
Volume 40

Issue 2 *Symposium: The Lawyer of the Future:
Exploring the Impact of Past and Present
Lawyers and the Lessons They Provide for
Future Generations*

Article 5

2-26-2013

The Future of Legal Education Reform

James E. Moliterno

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Legal Education Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

James E. Moliterno *The Future of Legal Education Reform*, 40 Pepp. L. Rev. Iss. 2 (2013)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol40/iss2/5>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.spath@pepperdine.edu, linhgavin.do@pepperdine.edu.

The Future of Legal Education Reform

James E. Moliterno*

The history of the legal profession's self-regulation during self-identified crisis times (such as the present) is not a happy one. The profession has resisted change. When it has instituted change, such change has been directed not at the existing members of the profession, but at new entrants. Mostly, the change that has come has been forced by the influence of society, culture, economics, and globalization—not by the profession itself. These change agents include Watergate, communist infiltration, the arrival of waves of immigrants, the litigation explosion, the civility crisis, and the current economic crisis that blends with dramatic changes in technology, communications, and globalization. In every instance the profession has held fast to its history and its ways long after those ways have become anachronistic.¹ The profession seems to repeat the same question in response to every crisis: How can we stay even more the same than we already are?

The short story is that the legal profession is ponderous, backward-looking, and self-preservationist. The American Bar Association's (ABA) currently-functioning Ethics 20/20 Commission was established because of the dramatic changes in the economics of law practice, globalization, and technology.² Yet its mission quote sets the tone for its work: "The principles guiding the Commission's work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession."³ Protect, preserve, and maintain. This most recent

* Vincent Bradford Professor of Law, Washington and Lee University School of Law. This article is part of *Pepperdine Law Review's* April 20, 2012 *The Lawyer of the Future* symposium, exploring the role of the lawyer in American society—past, present, and future.

1. These themes will be developed in MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS* (forthcoming Oxford Univ. Press).

2. See *About Us*, ABA CENTER PROF. RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Oct. 3, 2012).

3. Memorandum from the ABA Comm'n on Ethics 20/20 Working Grp. on Alt. Bus. Structures to ABA Entities, Courts, Bar Ass'ns, Law Schools, and Individuals (Apr. 5, 2011)

“reform” mission statement is strikingly similar to that of the first bar associations, born of “crisis” and formed for their profession’s “protect[ion], pur[ification] and preserv[ation].”⁴ I recommend a more forward-looking approach, one that welcomes the views and even control of non-lawyers, innovators in business, and other enterprises. My hope is that the legal profession going forward can be more like Apple and IBM and Western Union, and less like Kodak.

Albert Einstein taught us, “You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew.”⁵ The American legal profession tries to solve problems with the same thinking that created them. It clings to the past and precedent. It “protects, preserves, and maintains.”⁶ It acts as if preserving the status quo will solve all, when in fact it will solve nothing. This backward thinking, the same thinking that preceded the crisis, exacerbates the impact of the crisis. More than anything else, the legal profession would benefit from the thinking patterns of innovative non-lawyers.

When change comes to the legal profession, it is brought by forces outside the bar. At the turn of the twentieth century, immigrants eventually integrated themselves into the bar notwithstanding the bar’s efforts to diminish and exclude them.⁷ Other changes in demographics and culture, leading to the entry of women and African Americans into the profession, have been inevitable, even if resisted by the profession at various times.⁸ Communism came and went without being affected by the bar’s efforts to stem the tide of its professional infiltration.⁹ The so-called civility crisis of the 1990s came into the profession as the world was becoming a more competitive place and road-rage reflected one external symptom of an

[hereinafter ABA Memorandum], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

4. *Professional Organizations*, 6 ALB. L.J. 233, 233 (1872); see generally Walter B. Hill, *Bar Associations*, 23 AM. L. REV. 213 (1889).

5. SANDRA WADDOCK & ANDREAS RASCHE, BUILDING THE RESPONSIBLE ENTERPRISE: WHERE VISION AND VALUES ADD VALUE 295 (2012). Other versions of this quote, credited to Einstein, include, “We can’t solve problems by using the same kind of thinking we used when we created them.” See, e.g., *Albert Einstein Quotations*, THIRD WORLD TRAVELER, http://www.thirdworldtraveler.com/Authors/Albert_Einstein_quotes.html (last visited Oct. 3, 2012).

6. See ABA Memorandum, *supra* note 3.

7. James E. Moliterno, *A Golden Age for Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261, 1284–88 (2009).

8. See generally Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405, 1408–09 (2002).

9. Cf. Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1856–57 (2009) (recounting efforts by the bar to resist the infiltration of communism).

anxious society.¹⁰ The profession's decades-long, repeated efforts to protect confidentiality, even in the face of corporate frauds, finally collapsed in the post-Enron era when change in the Model Rules was largely driven by SEC regulations adopted over the profession's objections.¹¹ Economic changes in the 2000s are what they are. The legal market, domestic and global, will be what it will be, and the bar's reaction to these changes will not stay their effects. Instead of resisting change, the profession should become more attuned to events and trends outside its walls. The profession should adjust and become a player in how change is assimilated into established ways, and how established ways are replaced by more effective ones.

Even change occasionally wrought at the hands of the bar¹² seems designed to leave the lives of the bar's elite as-is to the greatest extent possible. The major changes that followed in Watergate's wake raised entry barriers (the Multistate Professional Responsibility Examination (MPRE) and required ethics courses in law school),¹³ but had barely a wisp of effect on the already-admitted.¹⁴

The legal profession and the society it claims to serve would be better off if regulation of the legal profession were more open and viewpoint-inclusive. No entity, whether motivated by profit, altruism, or a mixture of the two, can manage itself without an eye to the future. Successful businesses and institutions engage in forward-looking strategic planning. Successful businesses and institutions examine society's trends to predict future markets and to modify their own practices in order to be well-

10. See Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next Level*, 79 TUL. L. REV. 1539, 1543-45 (2005).

11. See generally Nicole Kroetch & Samantha Petrich, *Task Force on Corporate Responsibility: Should the American Bar Association Adopt New Ethics Rules?*, 16 GEO. J. LEGAL ETHICS 727, 727-46 (2003) (discussing proposed changes to ethics regulations after the collapse of Enron and other corporations).

12. The ABA Canons were in force for sixty-two years (1908 to 1970) when at long last they were replaced by the Model Code. The ink on the Model Code barely dried when Watergate sent the profession scrambling for public relations cover in 1976 in the form of the Model Rules. The major Model Rules' amendments between 1983 and 2012 have been driven by forces outside the profession, such as the post-Enron amendments to rules 1.6 and 1.13 and the currently proposed Ethics 20/20 amendments that largely reflect changes in technology that have already occurred. Otherwise, the amendments to the Model Rules have been more like tinkering than reform.

13. See David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023, 1025-26 (1999).

14. The change from Model Code to Model Rules, as adopted rather than as proposed, was more repackaging than concept- or lawyer-obligation-changing. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 792-94 (1997).

positioned to succeed in whatever happens to be the business's or institution's place and goal-set.

There have been other impediments to innovation in the legal profession. Legal education has not been much better than the profession itself at innovation. Legal education's last transformative reform occurred in the late nineteenth century when Christopher Columbus Langdell and James Barr Ames invented the case method, the case-book, and the basic curriculum that remains the staple of nearly every U.S. law school even now, 130 years later.¹⁵ (Certainly, changes in legal education have occurred during those 130 years, but the core of that reform remains the core of today's legal education.) The Harvard-led reform of Langdell and Ames was part of a larger move toward scientification.¹⁶ Higher education was becoming more scientific and unless a discipline could be described as a serious science, it was doomed to lower-class status within the academic community.¹⁷ So the legal education reforms, meant to make law feel like biology (biology's taxonomic ranks and classification trees look not unlike the West Key Number System for classifying decided cases¹⁸) and geometry (in terms of proofs based on certain axioms) made sense.¹⁹ But a fateful choice was made: medical education, reformed at the same time, decided its mission would be to generate doctors; legal education decided its mission would be to create law professors.²⁰ Legal education intentionally

15. See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277, 292–93 (2004).

16. See Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 1–4 (1980).

17. M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 119–121 (1986).

18. The system was first described by John B. West in 1909. John B. West, *Multiplicity of Reports*, 2 LAW LIBR. J. 4 (1909).

19. See Hoeflich, *supra* note 17, at 100.

20. There was resistance to the professional separation strategy of Langdell and Ames. In an 1883 letter from Harvard Law Dean Ephraim Gurney to Harvard President Charles W. Eliot, Gurney lamented that Langdell's ideal is to:

[B]reed professors of Law, not practitioners; erring, as it seems to me, on the other side from the other schools, which would make only practitioners. Now to my mind it will be a dark day for the School when either of these views is able to dominate the other, and the more dangerous success of the two would be the doctrinaire because it would starve the School. In my judgment, . . . if . . . the School commits itself to the theory of breeding within itself its Corps of instructors and thus severs itself from the great current of legal life which flows through the courts and the bar, it commits the gravest error of policy which it could adopt. . . . Another feature to my mind of the same tendency is the extreme unwillingness to have anything furnished by the School except the pure science of the law. It seems to a layman that when the School exacts a year more than any other of study for its degree, it might concede something, at least at the start, of their time to such practical training as might be given successfully in such a school. I have never been able to see why this should be thought belittling to the School or its instructors. . . . If you[r] LLB at the end of his three years did not feel as helpless on entering an office on

disconnected from the legal profession, much to the dismay of some old standard law professors.²¹ The legal profession is still recovering from that choice.

Periodically, legal education has been criticized as disconnected from the profession by the profession itself. Among those critiques was a 1992 Michigan Law Review piece by Harry Edwards.²² Chief Justice John G. Roberts, Jr. expressed the same sentiment at the 2011 Fourth Circuit Court of Appeals Annual Conference, explaining that the disconnect between the academy and the profession produces very little scholarship that is either helpful to the practicing bar or judges or influential on the development of law.²³ Indeed, Roberts stated that he could not remember the last law review article he read.²⁴ Similarly, the New York Times critiqued law schools for producing cryptic, unhelpful, and, often, unread faculty scholarship despite the millions of dollars devoted to such work in law school budgets.²⁵ In the shadow of this outlay, law students often leave law school with no practical training.²⁶

Now, legal education is in the cross-hairs of multiple shooters: law firms and other legal employers; law firms' clients (General Counsels and business people alike); prospective students; the New York Times; and so on.²⁷ The economy our students face is highly discouraging.²⁸ Everyone, except older lawyers opposing change for opposition's sake and faculty members with a stake in the status quo, is demanding that law schools do

the practical side as he is admirably trained on the theoretical, I think he would begrudge his third year less.

ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD*, 188–89 (1967) (alteration in original).

21. James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 82–90 (1996).

22. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993) (recounting the immediate “extraordinary” response).

23. *Annual Fourth Circuit Court of Appeals Conference*, at 30:30 (C-SPAN television broadcast June 25, 2011), available at <http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/>.

24. *Id.*

25. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

26. *Id.*

27. *See id.*

28. *See id.* (“The legal services market has shrunk for three consecutive years, according to the Bureau of Labor Statistics.”).

better.²⁹ If ever there were a time for innovation in legal education, it is now.

Some law schools are likely to fail as prospective students become less willing to pay \$120,000 while foregoing income for an uncertain future.³⁰ As the ABA belatedly unmask deceptive employment statistics, all created in compliance with the ABA's former regime of reporting,³¹ prospective students will be less willing to mortgage their future to attend marginal law schools that offer little hope of remunerative employment upon graduation.³² One set of reforms addresses the market for legal education: increased transparency regarding employment prospects, varied accreditation standards, and less availability of government guaranteed student loans.³³ Will these measures cause some law schools to fail? I think so. When the Japanese installed U.S.-style graduate legal education not quite ten years ago, seventy-plus new law schools sprang up.³⁴ But the bar pass rate, always exceedingly low in Japan, did not increase at anywhere near the proportion of the new law schools' output.³⁵ Many law schools found themselves graduating entire classes of students, none of whom passed the bar.³⁶ Over thirty of those seventy-plus new schools have closed.³⁷ Not all of the

29. See *id.* (mentioning the "legal academy's peculiar set of neuroses" in resisting fundamental change to the law school curriculum).

30. See generally David Segal, *For 2nd Year, A Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, March 19, 2012, <http://www.nytimes.com/2012/03/20/business/for-1sat-sharp-drop-in-popularity-for-second-year.html>.

31. For instance, New York Law School was the subject of a 2011 class action suit in which three former students accused the school of misleading them about their post-employment prospects. See *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (Sup. Ct. 2012). The school responded in its motion to dismiss that it was "in full compliance with the American Bar Association procedures for reporting post-graduation employment data." Jessica Dye, *New York Law School Fights Class-Action Suit over Job Rates*, THOMSON REUTERS (Oct. 14, 2011), http://newsandinsight.thomsonreuters.com/New_York/News/2011/10_-_October/New_York_Law_School_fights_class-action_suit_over_r_job_rates/.

32. See ABA COMM'N ON THE IMPACT OF THE ECON. CRISES ON THE PROF. & LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (Nov. 2009), available at <http://www.americanbar.org/content/dam/aba/migrated/lstd/legaled/value.authcheckdam.pdf> (maintaining that most law students' expected return on their investment in a legal education is challenged by both the increasing costs of that education and a bleak employment market).

33. See Press Release, Am. Bar Ass'n, Reforms to Reporting of Law Graduate Employment Data Proposed by ABA Section of Legal Education and Admissions to the Bar (Mar. 20, 2012), available at <http://www.abanow.org/2012/03/reforms-to-reporting-of-law-graduate-employment-data-proposed-by-aba-section-of-legal-education-and-admissions-to-the-bar/>.

34. See Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese "American" Law Schools*, 24 WIS. INT'L L.J. 197, 197 (2006) (stating that as of 2005, Japan had "more than seventy" newly established, American-style law schools).

35. See *id.* at 205-06; Setsuko Kamiya, *Law Schools Grope to Create Better Lawyers*, JAPAN TIMES, Nov. 4, 2006, <http://www.japantimes.co.jp/text/nn20061104fl.html>.

36. See Kamiya, *supra* note 35.

37. Cf. Miki Tanikawa, *A Japanese Legal Exam that Sets the Bar High*, N.Y. TIMES, July 10, 2011, <http://www.nytimes.com/2011/07/11/world/asia/11iht-educLede11.html?pagewanted=all>

remaining fifty or so are stable.³⁸ In the United States, the difference between job prospects and supply of graduates is not that stark, but when transparency comes, the public will learn that we have some law schools with single digit employment rates at graduation. Some measure of failure will likely occur.³⁹

Some law schools are responding to the challenge and finding ways to tap private bar resources to help pay for the increased costs associated with smaller classes and more hands-on teaching methods.⁴⁰ Recruiting expert practitioners to teach practice-oriented courses at little or no cost to the law school can form a partnership between the practicing and teaching branches of the profession. Expert lawyers-cum-teachers from significant law firms can, by this device, share the training once provided to their own beginning lawyers with all students who register for their course.

The future law graduate faces a world we did not envision in the '80s, '90s, and even the first half of the prior decade. But now, changes in the market for legal services have come, despite the organized profession's futile clinging to old forms. Unauthorized practice of law restrictions must and will fall, especially but not exclusively as they relate to cross-border practice. Competition will be the driver of reform resisted by the organized bar: competition from commoditization of law products and competition from U.K. firms armed with new corporate financing for global dominance.⁴¹ In such a new legal services market, fewer graduates will find high-figure paychecks being cut by employers. More graduates will be entrepreneurs.

Law schools must reform, at long last, to generate law graduates better able to contribute to clients of law firms and to clients of their solo or small firm entrepreneurial endeavors. Teaching one skill—legal analysis—as was done from the 1880s until the 1980s, is no longer enough, even for elite law schools that will be more delayed in reacting to change because of their

(noting rapidly decreasing enrollment and the closure of several Japanese law schools).

38. *Cf. id.*

39. See Segal, *supra* note 30 (arguing that fewer applicants will force lower-ranked institutions to accept lower-quality students, which will decrease bar passage rates and ultimately lead to institutional failure).

40. See, e.g., *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, WASH. & LEE UNIV. SCH. L., <http://law.wlu.edu/thirdyear/> (last visited Oct. 1, 2012).

41. See, e.g., Nathan Koppel, *India Considers Opening Its Doors to U.K. Law Firms*, WALL ST. J. L. BLOG (Sept. 27, 2011, 8:48 AM), <http://blogs.wsj.com/law/2011/09/27/india-considers-opening-its-doors-to-u-k-law-firms/?mod=WSJBlog> (highlighting the uncertainty of American law firms being “invited to the party” in a reciprocity agreement between India and the United Kingdom).

market strength.⁴² Teaching the laundry basket of skills of the 1980s and '90s (interviewing, negotiating, advocacy, writing), as critical as they are as a base, is also no longer enough.⁴³ Law schools must prepare students to contribute; to be positive members of teams; to understand how projects are managed; and to be creative in their view not only of legal analysis but also of business, markets, and the needs of clients. Law schools must prepare students to engage in sophisticated practice for higher paying clients. To do so, students need to acquire the sensibilities of successful lawyers. They need to take ownership of client problems, be willing to be “out there” and not merely answer posed questions, and be able to solve problems with ingenuity and creativity.

Beyond outmoded restrictions on cross-border practice, the standard form of the bar exam has also inhibited reforms in legal education. Each state tests a dizzying myriad of subjects beyond the core subjects tested on the Multistate Bar Exam (MBE) and the Multistate Professional Responsibility Exam.⁴⁴

A typical law school requires eighty-four credits during the students' three academic years.⁴⁵ Courses average three credits each, so a typical student takes about twenty-eight courses.

Often justified for its “gatekeeper” function of protecting the public from incompetent lawyers, the profession has lost sight of the function of the bar exam as a gatekeeper. To be a rational gatekeeper, passage through the gate must be related to what is on the other side of the gate—in this instance the practice of law. A difficult macramé-skills exam would also keep many from passing through the gate, but there would be no confidence that those who passed could practice law. Purely testing knowledge of a wide array of topics fails to assure competence as well.⁴⁶ The current typical bar exam

42. See generally Segal, *supra* note 30.

43. See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 518 (2007) (“Curricular reformers seek to realign the study of law with its twenty-first century practice. They strive to expose students to a broader range of knowledge, tools, and methods for doing lawyers’ work.”).

44. See *infra* Table 1.

45. See AM. BAR ASS’N, 2007–2008 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 25 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf (“To achieve the required total of 58,000 minutes of instruction time, a law school must require at least 83 semester hours of credit, or 129 quarter hours of credit.”); see also, e.g., *Cornell Law School: JD*, CORNELL UNIV. LAW SCH., <http://www.lawschool.cornell.edu/admissions/degrees/jd/index.cfm> (last visited Nov. 5, 2012) (“Students must satisfactorily complete 84 semester credit hours.”).

46. See Ilya Somin, *A Modest Proposal for Bar Exam Reform*, VOLOKH CONSPIRACY (Jul. 29, 2009, 1:11 AM), <http://www.volokh.com/2009/07/27/a-modest-proposal-for-bar-exam-reform/> (“[A]s anyone who has taken a bar exam knows, they test knowledge of thousands of arcane legal rules that only a tiny minority of practicing lawyers ever use. . . . Effectively, bar exams screen out potential lawyers who are bad at memorization or who don’t have the time and money to take a bar prep course or spend weeks on exam preparation.”).

tests too much and too little. The sheer number of substantive subjects tested and the absence of serious testing of the skills of law practice combine to make the bar exam a counter-productive exercise.⁴⁷

No lawyer knows all the law that would be useful to know. Lawyers should have a base-line level of knowledge of the core legal subjects; beyond that, every lawyer must know how to learn what is needed to serve his or her clients. I have met lots of lawyers in my thirty-two years since law school. So far I have never had a lawyer say that she solved a client's problem solely based on what she learned during a particular Tuesday afternoon session of the Torts or Contracts class. Client problems are more complex than that, and almost always require some measure of synthesis of topics. No matter how many subjects we test, we will never ensure that every beginning lawyer knows all of the law that would be useful to know. There is too much law and it is too complex. So let's stop designing a bar exam that seems aimed at that unrealistic and unnecessary goal.

Table 1: Subjects Tested on Various State Bars

Virginia ⁴⁸	Agency • Conflict of Laws • Constitutional Law • Contracts • Business Organizations • Creditor's Rights • Criminal Law • Domestic Relations • Equity • Evidence • Federal Practice and Procedure • Local Government Law • Professional Responsibility • Real and Personal Property • Sales • Taxation • Torts • Trusts • Uniform Commercial Code • Virginia Civil and Criminal Procedure • Wills and Estate Administration
New York ⁴⁹	Business Relationships • Civil Practice and Procedure • Conflict of Laws • New York and Federal Constitutional Law • Contracts and Contract Remedies • Criminal Law and Procedure • Evidence • Matrimonial and Family Law • Professional Responsibility • Real Property • Torts and Tort Damages • Trusts, Wills and Estates • Uniform Commercial Code

47. See Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. 1191, 1206 (1995) ("Rather than testing for competency (or incompetency), the bar exam is essentially an achievement test and does not test for what lawyers actually do.").

48. VA. BD. OF BAR EXAMINERS, RULES (Aug. 2012), available at <http://www.vbbe.state.va.us/pdf/VBBERules.pdf>

49. N.Y. STATE BD. OF LAW EXAMINERS, CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAMINATION (May 2010), available at <http://www.nybarexam.org/Docs/CONTENT%20OUTLINE%20%28revised%20May%202010%29.pdf>.

California ⁵⁰	Business Associations • Civil Procedure • Community Property • Constitutional Law • Contracts • Criminal Law and Procedure • Evidence • Professional Responsibility • Real Property • Remedies • Torts • Trusts • Wills and Succession
Illinois ⁵¹	Business Associations • Agency and Partnership • Corporations and Limited Liability Companies • Conflict of Laws • Constitutional Law • Contracts • Criminal Law and Procedure • Evidence • Family Law • Federal Civil Procedure • Real Property • Torts • Trusts and Estates • Decedents' Estates • Trusts and Future Interests • Uniform Commercial Code • Negotiable Instruments and Bank Deposits and Collections • Secured Transactions
Texas ⁵²	Business Associations • Trusts and Guardianships • Wills and Administration • Family Law • Consumer Rights • Real Property • Uniform Commercial Code • Marital Property • Bankruptcy and Federal Income Tax
Pennsylvania ⁵³	Business Organizations • Employment Discrimination • Professional Responsibility • Civil Procedure • Evidence • Real Property • Criminal Law • Family Law • Torts • Conflict of Laws • Federal Constitutional Law • Uniform Commercial Code • Contracts • Federal Income Taxes • Wills, Trusts, and Decedents' Estates
Michigan ⁵⁴	Real and Personal Property • Wills and Trusts • Contracts • Constitutional Law • Criminal Law and Procedure • Corporations, Partnerships, and Agency • Evidence • Creditor's Rights • Practice and Procedure • Equity • Torts • Uniform Commercial Code • Michigan Rules of Professional Conduct • Domestic Relations • Conflicts of Laws • Worker's Compensation

Other states follow these patterns. Insecure students have invested upwards of \$150,000 in their legal education and will invest thousands more

50. *Scope of the California Bar Examination: General Bar Examination and Attorneys' Examination*, ST. B. CAL., [http://admissions.calbar.ca.gov/Portals/4/documents/gbx/Scope outlines.pdf](http://admissions.calbar.ca.gov/Portals/4/documents/gbx/Scope%20outlines.pdf) (last visited Nov. 5, 2012).

51. *Subject Matter Outlines*, NAT'L CONF. B. EXAMINERS, http://www.ncbex.org/assets/media_files/Information-Booklets/SMOs-from-MEEIB2012.pdf (last visited Nov. 5, 2012).

52. *Texas Bar Examination Subjects*, TEX. BD. L. EXAMINERS, <http://www.ble.state.tx.us/Rules/NewRules/appendixA.htm> (last visited Nov. 5, 2012); *Appendix A—Overview of the Texas Bar Exam*, TEX. WESLEYAN SCH. L., <https://law.txwes.edu/CurrentStudents/PlanningYourCourseofStudy/AppendixAOverviewoftheTexasBarExam/tabid/1700/Default.aspx> (last visited Nov. 5, 2012).

53. *Bar Exam Tests and Topics Tested*, PA. BD. L. EXAMINERS, http://www.pabarexam.org/bar_exam_information/testssubjects.htm (last visited Nov. 5, 2012).

54. *Frequently Asked Questions: Question 15: What Is the Format of the Michigan Bar Examination?*, MICH. CTS., <http://courts.michigan.gov/courts/michigansupremecourt/ble/pages/frequently-asked-questions-%28faq%29.aspx> (last visited Nov. 5, 2012).

in bar prep courses.⁵⁵ They understandably fear facing the bar exam without having taken as many of the tested subjects as possible during their three years of law school.⁵⁶ This fear exists in inverse proportion to the status of the law school attended and the qualifications of the students. The further down the pecking order the law school, the more insecure are the students about facing the bar exam. So, while elitism impedes reform at the highest ranked schools, fear of the bar exam impedes reform at the lowest ranked schools. (To be sure, other factors play significant roles as well, such as the ranking system itself and the inflexibility of the accreditation standards, both of which force all law schools to look as much as possible like Yale.)⁵⁷ By pressuring students to be prepared for a dizzying number of subjects, the bar exam impedes reforms that would assist students in being prepared to practice law. Courses, or activities within courses, on writing, problem solving, project management, teamwork, business-savvy, financial knowledge, and the like, are not tested on the bar exam. So the official message sent is that they are not a concern of the organized bar. They simply do not play a role in the gatekeeping function. Instead, the gate bears little relationship to what is beyond the gate.

Aiming to meet an unnecessary and unattainable goal of instruction in all potentially useful subjects acts as a deterrent to law school reform.⁵⁸ Simply no positive reason exists for the wide range of subjects. When law schools require more writing courses, more practice-oriented courses, and more ethics courses, students and alumni ask: “But how will they pass the twenty-seven subjects tested on the Bar exam?” Students, depending on their level of insecurity, feel a need to fill up their schedules with as many

55. Based on data available from students graduating in 2011, the average debt load was \$100,433, although some schools reported debt loads of \$50,000 more. Ryan Lytle, *10 Law Schools That Lead to the Most Debt*, U.S. NEWS: EDUC. (Mar. 22, 2012), <http://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/2012/03/22/10-law-schools-that-lead-to-the-most-debt>. The cost of a bar exam prep course may increase a student's debt load by a few thousand dollars. See, e.g., *California Bar Review Course Pricing*, BARBRI, <http://www.barbri.com/courseInfo/barReviewCourse/pricing.html?selectedState=CA> (last visited Nov. 12, 2012).

56. See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 360 (2003) (“[S]tudents almost invariably flock to those courses which are tested on the bar examination.”).

57. See Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 391–93 (2006) (commenting on the impact of the *U.S. News and World Report* rankings and comprehensive accreditation standards on legal education).

58. See OHIO ST. BAR ASS'N, REPORT OF THE TASK FORCE ON LEGAL EDUCATION REFORM 16 (Dec. 2009); Glen, *supra* note 56, at 379 (quoting AM. BAR. ASS'N, LEGAL EDUCATIONAL AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (MACCRATE REPORT) 278 (1992)).

bar courses as possible. Law schools feel a corresponding obligation to offer as many bar courses as possible. Ten subjects, including the MBE subjects, ethics, and state-specific procedure, would be more than sufficient to satisfy desires to make the exam a difficult, character-building rite of passage. Every subject tested beyond those incrementally diminishes the ability of law schools to reform their curricula to pay more attention to all of the things that lawyers want law students to have when they undertake law practice.

In the justifiable clamor for law schools to require more courses that demand that students write, solve problems, learn business sense, practice project management, and so on, the profession maintains a bar exam that frightens students into enrolling in as many of the twenty-five plus bar subjects of the twenty-eight courses they might typically take to earn their J.D.

There are those who would abolish the third year of the J.D. degree,⁵⁹ and if it remained a mere extension of the first and second years, I would not disagree. But rather than abandon the opportunity for education in the third year, legal education should produce value in the third year.

The most advantageous answer for this kind of education is sophisticated experiential education. The legal education system should abandon the term “skills education,” because its usual meaning has become too narrow and too pejorative in some circles.⁶⁰ So, adding to experiential education means more clinics, to be sure, and now-traditional skills courses (legal writing, trial advocacy, negotiation, etc.),⁶¹ but it means far more. This “far more” should come in the form of sophisticated, practice-setting, sensitive simulation courses taught by a mixture of professors and expert practitioners. In these courses, students are urged to make the transition from student to lawyer. Students continue to learn law, but now do so as lawyers do, with a client’s need as the driver, rather than as students do, with a three-hour exam as the driver. In such circumstances, students transition to the thought processes of lawyer-problem-solver and away from learning for no more reason than acquiring knowledge. This kind of third year could be a year with one foot in the academy and one in the practice. Far from being exclusively skills courses, these courses develop habits of the lawyer’s

59. See Kristina Dell, *Fast-Tracking Law School*, TIME (July 23, 2008), <http://www.time.com/time/nation/article/0,8599,1825863,00.html>. Judge Posner is also among those who have suggested abolishing the third year. Brian Leiter, *Four Changes to the Status Quo in Legal Education That Might Be Worth Something*, BRIAN LEITER’S L. SCH. REP. (Mar. 15, 2012, 4:00 AM), <http://leiterlawschool.typepad.com/leiter/page/18/>.

60. See Cecilia Bryant, *The Fork in the Road: The Bifurcated Purposes of Legal Education*, 71 FLA. B.J. 48, 54 (1997).

61. See Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT’L L.J. 295, 307 (2002).

mind that are not developed in the traditional courses aimed at appellate legal analysis. The third year should be a kind of “mental pathways’ transition time.”

An economic transfer is taking place. Law firms formerly trained beginning lawyers in their specific firm ways, mainly by billing their hours to corporate clients.⁶² That system no longer exists.⁶³ Now, law firms are demanding that law schools undertake more practical preparation.⁶⁴ Ironically, thirty or more years ago, major law firms preferred that law schools not so engage, fearing that law faculty would ruin otherwise trainable new associates.⁶⁵ But the transfer is now taking place from corporate client and law firm expenditures to law school expenditures aimed at more expensive clinical and skills courses.⁶⁶ The only way for this transfer to function well is for it to be incomplete: law schools must engage the low-cost, part-time faculty resources that are available to teach practice preparation.⁶⁷ At some schools, this has long been the case for courses in, for example, trial advocacy and mediation skills. More effective still would be elaborate simulation courses focused on particular practice settings and specialties.⁶⁸ So, for example, courses like “The Lawyer for Failed Businesses” might replace or supplement a Bankruptcy course; a course called “Corporate Counsel” or “The Defense Lawyer” might do the same for courses in Corporate Law and Criminal Procedure. Depending on how the new courses were structured, they might replace the former course or add a layer of application to it. Attracting and welcoming this no- or low-cost contribution from excellent lawyers (often alumni) not only ameliorates cost but represents a more altruistic contribution of the practicing branch to the education enterprise. Rather than exclusively teaching their particular firm’s

62. See Segal, *supra* note 30.

63. *Id.*

64. *Id.*

65. See Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 605 (2010) (stating that under the “traditional model . . . it was widely thought that large law firms provided the best training a young lawyer could receive”).

66. See Rachel J. Littman, *Training Lawyers for the Real World (Part 1)*, 82 N.Y. ST. B.A. J. 20, 20 (2010).

67. Thies, *supra* note 65, at 618–20.

68. See Stephen J. Friedman, *Why Can’t Law Students Be More Like Lawyers?*, 37 U. TOL. L. REV. 81, 90 (2005).

newest members, they will be providing their expertise to any students who enroll in their course.⁶⁹

Legal education can reform, and it must, despite numerous obstacles: elitism among top law schools and most law faculty, the economic transfer that is shifting the cost of preparing graduates for practice to the law schools, accreditation and rankings, and a dysfunctional bar exam.

69. This is no pipe dream, as it is precisely what has occurred at Washington and Lee University Law School. About thirty such new courses exist, half of which are taught by part-time faculty members who have, for practical measures, donated their time and are doing excellent work instructing their courses.