing regime.²⁵³ In New York, Chief Judge Jonathan Lippman spearheaded a Court Navigator program to provide specialized lay assistance in New York City housing and civil courts.²⁵⁴ Notably, in both

247. *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, at *16 (Oct. 18, 2013) ("The South Carolina Supreme Court has recognized that its 'duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public . . .'" (quoting *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 622 (2002))).

248. *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 716 (S.C. 2017).

[T]here is no allegation here of fault in connection with any title search, closing, disbursement or otherwise—Homeowners do not allege they were harmed in any way by the Quicken Loans model. . . . [W]e believe requiring more attorney involvement in cases such as this would belie the Court's oft-stated assertion that UPL rules exist to protect the public, not lawyers.

Id. at 716–17.

249. See *supra* notes 1–5 and accompanying text.

250. Letter from former ABA President William C. Hubbard, to Daniel E. Shearouse, Clerk of Court, Supreme Court of S.C. (Aug. 30, 2018) (on file with author); Letter from James J. Sandman, President of the Legal Servs. Corp., to Daniel E. Shearouse, Clerk of Court, Supreme Court of S.C. (Aug. 29, 2018) (on file with author).

251. Letter from Daniel E. Shearouse, Clerk of Court, Supreme Court of S.C., to David Michael Ross, Exec. Dir., S.C. Bar (Mar. 27, 2019) (on file with author).

252. See NAT'L CTR. FOR STATE COURTS, *supra* note 147, at iv (emphasizing the prevalence of self-represented litigants in state civil courts).

253. See Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"?: Implications for the Consumer Market*, 65 S.C. L. REV. 579, 588 (2014) (discussing Chief Justice Madsen's role); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 SUPRA 75, 90 (2013) (discussing the Washington State Bar Association's objections to limited licensing).

254. See Chambliss, *supra* note 253, at 592 (discussing the Navigator program and other New York initiatives to provide access to specialized non-lawyer assistance); JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., *THE STATE OF THE JUDICIARY 2014: VISION AND ACTION IN OUR MODERN*

states, the courts encouraged independent evaluation of these service initiatives, providing access and collaborating with researchers about research questions and design.²⁵⁵

In March 2019, the Supreme Court of Utah announced the formation of a collaborative working group to test innovative legal service models through use of a “regulatory sandbox,” which permits innovations to be tested safely and “generates data to inform the regulatory process.”²⁵⁶ The goal of the working group is to optimize the regulatory structure for the delivery of legal services, by considering, among other things:

(1) loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referrals and fee sharing; (2) providing for broad-based investment and participation in business models that provide legal services to the public, including non-lawyer investment and ownership of these entities; and (3) creating a regulatory body under the auspices of the Utah Supreme Court to develop and implement a risk-based, empirically-grounded regulatory process for legal services. This body would also, potentially, solicit non-traditional sources of legal services, including non-lawyers, and allow them to test innovative legal service models and delivery systems²⁵⁷

Judicial leaders in other states should pay attention to these developments and consider strategies for contributing to and coordinating related efforts. The Conference of Chief Justices and the Conference of State Court Administrators have passed numerous resolutions urging greater attention to access to justice, including support for “new or modified court rules and processes that facilitate access.”²⁵⁸ In 2016, the Conference

COURTS 8 (2014), <https://www.nycourts.gov/ctapps/soj2014.pdf> [<https://perma.cc/FYT5-79QZ>] (announcing the Navigator program).

255. See CLARKE & SANDEFUR, *supra* note 170 (evaluating the Washington State limited licensing program); SANDEFUR & CLARKE, *supra* note 216 (evaluating the New York City Navigator program).

256. SUPREME COURT OF UTAH, A MOVE TOWARD EQUAL ACCESS TO JUSTICE (Mar. 4, 2019), <https://www.utahbar.org/wp-content/uploads/2019/03/A-Move-Toward-Equal-Access-3.pdf> [<https://perma.cc/RK4F-HBVU>] (announcing the formation of the working group); see also JORGE GABRIEL JIMÉNEZ & MARGARET HAGAN, A REGULATORY SANDBOX FOR THE INDUSTRY OF LAW 2, <http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf> [<https://perma.cc/UFW2-QUS8>] (calling for “a sandbox approach to regulatory reform that would allow changes to promote innovation and new business structures that improve access to justice to be tested safely”).

257. SUPREME COURT OF UTAH, *supra* note 256.

258. Conference of Chief Justices & Conference of State Court Administrators, Resolution 5, Reaffirming the Commitment to Meaningful Access to Justice for All, adopted as proposed by the

of Chief Justices endorsed the ABA Model Regulatory Objectives.²⁵⁹ In a 2019 essay, Chief Justice Nathan L. Hecht of Texas, a self-identified conservative, calls access to justice “an American idea, not a liberal one or a conservative one,” and “simply good government.”²⁶⁰

State judicial leaders should also encourage support for state access to justice commissions, which play an increasingly organized role in civil justice reform.²⁶¹ Access to justice commissions have helped to increase state and private funding for civil legal aid,²⁶² promote evidence-based program assessment,²⁶³ and develop best practices for legal aid funding.²⁶⁴ State judicial leadership plays an important role in promoting access to

CCJ/COSCA Access, Fairness, and Public Trust Committee at the 2015 Annual Meeting, https://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx [<https://perma.cc/7C6Y-2V4D>]; *see also* Conference of Chief Justices & Conference of State Court Administrators, Resolution 13, Reaffirming Commitment to Access to Justice Leadership and Expressing Appreciation for Access to Justice Progress and Collaboration, adopted as proposed by the CCJ/COSCA Access, Fairness and Public Trust Committee at the 2013 Annual Meeting (July 31, 2013), <https://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/07312013-reaffirming-commitment-justice-leadership-expressing-atj-collaboration-ccj-cosca.ashx> [<https://perma.cc/8F4E-M7ZW>] (supporting access to justice commissions); Conference of Chief Justices & Conference of State Court Administrators, Resolution 4, In Support of the Statement of Best Practices for State Funding of Civil Legal Aid Prepared by the ABA Resource Center for Access to Justice Initiatives, adopted as proposed by the CCJ/COSCA Government Affairs Committee and the CCJ/COSCA Access, Fairness, and Public Trust Committee at the 2015 Annual Meeting, <https://ccj.ncsc.org/~media/Microsites/Files/%20CCJ/Resolutions/07252015-Support-Statement-Best-Practices-State-Funding-Civil-Legal-Aid.ashx> [<https://perma.cc/58GU-HG5D>] (calling for increased state legislative funding for civil legal aid).

259. Conference of Chief Justices, Resolution 9, Recommending Consideration of ABA Model Regulatory Objectives for the Provision of Legal Services, adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the Conference of Chief Justices 2016 Midyear Meeting (Feb. 3, 2016), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02012016-Recommending-Consideration-ABA-Model-Regulatory-Objectives-Provision-Legal-Services.ashx> [<https://perma.cc/3ZYX-KXUG>].

260. Nathan L. Hecht, *The Twilight Zone*, 148 *DÆDALUS* 190, 191 (2019).

261. *See* April Faith-Slaker, *Access to Justice Commissions—Accomplishments, Challenges, and Opportunities*, MGMT. INFO. EXCHANGE J., Fall 2015, at 13 (reporting a “new level of maturity” among state access to justice commissions and reviewing recent initiatives and accomplishments); Conference of Chief Justices & Conference of State Court Administrators, Resolution 8, In Support of Access to Justice Commissions, adopted as proposed by the CCJ/COSCA Access, Fairness and Public Trust Committee at the 2010 Annual Meeting (July 28, 2010), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07282010-In-Support-of-Access-to-Justice-Commissions.ashx> [<https://perma.cc/93JC-2C84>] (recognizing state access to justice commissions as “one of the most important justice-related developments in the past decade”).

262. *See* Faith-Slaker, *supra* note 261, at 13–14 (discussing increases in “state legislative funding . . . , funding from changes in court rules/statutes . . . and private funding” from the Public Welfare Foundation, the Kresge Foundation, and the Bauman Foundation).

263. *Id.* at 14, 16 (discussing commissions’ efforts to promote legal needs assessment and collaboration with independent researchers).

264. *Id.* at 17 (citing ABA Resource Center for Access to Justice Initiatives, Supreme Court Leadership on State Legislative Funding for Civil Legal Aid (2015), http://www.americanbar.org/content/dam/aba/images/legal_aid_indigent_defendants/ls_SC%20Best%20Practices.pdf).

justice commissions' visibility and authority within the bar.²⁶⁵

Researchers such as Greiner and Sandefur already have begun to collaborate with state and local courts to conduct research on existing practices and evaluate new service initiatives.²⁶⁶ Clinical law professors, too, have organized a burst of research on state civil courts and the experiences of self-represented litigants²⁶⁷ and, as discussed below, may be especially well positioned to conduct such research.²⁶⁸ However, most state courts have been slow to develop standards for data collection and research access. State court case management systems were developed for operational use, rather than research, and vary widely by jurisdiction,²⁶⁹ making the collection of even basic statistics about the civil justice system difficult.²⁷⁰ Policies for research access also vary widely, or are non-

265. *Id.* at 16; *see also* American Bar Association, Resolution 10D, Report to the House of Delegates (Aug. 2013), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_aba_atj_resolution.authcheckdam.pdf [<https://perma.cc/QL7G-KHHJ>] (calling for the establishment of access to justice commissions in every state and urging ABA member support).

266. *See Current Projects*, A2J LAB, <https://a2jlab.org/current-projects/> [<https://perma.cc/D747-3SCJ>] (list of ongoing RCTs); CLARKE & SANDEFUR, *supra* note 170 (evaluation of the Washington State limited licensing program); SANDEFUR & CLARKE, *supra* note 216 (evaluation of the New York City Navigator program).

267. *See* Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249 (calling for research on state civil courts and judges and providing a theoretical framework); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017) (studying judicial approaches to "active judging" to assist pro se litigants); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215 (studying pre-hearing procedures in unemployment insurance appeals and finding significant variations among judges); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058 (2017) (studying an experimental problem-solving housing court and suggesting that inquisitorial procedures may improve substantive justice for pro se litigants); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018) (urging the expansion of the problem-solving model in the rental housing and consumer debt contexts); Carpenter et al., *supra* note 173, at 1023 (studying lawyer and nonlawyer representation of employers in unemployment insurance appeals and finding that "judges play a critical role in shaping nonlawyer legal expertise"); *see also* Tonya L. Brito et al., *"I Do For My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3029 (2015) (reporting findings from a study of the role of counsel in civil contempt proceedings).

268. *See* Jessica K. Steinberg, *Law School Clinics and the Untapped Potential of the Court Watch*, 6 IND. J.L. & SOC. EQUALITY 176, 185 (2018) (promoting the "court watch" as a "signature research method" for clinics).

269. *See* Sandefur, *supra* note 213, at 297 n.6 (stating that "different jurisdictions collect different information, record the same information in ways that make comparisons difficult, and many still do not keep sufficiently detailed electronic case records").

270. *Id.* at 296–97 ("One of the most striking facts about civil justice in the United States is how few solid representative facts we have about it. . . . We do not and cannot presently know how many civil cases are filed in the United States in a given year. . . . what groups in the population are involved in which types of cases, how the cases are resolved, and with what outcomes for whom."); *SRLN Brief: How Many SRLs?* (SRLN 2019), SELF-REPRESENTED LITIG. NETWORK (May 25, 2019), <https://www.srln.org/>

existent, leaving researchers to negotiate access on a court-by-court, project-by-project basis.

The National Center for State Courts, the National Science Foundation, the American Academy of Arts and Sciences, and other organizations are actively working to improve state court data collection,²⁷¹ create standards for research access,²⁷² and leverage existing administrative data.²⁷³ State judicial leaders should support these efforts and encourage their states to implement standards for data collection and access. Judicial leaders should also engage with cybersecurity experts to implement privacy protections and best practices for data governance.²⁷⁴

B. Law Schools

Law schools are another important site for advancing the normative and long-term, material project of evidence-based lawyer regulation. An obvious place to begin is with the professional responsibility curriculum. Many leading professional responsibility scholars are critical of the breadth of lawyers' monopoly and call for systematic research to guide professional regulation.²⁷⁵ However, in most law schools, the required course on

n.org/node/548/srln-brief-how-many-srls-srln-2015 [https://perma.cc/E3TK-YRUJ] (“While the National Center for State Courts has developed a counting methodology for the courts, it is extremely difficult to implement for a variety of reasons, with the most notable being it requires a customization of a court’s case management system.”).

271. See COURT STATISTICS PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 1 (2019), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting.ashx> [https://perma.cc/X6YV-VF66] (providing a “standardized reporting framework for state court caseload statistics designed to promote intelligent comparisons among state courts”); NCSC Launches National Court Open Data Standards Project, @ THE CTR.: THE FLAGSHIP NEWSL. OF NCSC (July 10, 2018), <https://www.ncsc.org/Newsroom/at-the-Center/2018/Jul-10.aspx> [https://perma.cc/SF9Q-YBZK] (project to develop a uniform data standard to “foster more consistent and reliable data collection, lead to better data quality, lower court costs, and enable faster and more reliable data access”).

272. See AAAS Data Project, *supra* note 217 (project to develop standards and templates for research access).

273. See, e.g., *Workshop: Computing, Information Science and Access to Justice*, NAT’L SCI. FOUND., https://nsf.gov/awardsearch/showAward?AWD_ID=1839537&HistoricalAwards=false [https://perma.cc/7W35-DWZS] (convening researchers, data scientists, and legal service providers to discuss the application of computing methods in access to justice research); see generally Andrew M. Penner & Kenneth A. Dodge, *Using Administrative Data for Social Science and Policy*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 1, 2 (2019) (noting that “efforts to leverage administrative data in the social sciences are uneven”).

274. See Brian J. McLaughlin, *Cybersecurity: Protecting Court Data Assets*, in TRENDS IN STATE COURTS: COURTS AND SOCIETY 67 (Deborah W. Smith et al. eds., 2018) (discussing best practices for data-governance by state court administrators).

275. See, e.g., Hadfield, *supra* note 159, at 1690–91 (reviewing decades of “withering critiques” from professional responsibility scholars); Levin, *supra* note 9, at 2615 (finding little empirical evidence

professional responsibility—like the ABA Model Rules for Professional Conduct—focuses on the regulation of lawyers’ individual conduct and devotes little coverage to empirical questions or broader regulatory debates.²⁷⁶

The ABA curricular requirement for professional responsibility instruction is likewise narrow—and headed in the wrong direction. The relevant standard is Standard 303, which currently reads as follows:

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members²⁷⁷

Standard 303 used to require “substantial instruction in the history, goals, structure, rules of professional conduct, and the values, and responsibilities of the legal profession and its members.”²⁷⁸ However, in 2017, the ABA dropped the language about “history, goals, [and] structure”—words that suggest an empirical framework and some reflection on regulatory objectives—in favor of a narrow focus on existing rules and values.²⁷⁹

This narrow focus is seriously at odds with the realities of the legal market and current regulatory challenges and debates.²⁸⁰ Law students need to be exposed to these debates if they are to act as competent stewards of

to support lawyers’ monopoly claims); Rhode, *supra* note 158, at 439 (decrying the lack of systematic research on key regulatory issues).

276. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, a Case Study*, 69 FORDHAM L. REV. 817, 821–22 (2000) (criticizing the individualistic focus of the required professional responsibility course and calling for more attention to broader regulatory debates); E-mail from Donald K. Joseph to author (June 18, 2018, 2:38 PM) (on file with author) (reporting the results of a survey of ABA-accredited law schools, finding that 77 percent allow class sizes of more than sixty students in the required professional responsibility course, which may limit coverage of material beyond that required to pass the MPRE).

277. ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16 (2018).

278. Memorandum from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., to Interested Persons and Entities (Feb. 23, 2017) (on file with author), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/March2017CouncilOpenSessionMaterials/2017_february%20notice_revisions_to_standards_rules.pdf [<https://perma.cc/CT2S-X2QC>] (redlined version of the amended Standards).

279. *Id.*

280. See Chambliss, *supra* note 276, at 819–22 (arguing that a narrow focus on the ABA Model Rules provides a distorted empirical picture of the profession and professional regulation); Perlman, *supra* note 42, at 51 (arguing that the current lawyer-based regulatory framework needs to be reimagined).

the profession over the course of their careers.²⁸¹ Students should be taught to recognize the empirical assumptions underlying existing rules, not just about the boundaries of lawyers' monopoly—the focus of this Article—but also about confidentiality and the attorney-client privilege,²⁸² conflicts of interest,²⁸³ lawyer advertising,²⁸⁴ and other core subjects of professional regulation.

Professional responsibility also should introduce students to the norms of independent research and the difference between evidence in advocacy and evidence in social science. This is a tricky and interesting subject with a long history in the social sciences;²⁸⁵ but it is also a “professional responsibility” issue that relates directly to the profession's own rules requiring professional independence and the avoidance of conflicts of interest.²⁸⁶ Researchers are expected to be impartial, specify questions and

281. Chambliss, *supra* note 276, at 822 (“[B]y making the individual [lawyer] the unit of analysis, the traditional approach leaves out a whole set of ‘professional responsibilities’ having to do with the stewardship of the profession and its institutions and organizations.”); *see also* Andrew M. Perlman, *The Public's Unmet Need for Legal Services & What Law Schools Can Do About It*, 148 DÆDALUS 75, 75–76 (2019) (stating that “law schools have not prepared students to deliver legal services as efficiently as possible,” but rather have trained them to engage in “highly customized and expensive forms of lawyering”).

282. *See, e.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 cmt. c (AM. LAW INST. 2000) (noting that the rationale for the privilege rests on empirical assumptions about clients' need for lawyers and the effects of the privilege on client disclosure); Notes and Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1232 (1962) (finding that lawyers are more likely than non-lawyers to believe that the privilege encourages client disclosure and that most non-lawyers are unaware of the scope of the privilege); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 200–01 (1989) (questioning the value of the privilege as an inducement to candor in “communications between house counsel and corporate employees” and calling for more attention to “the need for lawyers to warn corporate employees that the corporation's attorney-client privilege does not belong to them personally”).

283. *See, e.g.*, SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002) (studying how lawyers manage conflicts of interest in a random sample of 128 Illinois law firms); Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003) (studying how lawyers manage conflicts of interest compared to other fiduciaries, such as accountants, psychotherapists, physicians, journalists, and academics).

284. *See, e.g.*, Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 692 (2013) (study challenging assumptions about the effects of advertising on fees in the contingency fee context, finding that “contingency fee clients are, for a number of reasons, uniquely insensitive” to price); Jim Hawkins & Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 U. ILL. L. REV. 1005, 1014 (noting that “lawyer advertising restrictions are adopted with minimal or no serious empirical study about the actual impact on the market for legal services”).

285. *See* Chambliss, *supra* note 47, at 34 (discussing epistemological debates within the social sciences and their relevance for empirical legal scholarship).

286. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2018) (discussing the professional independence of a lawyer); MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N

methods in advance, separate factual from normative claims, and make their data available to others.²⁸⁷ Providing an introduction to these norms—perhaps in conjunction with coverage of *N.C. Dental* and the increasing pressure for evidence-based lawyer regulation—would help students learn to distinguish between instrumental and inquisitive analysis,²⁸⁸ and to recognize the importance of “professional” (i.e. independent) research.²⁸⁹

Professional responsibility scholars interested in promoting evidence-based lawyer regulation should promote organized changes in the professional responsibility curriculum, including the language of Standard 303. Making a change in the formal standard—perhaps simply by requiring coverage of “regulatory objectives”—would signal the profession’s commitment to self-reflection about self-regulation and establish a foothold for research guided by professional regulatory objectives.

Law school clinics are also a natural setting for introducing students to evidence-based program assessment and the value and limits of different methods of measuring the impact of legal assistance. Students should be exposed to the reporting requirements for grant-funded clinics and the increasing use of cost-benefit analysis in legal aid advocacy.²⁹⁰ Clinical professors should invite students to think critically—and constructively—about how to measure the value of legal services to clients, government, and the public; and how to communicate these benefits to attract partners, raise money, and drive policy change.²⁹¹

Law school clinics are also promising partners for original research on legal services delivery.²⁹² Like teaching hospitals, they are well positioned to identify important research questions, facilitate access to client communities, and collaborate with experienced researchers in academic

2018) (discussing conflicts of interest).

287. See Greiner, *supra* note 46, at 68 (discussing “general norms of social science research”).

288. See Greiner & Matthews, *supra* note 182, at 12 (arguing that lawyers are trained to be instrumental, as opposed to inquisitive, resulting in a resistance to acknowledging empirical uncertainty).

289. See Chambliss et al., *supra* note 46, at 200 (emphasizing the need for “professional (independent, trained) researchers” in access to justice research).

290. See, e.g., REPORT OF STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A, at 3 (2016) (concluding that establishing a right to counsel for tenants in New York City “would provide a net cost savings to the city of \$320 million”).

291. See Chambliss, *supra* note 150, at 102 (calling on lawyers to “make a business case to consumers and to related service providers, such as health care providers, state and local governments, and court administrators”).

292. See Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145, 146 (discussing “the potential for law school clinics to serve as sites of empirical research to answer pressing questions about delivery of legal services in low-income communities”).

institutions.²⁹³ Court-centered clinics are especially well positioned to conduct “court watch” projects—observation and data-collection in the courtroom—a uniquely valuable method of access to justice research.²⁹⁴ Law students can be trained to meaningfully contribute to well-defined court watch projects,²⁹⁵ with important pedagogical as well as research benefits.²⁹⁶

Like professional responsibility teaching, clinical teaching is directly concerned with promoting the quality and efficacy of legal services, and clinical professors have been at the forefront of calls for evidence-based lawyer regulation.²⁹⁷ In 2003, the Association of American Law Schools (AALS) Section on Clinical Legal Education established the Bellow Scholars Program to support clinical research on legal services delivery and collaborations between clinicians and social science researchers.²⁹⁸ Many former Bellow Scholars continue to be active in conducting research,²⁹⁹ and the field is growing as more law schools establish tenure-track positions for clinicians.³⁰⁰

293. *Id.* at 161.

294. *See* Steinberg, *supra* note 268, at 187 (discussing the unique value of courtroom observation and in-court data collection in access to justice research); *see also* Brito, *supra* note 267, at 3031 (discussing the role of courtroom observations in a mixed-methods study of the impact of counsel in child support enforcement proceedings); Elizabeth G. Patterson, Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings, 25 GEO. J. ON POVERTY L. & POL’Y 75, 77 (2017) (discussing court observation studies of child support contempt proceedings in South Carolina).

295. Steinberg, *supra* note 268, at 186–87 (“Law students are not equipped to carry out complex data collection . . . [but] . . . can certainly partake in courtroom observations and record the presence or absence of a handful of variables.”); *see also* Enrique S. Pumar & Faith Mullen, *The Plural of Anecdote is Not Data: Teaching Law Students Basic Survey Methodology to Improve Access to Justice in Unemployment Insurance Appeals*, 16 UDC/DCSL L. REV. 17 (2012) (describing student training and contributions in a study of unemployment compensation appeals).

296. *See* Steinberg, *supra* note 268, at 190–95 (discussing the benefits of “see one, do one, teach one” pedagogy, and learning to think critically about legal institutions and roles).

297. *See* JEFFREY SELBIN ET AL., ACCESS TO EVIDENCE: HOW AN EVIDENCE-BASED DELIVERY SYSTEM CAN IMPROVE LEGAL AID FOR LOW- AND MODERATE-INCOME AMERICANS 3 (2011) (calling on the federal government to support evidence-based approaches to civil legal assistance); Abel, *supra* note 44, at 299 (proposing a metric for measuring the effectiveness of access to justice interventions); Charn, *supra* note 183, at 2226 (calling for “consumer-centered, evidence-based legal services”); Charn & Selbin, *supra* note 292, at 168 (discussing the political and ethical challenges of moving toward evidence-based legal services).

298. BELLOW SCHOLAR PROGRAM, <https://sites.google.com/view/bellowscholars/home> [<https://perma.cc/CQ4H-7FDV>].

299. *See* *Scholarship by Former Bellow Scholars*, BELLOW SCHOLAR PROGRAM, <https://sites.google.com/view/bellowscholars/scholars-and-selection/scholarship-by-bellow-scholars> [<https://perma.cc/CQQ6-BW6Z>].

300. *See, e.g.,* *New Voices in Civil Justice Workshop*, VAND. L. SCH., <https://law.vanderbilt.edu/academics/academic-programs/branstetter/new-voices-in-civil-justice-workshop.php> [<https://perma.cc/LEB5-VJBD>] (describing a workshop for junior scholars writing about civil justice, recently featuring a

In addition to clinics, a number of law schools have established research and training centers focusing on access to justice and innovations in legal services delivery. Stanford Law School was an early leader in research on access to justice³⁰¹ and, in 2013, established a research and training center on legal design.³⁰² Chicago-Kent College of Law's Center for Access to Justice & Technology has been a leader in the development and testing of self-help legal software.³⁰³ In 2014, the National Center for Access to Justice, now at Fordham Law School, launched the Justice Index, an annual benchmarking tool that provides “a visual and data-based picture of the quality of access to justice in state justice systems.”³⁰⁴ In 2016, as discussed above,³⁰⁵ Harvard Law School established a research center to test the effects of specific legal interventions using randomized control trials.³⁰⁶ And numerous other law schools have launched related research and training programs in recent years.³⁰⁷ Law deans should support research and

number of clinical scholars doing empirical research); *Congratulations to the 2017 ASPIRE Grant Recipients*, U. S.C. OFFICE VICE-PRESIDENT FOR RES., https://www.sc.edu/about/offices_and_divisions/research/news_and_pubs/news/2017/20170428_ASPIRE_Recipients_Announcement.php [<https://perma.cc/H7D2-NLM5>] (announcing an interdisciplinary study of juvenile court intake “to promote the integration of empirical inquiry into policy analysis”).

301. See *Stanford Center on the Legal Profession*, STAN. L. SCH., <https://law.stanford.edu/stanford-center-on-the-legal-profession/> [<https://perma.cc/2XTP-MNFZ>] (stating that the Center was founded in 2008 to support “research, teaching, programs and public policy initiatives on crucial issues facing the bar” such as access to justice and lawyer regulation); see also Mark Childress, *Programs of Change: Law Schools Explain Their Commitment to Public Service*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Oct. 25, 2011, 5:58 PM), <https://obamawhitehouse.archives.gov/blog/2011/10/25/programs-change-law-schools-explain-their-commitment-public-service> [<https://perma.cc/VX6T-3F96>] (reporting on a U.S. Department of Justice Access to Justice Initiative honoring Stanford law professor Deborah Rhode as a “champion of change”).

302. See *Legal Design Lab*, STAN. L. SCH., <https://law.stanford.edu/organizations/pages/legal-design-lab/> [<https://perma.cc/QGF3-Z5SA>]; *About*, LEGAL DESIGN LAB, <http://www.legaltechdesign.com/about/> [<https://perma.cc/V8RF-EHC5>] (“The Legal Design Lab . . . was founded in fall 2013 to bring designers, lawyers & technologists together to advance legal innovation and access to justice.”); see also Margaret Hagan, *Design Comes to the Law School*, in MODERNISING LEGAL EDUCATION 202, 220 (Catrina Denvir ed., forthcoming 2020) (discussing the role of the design lab as a partner in research).

303. *Center for Access to Justice & Technology*, CHI.-KENT C. L., <https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/history> [<https://perma.cc/4BAN-K7YL>] (chronicling the development of A2J Author, a widely-used self-help document assembly software).

304. *National Center for Access to Justice Launches Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., <https://ncforaj.org/2014/03/04/national-center-for-access-to-justice-launches-justice-index/> [<https://perma.cc/Q2ZU-88NS>]. The Center moved from Cardozo Law School to Fordham Law School in 2016. See *We're Moving—NCAJ Heading to Fordham Law School!*, NAT'L CTR. FOR ACCESS TO JUST., <https://ncforaj.org/2016/08/01/were-moving-ncaj-heading-to-fordham-law-school/> [<https://perma.cc/9RFY-4DU9>].

305. See *supra* notes 193–195 and accompanying text.

306. See *Access to Justice Lab at Harvard Law School*, A2J LAB, <https://a2jlab.org/> [<https://perma.cc/GTN8-AKUZ>].

307. See, e.g., *Center for Access to Justice*, GA. ST. U.C.L., <https://law.gsu.edu/faculty-centers/>

training programs focused on legal services delivery and pitch such programs to applicants and donors as a means of preparing lawyers for a changing legal market.³⁰⁸ The AALS and affiliated faculty should look for ways to coordinate their research and regulatory policy agendas.

C. Bar Associations

Finally, bar leadership will be critical in shaping the profession's response to market and regulatory changes and the development of the profession's capacity for evidence-based regulation. Some professional groups already are active in efforts to rethink lawyer regulation based on empirical data. For instance, the Association of Professional Responsibility Lawyers (APRL) recently led an effort to clarify and streamline the ABA Model Rules governing lawyer advertising,³⁰⁹ based on a state-by-state survey of current enforcement practices and complaints.³¹⁰ As a follow-up,

center-for-access-to-justice/ [https://perma.cc/FT6H-KW3U]; CIV. JUST. RES. INITIATIVE, <https://civiljusticeinitiative.org/> [https://perma.cc/FT6H-KW3U] (describing a collaboration between Berkeley Law and UC Irvine School of Law); *Institute for the Advancement of the American Legal System*, U. DENVER, <https://iaals.du.edu/> [https://perma.cc/9AHM-RV9J]; *Boot Camp*, INST. FOR FUTURE L. PRAC., <https://www.futurelawpractice.org/bootcamp> [https://perma.cc/GX35-PC9M] (describing a collaboration among law schools and employers to expand law training in “complementary disciplines, including business, design, project management, technology, and data analytics”); *Legal Innovation & Technology*, SUFFOLK U.L. SCH., <https://www.suffolk.edu/law/academics-clinics/concentrations/legal-innovation-technology> [https://perma.cc/6877-JLCE]; *Iron Tech Lawyer*, INST. FOR TECH. L. & POL’Y GEO. L., <https://www.georgetowntech.org/itlabout> [https://perma.cc/AB9U-HB8L]; L. WITHOUT WALLS, <http://lawwithoutwalls.org/> [https://perma.cc/73QV-5Q2L] (part-virtual, collaborative training program hosted by University of Miami School of Law); *LegalRnD Lab*, MICH. S.U. COLL. L., <https://www.law.msu.edu/lawtech/legal-rnd-lab.html> [https://perma.cc/M8C2-UYCE]; *NMR&S Center on Professionalism*, U.S.C. SCH. L., <http://professionalism.law.sc.edu/> [https://perma.cc/4FZL-NK3T]; *Program on Law & Innovation*, VAND. L. SCH., <https://law.vanderbilt.edu/academics/academic-programs/law-and-innovation/index.php> [https://perma.cc/A38R-X7QK]; see also *Law School Innovation Index*, LEGAL SERVS. INNOVATION INDEX, <https://www.legaltechinnovation.com/law-school-index/> [https://perma.cc/6K5E-99LG] (identifying law school programs focusing on innovation in legal services delivery).

308. See William D. Henderson, *The Lawyer of the Future: A Blueprint for Change*, 40 PEPP. L. REV. 461, 465, 503–04 (2013) (noting that building a curriculum based on labor market data and feedback from employers can be “the basis for a successful law school capital campaign”); Perlman, *supra* note 281, at 76 (calling upon law schools to train students to “deliver services *efficiently*,” by teaching business skills, project management, design thinking, and data analytics).

309. See Scott Flaherty, *ABA Clarifies Rules on Lawyer Advertising (Sort of)*, AM. LAW. (Aug. 9, 2018, 4:45 PM), <https://www.law.com/americanlawyer/2018/08/09/ethics-update-on-lawyer-ads-move-aba-rules-toward-clarity/?srlreturn=20190106100924> (reporting ABA approval of amendments “clarifying” and “condensing” the rules on advertising and solicitation but avoiding “murky questions” arising from online marketing platforms).

310. APRL, 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE 3 (June 22, 2015), http://aprl.net/wp-content/uploads/2016/07/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf [https://perma.cc/JE2G-RGJL] (describing the survey). The survey found that state enforcement of advertising rules varies considerably. Most complaints about lawyer advertising come from

APRL has launched a broader project on the “Future of Lawyering” to tackle the rules governing unauthorized practice, online lawyer marketing, and non-lawyer investment in legal services;³¹¹ and has reached out to researchers and alternative providers for input and data.³¹²

The State Bar of California, likewise, has created a task force to identify possible regulatory changes to improve the delivery of legal services through the use of technology, including artificial intelligence and online legal service delivery models.³¹³ The task force will review the consumer protection purposes and impact of current UPL prohibitions; evaluate existing regulation governing lawyer advertising, solicitation, and fee splitting; and prepare a recommendation as to whether the State Bar “should consider increasing access to legal services by individual consumers by . . . permitting non lawyer ownership.”³¹⁴ As part of this effort, the State Bar commissioned an independent research report to lay the groundwork for the task force’s work.³¹⁵

Meanwhile, several states are actively considering proposals to regulate online document providers. In Washington, for instance, the Practice of Law Board has proposed amendments to the definition of the “practice of law” to explicitly allow online document provision under certain conditions, including provider registration with the state bar.³¹⁶ The proposed amendments are structured so that the court would “retain control of the scope of the exception,” thus “keeping authority over the practice of law

competitors rather than clients and there is “virtually no empirical data demonstrating actual consumer harm caused by lawyer advertising.” *Id.* at 27.

311. See *The Future of Lawyering*, ASS’N PROF. RESP. LAW., <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/> [<https://perma.cc/8TS8-WGSG>] (stating that the goal of the project is to develop proposals for “amending the legal ethics rules and reforming the lawyer regulatory process” to respond to the “evolving nature of technology and its impact on the delivery of legal services and access to justice”).

312. See *id.* (providing a link to the roster of participants).

313. See *Task Force on Access Through Innovation of Legal Services*, ST. B. CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> [<https://perma.cc/88D8-QMUT>] (reporting the creation of a task force “charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services”).

314. *Id.*

315. See WILLIAM D. HENDERSON, LEGAL MARKET LANDSCAPE REPORT (July 2018), <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf> [<https://perma.cc/96TV-NYKY>], Attachment A; Laurel Terry, *Back to the Future (Again) Regarding the Regulation of Legal Services*, JOTWELL, at 1 (Apr. 18, 2019) (reviewing HENDERSON, *supra* note 315) (describing the report as “jammed with data” and a must-read for “anyone who is concerned about access to legal services and the proper scope of lawyer regulation”).

316. See *In re Suggested Amendments to GR 24—Definition of Practice of Law*, Order No. 25700-A-1255 (Nov. 28, 2018) (on file with author).

with the judicial branch.”³¹⁷ Tennessee also is considering an amendment to its statutory definition of the practice of law to make clear that the “practice of law” includes “the generation of legal documents for valuable consideration by means of interactive software,” and to require provider registration.³¹⁸ At the national level, the New York State Bar Association and New York County Bar Association are leading an effort to draft model regulation of online document providers for consideration by the ABA in August 2019 (“Resolution 10A”).³¹⁹

These efforts are controversial both with traditionalists, who view commercial legal software as a threat to consumers,³²⁰ and with some legal tech entrepreneurs, who view the regulation of legal software as incompatible with the First Amendment.³²¹ Numerous bar groups have weighed in to urge restraint and further study.³²² Currently, however, there is no systematic research to inform the debate.

These regulatory issues deserve national, organized attention and research support. ABA leaders should use their platform to promote states’ adoption of the ABA Model Regulatory Objectives, and make explicit the demand for a paradigm shift in professional self-regulation.³²³ The ABA should provide leadership and resources to promote national data sharing and evidence-based policy-making about specific regulatory issues, and

317. *Id.* at 6.

318. H.B. 1411 Amended, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (on file with author).

319. See Lorelei Laird & Jason Tashea, *Proposed Model Rules for Online Legal Document Companies Go Back to the Drawing Board*, ABA J. (Feb. 1, 2019, 3:40 PM), <http://www.abajournal.com/news/article/model-rules-for-online-legal-document-companies-withdrawn/> [<https://perma.cc/9NZV-RRUT>] (discussing the formation of a working group to edit the guidelines for presentation in August 2019).

320. *Id.* (noting that two prior iterations of the proposal have been withdrawn due to concerns about warranties, intellectual property, dispute resolution, and whether the proposed guidelines would apply to courts offering online forms); see also *supra* note 7 and accompanying text.

321. See Richard S. Granat, *Call for an Association for the Advancement of Legal Product*, RICHARDGRANAT.COM (Mar. 26, 2019), <https://www.richardgranat.com/single-post/2019/03/26/Call-for-an-Association-for-the-Advancement-of-Legal-Product> [<https://perma.cc/8LRJ-LMS9>] (explaining his opposition to Resolution 10A and arguing that such efforts will be the “death knell of the emerging consumer-facing digital application industry”); see also Marc Lauritsen, *Are We Free to Code the Law?*, 56 COMM. ACM 60 (Aug. 2013), <https://static1.squarespace.com/static/571acb59e707ebff3074f461/t/5946f665bf629ad759f22b07/1497822826191/AreWeFree.pdf> [<https://perma.cc/CB6Z-U6PF>] (questioning whether restricting the distribution of interactive legal software is within the legitimate scope of government action).

322. Summary of Points/Positions in Opposition to Resolution 10A (on file with author).

323. ABA President-Elect Judy Perry Martinez served as chair of the ABA Commission on the Future of Legal Services and was a chief proponent for the adoption of regulatory objectives. See *Judy Perry Martinez*, ABA (Aug. 7, 2018), https://www.americanbar.org/groups/leadership/aba_officers/judy-perry-martinez.html [<https://perma.cc/GPV8-FMBC>] (discussing Perry’s prior leadership and service within the ABA).

develop a proactive research agenda guided by professional regulatory objectives.³²⁴ ABA leaders should work with regulators, researchers, consumer advocates, and funders to organize and support such research.

The U.S. legal profession lags well behind legal professions in other Anglo-American jurisdictions, such as Australia, Canada, and Britain, in institutionalizing empirical research as part of professional self-regulation. In New South Wales, for instance, an early study of self-assessment by entity providers found a dramatic reduction in client complaints and paved the way for regulatory reform throughout Australia and Canada.³²⁵ The Solicitors Regulatory Authority (SRA), the primary authority for the regulation of solicitors in England and Wales, maintains a research staff of fourteen, who proactively design and conduct research to guide regulatory policy.³²⁶

The ABA should use the occasion of its recent reorganization to promote evidence-based policy-making for the benefit of its members as well as the public. Many lawyers and law firms could profit from new models for service provision and marketing, collaboration with technology companies, and the ability to raise outside capital. The challenge is to develop new models without sacrificing consumer protection. Building research capacity is essential for promoting professional regulatory objectives in an expanding legal market.

CONCLUSION

The United States is moving toward evidence-based lawyer regulation. The seeds were sown in 2015, when the Supreme Court narrowed the scope of state-action antitrust immunity for professional licensing boards, and 2016, when the American Bar Association adopted Model Regulatory Objectives for the Provision of Legal Services. These developments create

324. See Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 HOFSTRA L. REV. 95, 118–20 (2014) (stating that “if the ABA wants to continue to be relevant and useful to its members and to U.S. regulators,” it should strive to serve as an “early warning system” for difficult lawyer regulation issues, aggregate relevant information, and facilitate national and global conversations about lawyer regulation).

325. See Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check”*: Learning from Reflection on Ethics Inside Law Firms, 24 GEO. J. LEGAL ETHICS 399 (2011) (describing the study); Terry, *supra* note 223, at 727 (discussing the study and its impact throughout Australia and Canada).

326. See, e.g., David Bish & Debra Malpass, Price Transparency in the Legal Services Market: A Behavioural Trial Exploring the Effect of Price Information on Consumer Decision Making (June 13, 2018) (paper presented at the International Conference on Access to Justice in London); George Hawkins & Mijanur Rashid, Using Insurance Claims Data to Determine Appropriate Levels of Public Protection in a Regulated Market (June 13, 2018) (paper presented at the International Conference on Access to Justice in London); see also SOLICITORS REGULATION AUTH., *supra* note 43 (providing an index of recent research).

pressure for empirical evidence to assess the costs and benefits of lawyers' monopoly over legal services.

But who will conduct the research necessary for an "evidence-based" approach? What methodological standards will govern? And what role will the organized profession play in the theoretical development of the field? The profession historically has played a minimal role in assessing the costs and benefits of anticompetitive regulation and faced little pressure to do so. Now, the profession is on the defensive as market—and regulatory—competitors emerge.

This Article has argued that the profession is losing its authority over the regulation of legal services, and called upon state judicial leaders, law schools, and bar associations to respond. Professional self-regulation has many critics and most evidence suggests the boundaries of lawyers' current monopoly are overbroad. Yet, fiduciary values and provider experience are critical components of any system redesign. The profession has a responsibility to engage in the growing national research conversation about access to justice, and to expand its commitment to evidence-based lawyer regulation.