

KEYNOTE ADDRESS

Law Schools Need Curricular Reform: Time to Address Transactional Students' Needs

Stephanie Hunter McMahon¹

PROFESSOR MCMAHON: Thank you for the invitation to speak on the important topic of curricular reform. Today, students in most American law schools leave their first year of legal education knowing they do or do not like standing up before a panel that resembles a court. Many draw from this experience a sense whether they do or do not like litigation (which should really be appellate law, but even those who love the experience may not understand the distinction). For those who do not want to stand before a judge, they have not learned how to distinguish among the many other types of legal practices available in transactional fields. This does not have to be the case. Law schools could recognize that it is part of their job to show students different professional outcomes early in their legal careers to maximize the amount of time students have to develop into the type of lawyers they want to be. This conception of professional identity formation stresses early exposure to many forms of practical lawyering, including transactional law, earlier than occurs today and requires it for every student.

It may be strange that I, a tax professor for 15 years, have gotten into this debate. It seems that I have been identified by my faculty as a representative of the practical side of transactional practice. I do urge my colleagues to incorporate practical skills in doctrinal law classes, like framing short answer questions as professional emails and negotiating the provisions of an agreement as part of figuring out what those provisions mean. As a result, my former dean appointed me to co-chair a curriculum reform committee as a representative for transactional law. I had long heard from students and felt myself that the first year is focused too narrowly, or at least

¹ Professor of Law, University of Cincinnati College of Law. I would like to thank Sue Payne for the invitation to present the keynote address at this 8th Biennial Conference on the Teaching of Transactional Skills and the many participants who made the conference truly enjoyable as well as educational. I would also like to thank my colleagues at the University of Cincinnati College of Law and the many professors at other institutions that answered questions about their schools' curricular choices.

too significantly, on appellate cases. Moreover, legal research and writing is often siloed from doctrinal law courses, and it is often focused heavily on litigation and the development of the common law. So, I was to represent the transactional law voice.

That committee failed to accomplish anything, as a sizable minority of the faculty was content with the status quo. I was then appointed the sole chair the next year of a committee tasked to present to the full faculty an alternative curriculum even if not everyone supported it. We made a proposal, which was significantly more moderate than what I'll propose today, but the looming NextGen Bar exam gave rise to the argument that we should wait. I then took what I had written to try and persuade my faculty to update the curriculum and pushed for even greater change in a law review article.² I argue that we need major change in how law schools present legal education, particularly in the first year.

To work through my argument for this big change, I will start by looking at what law schools need to teach with a focus on transactional students; then what law schools are teaching and why law schools do not simply change their curricula. I will then turn to why existing outside pressures put on by the American Bar Association and the bar examiners are insufficient to force those changes, and, finally, what those external pressures should be aiming for and how to change their messaging to provide a more well-rounded legal education for all of our law students.

I. What We Need to Teach

The National Conference of Bar Examiners ("NCBE") has undertaken a significant amount of work in order to develop and reframe its NextGen bar exam.³ The Testing Task Force ("Task Force") undertook a

² See Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 PACE L. REV. 106, 165–69 (2022).

³ See generally NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 4–14 (2021) (providing an in-depth look into the NCBE's process to create the NextGen Bar Exam) (hereinafter "Final Report").

three-year study to pinpoint the abilities, skills, and knowledge that recent graduates need in order to be competent. In many ways this establishes a relatively low bar. The bar exam is not to create specialists or exceptional attorneys but only to test the foundational skills and knowledge necessary at an entry-level practice of law. In fact, the NCBE says that the “purpose of the bar exam is to protect the public by helping to ensure that those who are newly licensed possess the minimum knowledge and skills to perform activities typically required of an entry-level lawyer.”⁴ Hopefully, the law school experience goes well beyond this bar.

However, I think that the NCBE actually found more and went a step further than what they accept as their charge. They began figuring out what those who hire entry-level attorneys want in order to give them jobs. This is not necessarily the same as what they need to do their jobs. And there is always the risk that when you ask people what they want from new employees, they will respond with what they think they should want rather than what they really need.

From a survey of almost 15,000 respondents, the NCBE found that some of the most commonly performed tasks was that junior lawyers must identify issues whether legal, factual, or evidentiary.⁵ They must research case law but also statutory and constitutional authority and secondary authority. They must interpret laws, rulings, and regulations and evaluate how to construe legal documents. They must evaluate strengths and weaknesses of client matters; develop goals and prioritize, organize, and investigate. Despite the fact we know many students complain about working in groups, junior attorneys must consult with colleagues and third parties. An additional difficulty for law schools is that the least commonly performed tasks might be very common for particular attorneys but not for every attorney.

⁴ NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2 (2021).

⁵ See NAT'L CONF. OF BAR EXAM'RS, *supra* note 3, at 6–7, 9.

Therefore, it is important to set goals for the mandatory curriculum but allow students sufficient freedom to specialize.

The NCBE also looked at knowledge areas, which are not always the same as law school doctrinal law courses, although it did get filtered back to courses as we will discuss later.⁶ The areas with the highest importance are the rules of professional responsibility, civil procedure, contracts, evidence, and torts.⁷ They also include legal research methodology, statutes of limitations, local court rules, statutory interpretation, and sources of law.

But note how the tasks and knowledge areas only incompletely correspond to the most common practice areas of those surveyed. This should not be surprising because we know that lawyers who do real estate are actually doing a complex mesh of activities and not all real estate attorneys do the same thing—some negotiate leases or construction, buy and sell properties, sue over those agreements. The key, that the Final Report only imperfectly conveys, is what part of each interviewee's time is spent in the broader categories of legal activities. This is despite the fact that the Task Force organized the tasks for its survey in the four broad categories of (1) general tasks, (2) trial/dispute resolution tasks, (3) transactional / corporate / contracts tasks, and (4) regulatory / compliance tasks.⁸ This framing rubric, though lost in the Final Report, is reflective of how most lawyers see their jobs. Unfortunately, this rubric is also often lost as we move from self-identification by lawyers to surveys to a compilation of results in terms that law school faculty understand.

The results were listed as “Foundational Concepts and Principles” and “Foundational Skills,” mirroring the long-standing trend to silo doctrinal law and legal skills, which is not the way most lawyers probably think of their legal work.⁹ Unsurprisingly, there is much duplication of the existing bar exam's doctrinal law, although with some shrinkage of topics. The

⁶ *Id.* at 10.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.* at 20.

foundational skills have been expanded, in a way that looks like it may balance doctrinal law, but this balancing is not revealed in the NCBE's description of the Bar Exam Content Scope. Possibly because we all experienced the old bar exam, it remains easier for the NCBE to describe what it wants to accomplish with what we know, rather than figuring out how to describe something new.

It remains curious to me that some topics that seem critical have not yet made it into the list of doctrinal law, which I find frustrating largely because of those topics import to transactional attorneys. If you look into the way concepts are defined in the NCBE's Bar Exam Content Scope, students will still need to understand the first and second amendment—which I agree are important and recent graduates would sound uneducated if they could not talk intelligently about these topics to others—but there is no need to understand the Administrative Procedure Act and its notice and comment requirements but only very circumspectly how to read a statute or a contract and certainly not how to interact with a government agency.¹⁰ The balance seems off to me.

But not all information or experience of lawyering is to be found on the bar exam itself. Studies of lawyers show, roughly, the different practice areas attorneys work in. Unfortunately, it is hard to tease out whether those lawyers who are solo or in two to twenty-person firms to those in 251-person firms are transactional or litigation or something of both. There is a growing number of people who, over their careers, are at nonprofits or in education and, even more, as business-inside counsel and business-not practicing.¹¹ Looking more closely at one study of graduates at non-law firm jobs, the business industry and government jobs are much higher for lower ranked schools where these schools should probably rethink the breadth of skills and knowledge that their students need, even as they must also worry about their graduates' abilities to pass the bar exam.¹² Therefore, the need to rethink

¹⁰ *Id.* at 21.

¹¹ McMahon, *supra* note 2, at 120.

¹² *Id.* at 115.

our curricula may well differ for schools depending on where they fall on the distribution of the accursed law school rankings.

Other studies have estimated that 50% of lawyers who work as lawyers do so in transactional practices, which is an extremely broad classification of legal practices.¹³ Nevertheless, as a group, transactional attorneys almost certainly have a different interpretation of core competencies from their litigating counterparts. Too little study has been made into the differences in what people mean when they adopt these broad categories. But we know differences exist. Ethical rules and those of professional conduct play out differently if you are a transactional attorney than if you are a litigator: Not 100% but sufficiently so that law schools need to be cognizant and plan for the differences.

This need to think about what lawyers generally, and each of our schools' graduates in particular, do with their legal degrees is increasingly true for those law schools that have students who are not going to be practicing attorneys, at least not in the United States. Many law schools have a growing number of non-JD students as constituencies for whom the old-school model of a 1L doctrinal law-heavy curriculum followed by specialization may not serve.¹⁴ How are we to integrate someone who is a non-US lawyer seeking an LLM into 1L or upper-level law school classes? Schools can isolate these students into their own classes or throw them into other classes for which we often expect students to combine three years of education to get a grounding in knowledge and skills. These new constituencies can help justify law schools rethinking the way they teach the law; however, from a review of many websites (which I admit are notoriously unhelpful) the curricular needs of these students is an afterthought in JD programs or remains siloed.

So today, we know not all lawyers litigate and not all law school students will practice any form of law. Nevertheless, law schools have

¹³ Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASSN LEGAL WRITING DIRS. 118, 118 (2008).

¹⁴ See McMahon, *supra* note 2, at 122–23.

demonstrated a longstanding, well-entrenched reluctance to recognize that fact and reframe the curriculum to respect the needs of all of their students.

II. What We Teach

The law school model created by Christopher Columbus Langdell in the 1870s remains dominant. I reviewed 54 law schools along the spectrum of U.S. News and World Report's 2021 rankings with data from their websites at that time to discern their required curricula.¹⁵ The data showed that law schools largely retain Langdell's curriculum. However, to be fair, the chart is already partially out of date as some schools, such as the University of Chicago which reached out to me, have made efforts to reframe the 1L curriculum in recognition of the importance of transactional lawyering by adding a class on it and a class on legislation and statutory interpretation.

Nevertheless, the dominance of private law and the case method has remained largely static since 1870, despite the shift of the law from common law to an increasingly statutory and regulatory field. In particular, as shown from this survey of fifty-four law schools, little has changed in the first year from what you would have seen at Harvard Law School in 1870.

This first year is so important because, for many law schools, it is the only time all students take the same courses at the same time, as students develop the foundation and context for further study. By the end of that first year, students are generally expected to possess a broad array of legal research, writing, and analytical skills, as well as knowledge about the law and the government's regulation of people and private entities. However, the scope of that foundation remains a narrow one not attuned to the breadth of J.D.-required and J.D.-advantaged careers and, perhaps because of this fact, the first year is not particularly valued by graduates. Within the first two to three years, young attorneys reported whether their experiences in law school were helpful or not in practice. They reported clinical courses the most helpful, then legal writing, internships, upper year lectures, course

¹⁵ See generally McMahon, *supra* note 2.

concentrations, and then first year curriculum (but still before legal ethics and pro bono).¹⁶

As of 2021, the research shows that all law schools continue to require Criminal Law, Contracts, and Civil Procedure in the first year of law school.¹⁷ The outliers are notable but few. For example, Property is not required by four of the top eleven law schools, one of the same does not require Constitutional Law, and five that require Constitutional Law do not require it in the first year.¹⁸ At the other end of the spectrum are the schools ranked 98 to 102 that tend to require more of the traditional doctrinal courses, for example more than one semester of Civil Procedure, Constitutional Law, Contracts, and Property, even though their students are less likely to find jobs as traditional attorneys.

This framing of the first year is heavily weighted to courses on particular common law topics. It is intended to inculcate legal knowledge and push students to get the right answer as a matter of black letter law as opposed to conducting legal work. This layout, used throughout the country, largely siloes these topics and, doing so, does not show students the ways in which society and lawyers choose among these topics as tools to address clients' or society's problems. Insulating Torts from Contracts from Property ignores the many ways in which the lines are often blurred for practicing attorneys. It also ignores that what students are really learning in law school are tools to help clients, knowledge-based tools of course, and that the choice among the tools has different practical consequences that lawyers must weigh.

The similarity of various schools' core 1L courses and their focus on the theoretical is apparent in course descriptions. I reviewed the course description of the required first year Contracts course at Harvard Law School, at the time ranked #3, Hastings, ranked #50, my own University of

¹⁶ RONIT DINOVIETZ ET AL., AFTER THE JD: FIRST RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 81 (2004).

¹⁷ McMahon, *supra* note 2, at 127–28.

¹⁸ *Id.* at 128.

Cincinnati College of Law ranked 81, and the University of New Mexico School of Law ranked 102.¹⁹ Each school's course description of Contracts, the most transactional doctrinal course in the first year, focuses almost exclusively on the common law either implicitly with the list of topics at Harvard or explicitly as with the University of New Mexico.²⁰ From these descriptions, possibly Harvard and Cincinnati add a bit of contract interpretation and the role of lawyering, but it is not clear if this means contract negotiation or only the defense of contracts. Nothing in any of the descriptions alludes to the introduction of transactional practice or the way in which lawyers craft or use contracts. Instead, these courses prepare students to spot legal (but not business and not practical) issues with already drafted contracts for potential litigation. The transactional skills necessary to make contracts—rather than litigate them—are often limited to Legal Research and Writing or left as an elective in the upper-level curriculum.

This is not to discount that some professors and some schools blur the lines between course topics and incorporate skills into doctrinal courses. However, academic freedom in designing classes often means that different professors even within the same school take different approaches. Some students may benefit from having a practice-focused approach, but by no means is that the case for all students. Nor do the descriptions show the importance of practical lawyering and the goals of preventative law.

This framing of the first-year doctrinal curriculum then leaves a tremendous amount of work to be siloed into legal research and writing in the first year and other skills courses. Even though many schools have successfully moved to increasing mid-semester or mid-quarter assessments in their 1L courses, few professors of 1Ls that I have spoken with use practical, “real world lawyering” types of assessments in doctrinal law classes but instead use assessments that line up with their chosen form of final exam. Final exams often remain heavily descriptive essay, short answer, or multiple choice. Although I have yet to see a lawyer fill out a scantron in a client

¹⁹ *See id.* at 131–32.

²⁰ *Id.*

meeting, it can be an effective way of assessing knowledge of, and possibly application of, doctrinal law. However, it does not address legal skills, so many doctrinal law first-year courses silo, and therefore minimize, the importance of using that doctrinal law.

This survey also showed that schools are compliant with the ABA requirements of writing courses, but they do so differently.²¹ Legal drafting is far from universally required. The effect is that all students are trained to be litigators but not all students are trained to be transactional attorneys. This also means that all students are exposed to some extent to what it means to be a litigator but not all students are even exposed to transactional law if their contracts course is taught as a common law thought experiment.

This negatively affects young transactional lawyers, in particular, because their critical first year does not show them the law as a preventative, problem-solving practice. For students who know they want to go into a transactional practice, the first year can be isolating. For those who do not know what they want to do, the first year in most schools is not going to show them.

Other things I found that were interesting is that Leg-Reg (short for Legislative-Regulatory or some variant) or a statutory interpretation / administrative law course is offered at many schools but by no means all.²² This movement away from the original Langdellian vision recognizes the changing sources of law but generally within a doctrinal law framework. One professor I spoke with about his Leg-Reg course as my school considered adopting one was the difficulty of putting disparate material into one course, in many schools only a 2-credit-hour course. Leg-Reg can cover everything from how to read complex statutes practically, to how judges use various judicial theories when interpreting statutes, to the modern administrative state and the requirements of administrative law. Needless to say, different

²¹ *Id.* at 127.

²² *Id.* at 135.

professors could balance the course in very different ways based on their own personal senses of what is the most important.

Also of note is that many schools, particularly higher ranked schools, give students some degree of freedom to choose an elective in the first year. From many of the lists, students are choosing from a list of doctrinal courses, although some have experiential options. One take away from most of the electives is that not all students will share these experiences so that upper-level professors cannot expect all students to have any particular piece of knowledge or skill gained in an elective.

At the other end of the ranking spectrum, schools tend to impose more upper-level requirements. Although most schools stick to ABA requirements in the upper-level curriculum and otherwise give choice, those at lower ranked schools tend to require more bar courses for all of their students and, currently, the bar exam is not representative of transactional law.²³

Only eight of the fifty-four schools, or less than 15%, required a skills-training course at the time of the survey, and only two required more than the ABA's 6-credit-hour experiential learning requirement.²⁴ Many schools expressly pointed out that their students partially completed the experiential learning requirement in their first year, despite having first year curricula that generally fit the mold of the other schools. Thus, the current mandatory curriculum remains one in which law is predominately a judge-made subject and signals that legal skills are less important than doctrinal law.

However, as any transactional attorney will tell you, law is more than what a judge says it is. It is often determined by what the legislature writes, what an agency publishes, or what parties agree to. Therefore, learning how

²³ *Id.* at 127.

²⁴ *Id.* at 137. Although, the ABA is considering increasing experiential requirements. *See* ABA, Memorandum from Council of the Section of Legal Educ. and Admissions to the Bar (Dec. 11, 2023).

to interpret and create statutes, agency guidance, and agreements are critical elements of legal education that are often given short shrift. Transactional lawyers, in particular, also need to understand the practical world of business, with its own sense of economic priorities and the ability to negotiate those priorities. These sources and topics are as critical today as the common law and should be given equal weight in the first year.

What makes this more troubling is that this lack is not easily made up in later years. Not only are fewer courses required in upper years, but students choose their second-year courses based on their first-year experience. These students have scant information on which to make the best determination of what they will need for their careers. How can a student know if they want to be a transactional attorney if they have not discussed transactions? How can they know if they want to work in an administrative law fields if they do not know what it entails? Moreover, students who take predominately doctrinal electives throughout law school have insufficient exposure to what it means to be a lawyer regardless of their practice area.

III. Why We Don't Change

I note current deficiencies but the need to “creat[e] more room in the professional curriculum of the law-school for topics like administrative law, problems of procedural reform, corporate finance, and international law” began back in the 1930s.²⁵ Nevertheless, not much has changed, especially in the first year. Much of past criticism has resulted in, if anything, an overlay of new requirements rather than a deep rethinking of the old. The inertia in law school curricula shows the impact of law schools’ three Fs—faculty, fear,

²⁵ John Dickinson, *Legal Education and the Law-School Curriculum*, 79 U. PA. L. REV. 424, 435 (1931).

and funding. They are obstacles sufficiently large that curricula have not adapted to changes in forms of law or in the way lawyers work.

a. Faculty

Faculty are, of course, a tremendous resource for law schools, and most that I have had the pleasure to work with or meet at conferences care deeply about their students and their institutions. Nevertheless, as the primary gatekeeper for curriculum in a world where most institutions value faculty-governance, the lack of adaptation of the curriculum must be laid squarely at faculty feet. However, blame does not solve the problem because faculty have reasons, some more justifiable than others, for their inaction.

Likely the largest reason for faculty reluctance to modernize their curricula, at least as claimed by those who do not like the academy, is that so many faculty have tenure and tenure means that faculty do not need to adapt to changing times. The effect of tenure is then coupled with faculty's academic freedom. The American Association of University Professors defines the freedom to teach to include "the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance"²⁶ But this freedom is not unlimited.

To be clear, I support academic freedom. I have recently written on how to use the tax system to provide access to abortions in the post *Dobbs* world and how the tax system should stop ignoring the reality of convict labor by denying them benefits that are funded through taxes on labor.²⁷ I

²⁶ Press Release, Am. Ass'n of Univ. Professors, Brief Statement on the Freedom to Teach (Nov. 7, 2013).

²⁷ See generally Stephanie Hunter McMahon, *Prison Work is Taxing and Should Be Taxed*, 105 TAX NOTES STATE 1109 (2022) (discussing how inmates should receive tax benefits for their labor); Stephanie Hunter McMahon, *Using the Tax System to Ease Some of the Dobbs Hardship*, TAX NOTES FEDERAL 176 (Aug. 15, 2022) 1105–114 (discussing how people can use the tax system to facilitate abortions); Stephanie Hunter McMahon, *Freed from Prison and Unemployed: What Happens After Your Prison Job Ends?*, 110 Ky. L.J. 739 (2022) (discussing the need to provide unemployment benefits to incarcerated workers); Stephanie Hunter McMahon,

strongly believe how I teach material should be something I am able to evaluate for myself. I do not like textbooks for my courses and I do not like exams for upper-level tax courses. Having the freedom to use TWEN rather than Canvas is important to me because I know students will have the Westlaw password when I make them do research. Academics' need to control the substance of their courses is real and can function as a counterweight to political forces operating on law schools.

But this academic freedom does not and should not extend to whether or not my course fulfills a particular need in the law school curriculum. If I teach a course covered by the bar exam and it is intended by the institution to prepare students for the bar exam, it is fair to expect me to cover the material on the bar exam to the best of my ability. Academic freedom should not be a shield to protect professors from covering that material. Law schools remain schools that need to provide students with training for their careers. Moreover, if faculty of upper-level courses are to build on what students learned in earlier courses, faculty need to know what is covered. The balance between providing faculty the freedom to develop courses and ensuring students are taught necessary and relevant material is a difficult one to achieve, and I also recognize my interpretation is not universally accepted.

If you do accept that institutions can say that some topics or skills must be covered in a particular course (with the professor choosing how to do so), in order for that requirement to be meaningful, the requirement must be more than cosmetic. This is particularly difficult to ensure if changes are instituted through labels rather than larger descriptions because different people, even when acting in good faith, will think requirements mean different things. For example, the University of Cincinnati College of Law adopted a Diversity, Equity, and Inclusion ("DEI") course requirement. Under the requirement, students are required to take one course that is focused on DEI. It has since developed that both Federal Courts, and Wills

Inmates May Work, But Don't Tell Social Security, 72 S.C. L. REV. 757, 759 (2021) (examining how the tax system denies inmate workers benefits).

and Trusts have been held to satisfy the DEI requirement because the professors incorporate a learning outcome of exposing students to DEI and address the topics in their courses. Although I personally do not feel that this satisfies what we as a faculty agreed upon if they adequately cover their complex substantive subjects, the point is not to criticize my colleagues, who I trust are acting on their own interpretation of the new rule, but as a warning that requirements can be interpreted differently, and consequently, may not accomplish their original goals.

This academic freedom makes piercing the classroom veil much more difficult and, consequently, makes it more difficult to accomplish curricular objectives. Some academics, including my colleague Louis Bilonis who has written on professional identity formation, suggests building alliances with those who want to make change.²⁸ I question how to make larger changes to the way law schools work when academic freedom effectively makes it optional per class. As the sampled law schools have 26 to 184 full-time faculty members, and an average of 62, unanimity would be unheard of and consensus would be difficult.²⁹ It is doubtful that unanimity would ever be required for making curricular change, but enough voices could negate the impact.

b. Fear

Not all reluctance to change is for selfish reasons: Law schools and their faculty may legitimately fear that change would be worse than the established curriculum that has operated for over 100 years. Thus, law schools and law faculty may be hesitant to embrace new curricula because of fear—fear of the unknown, fear of getting it wrong, and fear of bad press.

²⁸ See Louis Bilonis, *Professional Formation and the Political Economy of the American Law School*, 83 TENN. L. REV. 859, 905 n. 43 (2016); accord NEIL HAMILTON & LOUIS BILIONIS, LAW STUDENT PROFESSIONAL DEVELOPMENT AND FORMATION 52 (2022); Louis Bilonis, *Law School Leadership and Leadership Development for Developing Lawyers*, 58 SANTA CLARA L. REV. 601 (2018).

²⁹ McMahon, *supra* note 2, at 159.

Fear helps prevent rash changes but remains an obstacle to be overcome to adapt a curriculum to twenty-first century law.

Most proposed changes to the first year, particularly those that increase a focus on skills, means that some substance currently covered in the first year would not be taught that year, and it is impossible to say definitively that what is cut will not be missed. Current common law topics may be covered to a lesser extent than they are today. Karl Llewellyn noted that “a first year course which takes on as a deliberate part of its job and adequate training in one or more practical skills must, to get that job done, reduce its ‘content’ of ‘subject matter’ for standard classroom coverage by at least a third.”³⁰ He did not worry about that as a philosophical matter, and neither should we.

However, the fear of making bad changes is likely coupled with the fear that any change would adversely affect bar passage. Despite the importance of the bar exam, law schools have nevertheless long taken the position that they do more than train for a test and that the bar exam is insufficient to ensure that students are prepared to be attorneys. This means that the bar exam is an insufficient guide to creating a law school curriculum, but it remains one restraint on changing the curriculum.

Fear of reducing bar passage is also tied up with the fear of lowering law school rankings. Honestly, rankings are unlikely to change, at least not quickly. Although employment’s role in determining law school rankings has grown from 25.25% to 26%, legal employers use simplifying heuristics—reputation and perhaps geographic proximity plus GPA, moot court, law review, and poise—in their hiring decisions.³¹ A changed curriculum probably would neither hurt nor help rankings.

³⁰ Charles Bunn et al., *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 362 (1945).

³¹ Robert Morse et al., *Methodology: 2023 Best Law School Rankings*, U.S. NEWS & WORLD REP (May 10, 2023, 9:00 PM), <https://perma.cc/GPQ9-PNA5>; Keith A. Findley, *Assessing Experiential Legal Education*, 2015 WIS. L. REV. 627, 636 (2015).

One last fear is related to the industry and I have heard it in several faculty meetings: fear of moving from a liberal arts-based curriculum to lesser-valued vocational training and from the nation's esteemed problem-solvers to narrow scribes. This shift threatens prestige, resources, and the ability to help fix society's problems. However, for this threat to be credible, a change to address the changing law and legal profession must create more narrow thinkers. But most proposed changes would broaden students' exposure to more tools, ideally with a problem-solving focus.

c. Funding

Change is not only scary to a faculty that may not feel that it is necessary to confront those fears, it can also be difficult because of the resources currently devoted to the established curriculum. Law schools have invested heavily in their curricula primarily through tenure and, for some schools, named professorships for the faculty who teach these courses. If these professors' skill sets are not transferrable to other areas of law, or if faculty resist change, new faculty would need to be hired to teach a broader, more modern curriculum. Many schools do not have the luxury of letting tenured faculty languish but need them to teach core courses to large numbers of students.

Funding issues are particularly acute if institutions are to make curricular changes because of law schools' reliance on tuition. When the number of applicants goes down, law schools may be more inclined to think critically about changing their institutional models to draw in students, but they are in a worse position to undertake the costs of doing so. The more applicants, the less need to consider tailoring law school to potential students because the old model works well enough. Unfortunately, that cyclical model encourages law schools to make short-sighted and superficial changes in times of need rather than facing the reality that the legal market has changed over the last 150 years and that what students need in order to function in the market has also changed.

IV. External Pressures Are Insufficient

There are two main drivers of change to law school curricula—the ABA and the bar exam. The NCBE recently agreed that it would change its tested material before 2026.³² The framing in the First Administration of Bar Exam Content Scope that was released in May 2023, reduced the substantive law topics, although they remain largely tied to traditional courses—especially their labeling. The NCBE fleshes out the material to be covered under each, and it is largely the same as under existing labels, which requires a significant amount of coverage of what remains very broad subject matters—and no administrative agencies show up and little statutory law. There is an increased focus on skills in litigation and in transactional legal practice; nevertheless, the weight is, unsurprisingly, heavily tilted toward litigation and skills remain divorced from doctrinal law. The NCBE has not finalized the final exam, but we are getting closer.

The ABA also imposes standards on law schools through accreditation.³³ The ABA recently added to standard 303(b) the requirement that law schools provide substantial opportunities for students to develop a professional identity, which is defined in its interpretation to include what it means to be a lawyer and the special obligations of lawyers to their clients. Professional identity formation needs to be in each year, so included in the first, and in courses and outside of courses. This is a good step but vague, and it will be interpreted by law schools in many different ways. It is unlikely to be seen as demanding as a rethinking of the curriculum.

V. What External Pressures Should Be Pushing For

But these agencies, the ABA and the NCBE, could do more. External pressures could encourage fundamental changes to the way law schools prepare students to be transactional and other types of attorneys by

³² NAT'L CONF. OF BAR EXAM'RS, *supra* note 4.

³³ See generally A.B.A., *2023-2024 Standards and Rules of Procedure for Approval of Law Schools* (last visited Feb. 16, 2024), https://www.americanbar.org/groups/legal_education/resources/standards/.

reframing their requirements which would trickle into the curricula, in particular the first-year curriculum. Most importantly, the ABA accrediting body and bar examiners should reframe what they require and test and how it is tested from various common law topics and various skills to a focus on types of legal practice.

By focusing on practice and eliminating links to established common law courses, schools' structural choices regarding the first year should focus on legal training by having students think about when a particular type of law is most effective to solve a client's or a societal problem. For example, when is it best to resolve a problem using tort as opposed to criminal law or when to plan *a priori* to allocate risk as opposed to *ex post* litigation? Situating the law in lawyers' problem-solving practices would help students conceptualize and utilize the law rather than focusing on identification of legal issues. That focus needs to be validated by the bar exam. Of course, students must be familiar with (but not experts in) the substance of the law in order to think about ways to use that substance. Nevertheless, the goal should not be substance for its own sake but as training in legal practice. Moving away from so much common law would reduce the depth of coverage, but this trade-off to a breadth of materials rather than a deep-dive into common law topics is consistent with how lawyers work.

To focus on practice areas, these external evaluators of legal education should push for a balanced first-year curriculum framed around the big groupings of practice areas rather than common law subjects. This would entail five core topics, although their substance would certainly be subject to debate at each law school.

- *Criminal Justice* would replace Criminal Law and explain what the prosecutorial system is trying to accomplish, how it does so, and what pitfalls are on the long road of criminal punishment.
- *Civil Litigation* would replace Civil Procedure and focus not only on the Federal Rules of Civil Procedure and what litigation is like

but also why people choose litigation as a means to resolve disputes and how they avoid it.

- *Transactional Practice* would replace Contracts and introduce contract law but also how to read, negotiate, write, and explain contracts to clients and to engage in business and preventative law.
- *Administrative Practice* would introduce administrative law and when agencies are used to solve problems, how they are formed, and how lawyers use the guidance agencies produce.
- *Public Interest Lawyering* would introduce basic justice concepts as well as the ways in which lawyers contribute to social justice projects.

This view of practice areas is not all inclusive. The division of the first year among practice areas is intended to introduce students to the major choices for their future careers. Armed with this information, students would be better informed when making course selections for electives in the 2L and 3L years. Added to this first-year curriculum from the dominant law school model are three critical practice areas: Transactional Practice, Administrative Practice, and Public Interest Lawyering. It includes in the first year the beginning of a deal or government regulation rather than focusing only on the litigated result, giving students a better glimpse of a lawyer's life.

Within each of these five courses, certain types of material should be required, partly to permit comparisons between courses and partly to ensure coverage of critical elements of law. This required material needs to be introduced early as a lens through which to see legal issues. For example, each course should include an element of statutory law, international law, ethics, and constitutional limitations. This coverage would not replace upper-level specialty courses but would provide students a baseline for making decisions as to which specialty courses they are interested in taking and ensures no student graduates law school without a rudimentary understanding of how the full legal system operates.

Additionally, skills should be included in each of these courses. The insertion of particular skills is, to an extent, arbitrary because the same skills could be taught in many classes. Nevertheless, if the bar exam said that students would have to know how to negotiate a contract in a transactional law course and to draft correspondence on a public interest matter, it would reduce the silo around skills and integrate the practice of law into the classes of law.

From all of this discussion, you likely see that my focus is less on doctrinal law (despite being a tax professor) than on skills and the awareness of how to use doctrinal law. This would not be surprising for a practitioner because surveys of practitioners consistently focus on graduates' ability to use law to handle legal problems rather than their grasp of doctrinal law. Of course, to apply the law and practice solving problems requires a baseline of legal concepts, but that baseline can be smaller and achieved more quickly than historically taught. Advocating a choice as between outcomes depends on understanding what outcomes are possible but knowing all potential outcomes does no one any good if the lawyer does not know how to weigh them against the facts.

By refocusing the first-year curriculum around practice areas, it would also signal to faculty and students alike the purpose of legal education. In doing so, it should also help enrollment numbers. The 2018 AALS study *Before the JD* surveyed undergrads considering law schools and the biggest reason—held by sixty-two percent compared to the next largest at fifty-four percent—was the potential for career advancement.³⁴ If students want meaningful employment that fits their passion, they need to know what lawyers do early enough to act on that knowledge.

While law school is not a “trade” school, used by many academics as a pejorative, it is not a liberal arts institution. It is a training program to create the next generation of societal problem-solvers. Graduates need to think

³⁴ ASSOC. OF AM. L. SCH., *BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL* 29 (2018).

broadly about problems and have the skills to find solutions. For all students, but especially future transactional attorneys, it is problematic that the first year and the case method starts with the end—with failed lawyering that resulted in litigation—because it omits significant, and really useful, parts of lawyering. For transactional lawyers, contingencies in cases are not a change of facts but different realities that might or might not occur. All law students should see this early enough in their education to thoughtfully consider it for their careers.