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Is the Legal Profession Too Independent?

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IS THE LEGAL PROFESSION TOO INDEPENDENT?

LIMOR ZER-GUTMAN* & ELI WALD**

Faced with mounting pressure to permit national law practice and increase access to legal services for those who cannot afford to pay for them and critiques about growing inequality and its failure to lead the battles for greater gender and racial justice, the legal profession's response has been to resist reform proposals by invoking its independence. Lawyers and lawyers alone, asserts the profession, ought to determine the pace and details of nationalizing law practice, set the conditions under which nonlawyers and artificial intelligence can offer legal services, and respond to growing inequality among lawyers and concerns about the role lawyers play, and fail to play, in the quest for a more just society. Any outside interference, cautions the profession, would undermine lawyers' independence and our commitment to the Rule of Law. Asserting the independence of the bar has proven to be an effective rhetorical ploy, successfully disarming criticisms and weakening calls for reform—because who can argue against the Rule of Law?

This Article argues that in debating the complex challenges of access, equality, and justice, the American legal profession's claims of independence must be carefully scrutinized rather than deferred to, and that, if the profession cannot meet the burden of showing that particular reform proposals undercut its independence, its claims must be dismissed. In support of its thesis, the Article advances theoretical and comparative claims. Theoretically, it draws on distinctions between types of legal professions—mature and emerging—and between types of independence claims—from the state and from powerful clients—to establish that claims by mature legal professions, such as the American legal profession, of independence from the state deserve little deference. If the profession cannot or will not address the access, equality, and

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justice challenges facing it, state and federal legislatures ought to take appropriate regulatory action unencumbered by the independence claims of the bar.

Comparatively, the Article shows that a mature legal profession can be too independent in the sense that it takes advantage of its independence from the state not only to defeat reform proposals but also to advance its self-interest at the expense of the public interest. Offering a detailed study of the Israeli legal profession, the Article documents how—in response to the opening of new law schools and a significant increase in the number of lawyers, and to increased competition in the market for legal services from nonlawyers and artificial intelligence—the Israeli Bar Association, which exercises exclusive control over the practice of law in Israel, took advantage of its independence from the state to reduce the number of new lawyers and stifle competition. Among other measures, the Israeli Bar Association made the bar exam harder to pass, extended the mandatory internship period, and aggressively asserted unauthorized practice of law rules against nonlawyers and artificial intelligence companies.

The experience of the Israeli legal profession, an independent from the state mature legal profession, should serve as a cautionary tale for its American counterpart. Left unchecked, a profession can be too independent and advance its self-interest at the expense of the public interest. To address access, equality, and justice challenges, the American legal profession must engage in reform proposals in good faith and avoid hiding behind empty assertions of threats to its independence.

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I. INTRODUCTION

The legal profession is at a crossroads, facing four interlocking challenges. First, the practice of law is growing nationally, increasingly putting it at odds with the historically state-based admission, licensing, regulatory, and disciplinary processes. Second, the profession is facing unprecedented pressures to increase access to those who cannot afford to pay for it by allowing nonlawyers to offer legal services at a reduced cost. Third, the profession is struggling with increased stratification, economic inequality, and instability. Finally, lawyers are under scrutiny for failing to lead the way as our nation is experiencing a racial and gender justice reckoning. And these challenges are taking place as the profession is coming to terms with the COVID-19 pandemic and its disruptive impact on the practice of law.¹

As lawyers navigate these challenges, one presumption is hardly ever revisited: the independence of the legal profession. Indeed, to question the independence of the bar is heresy because, as the profession keeps reminding us, an independent bar is a condition-precendent for the Rule of Law, justice, and the protection of our rights and freedoms.² Notably, however, the presumption of independence is, no pun intended, anything but an academic affair. Preserving the independence of the bar means that the nationalization of the practice of law will be overseen by lawyers who will retain near-exclusive control over admission, licensing, regulation, and disciplinary affairs. It also means that lawyers will have a meaningful say, if not outright control, over the practice of law by nonlawyers and artificial intelligence (AI). Fidelity to an independent bar implies that lawyers alone ought to deal with—or leave unaddressed—the growing inequality within the profession, and that lawyers alone ought to decide how to respond to calls for greater racial and gender justice by Black Lives Matter and @metoo advocates. Practically speaking, the independence of the bar shapes and informs the future of the profession at this crucial moment for lawyers.³

1. *Infra* Part II.A.

2. *Infra* Part II.B.

3. *Infra* Part II.C.

But what if the independence of the bar is an excuse used by the profession to block much needed public interest reform and shape the future in its own self-interest? This Article argues that instead of accepting the independence of the profession as an irrebuttable presumption, we need to carefully examine independence claims in context and assess how they matter to particular reform claims. The thesis of the Article is that in autocratic societies with emerging legal professions, the independence of the bar and the judiciary are constitutive elements of the Rule of Law, justice, and fairness; whereas in liberal democracies, with mature legal professions, the independence of the bar is often invoked by lawyers as a (powerful) rhetorical ploy to defeat reform proposals that are inconsistent with the profession's self-interest. This, to be sure, does not mean that independence claims by mature legal professions must always be dismissed out of hand as lawyer posturing, but it does mean that such claims must be subjected to a healthy degree of scrutiny as we navigate important challenges that will determine the future of the practice of law, access to legal services, and greater equality within and outside of the profession.

The Article is organized as follows. Part I begins with a study of the challenges facing the legal profession in the twenty-first century. It then summarizes the independence claims of the bar and shows how mature legal professions may use these claims to defeat public interest reform agendas acting in lawyers' self-interest. Part II draws on the experience of another mature bar, the Israeli legal profession, to demonstrate how a too independent profession uses its power to act in its members' self-interest. The Article's analysis establishes that, rhetorical pretenses about the demise of the Rule of Law aside, a mature legal profession can be too independent in the sense that it uses its powers to advance its own interests at the expense of the public good. The claim that a monopolistic legal profession may use its unchecked power to advance its own self-interest at the expense of the public is not new.⁴ The main contribution of this Article is to offer a contemporary, detailed account of how exactly a mature legal profession uses its independence to advance its self-interest and defeat public spirited reform proposals. The Article concludes with a cautionary independence tale, exploring the ways independence claims should and should not inform our discourse as we traverse the future of the legal profession and the thorny challenges facing it.

4. *See, e.g.*, RICHARD L. ABEL, *AMERICAN LAWYERS*, 37–38 (1989); MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 2–3 (1977); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 186–87, 305–06 (1999).

II. THE LEGAL PROFESSION IN THE TWENTY-FIRST CENTURY: CHALLENGES, INDEPENDENCE, AND THE FUTURE OF LAW PRACTICE

As the legal profession begins to emerge from the COVID-19 pandemic, it faces complex interconnected challenges. These challenges are made more complicated than they need to be when lawyers over-claim independence to undercut reform proposals meant to address evolving practice realities, increased access to legal services, and concerns about growing inequality within the profession.

A. *The Challenges Facing the Legal Profession*

The nationalization, even globalization, of the practice of law has long been a concern for BigLaw, serving large entity clients with national and global legal needs.⁵ State-based admission and licensing schemes restrict competitive entry-level and lateral hiring and state-based unauthorized practice of law rules (UPL) limit effective national service of clients or add costs for local counsel.⁶ At the same time, state-based disciplinary enforcement undermines the effective regulation of lawyers and law firms who de facto practice on a national basis.⁷ Yet, in the twenty-first century, the nationalization of law practice is no longer just a BigLaw problem. Although some practice areas and fields of law remain predominantly state-based—for example, plaintiff attorneys’ work related to automobile accidents and defense counsel’s representation of those accused of violating states’ penal codes—increasingly clients’ legal needs cut across state borders.⁸

5. MITT REGAN & LISA H. ROHRER, *BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM 3* (Chicago University Press 2021).

6. MODEL RULES OF PRO. CONDUCT r. 5.5(c)(1) (AM. BAR ASS’N 2021), for example, generally allows a lawyer to provide legal services on a temporary basis in a jurisdiction in which the lawyer is not licensed that are “undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.” Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 511–12 (2011); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 346 (1994).

7. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) (“[S]tudy after study has shown that the current rules of professional conduct are not enforced.”); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 493 (1990) (noting rules of professional conduct tend to be “systematically underenforced”); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 814–19 (1992); RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) (studying disciplined lawyers in New York and showing that underenforcement is a serious concern).

8. Wald, *supra* note 6, at 494.

Consider a small business owner. In the ordinary course of doing business, national supply chains require interstate contracting and give rise to interstate disputes. Obtaining lines of credit, from both commercial lenders and the Small Business Administration, demands lawyers with cross-state legal expertise. The ability of state-licensed lawyers to effectively and efficiently serve the national needs of their clients is strained under the state-based rules of professional conduct, which limit the services lawyers can offer out-of-state.⁹ Similarly, the ability of lawyers to effectively compete in the market for legal services to the benefit of clients is constrained under the traditional state-based regime, which forces lawyers to initially choose one jurisdiction in which to practice law out of law school and imposes state-based admission hurdles, fees, and Continuing Legal Education (CLE) requirements on those wishing to practice on a more national basis. The COVID-19 pandemic drove home some of the anachronistic features of the state-based regulatory apparatus, complicating the lives of lawyers admitted and licensed in State A but forced to reside and practice out of State B for an extended period of time.¹⁰

Next, insufficient access to legal services has plagued middle class and poor Americans for a while.¹¹ Recently, frustration with the legal profession and politicians' apparent inability to close the access gap—taking place at the same time as AI advances increase possibilities of nonlawyer delivery of legal services—has led to various experiments with access-driven initiatives and limited deregulation of the practice of law. Arizona and Utah, for example, have launched programs allowing nonlawyers to offer limited legal services.¹²

9. MODEL RULES OF PRO. CONDUCT r. 5.5(c) (AM. BAR ASS'N 2021).

10. Anne G. Crisp, Joan MacLeod Heminway & Gray Buchanan Martin, *Business Law and Lawyering in the Wake of COVID-19*, 22 TRANSACTIONS: TENN. J. BUS. L. 365, 374–75 (2021).

11. See Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 555 (1981); Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 806–07 (1971); DEBORAH L. RHODE, IN THE INTEREST OF JUSTICE 7, 143–83 (2003); JEANNE CHARN & RICHARD ZORZA, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 1 (Bellow-Sacks Access to Civil Legal Services Project, President and Fellows of Harvard College 2005).

12. See UTAH JUDICIAL ADMIN. r. 14-802(c) (2017) (permitting licensed paralegal practitioners to engage in limited practice in areas including divorce and cohabitant abuse). Arizona has also begun a two-year pilot project that will license a small number of nonlawyer “legal advocates” to provide limited advice on civil matters arising from domestic violence. See Stephanie Francis Ward, *Training for Nonlawyers to Provide Legal Advice Will Start in Arizona in the Fall*, ABA J. (Feb. 6, 2020), <https://www.abajournal.com/web/article/training-for-nonlawyers-to-provide-legal-advice-starts-in-arizona> [<https://perma.cc/LL9J-FAZS>]. As of November 2021, the State Bar of California was considering a proposal that would permit nonlawyer paraprofessionals to provide legal advice and undertake other tasks typically handled by attorneys in areas such as family law, housing, consumer

AI breakthroughs challenge old restrictions on nonlawyer providers, eclipsing the services already offered by the likes of LegalZoom.¹³ Similar deregulatory developments in Canada, the U.K., and around the world suggest that the days of the legal profession's monopoly over the provision of legal services are coming to an end,¹⁴ and that the profession must come to terms with solutions meant to increase access to those who cannot afford to pay lawyers' fees.¹⁵

To make matters worse, the nationalization and globalization of law practice and the access-driven deregulation of lawyers' monopoly are taking place in a time of unprecedented instability, growing stratification, and increased economic inequality for lawyers. Discrimination, exclusion, and stratification are not new phenomena for the legal profession.¹⁶ Explicit gender

debt, employment/income maintenance, and collateral criminal law. Paraprofessionals would also be able to have minority ownership interests in law firms. See CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP, REPORT AND RECOMMENDATIONS (Sept. 23, 2021), <https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/PPWG-Report-to-BOT.pdf> [<https://perma.cc/EJ4Z-JRZ5>]. Notably, Washington was the first state in the country to experiment with a nonlawyer affordable legal support option to help meet the needs of those unable to afford the services of an attorney. It authorized Legal Technicians, also known as Limited License Legal Technicians (LLLT), to advise and assist people going through divorce, child custody, and other family-law matters in Washington. On June 4, 2020, the Washington Supreme Court decided to sunset the LLLT program, citing the program's high costs and its inability to attract LLLTs. See *Become a Legal Technician*, WASH. BAR ASS'N., (Oct. 8, 2021), <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician> [<https://perma.cc/7RDY-7LA4>].

13. John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3041–42 (2014); Dana Remus & Frank S. Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 *GEO. J. LEGAL ETHICS* 501, 502–03 (2017); Milan Markovic, *Rise of the Robot Lawyers?*, 61 *ARIZ. L. REV.* 325, 329 (2019). See generally MICHAEL LEGG & FELICITY BELL, *ARTIFICIAL INTELLIGENCE AND THE LEGAL PROFESSION* (2020).

14. Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 *OHIO ST. L.J.* 1, 10 (2012); Andrea Remyne, *Preventing Self-Regulation from Becoming Self-Strangulation: The Application of Deregulation and Independent Oversight to Allow the US Legal System to Adapt to Market Forces Currently Threatening Lawyers, Law Schools and Access to Justice*, 22 *MICH. ST. INT'L. L. REV.* 1149, 1150 (2014) (summarizing deregulation of the legal profession in the United Kingdom).

15. In 2016 the ABA passed Resolution 105, seemingly opening the door for the provision of legal services by nonlawyers. See ABA COMM'N ON THE FUTURE OF LEGAL SERVICES, REP. TO THE HOUSE OF DELEGATES, RESOL. 105 (2016), [<https://perma.cc/A7NQ-SKKS>]. See generally RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2010).

16. JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 120 (1966); JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 40 (1976); ERWIN SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 44–46 (1964); MICHAEL J. POWELL, *FROM*

and racial discrimination and exclusion from the practice of law were the norm until the 1950s, gradually declining through the 1960s and 1970s.¹⁷ Economic and ethnoreligious stratification was similarly common through the 1970s,¹⁸ and the growth of large law firms contributed to the fragmentation of the bar into the corporate and the individual hemispheres.¹⁹ Moreover, down cycles have occurred before,²⁰ leading some commentators to comment that the legal profession was in a state of perpetual decline.²¹

The twenty-first century, however, has added new types of discrimination, stratification, and instability challenges. Implicit bias has proven hard for law firms to combat.²² For some BigLaw equity partners and elite in-house lawyers, these are the best of times,²³ while other attorneys are relegated to new lawyer-

PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 141–44 (1988) (discussing the development of bar rules designed to exclude ethnoreligious minorities and non-elites).

17. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1042 (2011); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1119 (2011).

18. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1804 (2008); Eli Wald, *Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?*, 36 TOURO L. REV. 299, 309 (2020).

19. On the individual and corporate hemispheres of the legal profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319–20 (1982) (finding that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 30–31, 44 (2005) (documenting that lawyers work in two fairly distinct hemispheres—individual and corporate—and that mobility between these hemispheres is relatively limited).

20. See generally William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209–10 (2003).

21. See Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) (“Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar.”).

22. Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2413 (2015).

23. Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. 1765, 1776 (2020).

employee classes.²⁴ Increased competition, uncertainty, and instability continue to plague law firms,²⁵ and all of this was happening pre-pandemic.²⁶

Finally, notwithstanding lofty rhetoric characterizing lawyers as public citizens who owe a special responsibility to the quality of justice,²⁷ the legal profession has long had a disappointing record of under-representation of women, lawyers of color, and lawyers from other disadvantaged groups in positions of power and influence.²⁸ Against this poor background, the legal profession has struggled to meet the challenges of increased racial and gender equality by failing to join and lead movements such as Black Lives Matter and @metoo.²⁹

24. Eli Wald, *In-House Pay: Are Salaries, Stock Options, and Health Benefits a “Fee” Subject to a Reasonableness Requirement and Why the Answer Constitutes the Opening Shot in a Class War between Lawyer-Employees and Lawyer-Professionals*, 20 NEV. L.J. 243, 282–89 (2019).

25. See generally John Morley, *Why Law Firms Collapse*, 75 BUS. LAW. 1399 (2019).

26. Raymond H. Brescia, *Lessons from the Present: Three Crises and Their Potential Impact on the Legal Profession*, 49 HOFSTRA L. REV. 607, 608–09 (2021).

27. “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PRO. CONDUCT, pmb1., cmt. 1 (AM. BAR ASS’N 2021) (emphasis added).

28. Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 57–59, 64–69 (1994); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 587–94 (1996); Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1764–68 (1991); Cynthia Fuchs Epstein, Robert Sauté, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 309 (1995); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1677 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 502 (1996); Eli Wald, *Serfdom without Overlords: Lawyers and the Fight against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 278 (2016).

29. Deborah L. Rhode, *David Boies’s Egregious Involvement With Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/opinion/david-boies-harvey-weinstein.html> [<https://perma.cc/4SWA-HPUH>]. To demonstrate its commitment to justice and equality, the profession sometimes points to the celebrated record of civil rights attorneys, or, more recently, to the willingness of some of its leading lawyers to represent Guantánamo Bay detainees, see generally, e.g., THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux & Jonathan Hafetz eds., NYU Press 2011), or to the flocking of immigration lawyers to U.S. airports to help represent those in need following President Trump’s executive orders, see, e.g., Enid Trucios-Haynes & Marianna Michael, *Mobilizing a Community: The Effect of President Trump’s Executive Orders on the Country’s Interior*, 22 LEWIS & CLARK L. REV. 577, 590–93 (2018). Yet, notwithstanding such inspiring moments, the profession is generally known for advocating for the powerful and rich, not for its cutting edge commitment to justice movements. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 205 (Princeton Univ. Press 2020).

B. *The Independence of the Legal Profession*

An independent legal profession is a cornerstone of the Rule of Law.³⁰ The independence of the bar from political retaliation and influences means that people are free to live their lives subject only to the law and may retain lawyers to explain and advise regarding the law. Lawyers in turn are free to assist people without fear of persecution or retribution, resulting in clients pursuing a “first-class citizenship.”³¹ The independence of the bar manifests itself in self-regulation.³² The legal profession oversees admission and licensing, promulgates its own rules of professional conduct, and enforces them through a disciplinary apparatus, maintaining its independence—all in pursuit of the public interest and effective representation of clients.³³

In the United States, the legal profession has long enjoyed ample independence from political retaliation by the executive and legislative branches.³⁴ Generally speaking, although with some jurisdiction-based variations, lawyers are admitted to practice law in each state after earning a law degree at an accredited law school approved by the American Bar Association (ABA)—the largest national voluntary bar association—passing a bar exam, and submitting an application to the state’s supreme court. Upon admission to the bar, lawyers are subject to the state’s rules of professional conduct, adopted by each state’s supreme court following the ABA Model Rules of Professional Conduct, and, in particular, are subject to discipline imposed by the state

30. Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 867–71 (2017). *See generally* TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 370–71 (1987) (discussing ways in which legal professions take primary responsibility for sustaining and advocating the integrity of the legal process and the Rule of Law throughout the world).

31. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613, 617 (1986).

32. MODEL RULES OF PRO. CONDUCT, pmb., cmts. 10–12 (AM. BAR ASS’N 2021) (“The legal profession is largely self-governing To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. *Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.* The legal profession’s relative autonomy carries with it special responsibilities of self-government. *The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.*” (emphasis added).

33. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6–7, 61 (1988).

34. *See generally* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS* (1950); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005).

supreme court for violating the rules. Finally, to maintain their license in good standing, lawyers must stay current by, *inter alia*, meeting CLE requirements overseen by the state's supreme court. Thus, although not exclusive—many jurisdictions have passed numerous statutes regulating the practice of law and a growing number of federal statutes also apply to lawyers³⁵—state supreme courts dominate and exercise significant control over the legal profession, ensuring its independence.³⁶

Indeed, the American legal profession is so independent that in recent memory, scholarly attention has shifted away from worrying about the independence of the profession from political pressures by the executive and legislative branches to worrying about the independence of the bar from market pressures by powerful entity clients.³⁷ Moreover, commentators have pointed out that—following crises claims and complaints about lawyers assisting large entity clients to perpetrate massive frauds on the public—the profession has asserted its independence to defeat reform agenda meant to address “Where were the lawyers?” challenges.³⁸ That is, the profession has invoked the rhetoric of independence, meant to insulate it from political pressures in the name of pursuing the public interest, to defend against reform proposals meant to enhance its independence from market pressures.

Whereas other mature legal professions enjoy similar degrees of independence,³⁹ the picture is quite different in the case of emerging legal

35. Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 124 (2011).

36. *Cf.* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 152 (2010) (exploring whether trial court and appellate judges, as opposed to state supreme courts, should regulate lawyers).

37. Gordon, *supra* note 33, at 8. In the twenty-first century, the concern has been particularly pronounced with regard to in-house lawyers who serve but one entity client. Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997); Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 449–50 (1988); Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867, 1868 (2016). On the power shift from outside counsel to in-house lawyers and their entity clients, see Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479–80 (1989); David B. Wilkins, *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2070–71 (2010).

38. *See generally*, Simon, *supra* note 20.

39. Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2718 (2012) (on the independence of the UK legal profession); Christine Parker, *Peering over the Ethical Precipice: Incorporation, Listing and the Ethical*

professions where, notwithstanding significant gains, the independence of the bar is not secure, and lawyers are sometimes persecuted for advocating for clients and the Rule of Law.⁴⁰ Thus, in assessing the independence and independence claims of legal professions, distinguishing between mature and emerging legal professions is essential. It requires scrutinizing independence claims in the former while building and defending independence from the state to ensure the Rule of Law in the latter. Drawing this distinction, however, is not always a straightforward undertaking because increased lawyer mobility across the globe has blurred the line between the practice of law in the United States and Western Europe and in Asia, Latin America, and other parts of the world.⁴¹ Moreover, multinational corporations, global law firms and other international intermediaries reshape and redefine the meaning of law practice and the social structure of legal professions.⁴²

Moreover, the multifaceted, gradual globalization of legal professions requires nuanced contextual attention to different assertions and types of independence. Mature legal professions' claims of independence from the state ought to be questioned and sometimes discounted, while their market independence from powerful entity clients ought to be fostered;⁴³ whereas the independence of emerging legal professions from the state must be prioritized,

Responsibilities of Law Firms (Melbourne L. Sch., Legal Stud. Rsch. Paper No. 339, 2008), https://law.unimelb.edu.au/_data/assets/pdf_file/0009/1709838/70-Parker_paper11.pdf [<https://perma.cc/Q32L-734K>] (Austl.); ANTOINE VAUCHEZ & PIERRE FRANCE, *THE NEOLIBERAL REPUBLIC: CORPORATE LAWYERS, STATECRAFT, AND THE MAKING OF PUBLIC-PRIVATE FRANCE* 13–14, 21 (2020) (Fr.).

40. Elizabeth M. Lynch, *China's Rule of Law Mirage: The Regression of the Legal Profession Since the Adoption of the 2007 Lawyers Law*, 42 *GEO. WASH. INT'L L. REV.* 535, 535 (2010) (China); Katerina P. Lewinbuk, *Perestroika or Just Perfunctory? The Scope and Significance of Russia's New Legal Ethics Laws*, 35 *J. LEGAL PROF.* 25, 26 (2010) (Russ.); David Pimentel, *Reframing the Independence v. Accountability Debate: Judicial Structure in Light of Judges' Courage and Integrity*, 57 *CLEV. ST. L. REV.* 1, 2–4 (2009) (Pak.). See generally *LAWYERS IN 21ST-CENTURY SOCIETIES*, VOL. 1: NATIONAL REPORTS (Richard L. Abel, Ole Hammerslev, Hilary Sommerlad & Ulrike Schultz eds., 2020) [hereinafter *LAWYERS IN 21ST-CENTURY SOCIETIES*].

41. Sida Liu, *The Legal Profession as a Social Process: A Theory on Lawyers and Globalization*, 38 *L. & SOC. INQUIRY* 670, 670–71 (2013); YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE TRANSFORMATION OF LATIN AMERICAN STATES* (Univ. Chi. Press 2002).

42. Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in *ADAPTING LEGAL CULTURES*, 241–53 (David Nelken & Johannes Feest eds., 2001).

43. Richard L. Abel, *Comparative Sociology of Lawyers, 1988–2018—The Professional Project*, in *LAWYERS IN 21ST-CENTURY SOCIETIES*, *supra* note 40, at 895–97.

even as global market forces also shape and inform the development of these nascent legal professions.⁴⁴

C. Too Much Independence? Over-Claiming Independence in the Face of Possible Reform

The U.S. legal profession's tendency to sound the independence alarm every time it faces criticism is a concern as the bar attempts to navigate the challenges facing it in the twenty-first century. First, consider the nationalization of law practice. Although some aspects of the regulatory apparatus have grown quasi-national—for example, the ABA promulgates uniform accreditation standards for all American law schools,⁴⁵ the National Conference of Bar Examiners (NCBE) administers a portion of the bar exam for most jurisdictions,⁴⁶ many states coordinate and have moved toward a national bar exam,⁴⁷ and the ABA promulgates the Model Rules of Professional Conduct, which serve as the basis for the rules of professional conduct in most states⁴⁸—many unsettled questions remain about the future of the nationalization of law practice. What court or agency will admit lawyers nationally?⁴⁹ Who will promulgate and enforce the rules of professional conduct?⁵⁰

In theory, one can imagine that the nationalization of law practice may be achieved via federalization of the bar, that is, by Congress passing statutes regulating national admission, practice, and discipline of lawyers, perhaps constituting a national regulatory agency to oversee lawyers. Yet, given the longstanding independence of the bar, such regulatory reform is unlikely and certain to be met with strong opposition from the legal profession, state supreme

44. Hilary Sommerland & Ole Hammerslev, *Lawyers in a New Geopolitical Conjuncture—Continuity and Change*, in *LAWYERS IN 21ST-CENTURY SOCIETIES*, *supra* note 40, at 5–10, 14–22.

45. 2020–2021 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, A.B.A., https://www.americanbar.org/groups/legal_education/resources/standards/ [https://perma.cc/K3A8-L4Q3].

46. *See Jurisdictions Administering the MBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/mbe/> [https://perma.cc/VK45-7WJK].

47. *See Jurisdictions Administering the UBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/> [https://perma.cc/K3Y2-7FYP].

48. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2021), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/PZK8-FND4].

49. Wilkins, *supra* note 7, at 814.

50. *See* Zacharias, *supra* note 6, at 337.

courts, and state bar associations. Instead, the ABA is likely to demand a key role in the regulation of lawyers, and nationalization is more likely to be achieved by incrementally building on the status quo—for example, by allowing lawyers to practice de facto nationally based on a license in good standing from any jurisdiction, perhaps subject to paying additional state-based fees and availing oneself of discipline by the state supreme courts of all jurisdictions in which one practices.⁵¹

Second, consider the increased access to legal services reform agenda, driven by both nonlawyers and AI. As in the case of the nationalization of law practice, many key questions remain unresolved. For example: What rules should apply and who should regulate nonlawyers? Once again, the legal profession has invoked its independence claims to assert influence over the process. At the same time as the organized bar has regularly challenged nonlawyers' provision of legal services as the unauthorized practice of law,⁵² it has worked hard to dominate deregulation, from curtailing state supreme courts' increased access programs⁵³ to claiming that the ABA should regulate nonlawyers.⁵⁴

Finally, in the face of mounting pressure to deal with inequality within the profession and the role of lawyers in justice movements, the bar has once again asserted its independence to deflect criticisms and maintain control over reform agendas. After letting law firms self-regulate by pursuing their own mostly ineffective diversity programs for years, at least measured in terms of the underrepresentation of women and lawyers of color as powerful equity partners,⁵⁵ the ABA has finally passed its “anti-discrimination” rule of professional conduct⁵⁶—not without ample controversy⁵⁷—only to leave out of

51. See, e.g., NEV. RULES OF PRO. CONDUCT r. 7.5(a) (2021).

52. John S. Dzienkowski & Robert J. Peronia, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 90–96 (2000).

53. WARD, *supra* note 12.

54. ABA, *supra* note 15 (ABA Resolution 105 claims a role for the ABA in regulating the practice of nonlawyers offering legal services).

55. Wald, *supra* note 17.

56. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2021).

57. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 243 (2017). See also ABA Comm. On Pro. Ethics & Pro. Resp., Formal Op. 493 1, 13 (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf [<https://perma.cc/AR8Q-XGDF>].

the rule perhaps the most significant cause of inequality in the twenty-first century, implicit bias.⁵⁸ Similarly, with regard to justice movements such as Black Lives Matter and @metoo, the profession has by and large stayed out of the fray, with leading law firms issuing sympathetic statements.⁵⁹ The most the profession appears willing to do is adopt new equity, diversity, and inclusiveness (EDI) CLE requirements.⁶⁰

Collectively, the important challenges facing the legal profession in the twenty-first century and the bar's responses to date, relying heavily on the presumption of independence to counter reform agenda, raise important questions: Is the American legal profession too independent and is it using independence to defeat reform policies in its own self-interest?⁶¹ The point, to be clear, is not to suggest that the legal profession should play no role in addressing the many challenges facing it, nor should it support sweeping federal-level or state-based legislative reform undermining the long history of near-exclusive judicial oversight over lawyers. Rather, it is that near-blind deference to lawyers relying on the rhetoric of independence may be equally ill-advised. What is needed is a level-headed assessment of various reform proposals which takes independence claims seriously, but not too presumptively.

Fortunately, moving away from blind deference and beginning to systematically assess independence claims does not require reinventing the regulatory wheel. Rather, the American legal profession may learn from the comparable independence experiences of other mature legal professions. Here, we explore the experience of the Israeli legal profession to gain valuable insights about the future of the American legal profession.

58. Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 840 (2019).

59. Kathryn Rubino, *What Biglaw Is Saying About The Unrest Sweeping The Nation*, ABOVE THE LAW (June 2, 2020), <https://abovethelaw.com/2020/06/biglaw-george-floyd/> [<https://perma.cc/6MMW-QQXE>].

60. Colorado, for example, has recently revised its CLE requirements to include EDI CLE. See *Continuing Legal and Judicial Education Requirements*, COLO. SUP. CT. OFFICE OF ATTY. REG. COUNSEL, <https://coloradosupremecourt.com/Current%20Lawyers/CLENewAtty.asp> [<https://perma.cc/G96Z-8JNW>].

61. POSNER, *supra* note 4, at 186–87.

III. TOO MUCH INDEPENDENCE?

THE CASE OF THE ISRAELI LEGAL PROFESSION⁶²

In Israel, for several reasons, the legal profession plays a dominant role and exerts a strong influence on society as a whole. First, from the mid-1980s, with the rise of the ideology of individualism and the market economy, a discourse of rights and heightened legalization became central to Israeli society.⁶³ This included the decline of formalism and the rise of values,⁶⁴ the constitutional revolution and the rise in the status of freedom of occupation,⁶⁵ and the weakening of monopolies and centralized bodies.⁶⁶ The legalization process is expressed in increasing recourse to litigation to solve personal, economic, social, and even political conflicts.⁶⁷ Indeed, it has become difficult to contend with bureaucracy without the help of lawyers.⁶⁸ For example, every seventh person finds themselves involved in a legal proceeding in which they require representation by a lawyer.⁶⁹

Second, a dramatic rise in the number of lawyers, which began in the mid-1990s and has continued ever since, increases the influence of the legal profession on Israeli society.⁷⁰ Indeed, Israel has the highest number of lawyers per capita in the world—a lawyer for every 140 residents.⁷¹ The growth in the

62. Some source materials in Hebrew were translated by the authors and assertions supported by these sources were verified by the Marquette Law Review members and editors using best efforts.

63. Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 247, 265–67 (2007); MENAHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 110 (2011).

64. MAUTNER, *supra* note 63, at 90–91.

65. *Id.* at 44–47; SUZIE NAVOT, *THE CONSTITUTION OF ISRAEL* 25–31 (2014).

66. Ido Baum & Davida Lachman Messer, *Can the Next Amazon or Facebook Be Controlled Before It Becomes Too Powerful?*, 52 U. MEMPHIS L. REV. 1, 38 (forthcoming 2022).

67. Neta Ziv, *Unauthorized Practice of Law and the Production of Lawyers in Israel*, 19 INT'L J. LEGAL PRO. 175, 177 (2012).

68. *Id.*

69. THE JUDICIAL SYSTEM, COURT ADMINISTRATION ANNUAL REPORT 2019, 9 (Aug. 2020), https://www.gov.il/BlobFolder/reports/statistics_annual_2019/he/%D7%93%D7%95%D7%97%20%D7%A9%D7%A0%D7%AA%D7%99%202019.pdf [https://perma.cc/ZGJ5-ZS56] (Isr.) (author translated). In 2019, 853,154 new court files were opened together with another 443,785 court files left open from previous years—for a total of 1,296,939 court files handled in that year. Israel's population is approximately 9 million, which means that about every seventh person was involved in court litigation in 2019. *Id.*

70. Limor Zer-Gutman, *Effects of the Acceleration in the Number of Lawyers in Israel*, 19 INT'L J. LEGAL PROF. 247, 248–50 (2012).

71. *Id.* at 250.

number of lawyers led to the transformation of the profession from homogeneous to heterogeneous following the addition of new population groups to its ranks. This has been accompanied by a number of occupational changes stemming from the dramatic numerical growth, for example, the entry of minority groups into the profession and a large increase in the number of lawyers in the periphery.⁷² Beyond sheer numbers, the public visibility and the overall influence of lawyers are very high. Lawyers are found in all spheres of society, law, business, media, and politics.⁷³

Third, the independence of the profession along with its high degree of autonomy and broad self-regulation, which has not changed for nearly sixty years, sustains the power and influence of Israeli lawyers.⁷⁴ The professional regulation of lawyers and the legal services market in Israel is governed by the Israel Bar Association Law of 1961 [hereinafter “the law”]. The law established the Israel Bar Association (IBA) as a statutory body in order to “unite lawyers in Israel and work for the standards and integrity of the legal profession.”⁷⁵ According to the law, membership in the IBA is mandatory—one cannot practice law in Israel without being a member of this body.⁷⁶ The IBA is composed of various institutions staffed through general elections held every four years.⁷⁷ Four ballots are cast: for the President of the IBA, the governing party in the IBA’s national institution, the head of the district in which lawyers are members, and the governing party in the district committee where lawyers practice.⁷⁸ The elections are similar in nature to those held for the Israeli Parliament-Knesset, featuring candidates from numerous parties.⁷⁹

72. *Id.* at 250–54; Tamar Kricheli-Katz, Issi Rosen-Zvi & Neta Ziv, *Hierarchy and Stratification in the Israeli Legal Profession*, 52 *LAW & SOC’Y REV.* 436, 444 (2018); Eyal Katvan, *Overcrowding the Profession*, 19 *INT’L J. LEGAL PRO.* 409, 412 (2012). There are no accurate numbers evidencing the increased diversity of the Israeli legal profession since the Israel Bar Association database does not specify lawyers’ ethnicity, but the above three different studies all documented this change based on various surveys conducted among law students and practicing lawyers.

73. Barzilai, *supra* note 63, at 261.

74. Limor Zer-Gutman, *Israel: Regulation of Lawyers and Legal Services in Israel*, in *INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES* 139, 140 (Andrew Boon ed., 2017).

75. §§ 1–2, Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (specifying the mandatory functions of the IBA) (emphasis added).

76. *Id.* §§ 42, 46.

77. *Id.* §§ 8(a), 14(a).

78. Zer-Gutman, *supra* note 74, at 147–48.

79. § 4, Basic Law: the Knesset, SH 244 (1958) (Isr.), <https://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/basic%20law-%20the%20knesset%20-1958-%20-%20updated%20translatio.aspx> [<https://perma.cc/6789-48B8>].

The candidates campaign as party members, and after the election, negotiations are held to form a coalition.⁸⁰

The law constituted the IBA as the sole governing body of the legal profession. Through its various committees and bodies, the IBA collects mandatory membership fees, oversees the internship requirement—which is a condition-precedent for taking the bar exam—administers the bar exam, and regulates licensing.⁸¹ The IBA is also authorized to promulgate disciplinary rules with the authorization of the Ministry of Justice.⁸² Based on the law, the disciplinary system is autonomous and independent, with minimal external oversight.⁸³ The IBA's ethics committees issue ethical pre-ruling opinions to its members, prosecute lawyers for disciplinary misconduct, and operate regional (first tier) and national (second tier) disciplinary courts.⁸⁴ Only the third tier of the disciplinary process is outside of the IBA's control—there is a right of appeal of disciplinary courts' rulings to the Israeli equivalent of a state district court.⁸⁵ The IBA is very active in maintaining its exclusive control over the practice of law in Israel, for example, by enforcing UPL rules against nonlawyers.⁸⁶

The influence of the IBA reaches beyond its members to Israeli society as a whole.⁸⁷ To begin with, the IBA has two representatives on the nine-member Judicial Appointments Committee in Israel—the committee which appoints all judges in Israel, including the Justices of the Supreme Court.⁸⁸ Next, one of the permissible functions of the IBA listed in the law is to “give an opinion on bills concerning the courts and legal procedure.”⁸⁹ The IBA takes advantage of this statutory provision by regularly getting involved in the legislative process in

80. *Id.* §§ 8–9, 13.

81. Zer-Gutman, *supra* note 74, at 145, 150–53 (describing how the IBA controls both the internship and the licensing that constitute the entry barriers to the legal profession in Israel).

82. § 109, Israel Bar Association Law (1984) (Isr.).

83. *Id.* §§ 153–55 (describing how the disciplinary system of lawyers in Israel operates; establishing its autonomous nature with minimal external oversight).

84. *Id.*

85. *Id.* § 155.

86. Ziv, *supra* note 67, at 179–80.

87. Eyal Katvan, Limor Zer-Gutman & Neta Ziv, *Israel: Numbers, Make-Up and Modes of Practice*, in *LAWYERS IN 21ST-CENTURY SOCIETIES*, *supra* note 40, at 601.

88. § 6, Courts Law, 2004-1984 (1984) (Isr.).

89. § 3(1), Israel Bar Association Law, 5721-1961 (Isr.).

the Parliament, not only with regard to legislation relating to the profession.⁹⁰ Finally, the IBA regularly files amicus briefs in court proceedings that address the public interest.⁹¹

In sum, the Israeli legal profession, through the IBA, enjoys a high degree of independence, exercising exclusive control over the practice of law in the county.

A. The Risks of Too Much Independence: Self-Interest and Lack of Transparency

One danger posed by an exclusive and arguably excessive independence of the legal profession is that instead of using its ample powers to promote the public interest, the profession may instead advance the interests of lawyers at the expense of the public interest and individual rights.⁹² In Israel, lawyers have exploited their exclusive power and control over the market for legal services to systematically advance their own interests, particularly economic ones, even in instances in which the bar's self-interest undercuts the public interest and the rights of nonlawyers, the rights of applicants to the bar, and the rights of other lawyers. Thus, the profession, vested with responsibility to protect individual rights, appears to be indifferent to the harm it causes them while pursuing its own self-interest.

90. See, e.g., Israel Bar Association, *Announcement on Insolvency and Economic Rehabilitation Law* (Mar. 6, 2018), https://www.israelbar.org.il/article_inner.asp?pgId=392387&catId=3082 [<https://perma.cc/JV56-FLAR>] (describing the extensive involvement of the IBA, for two years, in the promulgation of a new bill titled Insolvency and Economic Rehabilitation Law).

91. See, e.g., Israel Bar Association Petition (Apr. 11, 2021), https://www.israelbar.org.il/article_inner.asp?pgId=423688&catId=5079 [<https://perma.cc/WX5B-K2SY>] (seeking permission to join a Supreme Court case demanding the appointment of a Minister of Justice). See also Israel Bar Association Petition (Feb. 9, 2021), https://www.israelbar.org.il/article_inner.asp?pgId=421873&catId=5079 [<https://perma.cc/7KKE-WTAM>] (requesting to join a Supreme Court case seeking to compel Israel to provide COVID-19 vaccines to prisoners as done with the general population).

92. For a definition of the "public interest" role of the legal profession see, S. Stephen Mayson, *Legal Services Regulation and 'The Public Interest'*, LEGAL SERVS. INST. (Jan. 2013), <https://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf> [<https://perma.cc/T22Y-HBMH>] ("The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society.").

i. Self-Interest in Admission: The IBA Revises the Bar Exam and Extends the Length of the Mandatory Internship to Reduce the Number of New Entrants as the Number of Lawyers Increases

The law accords the IBA near exclusive control over admission to the profession. The law sets out three admission criteria. First, a candidate must hold a law degree from an accredited institution.⁹³ This condition is not within the control of the IBA because the authority to accredit law schools is granted to the Council for Higher Education, a public body under the responsibility of the Ministry of Education. Second, a candidate must complete an internship that currently stands at eighteen months.⁹⁴ Third, a candidate must successfully pass a bar examination.⁹⁵ The latter two conditions are within the control of the IBA, which registers candidates, supervises their internship, and examines them, as well as certifies lawyers by admitting them as members of the profession.⁹⁶

The IBA's control over internships, the bar exam, and admission to the bar is based on four statutory powers wielded by the IBA: to allow a candidate to begin an internship,⁹⁷ to supervise and approve that internship,⁹⁸ to manage and evaluate the bar examination,⁹⁹ and to approve the admission and membership

93. §§ 24–25, Israel Bar Association Law, 5721-1961 (Isr.).

94. *Id.* at § 35.

95. *Id.* at § 38.

96. *Id.* at § 2 (stating the Bar shall: (1) Register interns, supervise their internship and examine legal interns; (2) Sanction and qualify advocates by admitting them as members of the Bar; (3) Exercise disciplinary jurisdiction over members and legal interns, as per the provisions of this law; (4) Provide legal aid to persons of limited means that according to the law are not entitled for state legal aid, all based on this law.).

97. *Id.* at §§ 2, 26–27; §§ 2–3, Israel Bar Association Rules (Interns Registration and Supervision), 5722-1962, KT 1313, (1962) (Isr.).

98. §§ 2, 14, Israel Bar Association Law, 5721-1961 (Isr.); §§ 15(a)-15(c), Israel Bar Association Rules (Interns Registration and Supervision), 5722-1962, KT 1313, (1962) (Isr.).

99. §§ 38–40, Israel Bar Association Law, 5721-1961 (Isr.).

of a person who has completed the internship and passed the examination.¹⁰⁰ Without such approval a person cannot obtain a license to practice law.¹⁰¹

The first and fourth powers are vested in the hands of the IBA's internship committee.¹⁰² Unlike the United States, but similar to the U.K. and Canada, a person who has earned a law degree and wishes to qualify as a lawyer must submit an application to the IBA to approve beginning an internship. The application must be supported by an affidavit under oath.¹⁰³ The affidavit must detail the candidate's criminal and disciplinary records as well as police investigations, attaching all relevant documents.¹⁰⁴ The law confers upon the IBA authority to not register a person as an intern if it believes, based on the affidavit, that the candidate is not fit to serve as a lawyer.¹⁰⁵ The candidate is given an opportunity to plead their case before a decision is made.¹⁰⁶ The open-ended language of the section—"unfit to be an advocate"¹⁰⁷—confers upon the IBA broad discretion to disqualify an internship candidate.

100. *Id.* at §§ 44, 46. Section 44 states: "After giving the candidate an opportunity to plead his case before it, the Bar may refuse to admit him as a member notwithstanding the candidate's status as 'qualified.'" The Section continues to detail the two circumstances for such refusal. Section 46 states: If the Bar decides to admit the candidate or if the Supreme Court voids the Bar's refusal to admit him, the Bar shall inscribe him on the Roll of Members of the Bar and shall issue to him a certificate of membership; the person inscribed may practice the profession of advocacy from the day of his inscription." *Id.*

101. *Id.* at § 42 ("A person qualified to be an advocate, who is resident in Israel and is an adult, shall become an advocate upon his admission as a member of the Bar.").

102. *Id.* at §§ 27, 44. This committee, which possesses substantive powers, is political by nature since all its members are volunteer lawyers that are selected by the elected politicians of the bar. *Id.* at § 9(e)(1). When the term of the politicians ends, new committee members are selected by newly elected politicians.

103. § 1(b), Israel Bar Association Rules (Interns Registration and Supervision), 5722-1962, KT 1313, (1962) (Isr.) ("The Bar, as it finds necessary, can require each candidate to provide further necessary details and documents, and can require the applicant to verify his application in an affidavit.").

104. Where a candidate's affidavit fails to disclose a material fact in the candidate's past, and such a fact is later discovered by the IBA, the maker of the affidavit is subject to disciplinary proceedings and revocation of their membership in the Bar if it is proven that the membership was obtained by fraud. *See* § 47, Israel Bar Association Law, 5721-1961 (Isr.).

105. § 27, Israel Bar Association Law, 5721-1961 (Isr.) ("After giving the candidate an opportunity to plead his case before it, the Bar may refuse to register him as a legal intern (notwithstanding his eligibility under section 26) if facts, which the Bar believes render him unfit to be an advocate, have come to light.").

106. *Id.*

107. *Id.*

The internship committee is also authorized to approve the admission of a candidate who has completed his internship and passed the bar examination (the fourth statutory power). The committee considers an updated affidavit submitted by the candidate as well as objections to a candidate put forward by third-parties.¹⁰⁸ Some of the objections come from within the IBA's ranks, filed by ethics committees investigating grievances about interns.¹⁰⁹ Like the procedure for approving internships, here too the committee must determine whether the candidate is "fit to be a lawyer."¹¹⁰

The IBA internship committee's decisions regarding candidates, in both the internship and the admission to the bar stages, are made without guiding rules and transparency.¹¹¹ The ad hoc decision-making processes and lack of transparency make it impossible to predict, assess, and criticize the decisions. Indeed, only when a decision is contested in court does it become public. An inspection of these petitions reveals inconsistencies and raises concerns that unfair decisions could be made by the committee.¹¹² Notably, the IBA has never published official data relating to the number of requests for internships, the number of applications for admission which have been rejected each year, or the grounds for such rejections.¹¹³ Furthermore, the IBA has never published the decisions themselves (redacting the candidate's name), rendering it impossible to ascertain whether the decisions are consistent or whether they have been impacted by improper considerations.

Professor Ofer Tsfoni argues compellingly that the internship committee, as other bodies of the IBA, is political in nature. Combined with its lack of transparency, this leads to concerns regarding the ability of the IBA to properly manage its admission power.¹¹⁴ The research further criticizes the unfair procedures, the ambiguity in the section of the regulations that refers to the

108. *Id.* at § 43.

109. *Id.* at § 27.

110. *Id.* at § 44.

111. Michal Ofer Tsfoni, *Regulation Governing Admission to the Bar—Ideals and Reality*, 23 *HAMISPAT L. REV.* 115, 130 (2017) (author translated).

112. *Id.* at 128–29. The Article studies the discretion not to admit a candidate, even though they may meet the formal admission requirements. The committee's discretion is explored in two stages: who has the authority to exercise the discretion and subject to what procedures; and what are the content and the scope of the discretion. The Article proposes a reform in Israel and suggests a new model regarding the decision-making body; the procedures; and the nature of the discretion.

113. *Id.* at 131.

114. *Id.* at 130.

character or past behavior of candidates, and the injustice that is a byproduct of the procedures.¹¹⁵

A person who has obtained permission to start an internship must do so under the guidance of a lawyer who has been approved by the IBA as eligible to supervise interns.¹¹⁶ Although the law specifies formal criteria for being a supervisor, the IBA has exclusive authority to refuse supervisory accreditation and to revoke such accreditation after it has been given.¹¹⁷ During the year and a half long internship period,¹¹⁸ the intern and the supervisor are required to submit periodic reports to the IBA detailing the tasks performed by the intern.¹¹⁹ The IBA operates a network of inspectors who visit and evaluate the interns.¹²⁰ The IBA has sole authority to disqualify an internship or to not recognize parts of it, making it necessary for the intern to repeat the internship.¹²¹ Consistent with its opaque standards of approving internships and admission to the bar, the IBA has never published official data relating to the number of interviews conducted or the number and reasons for disqualification of internships, apparently because it does not gather such data and does not have a yearly plan regarding this authority.¹²² Thus, no research can be undertaken, nor conclusions be drawn regarding the propriety of the process.

Finally, following the completion of an internship, a candidate for admission to the bar must pass a bar exam, administered biannually.¹²³ The IBA oversees the bar examination.¹²⁴ Until 2016, only judges and lawyers appointed by the President of the IBA could be members of the examination committee.¹²⁵ An Israeli Supreme Court decision from the 1980s discussed the

115. *Id.* at 131–33.

116. § 29, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

117. *Id.* at § 30.

118. *Id.* at § 35(a).

119. Israel Bar Association Rules (Interns Registration and Supervision), 5722-1962, KT 1313, § 14 (1962) (Isr.).

120. *Id.* at § 15(a)–(c).

121. § 27, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

122. STATE COMPTROLLER'S OFFICE, REPORT ON CRITICISM OF THE ISRAEL BAR ASSOCIATION 70B, 41–44 (2020).

123. § 1(a), Israel Bar Association Regulations (Procedures for Writing the Examination on the Laws of the State of Israel regarding Professional Ethics as Applied to Foreign-born Lawyers and the Practical Occupations), 5723-1962, KT 1395, (1962) (Isr.).

124. § 2(1), Israel Bar Association Law, 5721-1961, SH 374 (Isr.). (“The Bar shall: Register, supervise and examine interns.”).

125. § 40(b), Israel Bar Association Law (2016). The Section was revised in 2017. § 2(1), Israel Bar Association Law.

examination committee's makeup, stressing that in determining its composition, the legislature demanded that its decision-making power be placed in the hands of an objective body whose members would include a judge and a lawyer from the public sector.¹²⁶ The Court also addressed the role of the examination committee and determined that it has a dual role: drafting the bar exam questions as well as determining the correct answer for each question.¹²⁷

Amendment No. 38 (2016) to the law aimed to make the committee more independent of the IBA and more objective by revising the makeup and selection criteria for committee membership.¹²⁸ Amendment No. 38 introduced two major changes regarding the committee. First, the power of appointment to the committee was transferred from the President of the IBA to the Minister of Justice after conducting a mandatory consultation with the President of the IBA.¹²⁹ Second, two representatives of legal academia were added to the committee, and the number of lawyers serving on it was correspondingly reduced.¹³⁰ As the Israeli Supreme Court stated while dismissing a challenge to the Amendment, the examination committee is independent and self-contained body.¹³¹

Amendment No. 38 notwithstanding, the examination committee and the bar exam remain within the control of the IBA. First, examination fees are paid directly to the IBA.¹³² Second, the examination committee conducts its business out of the IBA's offices, and the examination committee coordinator is a salaried employee of the IBA, concurrently serving as a senior official

126. HCJ 110/87 Bloy v. The Minister of Justice, 42(2) PD 373, 376 (1987) (Isr.).

127. *Id.* at 378. Ten years later, the Court revisited the issue in a case in which interns who failed the bar exam argued that the decisions of the committee regarding the exam should be void because of substantive flaws in the process and in the committee makeup. The Court dismissed those allegations. HCJ 7505/98 Korinaldi v. Israel Bar Association, 53(1) PD 153 (Isr.).

128. § 25, Proposed Israel Bar Association Law (Amendment 38), 2542-2016, HH 937 (correcting § 40 of the same law).

129. *Id.*

130. *Id.*

131. AdminA 3717/18 Peretz v. IBA Examination Committee, Nevo Legal Database ¶¶ 3, 28–33 PD (2018) (by subscription, in Hebrew) (Isr.). Notably, while Justice Amit declared that the committee is independent, he referred to both respondents—the committee and the IBA—collectively as “the bar.” Arguably, Justice Amit understood the legal profession to be the true respondent in the case as opposed to the formal respondent, the committee which drafted the exam.

132. § 2, Israel Bar Association Regulations (Procedures for Writing the Examination on the Laws of the State of Israel regarding Professional Ethics as Applied to Foreign-born Lawyers and the Practical Occupations), 5723-1962, KT 1395 (1962) (Isr.).

responsible for internships and examinations at the IBA.¹³³ Third, logistically, the IBA manages and conducts the examination.¹³⁴ Fourth, if an intern appeals to the court challenging the examination, IBA lawyers or IBA funded lawyers represent the examination committee.¹³⁵

The IBA's de facto control over the bar exam has proven to be important and controversial. Since the mid-1990s, several new law schools have opened (the total number of law schools in Israel has risen from three to fourteen).¹³⁶ As a result, the number of candidates for admission to the bar has increased many times over, to the point that Israel has the highest number of lawyers per capita in the world.¹³⁷ In recent decades the increased number of lawyers and corresponding increased competition in the market for legal services have become issues of concern to many lawyers who have demanded that the criteria for admission to the profession be made more stringent.¹³⁸ Initially, notwithstanding this muttering, little was done, and the bar exam and its pass rate remained unchanged. Historically, for many years the examinees' pass rate stood at about 70%–80%.¹³⁹ In July 2015, a new elected President of the IBA who had campaigned on a platform of fighting against the flooding of the profession by means of introducing more stringent admission criteria, entered office.¹⁴⁰ In the first examination following his election and since, the pass rate fell sharply to 60%.¹⁴¹

133. Menachem Shtaubert, *What's Going on at the Israel Bar Association's Examining Committee*, GLOBES (Isr. daily newspaper) (Aug. 22, 2018), <https://www.globes.co.il/news/article.aspx?did=1001251041> [<https://perma.cc/M2LV-7WHU>].

134. §§ 7–9, Israel Bar Association Regulations (Procedures for Writing the Examination on the Laws of the State of Israel regarding Professional Ethics as Applied to Foreign-born Lawyers and the Practical Occupations), 5723-1962, KT 1395 (1962) (Isr.).

135. See, e.g., HCJ 110/87 Bloy v The Minister of Justice, 42(2) PD 373, 376 (1987) (Isr.).

136. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 611.

137. *Id.* at 610.

138. See generally Katvan, *supra* note 72. (describing the two hemispheres in the legal education and the profession that emerged in Israel since the opening of the private law colleges in the 1990s.). See also Kricheli-Katz, Rosen-Zvi & Ziv, *supra* note 72, at 438–41.

139. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 612.

140. Zer-Gutman, *supra* note 74, at 152.

141. Limor Zer-Gutman, Opinion, *There is a Material Flaw in the Bar Association's "Certification Exams,"* GLOBES (Isr. daily newspaper) (July 30, 2018), <https://www.globes.co.il/news/article.aspx?did=1001247937> [<https://perma.cc/P7TZ-R5UR>] (author translated). The Op. Ed. documents the pass rates of the bar exam from May 2010 until May 2018. The sharp decline in the pass rate starts with the November 2015 exam and continues since. See also HCJ 9053/15 Macnes v. Minister of Justice IBA Examination Committee, Nevo Legal Database (Apr.

The public record indicates that this former President of the IBA was involved in decisions relating to several examinations.¹⁴² For example, the chairperson of the Parliament's State Control Committee, after hearing testimonies by and arguments for interns who failed to pass the 2018 exams, stated: "A dreadful situation was revealed, where in practice there is no separation between the examination committee and the Bar, and there is a real concern for the improper involvement of the Bar in the examination process, all based on the arguments and documents presented to the committee."¹⁴³ In this special hearing an IBA representative failed to provide proper answers to the interns' claims regarding the involvement of the IBA and to the evidence showing that the committee was not an objective professional body.¹⁴⁴

In response to an administrative petition filed by interns who failed a new format of the bar exam in 2017, the IBA argued that the low pass rate was due to the poor quality of law students rather than the alleged difficulty of the exam.¹⁴⁵ The argument was based on two figures presented to the Court: the relatively high pass rate of first-time takers as opposed to repeat-takers,¹⁴⁶ and the distribution of the pass rates among graduates of Israel's law schools. Specifically, whereas over 90% of graduates of high-ranked university-based

19, 2016) (Isr.) (by subscription, in Hebrew). The petition and the decision relate to the November 2015 exam.

142. See, for example, the Minister of Justice's decision regarding the August 2018 examination, made following a meeting and consultation with the chairman of the examination committee and the President of the IBA. See Efrat Neuman, *Good News for Legal Interns: Questions Disqualified and Mitigations in the Next Examination*, THE MARKER (Isr. daily newspaper) (Aug. 8, 2018), <https://www.themarker.com/law/1.6361819> [<https://perma.cc/R6VC-7XKT>] (author translated).

143. Protocol No. 04278018 of State Control Committee of the 21st Knesset, Nov. 14, 2018 (author translated quotation).

144. *Id.*

145. AdminA 3717/18 Peretz v. IBA Examination Committee, Nevo Legal Database, ¶ 4 PD, (2018) (Isr.) (by subscription, in Hebrew) (Isr.).

146. *Id.* at ¶¶ 28–33. In the December 2020 examination, 74% of those who took the exam for the first time passed. In the most recent exam in June 2021, 70% of those who took the exam for the first time passed. *Bar Association Examinations—December 2020 47% of the Examinees Failed*, GLOBES, (Isr. daily newspaper) (Jan. 11, 2021), <https://www.globes.co.il/news/article.aspx?did=1001356755> [<https://perma.cc/Q8RY-QYJH>]; *IBA Press Release*, THE MARKER (Isr. daily newspaper), https://www.themarker.com/embeds/pdf_upload/2021/20210715-195438.pdf [<https://perma.cc/WEN7-FVL2>].

law schools passed, only 40%–60% of graduates of the newer, lower-ranked, private law colleges passed the exam.¹⁴⁷

In the landmark *Peretz* case, challenging the IBA's reasoning, failing interns raised two principal arguments. First, the change in the degree of difficulty of the examination and the subsequent modification of its format were implemented effective immediately and applied retroactively to those already progressing through the qualification track (i.e., pursuing undergraduate law studies or internships).¹⁴⁸ In contrast, argued the interns, the extension of the period of internship (from one year to one and a half years), which was adopted in the same Amendment No. 39 to the Act, was applied only to those who had not yet commenced their law studies.¹⁴⁹ Those already on the qualification track had arguably relied on the well-established, higher pass rate, forming a reasonable expectation of completing their qualifications and becoming lawyers. Second, the interns complained about flaws in the examination itself.

In *Peretz*, the Supreme Court noted a number of such flaws—the unreasonable level of knowledge required, including esoteric information unfamiliar to even experienced lawyers, the extremely long list of statutes that must be learned, the very short time available, and more.¹⁵⁰ The Court further noted that the revised bar exam appeared to have been designed to limit admission by failing a relatively high number of candidates as opposed to ascertaining minimal competency.¹⁵¹ The Court clarified that the proper purpose of the bar exam is neither to sort nor limit the number of lawyers in Israel. Rather, the purpose of such an exam is to protect the public interest by

147. *Id.* at ¶ 5 (IBA answer in *Peretz*). In the December 2020 exam, 94% of the Hebrew University Faculty of Law (an established elite law school) graduates passed, while only 33% of the Zefat Academic College of Law (newer state-funded law school in the northern periphery) graduates passed the exam. *Bar Association Examinations, supra* note 146. Similarly, in the recent June 2021 exam, 96% percent of the Hebrew University Faculty of Law graduates passed while only 50% of the graduates of Netanya College of Law (lower-ranked private college) graduates passed the exam. *IBA Press Release, supra* note 146.

148. See H CJ 2189/18 Vaknin Sokron-Sherman v. IBA, Nevo Legal Database (2018) (Isr.) (by subscription, in Hebrew); H CJ 9053/15 Macnes v. Minister of Justice IBA Examination Committee, Nevo Legal Database (2016) (Isr.) (by subscription, in Hebrew) (there were three respondents to this petition: Minister of Justice, IBA, and the Examination Committee).

149. § 36, Proposed Israel Bar Association Law (Amendment 39), 2657-2017, HH 1107 766, 772.

150. *Peretz v. IBA Examination Committee* at ¶¶ 28–31. The court stated that examinees were required to answer difficult and sometimes esoteric questions, in all legal areas, and questioned whether even highly knowledgeable, experienced lawyers could pass the exam. The court disqualified two exam questions in addition to three questions disqualified by the lower court.

151. *Id.* at ¶ 31.

ensuring that only those who are competent (studied law, trained during the internship, and passed the qualifying examination) will pass and be allowed to provide legal services to the public.¹⁵²

The lack of fairness claim was bolstered by the stark decline in the pass rate following Amendment No. 39. The pass rate for the second exam in the new format (in late 2017) was 32%, increasing to 38% after a number of exam questions were tossed out by the courts.¹⁵³ Indeed, about a month after the exam results became public, the Minister of Justice announced that the bar exam should be fair, and that accordingly, starting with the next examination, a number of mitigating factors will rectify the new format—extra time, a shortened list of statutes to be learned, etc.¹⁵⁴ But the public outcry did not calm down. Rather, in November 2018, the Parliament’s State Control Committee conducted a special hearing concerning “the injustice and the wrongful harm caused to the interns that participated in the 2018 exams.”¹⁵⁵ A group of sixty-one Parliament members, notably a majority in Israel’s 120-seat Parliament, signed a petition calling on the Minister of Justice to address the injustice.¹⁵⁶ The public outrage continued as more candidates failed each exam, some of whom failed repeatedly.¹⁵⁷ In January 2019, the Minister of Justice announced a compromise with the IBA and its examination committee—the passing exam score was set at 60 (previously 65), and this lower mark would be applied retroactively to the three past exams with the lowest passing rates.¹⁵⁸ As of 2021, after each exam, interns have appealed to the court system claiming unfairness and seeking to disqualify unreasonably difficult questions.¹⁵⁹

152. *Id.* at ¶ 29.

153. *See* Neuman, *supra* note 142.

154. *Id.*

155. Protocol No. 04278018 of State Control Committee of the 21st Knesset, Nov. 14, 2018 (author translated quotation).

156. Letter from 61 Parliament Members to Ayelet Shaked, Minister of Justice (Nov. 3, 2018) (on file with author).

157. *Peretz v. IBA Examination Committee* at ¶ 5 (Justice Amit’s decision) (by subscription, in Hebrew).

158. Menachem Shtaubert, *There is a Deal: The Passing Score in the Bar Association’s Certification Exams Drops to 60*, GLOBES (Isr. daily newspaper) (Jan. 16, 2019).

159. *See, e.g.*, Nitzan Shafir, *Bar Exams—December 2020: 47% of Examinees Failed*, GLOBES (Isr. daily newspaper) (Nov. 1, 2021), <https://www.globes.co.il/news/article.aspx?did=1001356755> [<https://perma.cc/W9G8-SUD7>]. In that exam, 47% failed. 74% of those taking the exam for the first time passed. 92% of elite universities’ law school graduates passed compared to 49% of lower-ranked law colleges’ graduates. *Id.*

Israeli lawyers are required to pay an annual membership fee to the IBA, as a condition-precedent for practicing law.¹⁶⁰ The IBA's annual fees are not considered high—they range from USD 205 a year for junior members to a maximum of USD 340 for the most senior lawyers.¹⁶¹ Until 2016, the IBA had exclusive control over the fees. As a result of Amendment No. 38 to the law, fee increases now generally require the approval of the Minister of Justice.¹⁶² Membership fees are the main component of the annual budget of the IBA, which too is under the sole control of the IBA.¹⁶³ Limiting the number of new entrants might thus seem counterintuitive, reducing the IBA's income, yet given the increased number of lawyers since the 1990s, the IBA enjoys healthy finances.¹⁶⁴ Following Amendment No. 38, the IBA is required to submit its annual budget and financial statements to the Minister of Justice and make them available for public scrutiny on the IBA website.¹⁶⁵ However, the law does not grant the Minister of Justice the power to approve the budget.¹⁶⁶

ii. Self-Interest and Opaque Discipline

The discipline of Israeli lawyers is primarily handled by internal bodies of the IBA that enjoy broad independence with little external oversight. This self-regulated system operated undisturbed until a 2008 statutory “reform.”¹⁶⁷ The process of amending the law took five years, during which time the IBA exerted massive and successful pressure on the legislature.¹⁶⁸ While important changes were made, the IBA's self-regulatory powers remained intact. The law continues to grant the IBA exclusive authority in this regard, with the duty to

160. § 93(a)(1), Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

161. BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 42 (2020) (Isr.). The law allows the IBA to set different annual fees based on seniority, age, and area of practice. See § 93(a)(3), Israel Bar Association Law, 5721-1961, SH 374 (Isr.). The IBA uses the first criteria to differentiate between below 3 years of seniority and above, and the second criteria to give considerable discount to lawyers from the age of 67 and above. See generally, BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 (2020) (Isr.).

162. § 93(a)(1), Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

163. See, e.g., BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 43 (2020) (Isr.) (annual fees account for 99% of the annual budget).

164. *Id.* (The annual budget is almost 58 million shekels or approximately USD 17.8 million).

165. § 95(e), Israel Bar Association Law, 5721-1961, SH 374 (Isr.). Starting in 2002, the IBA has published its annual report on its website.

166. See *id.* (the law routinely specifies the powers of the Minister of Justice, but the power to approve the IBA's annual budget is not explicitly granted to the Minister).

167. Zer-Gutman, *supra* note 74, at 145.

168. *Id.* at 153.

“take good care to observe, supervise and ensure the standards and ethics of the legal profession.”¹⁶⁹

The disciplinary system in Israel is divided into two stages. At each stage, the autonomy and independence of the IBA is preserved because the hearing and the decision-making capacities are confined to the IBA body which wields a variety of powers.¹⁷⁰ In the first intake stage, the grievance is examined and a decision is made as to whether to dismiss the grievance or continue the investigation.¹⁷¹ The authority to make this decision is vested in the hands of six district committees and one national ethics committee.¹⁷² In the second stage, a decision is made whether to file a disciplinary charge against the lawyer.¹⁷³ If a charge is submitted, it is managed by a representative of the same ethics committee that decided to submit the charge.¹⁷⁴ Each district has a disciplinary court, which hears and decides the charge.¹⁷⁵ The panel in each disciplinary court is made up of lawyer volunteers.¹⁷⁶

Self-regulation is evident in several key features of the disciplinary process. First, only IBA bodies—the ethics committees—have the authority to hear and decide grievances about lawyers.¹⁷⁷ Second, the authority to decide whether to submit a formal disciplinary charge against a lawyer is solely within the purview of the IBA bodies.¹⁷⁸ Third, in the second stage, in which deliberations are conducted exploring the disciplinary charge, the first two tiers of

169. § 2(3), Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (author translated quotation).

170. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 603.

171. § 63, Israel Bar Association Law, 5721-1961, SH 374 (Isr.); §§ 2-9 Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5755-2015, KT 7520, (2015) (Isr.).

172. § 18(b), Israel Bar Association Law, 5721-1961, SH 374 (Isr.), states that in each IBA district there shall be an ethics committee. Subsequent sections specify the makeup of the committee and the nomination of its members.

173. §§ 63-64, Israel Bar Association Law, 5721-1961, SH 374 (Isr.); §§ 2-9, Israel Bar Association Regulations (Procedure in the Disciplinary Courts), 5755-2015, KT 7520, (2015) (Isr.).

174. § 14, Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5755-2015, KT 7520, (2015).

175. § 15, Israel Bar Association Law, 5721-1961, SH 374 (Isr.), states in relevant part: “(A) Each District of the Bar shall have a District Disciplinary Court whose members shall be elected, once every four years, from amongst the suitably qualified members registered in that District; the number of members of each District Disciplinary court shall be prescribed by rules.” *See also* §§ 14-51, 57, Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5755-2015, KT 7520, (2015) (Isr.); §§ 14, 16, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

176. § 16, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

177. § 3, Israel Bar Association Regulations (Procedures in the Disciplinary Courts), 5755-2015, KT 7520, (2015) (Isr.).

178. *Id.* at § 9.

adjudication consist of IBA bodies and the panels are made up solely of lawyers without the participation of any public representative or external supervision.¹⁷⁹ Only the third tier, which is the second instance of appeal (available as a matter of right) entails the state court system.¹⁸⁰

Notably, while the law allows grievances to be submitted and decided by two external, non-IBA bodies—the Attorney General and the State Attorney¹⁸¹—the use of this parallel authority is rare and in fact almost never applied.¹⁸² The Attorney General has issued a directive stating that the circumstances in which they or the State Attorney will use their authority are rare and will be confined to cases where a fundamental flaw has occurred in the conduct of the district ethics committee or the national ethics committee.¹⁸³ The public record reveals only a few cases in which the Attorney General or State Attorney used this authority.¹⁸⁴ In practice, therefore, grievances are adjudicated and decided by the IBA ethics committees, in which only one or two public representatives sit—jurists who are not members of the profession.¹⁸⁵

All disciplinary charges, regardless of their severity, are heard by the district disciplinary court of the district in which the lawyer is registered,¹⁸⁶

179. See § 2, Israel Bar Association Law, 5721-1961, SH 374 (Isr.); Zer-Gutman, *supra* note 74, at 153–55.

180. § 71, Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (“Both the accused and the complainant may appeal the judgment of a National Disciplinary Court to the District Court in Jerusalem, within thirty days from the date the judgment was handed down. The Central committee and the Attorney General may also appeal, even though they were not the complainants.”) (author translated quotation).

181. *Id.* at § 63.

182. Limor Zer-Gutman, *The Reform in Lawyers’ Disciplinary System: Were the Deficiencies Corrected?*, (2010) 15 HAMISHPAT L. REV. 27, 34 (author translated).

183. *Rules of Discipline*, 10.1000 Attorney General Guidelines (updated Aug. 18, 2010) (“The Attorney General and the State Attorney as Complainants According to the Israel Bar Association law”) (author translated).

184. Zer-Gutman, *supra* note 182, at 34; See also GABRIEL KLING, *ETHICS FOR LAWYERS* 13 (Isr. Bar Assoc. 2001) (Isr.).

185. § 18(b), Israel Bar Association Law, 5721-1961, SH 374 (Isr.). Further regulation limits the number of the members in each of the seven committees. See Israel Bar Association Rules (The Total Number of the Ethics Committee Members) (2009) (Isr.).

186. § 64(a), Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (“disciplinary offence shall be tried before the District Disciplinary Court of the district where the accused advocate is registered.”); § 11, Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5755-2015, KT No. 7523, (2015) (Isr.) (author translated quotation).

staffed by three-member panels made up of lawyers.¹⁸⁷ Panels adjudicate the case and hear the evidence and witnesses.¹⁸⁸ The disciplinary law reform process of 2008 was supposed to include the integration of public representatives as judges in the district courts; however, this measure was successfully opposed by the IBA.¹⁸⁹ The reform succeeded in making one change to the disciplinary courts—previously, judges were selected by politicians of the IBA so their appointment was based on party lines.¹⁹⁰ This procedure was criticized by the Supreme Court.¹⁹¹ The State Comptroller's report from 1999 also noted this problem.¹⁹² The reform changed the process of appointing judges to disciplinary panels. It has been placed under the supervision of an appointment committee headed by a retired judge.¹⁹³

The first appeal as a matter of right against a decision of a district disciplinary court is to the national disciplinary court.¹⁹⁴ There is only one national disciplinary court, and its size is determined by the IBA.¹⁹⁵ The Attorney General and the State Attorney may intercede before the national disciplinary court even if they were not parties to the proceedings at the first instance.¹⁹⁶ This mechanism is designed to ensure that control over the appeal process will not be confined to IBA bodies but will also be overseen by an external body. The Attorney General may also oversee the appeal by appearing, pleading, and presenting evidence at every stage of the disciplinary hearing,

187. § 63, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

188. These disciplinary courts are not subject to the rules of evidence applied in state courts; however, in practice, the disciplinary courts try to act in accordance with the rules of evidence. *See* § 67, Israel Bar Association Law, 5721-1961, SH 374 (Isr.); §§ 28–41, Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5772–1962, KT 7520 (Isr.) (2015).

189. Zer-Gutman, *supra* note 182, at 45 (explaining that in Israel, disciplinary courts of other professions often include judges who are not members of the profession, i.e., public representants). This practice was raised during the regulation process in the Parliament regarding the reform. *Id.*

190. Zer-Gutman, *supra* note 182, at 47.

191. HCJ 1302/96 Independence & Change Party v. Tel Aviv District Committee, 50 PD 749, 757–58 (1996) (Isr.).

192. STATE COMPTROLLER'S OFFICE, REPORT ON CRITICISM OF THE ISRAEL BAR ASSOCIATION, 21 (1999) (Isr.).

193. § 18(d), Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (The appointment committee has seven members to be selected by the Minister of Justice after consultation with the President of the IBA).

194. *Id.* at § 70.

195. *Id.* at § 14.

196. *Id.* at § 70.

even if the Attorney General was not a party to it from the outset.¹⁹⁷ These authority and external supervisory powers are almost never utilized.¹⁹⁸

Only the third disciplinary tier, which is the second appeal (by right), takes place before the regular state court system.¹⁹⁹ It should be emphasized that in terms of the appeals procedure, a second appeal is almost always by way of leave.²⁰⁰ A rare exception to this principle in Israeli law is found in the disciplinary process relating to lawyers, where the second appeal is allowed as a matter of right.²⁰¹ This renders the disciplinary process of lawyers more time consuming than other professions' processes. Other professions in Israel have only one stage of professional disciplinary court from which an appeal by right is made to the court, and a second appeal to the Supreme Court is only by permission.²⁰² For lawyers, an appeal to the Supreme Court is the third appeal, and it is also by permission.²⁰³ One may view the length of the process for lawyers (three appeals instead of the usual two) as a benefit that safeguards lawyers' rights.

Overall, the entire disciplinary process raises due process and lack of transparency concerns. The main concern is that the system does not provide proper supervision over lawyers that are being protected by hardly getting disciplined. The decision whether or not to pursue disciplinary charges continues to be made, as it has for almost 60 years, by ethics committees. These ethics committees are bodies of the IBA and are controlled by IBA elected politicians, either directly as sitting members of the committee or indirectly through the appointment of sitting members of the committee and the ethics attorney of the committee, all without effective external supervision.

The purpose of the 2008 reform was to separate the disciplinary system from the political division of the elected IBA officials so that the decision whether to submit a disciplinary charge would be made by a neutral committee

197. *Id.* at § 41; Israel Bar Association Rules (Procedure in the Disciplinary Courts), 5755-2015, KT No. 7520 (2015) (Isr.).

198. Zer-Gutman, *supra* note 182, at 35–36.

199. § 71a, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

200. Zer-Gutman, *supra* note 182, at 35.

201. *Id.*

202. *See, e.g.*, §§ 17e, 44c, The Medical Profession Ordinance (1976) (Isr.).

203. *The Judiciary: The Court System*, ISR. MINISTRY OF FOREIGN AFFS., <https://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> [<https://perma.cc/XUS6-2BUT>].

appointed by an external appointments committee.²⁰⁴ The IBA strongly objected to transferring the power to initiate disciplinary charges to a grievances committee, characterizing the move as a material violation of the autonomy that guaranteed the independence of the profession and its separation from state institutions.²⁰⁵ The IBA counter proposed that a “Professional Grievance Administration” be set up alongside the district ethics committee; an ethics attorney would be appointed to serve in the new body and would have the function of coordinating the professional handling of all grievances and providing the ethics committee with a professional opinion on every grievance.²⁰⁶ The decision-making power would remain in the hands of the ethics committee, which would be entitled to adopt or reject the opinion.²⁰⁷ In the IBA’s view, such a committee would preserve the autonomy of the disciplinary system while improving the decision-making process, as the decision-making body would have the benefit of a detailed opinion prepared by a paid, professional entity which is non-political and does not stand for election.²⁰⁸

During the five years in which the legislature deliberated the reform, the IBA succeeded in repelling any suggestion that would have compromised its self-regulation and autonomy in the sphere of the disciplinary system.²⁰⁹ In practice, the reform adopted the IBA’s proposal, but instead of establishing a professional grievances authority the IBA assigned its proposed functions directly to the ethics attorney.²¹⁰ The ethics attorney is purportedly an independent professional working alongside the ethics committee and is perceived as one of the elements separating ethics from politics by helping to detach the district committees from the decision as to whether to submit a

204. Memorandum of the Israel Bar Association Law, *Changes in Disciplinary Law and Other Provisions* (Amendment), 5763–2003, SH 127 (Isr.).

205. Dror Arad-Ayalon, *Publication of Disciplinary Hearings and the Establishment of a Professional Complaints Authority*, *LAWYER*, 2004 at. 45, 48 (author translated).

206. Zer Gutman, *supra* note 74, at 154.

207. *Id.*

208. Arad-Ayalon, *supra* note 205, at 48.

209. Zer-Gutman, *supra* note 74, at 153.

210. § 18c, Israel Bar Association Law, 5721-1961, SH 374 (Isr.) (“(a) Ethics attorneys will serve alongside the National Ethics Committee and alongside any District Ethics Committee (b) Ethics attorneys will examine grievances regarding disciplinary offences by lawyers handled by the ethics committee alongside which they serve and will make recommendations to the committee; ethics attorneys will also represent the ethics committee alongside which they serve in proceedings before the disciplinary courts and courts, and will advise the committee in any related matter.”).

disciplinary charge.²¹¹ The ethics attorney, however, is a salaried employee of the IBA and in practice often defers to the chair of the ethics committee with whom the attorney works.²¹² Although the ethics attorney is elected for a fixed term,²¹³ the ethics committee can dismiss them,²¹⁴ so the degree to which the attorney is independent is questionable. Thus, the reform failed to produce an independent and objective body in the first stage of examining the grievance which is needed to guarantee due process.

In the second stage, where disciplinary charges are heard and decided in the disciplinary court, due process concerns lay in unfulfilled separation of powers. The IBA investigates the grievance, decides whether to file a disciplinary charge, prosecutes the lawyer, and finally adjudicates the grievance. Particularly grave is the fact that the judicial body—the disciplinary courts in the first two tiers—is an organ of the IBA, which at the same time acts as prosecutor.

A recent disciplinary case illustrates the due process danger inherent in this state of affairs. In the case, the ethics attorney of the IBA's ethics committee submitted a request to the appointments committee to dismiss a panel-judge from office after she refused to approve several arrangements made with the accused on the grounds that they were illegal.²¹⁵ Although the appointments committee rejected the request because no grounds for dismissal had been proven,²¹⁶ the fact that the prosecution can demand the dismissal of a judge because of dissatisfaction with their rulings shows that these judges are not genuinely independent and casts a doubt on the due process guarantee of the process.

Moreover, in a series of investigative reporting, a commentator revealed how the then President of the IBA was intervening and influencing the decisions of ethics committee, allegedly in his personal interest and those of his

211. L. AND JUST. COMM., 17TH KNESSET, PROTOCOL NO. 416 OF THE CONST. 39 (Jan. 9, 2008). A dispute arose in the committee regarding the nature of the ethics attorney, because *inter alia*, the Aloni Committee's report, which had recommended this appointment, was not sufficiently clear. *Id.*, at 39–49.

212. Regarding the manner of appointment, the length of the term of office and the manner of its termination, see Israel Bar Association Regulation (Appointment of Ethics Attorneys to the Ethics Committees and Termination of their Office), 5770–2010, KT 6864, 737 (Isr.).

213. *Id.* at § 3(a) (setting a five-year term, which can be extended by five additional years).

214. § 18b(g), The Bar Association Act, 5721-1961 (Isr.).

215. Letter from Adi Feiner-Gilboa, Exec. to the Appointments Comm. (Sept. 16, 2015) (on file with author) (author translated).

216. *Id.*

political allies.²¹⁷ One case, for example, involved a law firm that was seemingly regularly violating the advertising rules, but all the complaints filed against that firm were dismissed by the ethics committee.²¹⁸ Even complaints from former clients about violations of the ethical duties to the clients were dismissed.²¹⁹ The news report claimed that the firm was closely aligned with the IBA President, helping him establish his relationship with the Minister of Justice.²²⁰ Despite a public outcry, those allegations were not formally investigated.²²¹ Arguably in an attempt to stop the independent reporter from publishing more articles, the IBA filed a defamation suit against her and her newspaper seeking damages.²²² Yet, before the defamation case was decided, the then IBA President resigned from office after being implicated in another controversy,²²³ and the new elected IBA President withdrew the lawsuit.²²⁴ The new elected IBA politician stated that “attacks against journalists are attacks against the democratic sphere, and we cannot tolerate them. The IBA, as the defender of the Rule of Law, must stand loud and clear against any personal attacks on journalists and the media.”²²⁵

The disciplinary proceedings held by the IBA also violate the principle of transparency. The ethics committees do not publish minutes of their deliberations or their reasoning.²²⁶ From time to time, complaints are lodged

217. Gila Pieshov, “Effie is coming soon”: What is Happening in Liron Sanda's Law Firm?, HA-MAKOM HCI HAM BAGEHENOM (Isr. independent journalism) (Mar. 5, 2019).

218. *Id.*

219. See Sharon Spurer, *Will IBA Suspend David Shimron as it Did to a Lawyer that Cursed the Lover of Her Husband*, HA-MAKOM HCI HAM BAGEHENOM (Isr. independent journalism), Nov. 14, 2017.

220. Gor Megido, *The Judges, the Census, and the Sympathetic Coverage: The Affairs that Were Never Investigated in Effi Naveh's Case*, THE MARKER (Isr. daily newspaper) (Apr. 2, 2019), (author translated).

221. Gor Megido *The Deal Between Ayelet Shaked and Effi Naveh—and The Documents that can Implicate the Minister of Justice*, THE MARKER (Isr. daily newspaper) (Apr. 2, 2019), <https://www.themarker.com/law/.premium-1.7081797> [<https://perma.cc/H4ZB-D5ZM>] (author translated).

222. Bini Ashkenazi, *With no Lawsuits Against Journalists: The Israeli Bar Withdrew Today its Suit Against Sharon Spurer*, THE MARKER (Isr. daily newspaper) (July 16, 2019), (author translated).

223. Anat Roeh, *Effi Naveh Resigned from Heading the IBA*, CALCALIST (Isr. daily newspaper) (Jan. 17, 2019), <https://www.calcalist.co.il/local/articles/0,7340,L-3754495,00.html> [<https://perma.cc/PD6F-B2NU>] (author translated).

224. Ashkenazi, *supra* note 222.

225. Hen Ma'anit, *Now it is Official: The Court Dismissed the Legal Suit Against Sharon Sporer*, GLOBES (Isr. daily newspaper) (Sep. 11, 2019), (author translated).

226. Zer-Gutman, *supra* note 74, at 154.

regarding the shelving of grievances involving cronies.²²⁷ For example, in one case, a court upheld the claim of an accused lawyer alleging selective enforcement by the ethics committee, which had decided to submit a disciplinary charge against him.²²⁸ Such cases, combined with the lack of transparency in the deliberations of the ethics committees, give rise to a real suspicion of unequal application of the law and a resultant violation of the right to equality and due process.

In 2008, as part of the reform, the IBA was instructed to publish all disciplinary judgments in an open database available for public scrutiny, free of charge.²²⁹ Incredibly, prior to the reform for nearly fifty years, the public could not readily ascertain which lawyers had been disciplined except for disbarred and suspended attorneys. The stated purpose of the disciplinary system is to protect the public from misbehaving lawyers.²³⁰ This goal cannot be achieved without disciplinary transparency. The Supreme Court only began publishing the names of lawyers who appealed discipline to it in 1995.²³¹ However, that decision did not bind the IBA, which continued to conceal the names of disciplined lawyers until the law was amended in 2008.²³² This is a striking example of the preference given to the self-interest of lawyers at the cost of the public's interest and its right to know material information about lawyers.

In theory, the right of the public to receive information may be broader than the right to review the disciplinary judgments database and may also include

227. Yuval Yoaz, *Their Own Law: Are Bar Association Officials Subject to Another Code of Ethics?*, GLOBES (Isr. daily newspaper) (Mar. 25, 2010), <https://www.globes.co.il/news/article.aspx?did=1000549292> [<https://perma.cc/NB9G-R8P5>] (author translated); Yuval Yoaz, *Judge Yitzhak Shimon Tried to Influence a Disciplinary Proceeding*, GLOBES (Isr. daily newspaper) (Feb. 24, 2011), <https://www.globes.co.il/news/article.aspx?did=1000626043> [<https://perma.cc/Z5DY-7L95>] (author translated). An e-mail from the IBA during the IBA elections was entitled "Adv. Moshe Taib was one of Adv. Barzilai's supporters throughout his current term. Then Taib came to the Ethics Committee [a grievance against Mr. Taib was filed and later dismissed by the committee]. Today he is a supporter of Adv. Naveh [Chairperson of the Ethics Committee who competed in the IBA elections against Mr. Barzilai]" E-mail from IBA Mailing System (May 14, 2015, 15:44) (on file with author) (author translated).

228. BDA 117/14 Tel Aviv District Committee v. Eron, 15(64) PE 748 (2015) (Isr.).

229. Zer-Gutman, *supra* note 182, at 55–57; § 69(b), Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

230. IBAA 3467/00 IBA District Committee in Tel-Aviv v. Tzltener, 55(2) PD 895, 900–01 (2002) (Isr.) (explaining that the two goals of the lawyers' disciplinary system are protecting the public from incompetent lawyers and enhancing the profession's standing and reputation).

231. HCJ 6005/93 Aliash v. Judge Zur, 49(1) PD 159, 165, 175 (1995) (Isr.).

232. Zer-Gutman, *supra* note 182, at 55.

receiving information about the disciplinary record of a particular lawyer. Such transparency could protect the public, yet in Israel, disciplinary records are unavailable for review. To realize the public's right to know and guarantee protection against misbehaving lawyers who have been disciplined, it is necessary to establish a database containing the disciplinary history of all lawyers. A client who wishes to retain a particular lawyer will be able to search the database and determine whether the lawyer was subjected to disciplinary charges and what decision was made in respect to that lawyer.

Proper transparency and protection of the rights of litigants in the disciplinary system also require the establishment of an ombudsman for disciplinary action. Currently, the IBA's internal comptroller handles all complaints relating to the activities of the IBA, including those concerning the disciplinary system.²³³ The IBA's internal comptroller is an employee of the IBA, beholden to the appointing political apparatus and, therefore, ineffective and incapable of ensuring the proper handling of complaints concerning the disciplinary process. In 2019, for example, an IBA spokesperson confirmed that the then IBA internal comptroller never filed a single report during her seven years in office.²³⁴

iii. Self-Interest and the Strict Enforcement of UPL Rules

Another key aspect of the exclusive jurisdiction of the legal profession in Israel relates to the monopoly of the profession over the provision of legal services. The monopoly is enforced in part via UPL rules that prohibit the practice of law by nonlawyers. UPL rules in Israel are very broad compared to other countries.²³⁵ The rules were established in the law and have not changed since.²³⁶ There are two classes of rules in the law—one found in a section that applies to “trespassers on the profession” and the other in a section that applies to lawyers and which prohibits them to share work or income with a nonlawyer.²³⁷ In 1992, the IBA initiated a new mandatory rule of professional conduct prohibiting lawyers from working in an entity that offers legal services

233. §§ 5, 18(a), Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

234. Anat Roeh, *The IBA Presents: 7 Years in Office, Salary of 2.4 Million Shekels and 0 Reports*, CALCALIST (Isr. daily newspaper) (Feb. 24, 2019), (author translated).

235. See generally Org. for Econ. Coop. and Dev. [OECD], *Policy Roundtables—Competitive Restrictions in Legal Professions 2007*, DAF/COMP(2007)39 (Apr. 27, 2009), <https://www.oecd.org/regreform/sectors/40080343.pdf> [<https://perma.cc/2ZGQ-XSAS>].

236. Ziv, *supra* note 67, at 178.

237. § 58, Israel Bar Association Law, 5721-1961, SH 374 (Isr.).

other than a law firm or receiving clients referred to them by entities that violate the UPL rules.²³⁸

For nearly sixty years, the IBA has been able to enforce UPL rules vigorously through disciplinary law and civil lawsuits instituted against those who violate these prohibitions²³⁹—blocking competition that could benefit the public. Throughout the years, the IBA has been conducting an uncompromising battle against anyone trying to enter the legal services market and harm the economic interests of lawyers.²⁴⁰ The IBA has consistently justified enforcement of the UPL rules in terms of the public interest, namely, the need to protect the public and ensure a high standard of legal services.²⁴¹ According to this argument, only lawyers who have completed their studies, internships, passed the bar exam, and are subject to rules of professional conduct and disciplinary enforcement can guarantee these objectives.²⁴²

The IBA's ongoing UPL campaign spans a long list of civil lawsuits filed against individuals and entities on the ground that they have trespassed upon lawyers' exclusive jurisdiction. These claims are based not only on complaints received from the public and individual lawyers but also on investigations initiated by the IBA itself in order to identify trespassers.²⁴³ A review of the IBA's budget in the past four years (2017–2020) indicates that 7% of its annual budget is allocated to this struggle.²⁴⁴ According to a recent IBA report, during 2020 the committee handled 250 complaints and initiated a few dozen private investigations designed to collect sufficient evidence to file civil suits and request court injunctions.²⁴⁵

238. § 11B, Israel Bar Association Rules (Professional Ethics), 5758-1998, (1986) (Isr.).

239. Ziv, *supra* note 67, at 179.

240. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 604.

241. See, for example, the IBA's enforcement actions suing public and private agencies purporting to assist clients with disability, illness, or injury entitlements. CivA 4223/12 Centre for Realization of Medical Rights v. The Israel Bar Association, Nevo Legal Database 17 (2014) (Isr.) (by subscription, in Hebrew). See also Ziv, *supra* note 67, at 180–83.

242. See, e.g., HCJ 9596/02 Pitsiy Nimratz v. The Israel Bar Association, 58(5) PD 792 (2004) (Isr.).

243. See BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 143 (2020) (Isr.).

244. BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5777 30 (2017) (Isr.); BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 2009 25 (2018) (Isr.); BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5769 40 (2018) (Isr.); BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 42 (2020) (author translated). The annual reports can be found at <https://www.israelbar.org.il/article.asp?catid=5&menu=1> [<https://perma.cc/52AZ-KNG6>].

245. BAR ASSOCIATION—ANNUAL ACTIVITY REPORT 5764 142–45 (2020) (Isr.).

A notable example of the UPL campaign is the battle orchestrated by the IBA against NGOs and law school legal clinics, which lasted a decade.²⁴⁶ The IBA sought to strictly apply the UPL rules to these institutions,²⁴⁷ despite the fact that the rules were originally aimed to address the activities of commercial for-profit entities, not of NGOs and educational institutions.²⁴⁸ In the eyes of the IBA, even nonprofit entities undermine lawyers' ability to make a living.²⁴⁹ The IBA's campaign severely undermined the NGOs and clinics' activities and greatly limited their ability to achieve their goal—expanding access to justice for disadvantaged sectors of society.²⁵⁰ Notably, pro bono in Israel is very limited,²⁵¹ such that the IBA's struggle against NGOs and law school legal clinics in enforcing the UPL rules was limiting access to justice.

The IBA's stance led the NGOs and clinics to submit an amicus curiae brief for an appeal submitted to the Supreme Court in the matter of a commercial company called The Center for Realization of Medical Rights (CMR).²⁵² The company assisted its clients in securing medical and disability entitlements from governmental organizations, primarily the National Social Security.²⁵³ CMR was held liable in a suit for professional trespass filed against it by the IBA.²⁵⁴ CMR appealed to the Supreme Court.²⁵⁵ Supporting CMR's appeal, the nonprofits argued that the IBA's broad interpretation of the UPL rules impaired access to justice of disadvantaged groups, which did not have the resources to hire a lawyer.²⁵⁶

246. Limor Zer-Gutman, *The Israeli Bar and the Legal Clinics: Anatomy of a Struggle*, 17 HAMISHPAT L. REV. 59, 60–62 (2013) [hereinafter *The Israeli Bar and the Legal Clinics*] (author translated). See also Katvan, Zer-Gutman & Ziv, *supra* note 87, at 609–10 (exploring the history and current practice realities of NGO and law school legal clinics).

247. Zer-Gutman, *The Israeli Bar and the Legal Clinics*, *supra* note 246, at 65–72.

248. Ziv, *supra* note 67, at 178–79.

249. *The Israeli Bar and the Legal Clinics*, *supra* note 246, at 65.

250. *Id.* at 62 n.3 (citing a letter that the representatives of the NGOs and legal clinics wrote to the head of the National Ethics Committee, explaining that the committee's decision undermines their ability to provide help for those in need).

251. Neta Ziv, *Pro Bono Representation of Refugee Seekers by Big Law Firms: A Political Say or Humanitarian Act?*, 12 MA'ASEI MISHPAT 82, 93–94 (2021).

252. CivA 4223/12 The Centre for Realization of Medical Rights v. The Israel Bar Association, Nevo Legal Database 1–3 (2014) (Isr.) (by subscription, in Hebrew).

253. *Id.* at ¶ 18.

254. CivA (DC Jer) 9270/07 The Israel Bar Association v. The Center for Realization of Medical Rights (2012) (Isr.).

255. *The Centre for Realization of Medical Rights v. The Israel Bar Association* at ¶ 79.

256. *Id.* at ¶ 30.

In 2014, the Israeli Supreme Court decided the CMR case, criticizing the public interest justification of the UPL rules. In the landmark decision, the Supreme Court held that the UPL rules:

[L]ike any monopolistic arrangement, are designed to promote the public interest, but simultaneously offer an advantage to the holder of the monopoly in safeguarding the boundaries of the profession and preventing the entry of competitors into the market. We must therefore be aware of the risk of exploitation of this power by the group benefiting from it and examine whether the arrangement actually promotes the public interest, or whether the “public interest” is a cloak for the monopoly holder, which allows it to continue to control the boundaries of the profession to promote its self-interest.²⁵⁷

The Supreme Court was critical of the IBA for blocking competition at the expense of nonlawyers, increased access to legal services, and the public interest.²⁵⁸ It added that a narrow interpretation should be applied to UPL rules and that such rules should only be upheld in cases where the restriction is necessary to protect the public interest.²⁵⁹ The Court set out three cumulative tests for identifying a “legal service,” which only lawyers could provide based on the UPL rules.²⁶⁰ Applying these tests, the Court allowed CMR to continue to operate some of the services it provided in the past, finding they were not “legal services,”²⁶¹ while disallowing other services, which were “legal services.”²⁶² The ruling allowed both parties—the commercial company and

257. *Id.* at ¶ 39 (author translated quotation).

258. See Michal Ofer Tsfoli & Limor Zer-Gutman, *Access to Justice in Israel: Rights, Legal Aid and Pro Bono in a Lawyer Dominant Environment*, in *THE ROLE OF LAWYERS IN ACCESS TO JUSTICE: ASIAN AND COMPARATIVE PERSPECTIVES* (H. Whalen-Bridge ed., Cambridge University Press forthcoming 2021).

259. *The Centre for Realization of Medical Rights v. The Israel Bar Association* at ¶¶ 42–43; see also Ziv, *supra* note 67, at 181–83.

260. *The Centre for Realization of Medical Rights v. The Israel Bar Association* at ¶ 48.

261. Ziv, *supra* note 67, at 183.

262. For example, advising National Social Security applicants about the applicable laws constituted “rendering legal advice” because it involved interpretation of the relevant laws and required the exercise of professional judgment. *The Centre for Realization of Medical Rights v. The Israel Bar Association* at ¶ 50.

the IBA—to claim victory.²⁶³ Still, the CMR case set a precedent for the narrow construction of UPL rules.²⁶⁴

In spite of the critical tone the Court took in the CMR case, the UPL restrictions imposed by the IBA on the work of NGOs and law school legal clinics remained in place until 2017 when the incoming president of the national ethics committee decided to allow nonprofit organizations and clinics to operate with only few restrictions.²⁶⁵ One of the authors of this Article previously argued that the IBA’s campaign against nonprofits revealed the dual purposes of UPL rules: protecting the public from subpar legal services, while at the same time safeguarding the self-interest of lawyers in preserving their monopoly in the marketplace.²⁶⁶

In particular, the IBA’s self-interested stance against nonprofits was inconsistent with its professed commitment to the public interest for three related reasons. First, it undercut access to justice since the NGOs and legal clinics offered legal services to indigent populations that could not otherwise afford a lawyer.²⁶⁷ Second, the campaign undermined individual autonomy and free choice, denying would-be clients their choice of nonlawyers.²⁶⁸ Third, it interfered with the freedom of occupation, deterring lawyers from working in and for NGOs and legal clinics for fear of facing disciplinary charges.²⁶⁹

In its fight against nonlawyers, the IBA has also targeted AI, including algorithm-based applications and online services that deploy AI technologies.²⁷⁰ Israel is known as a “start-up nation” and is home to some of the leading technology companies in the world,²⁷¹ including multiple businesses in the field of “legal-tech”—technology in the service of lawyers and legal services, such as technologically generated contracts and other legal

263. Zer-Gutman, *supra* note 74, at 157.

264. For example, in *Hasavim*, the district court rejected the IBA’s UPL enforcement action, allowing a commercial company to continue its operation. See CivC (DC Jer) 50926-10-15 Israel Bar Association v. Hasavim Ltd., Nevo Legal Data Base ¶ 35 (2017) (by subscription, in Hebrew) (Isr.).

265. Israel Bar Association, *Clarification of Decision—Provision of Non-Profit Legal Services*, 64 PROF. ETHICS 2, 9 (2017).

266. Zer-Gutman, *supra* note 246, at 86, 91.

267. *Id.* at 85–87.

268. *Id.* at 87–88.

269. *Id.* at 88.

270. Similar services are offered in the United States by companies such as LegalZoom. See LEGALZOOM, <https://www.legalzoom.com/contact-us> [<https://perma.cc/B296-G4AD>].

271. For example, LawGeex is an Israeli based hi-tech company that developed algorithm to read and review contracts. See LAWGEEX, <https://www.lawgeex.com/> [<https://perma.cc/L3PC-VBW2>].

documents, contract scanning, error detection, document inspection, and more.²⁷² However, when such AI allows clients to use algorithms to draft contracts and bypass the hiring of lawyers, the IBA sees AI as trespassing upon lawyers' jurisdiction and invokes the UPL rules.²⁷³

In recent years, the IBA has filed several UPL enforcement actions against companies providing legal technologies to the general public.²⁷⁴ In these lawsuits, the IBA has sought permanent injunctions preventing the sale and distribution of the technologies.²⁷⁵ Based on the Supreme Court's decision in the CMR case, lower courts apply a narrow interpretation of the UPL rules.²⁷⁶ The precedent often leads trial courts to reject the IBA position that the AI companies have breached the UPL rules, noting the importance of increasing access to justice.²⁷⁷

For example, in a case decided in 2017, the district court rejected the IBA's position of seeking an injunction against a company that was offering an algorithm-generated service that prepared employment contracts and other employment related documents on its paid subscription website.²⁷⁸ Citing the CMR case and its narrow interpretation of the UPL rules, the court concluded that the company and its algorithm were not rendering legal advice and services.²⁷⁹ The court further noted that the IBA itself was selling to its lawyer-members similar services of online-produced, AI-generated contracts and other legal documents, implying that the IBA was arguing a violation of the UPL rules as a business competitor, not as defender of the public interest.²⁸⁰ The IBA appealed to the Supreme Court, where during oral argument the Justices

272. The IBA itself, through its commercial arm, offers lawyers online services, including products designed to assist in the generation of legal documents. See ISRAEL BAR ASSOCIATION LTD., <https://ibar.org.il/hikashop-menu-for-module-368/category/%d7%90%d7%a1%d7%a7%d7%99> [https://perma.cc/YF2Z-X2HD].

273. Neta Ziv, *Who Moved My Mouse? Technology, Online Legal Services and Professional Ethics*, 39 TAU L. REV. 189 (2016) (author translated).

274. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 604.

275. Ziv, *supra* note 273, at 218.

276. *Id.* at 205.

277. CivC (DC Jer) 50926-1-15 Israel Bar Association v. Hasavim Ltd., Nevo Legal Data Base ¶ 25 (2017) (by subscription, in Hebrew) (Isr.); CivC (DC TA) 28548-03-17 Israel Bar Association v. Avramov, Nevo Legal Database (2018) (by subscription, in Hebrew) (Isr.). The IBA appealed the first case to the Supreme Court but withdrew the appeal.

278. See *Israel Bar Association v. Hasavim Ltd.* at ¶ 35.

279. *Id.* at ¶¶ 25–26 (finding that each user was individually producing the contract or the document).

280. *Id.* at ¶ 27.

advised the IBA to withdraw its appeal, hinting that they were about to dismiss the appeal and rule in favor of the technology company.²⁸¹ The IBA followed that advice.²⁸²

B. Asserting Independence While Advancing the Profession's Self-Interest

Israel is a liberal democracy.²⁸³ Lawyers thrive in liberal societies, and, in turn, as they mature, legal professions constitute a building block of the Rule of Law in such democracies.²⁸⁴ The independence of the legal profession is inherent to its ability to support and guard the Rule of Law. However, as the case of Israel shows, too much independence of a mature, secure legal profession, free of outside supervision and accountability, opens the door for the profession to over-claim independence to advance its own self-interest. In Israel, the unfettered independence of the legal profession, manifested in the exclusive control exercised by the IBA over the practice of law, has at times undercut the public interest. The IBA's self-interested over-assertions of independence have resulted in three specific harms to the public interest.

First, the IBA's independence over-claims have diminished access to legal services. The increased number of lawyers in Israel intensified competition, driving down legal fees—especially those charged by small and medium-sized firms serving small households.²⁸⁵ Yet, despite the decline in fees, the legal needs of the poor remain unmet, and access to justice has not improved greatly.²⁸⁶

It is only in the past two decades that Israeli law has begun to recognize the importance of the right of access to justice.²⁸⁷ The access agenda has been advanced by two institutions: the courts, and the NGOs and public interest

281. Ala Levi-Weinrib, *How the IBA was Defeated by the Legal Algorithms*, GLOBES (Isr. daily newspaper) (July 28, 2018) (author translated).

282. *Id.*

283. Navot, *supra* note 65, at 222.

284. TERRANCE C. HALLIDAY & LUCIEN KARPIK, *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* 15, 21 (1997).

285. Zer-Gutman, *supra* note 70, at 256.

286. Ziv, *supra* note 67, at 178 (collecting data from the Israel Court Administration showing that in 2007, 78% of civil-defendants were not represented by a lawyer). In debt collection proceedings, 95% of debtors were not represented compared to 6% of creditors that did not have a lawyer. *Id.*

287. See A. Barak, *The Right to Access the Legal System*, in SHLOMO LEVIN BOOK: ESSAYS IN HONOR OF JUSTICE SHLOMO LEVIN 31, 36, 38–41, 43–50 (Asher Grunis, Eliezer Rivlin & Michael Karayanni eds., 2013) (author translated).

lawyers who identified the barriers to accessing the legal system.²⁸⁸ The state is the central provider of access to legal services and justice in Israel to those who cannot afford to pay for it,²⁸⁹ but the legal profession and its representative, the IBA, are extraordinarily influential regarding the degree to which the right to access justice is realized.²⁹⁰

Regrettably, the IBA's attempts to limit the number of new lawyers by lowering the pass rate on the bar exam, extending the length of the mandatory internship, and enforcing UPL actions against nonlawyers are not the only examples of the legal profession's self-interested conduct—which is inconsistent with its stated commitment to increase access to legal services. Among other efforts, the IBA's ongoing battle against the Public Defender's Office (PDO)²⁹¹ is particularly noteworthy. The IBA objected to the creation of the PDO from the outset, or at least was ambivalent about its formation.²⁹² Since, the IBA has opposed any expansion of the PDO's powers. In 2016, the President of the IBA wrote to the Minister of Justice, claiming that the PDO provided overly broad representation to defendants, suspects, and prisoners, “*which violates the freedom of occupation of lawyers engaged in the criminal field.*”²⁹³ In February 2017, the President of the IBA announced that at his request, the Minister of Justice was considering several legislative amendments that would reduce the scope of representation offered by the PDO.²⁹⁴ Those amendments were never enacted. The PDO annual reports of 2018 and 2019 show that no changes were made regarding its designated activities.²⁹⁵ Still,

288. NETA ZIV, WHO WILL GUARD THE GUARDIANS OF LAW? LAWYERS IN ISRAEL BETWEEN THE STATE, MARKET AND CIVIL SOC'Y 91–115 (2015) (author translated).

289. In Israel, the state provides legal aid in criminal and in civil cases, mainly by providing legal services by state-employed government lawyers or state-funded lawyers. Since the 1970s, there has been a limited state legal aid agency in civil cases. In criminal cases, the Public Defender's Office was established in 1996 and has grown considerably since then. See Katvan, Zer-Gutman & Ziv, *supra* note 87, at 608–09.

290. Michal Ofer Tsfoni & Limor Zer-Gutman, *supra* note 258.

291. See Kenneth Mann & David Weiner, *Creating a Public Defender System in the Shadow of the Israeli-Palestinian Conflict*, 48 N.Y.U. L. REV. 91 (2008).

292. Eli Salzberger, *The Israeli Lawyers' Connection: On the Israel Bar Association and its Allies*, 32 MISHPATIM L. REV. 43, 68 n.115 (2002) (Isr.) (author translated).

293. See Letter from Effi Naveh, President of the Isr. Bar Assoc., to Ayelet Shaked, Minister of Just. (June 20, 2016) (on file with and translated by the authors) (emphasis added).

294. Public Announcement by the President of the Isr. Bar Assoc. reducing the scope of representation by the Public Defender's Office (Feb. 27, 2017) (on file with the authors).

295. PDO ANNUAL ACTIVITY REPORT 131 (2018) (Isr.); PDO ANNUAL ACTIVITY REPORT 127 (2019) (Isr.). The annual activity reports can be found at

purporting to advance the economic interests of criminal defense attorneys, the IBA was willing to publicly risk reducing access to justice in criminal cases where representation is most needed.

Second, the IBA has used its statutory role as the exclusive representative of the legal profession to advance the interests of lawyers, even at the expense of politicizing the judiciary and undermining its independence. According to Israeli law, the IBA has a statutory guaranteed position on the Judicial Appointments Committee.²⁹⁶ The process for appointing judges in Israel is fairly unique.²⁹⁷ The Judicial Appointments Committee consists of nine members: the President of the Supreme Court, two Justices of the Supreme Court elected by the Justices of the Supreme Court, the Minister of Justice and another minister elected by the government, two Knesset members elected by the Knesset and two representatives of the IBA elected by the National Council of the IBA.²⁹⁸ The Judicial Appointments Committee is chaired by the Minister of Justice.²⁹⁹ Statutory rules provide for the working procedures of the Committee;³⁰⁰ a decision on the appointment of a judge is passed by a simple majority on the Committee, while a decision on the appointment of a Justice of the Supreme Court must be passed by a majority of seven of the nine members of the Committee.³⁰¹

The judicial appointment consensus used to be that “thanks to its unique composition, the Committee makes decisions that are generally free of political considerations and appoints judges who are both of high professional standing and free from professional bias.”³⁰² Furthermore, “It is the candidates’ professional competence and not their political agenda that is evaluated.”³⁰³ In

<https://www.gov.il/he/departments/publications/reports/annual-report-all> [https://perma.cc/X8U8-P5NP]. The 2018 report indicates a slight decline in the number of PDO cases, unrelated to changes in the authority and powers of the PDO.

296. § 6, Judges Law, 5733-1953 (1953) (Isr.).

297. REPORT BY THE COMMITTEE FOR JUDGES’ SELECTION ARRANGEMENTS 24–25 (2001) (author translated).

298. *Id.*

299. *Id.*

300. § 11(a), Rules of Judiciary (Judicial Appointment Committee Work Procedures), 5744–1984, KT 4689 (Isr.).

301. § 7, Courts Law [Consolidated Version], 5744-1984, SH 1123 (1984) (Isr.). Over the past few years, a fierce struggle has been waged in the Knesset over the composition of the Judicial Appointments Committee, which has led to several amendments to the rules regulating work procedures.

302. NAVOT, *supra* note 65, at 89.

303. *Id.*

2017, however, the process collapsed when the President of the IBA revealed that he was working with the Minister of Justice to appoint only conservative, right-wing candidates.³⁰⁴ In this way, the conservative Minister of Justice, with the support of the two IBA representatives on the Judicial Appointments Committee, succeeded in bringing about the appointment of more than 100 new judges, including six new Supreme Court Justices (out of 15).³⁰⁵

In return, the Minister of Justice supported all the legislative amendments initiated by the IBA, including its bar exam agenda.³⁰⁶ Within a record time frame, all the promises made by the President of the IBA during his election campaign were approved by the government. The period of internship was extended from twelve to eighteen months, the examination format was changed, and the pass rate dropped dramatically.³⁰⁷ It should be noted that for fifteen years, the IBA failed to convince various Ministers of Justice and Parliaments to support its position and amend the law so the internship period will be extended from one year to eighteen months.³⁰⁸

The IBA's statutory power, having two seats on the Judicial Appointments Committee alongside the other three branches of government, was given to the IBA because of its expertise and knowledge regarding judicial selections,³⁰⁹ as well as its role as the representative of the legal profession. When IBA representatives on the Judicial Appointments Committee vote not based on that expertise and knowledge but rather based on the profession's self-interest, they undermine the public interest. The point, to be clear, is not to complain about the appointment of conservative leaning judges to the bench, nor is it to suggest that IBA representatives ought to automatically align themselves with the three Justices on the Committee in opposition to the representatives of the legislature and the executive branches. Rather, the point is that the representatives of the legal profession must act to advance the public interest, exercising their professional judgment based on their expertise and knowledge. When the IBA

304. Dr. Guy Loria, *The Committee for Appointing Conservative*, GLOBES (Isr. daily newspaper) (Mar. 20, 2019), <https://www.globes.co.il/news/article.aspx?did=1001278773> [<https://perma.cc/6VKS-X93Z>] (author translated).

305. *Id.* (explaining the danger in such appointments).

306. *Id.*

307. Zer-Gutman, *supra* note 74, at 141.

308. Katvan, Zer-Gutman & Ziv, *supra* note 87, at 603–04 (explaining that in 2002, a public committee recommended to extend the internship period to eighteen months. “The IBA lobbied strongly with the Ministry of Justice and Parliament to implement the proposed changes but succeeded only in 2017.”).

309. Simhon Shtreet, *The Process of Nomination Judges: Procedure and Standards*, 8 HAMISPAT L. REV. 357, 362 (2003) (Isr.).

representatives act in a manner that suggests a quid pro quo bargain meant to advance the interests of the profession, the burden ought to shift to the profession to show that it was acting in the best interests of the public.

Finally, the IBA is using its position to advance legislation favoring the self-interest of the legal profession. IBA volunteers appear on a regular basis in legislative deliberations in Parliament, representing the position of the legal profession when new bills are deliberated.³¹⁰ Notably, the IBA asserts positions on bills broadly, not limiting itself to bills that directly pertain to lawyers or the practice of law. For example, the IBA's summary of its legislative activities in 2018 reveals that IBA representatives participated in deliberations regarding amendments to the penal code and in deliberations regarding amendments concerning electric bicycles and employers' paid leave for women having fertility treatments.³¹¹

Because of the IBA's position and role as the exclusive representative of the legal profession, IBA representatives who take part in the legislative deliberations are not considered lobbyists, and the lobbying rules and regulations do not apply on them.³¹² Yet, arguably, the IBA is an interest group promoting the interests of the legal profession and its various factions.³¹³ For example, the IBA forum dealing with the enforcement of judgments is dominated by lawyers who represent creditors, such that the positions presented by this forum to the legislature overwhelmingly reflect the interests of creditors and not those of debtors.³¹⁴

310. See, e.g., Announcement from the IBA President, Unprecedented Achievement for the IBA in the Legislative Process (Nov. 11, 2021).

311. Examples are drawn from THE 20TH KNESSET, WINTER SESSION SUMMARY: ACTIVITIES OF THE KNESSET BAR ASSOCIATION (2018) (Isr.), http://www.israelbar.org.il/magazine/knesset_winter_session_2018/68/ [<https://perma.cc/LKK9-EJ57>]; Jonatan Green, *Regulating Lawyers in Israel—Analysis and Call for Reform* 7 n.28 (Kohelet Policy Forum, Policy Paper No. 60, 2020), https://kohelet.org.il/wp-content/uploads/2020/07/KPF_00108_Attorneys-Analysis-Reform_60_Electronic.pdf [<https://perma.cc/V9NH-PGGT>] (author translated).

312. § 65, Knesset Law (1994) (Isr.).

313. See Gur Megido, *IBA Representatives in the Knesset are Lobbyists*, GLOBES (Isr. daily newspaper) (Jan. 28, 2016), <https://www.globes.co.il/news/article.aspx?did=1001098915> [<https://perma.cc/J5VQ-2X4D>] (author translated).

314. For example, the position paper sent by the forum to the chairperson of the Constitution, Law and Justice Committee in the Knesset with regard to proposed amendments in the Executive Office Regulations, sought an interpretation pursuant to which costs could be imposed on a party for adjourning a hearing even where the party was unrepresented. See Yosef Weitzman & Lior Shapira, *Draft Execution Orders Regulations (Amendment), 5766—2016, Regulation of authority for imposing*

Similarly, the IBA's involvement in a special hearing regarding legal fees charged by lawyers representing plaintiffs in army disability cases revealed its complicated role advancing the interests of its members.³¹⁵ In that hearing, an IBA representative, a private lawyer who mainly represents plaintiffs in disability cases, vigorously opposed proposals to cap the legal fees collected by lawyers in army disability cases.³¹⁶ The representative claimed that such a cap will harm plaintiffs who will not be able to retain elite (and presumably expensive) lawyers while the other side, the government, will be represented by excellent, experienced lawyers.³¹⁷ Claiming that capping legal fees will harm plaintiffs is somewhat dubious given the prevalence of fee caps in other areas of law, such as car accident law,³¹⁸ without evidence of plaintiffs having difficulties retaining lawyers.³¹⁹ Arguably, and contrary to the IBA representative's claim, fee caps are meant to benefit plaintiffs by guaranteeing that most of the recovery will end up in their hands, as opposed to lawyers'.³²⁰

IV. CONCLUSION

Legal profession scholarship is blooming,³²¹ with new contributions from all over the world.³²² Vastly different laws, background conditions, cultures, and contexts, however, limit the extent to which one legal profession can learn

expenses (Israel Bar Association, Working Paper No. 4105/16, 2016), http://www.israelbar.org.il/article_inner.asp?catID=8&pgID=227105 [<https://perma.cc/3Y66-JRDT>].

315. 20TH KNESSET, *supra* note 311, at 16–18.

316. *Id.* at 15–18.

317. *Id.* at 18.

318. Compensation for Car Accident Injuries Act (1975) (Isr.).

319. David Zalmanovitsh, *The Legal Sector in the World and in Israel*, GLAWBAL (Isr.) (2017) (author translated) <http://www.glawbal.com/upload/GLawBAL%202017.pdf> [<https://perma.cc/B5QJ-H8GL>].

320. ELIEZER RIVLIN, CAR ACCIDENT 1045 (2011).

321. See David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017) (summarizing the evolution and growth of theoretical legal ethics scholarship); LAWYERS IN 21ST-CENTURY SOCIETIES, *supra* note 40, at 610.

322. See, e.g., THE BRAZILIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY (Luciana Gross Cunha, Daniela Monteiro Gabbay, José Garcez Ghirardi, David M. Trubek & David B. Wilkins eds., Cambridge University Press 2018); THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY (David B. Wilkins, Vikramaditya S. Khanna & David M. Trubek eds., Cambridge University Press 2017); SWETHAA S. BALLAKRISHNEN, ACCIDENTAL FEMINISM—GENDER PARITY AND SELECTIVE MOBILITY AMONG INDIA'S PROFESSIONAL ELITE (Princeton University Press 2020).

from the experiences of another.³²³ Mature legal professions, for example, may have relatively little to learn from the important experiences of emerging legal professions and perhaps have not as much to teach as they may assume.³²⁴ Indeed, even among developed professions, significant historical, political, economic, and cultural differences limit the practical relevance of comparative studies across the common law and civil law divide.³²⁵ The American legal profession may naturally pay close attention to other mature professions in English-speaking common law countries, such as the United Kingdom, but it can also learn from the experiences of the Israeli legal profession—a mature profession following the common law tradition. Specifically, the recent experiences of the Israeli legal profession should be of particular interest to American lawyers, regulators, and scholars as it is dealing with challenges similar to the ones facing the legal profession in the United States.

The Article's analysis of the independence of the Israeli legal profession, and how that profession invokes and uses its exclusive control over the practice of law in Israel to deal with regulatory challenges yields two key insights. First, strongly independent, powerful, mature legal professions appear to use their position to advance the self-interest of lawyers even at the expense of the public interest, to limit competition in the market for legal service, and to defeat regulatory reforms meant to increase access, transparency, and accountability of the profession.

The Israeli legal profession, acting through the IBA, did not hesitate to erect new barriers to entry into the profession—such as a lower pass rate on the bar exam and a longer mandatory internship period—to attempt to reduce the number of new law students and lawyers in response to an overall increase in

323. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515–19 (1990) (“The importance of taking context into account is clear when we reexamine how lawyers actually interpret and apply legal rules.”). See also David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145 (1993).

324. See, e.g., William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China* 287–310, in *RAISING THE BAR—THE EMERGING LEGAL PROFESSION IN EAST ASIA* (William P. Alford ed., Harvard University Press 2007); William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. REV. 945 (1986); Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64 (2000).

325. For examples of studies of civil law legal professions, see generally, VAUCHEZ & FRANCE, *THE NEOLIBERAL REPUBLIC*, *supra* note 39; LUCIEN KARPIK, *FRENCH LAWYERS: A STUDY IN COLLECTIVE ACTION, 1274-1994* (Oxford University Press 2000).

the number of lawyers in Israel since the 1990s.³²⁶ The IBA also sought to forcefully enforce the legal profession's monopoly over the provision of legal services through UPL rules to limit the ability of nonlawyers, including evolving AI technology, to compete with Israeli lawyers.³²⁷ Similarly, the IBA resisted regulatory reforms, such as Amendment No. 38³²⁸ and the 2008 reform,³²⁹ when the proposals appeared inconsistent with the interests of the legal profession.

Second, strongly independent legal professions pursue the self-interest of their members while claiming to act in the best interests of the public. That is, not only do mature legal professions over-claim independence, seeking to distract critics from substantive reform agendas by asserting threats to their independence—hardly a persuasive claim when made by powerful, well-established profession—but they disguise their self-interest by publicly claiming to advance and advocate for the public interest.

When the Israeli legal profession, for example, sought to limit the number of new entrants into the profession by making the bar exam significantly more difficult and extended the length of the mandatory internship, it claimed that the measure was necessary to protect the public from incompetent and low-quality lawyers. New private law schools were arguably graduating classes of law students who were not admitted by the historically higher-ranked university law schools, flooding the market with presumably low-quality lawyers. Advocating for a lower pass rate on the bar exam, the IBA, therefore, purportedly was not acting in lawyers' self-interest to limit the number of new lawyers and reduce competition in the market but in the public interest, ensuring the competence of new lawyers.³³⁰

Similarly, when the IBA was seeking to enforce UPL rules to stop nonlawyers, including AI, from competing with lawyers, it purported to explain its reasoning not in terms of the self-interest of lawyers but rather as protecting the public interest. Nonlawyers who did not meet the rigorous standards for admission into the profession were presumed less or unqualified to serve the public effectively.³³¹

326. *Supra* Section III.A.i.

327. *Supra* Section III.A.iii.

328. *Supra* Section III.A.i.

329. *Supra* Section III.A.ii.

330. *Supra* Section III.A.i.

331. *Supra* Section III.A.iii.

The tendency of mature legal professions, like the Israeli and American legal professions, to use their independence and near exclusive control over the practice of law to advance their self-interest while purporting to advocate for the public interest does not mean that we ought to dismiss or belittle what lawyers have to say when facing significant challenges affecting the profession and the public. It does mean, however, that we ought to take the profession's independence claims with a grain of salt and contextually and critically assess the substantive positions taken by the profession. Moreover, the documented track record of the profession to over-claim independence to defeat reform agendas in its own self-interest suggests that rather than presume that any reform agenda that seems to undermine the independence of the profession ought to be rejected, we ought to shift the burden to the profession, given its monopoly position, to justify and explain why the reform agenda ought not move forward.

The American legal profession is facing four related challenges in the twenty-first century. The nationalization of law practice, driven by client needs, is inevitable, yet history, tradition, and the independence of the legal profession stand in the way of grand changes to the state-based prevailing regime. State supreme courts are simply unlikely to cede control over the regulation of lawyers, and even if they did, there is no ready "national" court that could take over. Instead, the nationalization of law practice is likely to continue to evolve gradually and organically, with state supreme courts increasingly loosening traditional state-based controls, including UPL rules. Over time, this may come to mean that American lawyers, admitted in any U.S. jurisdiction, will be able to practice in all U.S. jurisdictions.

There is, to be sure, a long way to go before such nationalization becomes a reality and many practical hurdles to clear. For example, to prevent a race to the bottom—that is, a flocking of law school graduates to take the bar exam in the jurisdiction with the least difficult bar exam—applicable rules will need to be promulgated, perhaps requiring graduates to sit for the bar exam in the jurisdiction in which they expect to practice. In the alternative, states may coordinate and move toward a national bar exam, akin to the Uniform Bar Exam, a phenomenon already underway.³³² Following admission, states will need to further coordinate regarding the application and enforcement of the rules of professional conduct, perhaps relaying more heavily on the ABA Model Rules of Professional Conduct as the presumptive national rules.

332. See *Jurisdictions Administering the UBE*, *supra* note 47; see generally Dzienkowski & Peronia, *supra* note 52.

Notably, all these likely developments, some of which are already in motion, suggest greater reliance on organizations like the ABA, akin to the IBA, and trigger the “too much independence” concern.

As the American legal profession grows more national, issues like admission to law school and the regulation of law schools; nationalizing the bar exam; rethinking, modernizing, and nationalizing the rules of professional conduct;³³³ and nationalizing standards for disciplinary enforcement, including transparency and lay, nonlawyer involvement in them, will be increasingly decided by lawyers. The tendency, understandably enough, given the ABA’s vast experience and expertise, will be to rely on it to lead the way, and the ABA, no doubt, will be delighted to step into the national spotlight. And this is exactly where we ought to be mindful of the profession’s tendencies, acting through its organized institutions, to advance its own self-interest while claiming to advocate for the public interest. In every critical junction—from admission criteria to the bar exam, rules of professional conduct and discipline, including greater transparency and accountability in all of these stage—the burden should be on the profession to prove that its proposed arrangements and their details advance the public interest. Hiding behind independence over-claims to sustain and legitimate the status quo should simply not be done.

Providing greater access to legal services, especially for those who cannot afford to pay for it, is a constitutive challenge for the profession that it has been struggling to meet. At this crucial moment of likely deregulation, in terms of both welcoming nonlawyers into the market for legal services and permitting greater flexibility for AI providers, the profession is likely to proceed cautiously and guardingly—as it has, for example, in Washington, Arizona, Utah, and California.³³⁴ The Israeli experience provides both a cautionary tale and a possible way forward. On the one hand, the American legal profession, acting through its state-based institutions, is likely to and has followed the lead of its Israeli counterpart in aggressively trying to enforce existing UPL rules.³³⁵ On the other hand, the Israeli experience suggests that the U.S. legal profession, fearing a U.S. Supreme Court precedent finding UPL rules unconstitutional, may be willing to coordinate a narrow (or narrower) interpretation of the

333. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227 (2014).

334. *See supra* text accompanying note 12.

335. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014). *See also* Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97 (2018).

“practice of law.” Perhaps such a definition can be offered in a new addition to rule 1.0, the terminology section of the ABA Model Rules of Professional Conduct, or in the Restatement on the Law Governing Lawyers, ceding some ground and practice areas to nonlawyers.

To an extent, inequality within the profession reflects trends outside of it. For example, growing stratification and economic inequality, increasingly separating BigLaw equity partners and elite in-house counsel from solo practitioners and low-tier lawyer-employees,³³⁶ reflects the growing economic inequality in American society. Still, for a profession that purports to lead in the fight for greater equality and play a special role with regard to justice,³³⁷ the legal profession must do more, avoiding its usual tactics of evasion and delay meant to sustain the status quo. To begin with, the profession must increase transparency regarding the practice of law, including admission, discipline, compensation, stratification, and career trajectories to allow for informed decision-making by members and prospective members of the bar.³³⁸ Next, it must combat inequality and implicit bias to ensure that everybody has a fair opportunity to compete for its positions of power and influence. Although adopting EDI CLE rules is certainly a step in the right direction, the legal profession must proactively combat implicit bias in its midst, setting specific, quantifiable objectives for its various members and institutions.³³⁹

Finally, the legal profession must be a leader in the quest for greater equality in American society. Passive inaction and pursuit of self-interest, which inadvertently may increase inequality, cannot longer be tolerated. Once again, the experience of the Israeli legal profession is telling. Aggressively enforcing UPL rules seemingly to ensure competence and the quality of legal services while practically denying access to legal services for those who cannot afford to pay for them; instilling a more demanding bar exam score in the name of excluding low quality entrants while bringing about less diverse classes of new lawyers; and opposing caps on legal fees which can benefit claimants, all

336. Wald, *Getting in and out of the House*, *supra* note 23.

337. MODEL RULES OF PRO. CONDUCT, pmbl., cmt. 1 (AM. BAR ASS'N 2021).

338. See, e.g., Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. (forthcoming 2022), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3864142. [<https://perma.cc/BX8M-JEMV>]; See generally, Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2544–47 (2015) (advocating for greater transparency by large law firms); Eli Wald, *Success, Merit and Capital in America*, 101 MARQ. L. REV. 1, 64–66 (2017) (arguing that transparency is a constitutive condition for the successful pursuit of the American Dream).

339. Pearce, Wald & Ballakrishen, *supra* note 22, at 2443–44.

increase inequality and undercut the profession's commitment to justice and equality.

The American legal profession, in turn, need not reinvent the wheel or limit itself to sympathetic statements in support of the Black Lives Matter and @metoo movements. Lawyers need not agree on particular conceptions of justice and equality in order to stand united in support of them.³⁴⁰ Instead, they can serve as civic teachers and leaders,³⁴¹ role models in the quest for greater equality for all.³⁴²

340. Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685 (2021).

341. Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2009); Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601 (2016).

342. See, e.g., Wald, *supra* note 28, at 290.