

## Scholarly Commons @ UNLV Law

---

Scholarly Works

Faculty Scholarship

---

2019

### What Law Must Lawyers Know?

Joan W. Howarth

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



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

---

This Article is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [david.mcclure@unlv.edu](mailto:david.mcclure@unlv.edu).

# CONNECTICUT PUBLIC INTEREST LAW JOURNAL

---

VOLUME 19

FALL - WINTER 2019

NUMBER 1

---

## What Law Must Lawyers Know?

JOAN W. HOWARTH<sup>†</sup>

What constitutes the body of legal knowledge that every lawyer must possess? I used to know, or think I did, but no longer. I suspect no one else knows either. This difficult question is not just an intriguing theoretical matter but also an urgent, practical problem. Licensing regulators assume that minimal competence in any profession requires certain fundamental knowledge, skills, and abilities.<sup>1</sup> Bar examiners must determine what knowledge, skills, and abilities are necessary for minimum competence as an attorney and then design tests and other requirements to attempt to align licensure with minimum competence. Today's tangled attorney licensing puzzle cannot be solved without better answers to this foundational question: what law must every lawyer know?

### I. AN INITIAL CATEGORICAL QUANDARY: CAN WE SEPARATE KNOWLEDGE FROM SKILLS AND ABILITY?

Of the “knowledge, skills, and abilities” triad, my focus is knowledge.

---

<sup>†</sup> Distinguished Visiting Professor, Boyd School of Law, UNLV; Dean Emerita, Michigan State University College of Law. I thank the Boyd School of Law for generous research support and Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol Chomsky, Andi Curcio, Davida Finger, Alli Gerkman, Catherine Grosso, Eileen Kaufman, Debby Merritt, Patty Salkin, Elaine Shoben, Judith Wegner, Robin West, and participants in the West Coast Rhetoric Workshop for helpful comments and ideas.

<sup>1</sup> “[T]ests used for credentialing are designed to verify that candidates have mastered the knowledge, skills and abilities (KSAs) deemed necessary for work in a profession.” Mark B. Raymond, *Job Analysis, Practice Analysis and the Content of Credentialing Examinations*, in HANDBOOK OF TEST DEVELOPMENT 144 (Suzanne Lane, Mark R. Raymond & Thomas M. Haladyna eds., 2016); citing to AM. EDUC. RES. ASS'N., AM. PSYCHOL. ASS'N., & NAT'L COUNCIL ON MEAS. IN EDUC., STANDARDS FOR EDUC. AND PSYCHOL. TESTING 174, 174-75 (2014) [hereinafter 2014 STANDARDS]. “Tests used in credentialing are designed to determine whether the essential knowledge and skills have been mastered by the candidate.” *Id.* at 175.

But the three categories inevitably blur together. The skill or ability to do anything requires knowledge about how to do it. The cook learns the properties of food and language of recipes to produce an excellent meal. The quarterback knows the vocabulary of football and the names and descriptions of plays in the playbook in order to complete a pass. The skill of competent client counseling requires a substantial knowledge base, including knowledge about duties to clients, active listening, and whatever legal doctrine may be relevant to the client's concerns. But lines must be drawn, however imperfectly. I am following the licensing convention of considering knowledge to be linked to but distinct from skills or abilities.

## II. OUR BAR EXAMS TILT TOWARD KNOWLEDGE, NOT SKILLS

The question of what law lawyers must know is especially salient because attorney licensing in the United States stresses knowledge, not skills. Ironically, we know much more about what competent lawyers must be able to do than what they/we must know. Numerous reports and studies over decades present a consistent message about what skills or abilities are necessary for competence in practicing law.<sup>2</sup> Yet current bar exams continue to require memorization of extensive knowledge, while ignoring most of what we know lawyers must be able to do.

Too many applicants understand bar exams primarily as tests of doctrinal knowledge, probably because the massive memorization of rules currently required is the challenge for law graduates who have mastered legal analysis. Bar examiners who consider bar exam reform to mean changing the subjects tested are also wrongly considering the tests to be

---

<sup>2</sup> See A.B.A. SEC. OF LEGAL EDUC. & ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), available at [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf) [“MacCrate Report”]; Howard Gardiner & Lee S. Schulman, *The Professions in America Today: Crucial but Fragile*, 124 DAEDALUS 13, 1318 (2015); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 475, 477 (1993); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Law Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 L. & SOC. INQUIRY 620 (2011); Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, 83 B. EXAM’R 6, 6-9 (2014) (evaluating survey data from junior and senior lawyers in Minnesota, interviews, job analysis studies by the National Conference of Bar Examiners, and other studies); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT (2016), available at [https://iaals.du.edu/sites/default/files/documents/publications/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf). These findings and others are summarized in Joan W. Howarth & Judith Welch Wegner, *Ringling Changes: Systemic Legal Licensing Reform*, 13 FIU L. REV. 383, 399-406 (2019). Bar examiners have not yet determined how to incorporate these studies into licensing requirements.

primarily about doctrinal coverage, and attempting to match, somehow, the rules tested with the rules to be used in practice.

This tendency to prioritize knowledge over skills is exemplified by the response of the National Conference of Bar Examiners (NCBE) to their 2012 job performance study. Of the knowledge, skills, and abilities considered, the top twenty-five rated by participants in the NCBE study as most significant to their practice were skills and abilities, not knowledge. The knowledge domain rated as most significant, Rules of Civil Procedure, came in twenty-sixth.<sup>3</sup> Shortly thereafter, the NCBE completed its planned expansion of the doctrinal knowledge required for the Multistate Bar Exam by adding Civil Procedure.<sup>4</sup> Testing for knowledge is easier than testing for skills and abilities; testing for doctrinal knowledge is especially easy.

### III. ONE KIND OF KNOWLEDGE, ONE ANALYTICAL SKILL

Bar exams rest on the fallacy that the necessary knowledge base consists of legal doctrine or rules. Whatever the knowledge that every competent lawyer must possess, it is much more than rules.<sup>5</sup> What about knowledge of legal methods, culture, or strategies? Bar exams can test these kinds of legal knowledge; Ontario's multiple-choice questions require knowledge of law office management and strategy related to litigation, deal-making, and planning.<sup>6</sup> We should improve attorney licensing to take account of these broader categories of legal knowledge that are crucial for minimal competence. My primary focus here, however, is the subcategory of legal knowledge that dominates licensing, knowledge of rules or doctrine.

Pragmatism explains examiners' long-standing concentration on doctrinal knowledge. Knowledge of rules is relatively easy to test. Even more important, some doctrinal knowledge base is required to test the

---

<sup>3</sup> See Steven Nettles & James Hellrung (AMP), Nat'l Conf. of Bar Examiners, *A Study of the Newly Licensed Lawyer* (2012). For discussion of this job analysis, see Susan M. Case, *The NCBE Job Analysis: A Study of Newly Licensed Lawyer*, B. EXAM'R at 52 (Mar. 2013), available at <https://thebarexaminer.org/wp-content/uploads/PDFs/820113testingcolumn.pdf>. Eighty-six percent of respondents reported using Rules of Civil Procedure. The percentage of respondents that reported using the twenty-five skills or abilities rated as more significant ranged from 89% to 100%, with 99% the mode and median. *Id.* at 53.

<sup>4</sup> Case, *supra* note 3, at 53.

<sup>5</sup> Most U.S. jurisdictions now require candidates to take one or two performance tests as components of the bar exam, in addition to essays and multiple-choice questions. Performance tests assess a wider range of legal skills, including readings of statutes and cases, case synthesis, document drafting, project management, and higher order analytical skills necessary to handle more complexity and uncertainty in both factual settings and legal rules. Multistate Performance Tests currently take 25% of the time of the Uniform Bar Exam and account for 20% of its score. See NAT'L CONF. OF BAR EXAMINERS, *Uniform Bar Examination* (2019), available at <http://www.ncbex.org/exams/ube/> (last visited June 14, 2019). NAT'L CONF. OF BAR EXAMINERS, UNDERSTANDING THE UNIFORM BAR EXAM (1984), available at <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209%20rather%20than%20the%20page%20itself.%20Supplying%20the%20pdf>.

<sup>6</sup> See LAW SOC'Y OF ONTARIO, *Licensing Examinations*, available at <https://lso.ca/becoming-licensed/lawyer-licensing-process/licensing-examinations> (last visited June 14, 2019); see also Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *How to Build a Better Bar Exam*, N.Y. ST. B. ASS'N J. 37, 38-40 (2018).

foundational legal skill of applying legal rules to new facts. Although not the only lawyering skill necessary for minimal competence, the legal analytical skill or method of applying rules to new facts is foundational, dominating law school and bar exams.

Given this relentless emphasis on doctrinal knowledge, licensing authorities are long overdue to turn more serious attention to the difficult question of what doctrinal knowledge is necessary to be a competent lawyer today. What legal rules must every competent lawyer know?

#### IV. LEGAL EDUCATION PROVIDES LESS OF AN ANSWER THAN MAY APPEAR

Academic programs of professional schools are important evidence of what knowledge, skills and abilities are required for professional competence.<sup>7</sup> Bar examiners reasonably point to the uniformity and stability of law school curricula, especially in the first year, as evidence of the importance of those doctrinal subjects to competence as an attorney. A closer look reveals cracks.

Consider that law schools, unlike medical schools, do not impose any prerequisites or academic coursework that must have been successfully completed prior to law school. Indeed, law schools celebrate the diversity of academic backgrounds of our student bodies, believing that part of our gatekeeping function includes building a profession that incorporates backgrounds in science and the humanities, music theory and business, engineering and women's studies, and anything else.

Whatever it is that lawyers must know, we do not require any of it to be learned prior to law school.<sup>8</sup>

#### V. ACCREDITATION STANDARDS DO NOT HELP

Law school accreditation standards offer surprisingly few hints about what knowledge is necessary for attorney competence. ABA Standard 302 focuses on lawyer competence by requiring each law school to establish "Learning Outcomes" for four key aspects of lawyer competence, starting with "Knowledge and understanding of substantive and procedural law."<sup>9</sup>

---

<sup>7</sup> "[W]e should expect a high degree of overlap between the content of professional school curricula and the content of licensure and certification examinations, since both presumably emphasize knowledge and skills that are viewed as needed for effective practice." Michael T. Kane, *The Future of Testing for Licensure and Certification Examinations*, in *THE FUTURE OF TESTING* 145 (Barbara S. Plake & Joseph C. Witt eds., 1986).

<sup>8</sup> This may be a mistake. One solution to weak prior education related to civics and government would be to add a knowledge component to the LSAT, similarly to the science knowledge tested on the admissions test for medical school. Alternatively, LSAC could work with the Khan Academy to provide online courses on these subjects that law schools could require prior to matriculation.

<sup>9</sup> AM. BAR ASS'N, *Standards and Rules of Procedure for Approval of Law Schools* §303 at 16 (2019), [https://www.americanbar.org/groups/legal\\_education/resources/standards.html](https://www.americanbar.org/groups/legal_education/resources/standards.html) [hereinafter

This glaring failure to attempt any specificity is a clue about how difficult it is to know what lawyers must know.

ABA accreditation standards do establish multiple specific curricular requirements, including that each student have two different faculty-supervised writing experiences and at least six credit hours of experiential courses that "integrate doctrine, theory, skills, and legal ethics" while engaging students in performance of identified professional skills.<sup>10</sup> Substantial opportunities for law clinics or field placements and pro bono participation are also required. But Professional Responsibility is the only area of substantive law mentioned, and therefore the only doctrinal subject that accreditors require law students to take.<sup>11</sup>

Law school curricular uniformity is driven by factors other than accreditation pressure. One such force is the strong collective proclivity of legal academics toward tradition. Through training and personality, academic lawyers share the inclination of lawyers to look backwards for authority while valuing order, hierarchy, and predictability. Academic lawyers have doubled down on order, hierarchy, and predictability by choosing university settings over the pressures, risks, and rewards of practice. This partly answers why, with too few exceptions, we are untroubled by our roles delivering a curriculum that remains remarkably unchanged since it was invented in 1870. In the memorable words of Professor Ed Rubin, legal education uses an educational model that "treats the entire twentieth century like a passing annoyance."<sup>12</sup>

## VI. LAW SCHOOLS ARE SURPRISINGLY REMOVED FROM THE PRACTICE OF LAW

For complex historical reasons related to the contested move to university-based legal education, most law schools have been extremely focused on the academic study of law, not preparation for the practice of law.<sup>13</sup> This culture was enabled by the prior culture of elite law firm employers preferring to do their own training,<sup>14</sup> a tradition that helps to explain why law schools require little clinical experience compared to

---

ABA STANDARDS]. The other required competencies are "[l]egal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context; Exercise of proper professional and ethical responsibilities to clients and the legal system; and Other professional skills needed for competent and ethical participation as a member of the legal profession." *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Each student is required to complete at least two credits of "substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members." *Id.*

<sup>12</sup> Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007).

<sup>13</sup> See Howarth & Wegner, *supra* note 2, at 428-30.

<sup>14</sup> *Id.* at 429, citing WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 91-125 (2007).

virtually every other professional school.<sup>15</sup> These habits enable the incapacity of most law professors—those who do not teach in clinics-- to know what practice requires. By contrast, medical school professors, including the most elite, continue to practice medicine by treating patients throughout their academic careers. Legal educators are not necessarily attuned to the changing needs of the profession. Law faculty who know little about practicing law know little about minimal competence.

#### VII. LAW PROFESSORS TEACH ANALYTICAL METHODS

Using traditional law school curricula to determine what doctrinal subject knowledge is required for minimal competence suffers from an even more profound complication. The longstanding practice of naming courses after their doctrinal subject matter hides the truth that these courses may have methodological goals that are at least as important, probably even more essential, than goals related to doctrinal knowledge.

Consider Torts. Law schools require students to take Torts, typically in the first semester of law school. As a Torts professor, I believe that the Torts course includes some knowledge that every lawyer must understand. This necessary knowledge base includes differences between civil and criminal law; common law development; burdens of proof; standards of review; differences between standards and rules; distinctions between elements and factors; differing roles of judges and juries, and of courts and legislatures; burdens of production and proof; the impact of procedural context on doctrinal analysis; the purposes and limitations of systems for allocating the costs of accidents; the fault continuum of intentional, reckless, negligent conduct and strict liability; the elements of negligence, and of some intentional torts; causation principles; common defenses and privileges; theories of liability for injuries from products; and types of damages. The doctrinal portion of this inventory is relatively limited.

By contrast, the Torts doctrinal knowledge base required for the Multistate Bar Exam is quite extensive, covering many more areas of torts doctrine than I have identified as necessary for competence, and significantly more doctrine than is regularly covered in a four-credit Torts

---

<sup>15</sup> Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551 (2018).

class.<sup>16</sup> The Torts knowledge base required for licensure as a Solicitor in the United Kingdom is similar, but less extensive.<sup>17</sup>

We should be neither surprised nor troubled that Torts survives in the required curriculum untouched by the steep decline in the percentage of attorneys who handle tort matters.<sup>18</sup> Law schools do not require Torts because attorneys will practice personal injury law or will use much Torts doctrine. The course is foundational because Torts makes an excellent platform for learning basic legal analysis, including the application of legal doctrine to facts, burdens of proof, elements versus factors, and arguments based on precedent, analogy, and policy considerations. Some professors use Torts as a platform for teaching legal theory, whether law and economics, theories of distributive justice, or something else. We teach Torts to everyone because we believe it to be an effective platform for introducing necessary skills of legal analysis.

The concept that legal reasoning trumps doctrinal subject matter in learning goals of the traditional core curriculum is reflected in the decision of one of our newest law schools, the University of California Irvine School of Law, to rename its first year courses as types of analysis: “Torts” became “Common Law Analysis: Torts” “Criminal Law” became “Statutory Analysis.”<sup>19</sup> The remarkable staying power of the Langdellian first year curriculum rests on the usefulness of these doctrinal subjects as platforms for teaching and learning methods of analysis, not the necessity for or even likelihood of using the doctrinal knowledge in practice. In other words, law schools continue to require subjects that are useful platforms for teaching fundamental legal analysis in the same way that bar examiners continue to test subjects that are useful platforms for testing fundamental legal analysis

---

<sup>16</sup> See NATIONAL CONFERENCE OF BAR EXAMINERS, 2019 MBE Subject Matter Outline at 8, available at <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F226>.

<sup>17</sup> *Statement of Legal Knowledge*, THE U.K. SOLIC. REG. AUTH., <https://www.sra.org.uk/knowledge/#> (last visited Oct. 25, 2018). “The Statement of Legal Knowledge sets out the knowledge that solicitors are required to demonstrate at the point of qualification.” *Id.*

<sup>18</sup> “Tort cases declined from 16% of civil filings in state courts in 1993 to about 4% in 2015, a difference of more than 1.7 million cases nationwide, according to an analysis of annual reports from the National Center for State Courts.” Joe Palazzolo, *We Won’t See You in Court: The Era of Torts Lawsuits is Waning*, WALL ST. J. (July 24, 2017, 5:09 PM), <https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572>.

<sup>19</sup> The UCI School of Law course catalog describes the course as “consider[ing] the law of negligence, products liability, and intentional wrongdoing to examine how courts make rules, how those rules change over time, and the role of lawyers in causing such change.” See *Law 501 SEC 1 – Common Law Analysis: Torts*, U.C. IRVINE SCH. OF L., [https://apps.law.uci.edu/CourseCatalog/cap\\_details.aspx?id=1935](https://apps.law.uci.edu/CourseCatalog/cap_details.aspx?id=1935) (last visited Sept. 22, 2019). Similarly, the course description for “Common Law Analysis: Contracts” explains that “[t]his course will focus primarily on the common law of contracts to teach this method of analysis, in which the law is derived from judicial decisions rather than statutes or the Constitution.” See *Law 501 SEC 1 – Common Law Analysis: Contracts*, U.C. IRVINE SCH. OF L., [https://apps.law.uci.edu/CourseCatalog/cap\\_details.aspx?id=1601](https://apps.law.uci.edu/CourseCatalog/cap_details.aspx?id=1601) (last visited Sept. 22, 2019). By contrast, the first year required course that covers criminal law is called “Statutory Analysis” and described as “us[ing] criminal law as a basis for teaching students the methods employed in all areas of law for analyzing statutes.” See *Law 503 SEC 1 – Statutory Analysis*, U.C. IRVINE SCH. OF L., [https://apps.law.uci.edu/CourseCatalog/cap\\_details.aspx?id=1951](https://apps.law.uci.edu/CourseCatalog/cap_details.aspx?id=1951) (last visited Sept. 22, 2019).



skills. The selection of doctrinal subjects to be tested on bar exams probably has little relationship to attorney competence, meaning little relationship to the law most attorneys will use in practice. Instead, the stability of the core subjects rest on the benefits of using a standard common law doctrinal platform for testing legal method, particularly the application of legal rules to new facts.

#### VIII. A CIRCULAR DILEMMA: LAW SCHOOL CURRICULA ARE SHAPED BY BAR EXAMS

Another important reason that law school curricula fail as meaningful guides to attorney competence is that bar exams determine what is taught in law school as much as what is taught in law school determines what is tested on bar exams.<sup>20</sup>

Most law schools face direct and increasing pressure to shape their course coverage for bar passage.<sup>21</sup> Preparing to pass a bar exam is not the same as preparing for competence in practice, and current licensing exams test such a narrow set of skills (primarily first year skills of doctrinal analysis) that preparing for bar exam success can draw students away from coursework that prepare them for practice, such as clinical courses in which law students represent clients.<sup>22</sup>

#### IX. BAR EXAMINERS TEST DOCTRINAL KNOWLEDGE NO LONGER TAUGHT

Increasing pressure to prepare law students for practice has changed traditional course credit allocations. Many law schools have reduced the credits given to traditional first year courses such as Civil Procedure, Contracts, Torts, and Property in part to make room in the curriculum for

---

<sup>20</sup> See Joan W. Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 928-29 (1997). This is not true at the most elite law schools. Their students are exceptionally good test-takers who can pass current bar exams without taking many bar courses. For example, neither Yale nor Michigan requires J.D. students to take Corporations, Evidence, Property, or any UCC course beyond introductory Contracts. See *JD Degree Requirements*, YALE L. SCH., <https://law.yale.edu/study-law-yale/degree-programs/jd-program/jd-degree-requirements> (last visited Sept. 22, 2019); *Course List*, UNIV. OF MICH. L. SCH., <https://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/CourseList.aspx> (last visited Sept. 22, 2019); J.D. students at Harvard are required to take Property but not Constitutional Law, Evidence, Corporations, or any UCC course beyond introductory Contracts. See *First-Year J.D. Course and Credit Requirements*, HARV. L. SCH., <https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/requirements-for-the-j-d-degree/c-first-year-j-d-course-and-credit-requirements/> (last visited Sept. 22, 2019). Beyond the obvious explanation that admission to the “best” law schools and to the profession turns on multiple-choice testing expertise, we might think about what it means that these law schools are the least wedded to the knowledge base considered crucial by bar examiners.

<sup>21</sup> See, e.g., ABA STANDARDS, *supra* note 9, at 16 (requiring 75% bar passage within two years of graduation).

<sup>22</sup> See, e.g., Deborah J. Merritt, *Experiential Education and Bar Passage*, L. SCH. CAFÉ (Jan. 22, 2016), <https://www.lawschoolcafe.org/2016/01/22/experiential-education-and-bar-passage/>.

more experiential coursework and specialized courses. Bar examiners still test for the doctrinal subject matter content that was covered when core first year courses were six units stretched over two semesters. They are ignoring the trend of the last thirty years to shrink the credits given for the core first year subjects, while adding new first year courses (e.g., administrative law, lawyering courses) and new upper level offerings (more clinics, externships, and practice-oriented courses). The subject outlines of the doctrinal knowledge tested on bar exams courses have not shrunk, but the law school courses have. Bar examiners should immediately take the easy first step of limiting their doctrinal coverage to what is currently typically taught, even as they contemplate what deeper reforms are called for by the more profound changes in the profession and education in recent years.

#### X. WHAT DID BAR EXAMINERS TEST 100 YEARS AGO?

Attorney licensing can be as tradition-bound as legal education. Today's bar exam emphasis on doctrinal knowledge has deep roots, starting over a century ago when written attorney licensing tests were still new.<sup>23</sup> The subjects tested then are remarkably like those tested today, as are some of the rules being tested. The format was short answer. Some of the questions called for definitions, a more purely knowledge question than used today, without much analytical skill required.<sup>24</sup> Many of the questions from a century ago, however, present fact patterns that could show up on today's Multistate Bar Exam (MBE) with minor factual adjustments. For example, Ohio bar examiners asked candidates in 1908 to consider whether the dawn of the automobile age created a duty of a shopkeeper to tie up his team of horses:

A grocer leaves his delivery team, as was his custom, untied in front of his place of business. B., in passing with his automobile, frightened the team and caused it to run away, and in so doing it ran into the carriage of C. and injured his

---

<sup>23</sup> Jurisdictions used oral tests for attorneys until the beginning of the twentieth century when written tests became common. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983). In 1915, the American Bar Association urged states to elevate their standards by requiring law school and passage of an examination for licensure. *The Standard Rules for Admission to the Bar: As Adopted by the Section of Legal Education and Recommended to the American Bar Association*, 4 AM. L. SCH. REV. 201 (1915-22).

<sup>24</sup> The Torts section of the 1910 Massachusetts bar exam started with the following question: "1. Define the following and give examples: (a) The fellow servant rule; (b) The assumption of risk doctrine; (c) The doctrine of contributory negligence." *Recent State Bar Examination Questions*, 2 AM. L. SCH. REV. 559, 565 (1911) (from Mass. Bar Exam, 12/31/1910). My students would be pleased to be asked similarly definitional questions such as these asked by Ohio bar examiners in 1909: "74. Distinguish between a tort and a contract; 75. What is meant by proximate cause? Illustrate by example." *State Bar Examination Questions*, 2 AM. L. SCH. REV. 524, 530 (1911) (OH 12/7-8/1909).

minor son. Against whom, if anyone, can C. recover for the injury?<sup>25</sup>

Longevity does not necessarily signal value, but the analytical skill of applying legal doctrine to new fact scenarios tested in such questions is still fundamental to competent lawyering. The analytical skill remains fundamental, but a bigger question is whether the necessary doctrinal knowledge base has stayed the same over a century. Does minimal competence today mean the same breadth and depth of knowledge of the rules of Torts, Contracts, Procedure, Evidence, Criminal Law, Constitutional Law, Agency, Secured Transactions, and Equity that were tested a century ago? Profound changes in the profession suggest otherwise.<sup>26</sup> A hundred years ago an attorney was a generalist who needed a broad knowledge base in his (or rarely her) memory to practice competently. There were fewer courts and less law.<sup>27</sup> Doctrine changed more slowly, and law books were expensive and hard to get. The doctrinal knowledge required for competence in the twenty-first century must be different from what was necessary to be learned (and memorized) a hundred years ago.

#### XI. WHAT LAW MUST LAWYERS KNOW NOW?

Professional standards for licensing tests require examiners to keep tests current by regularly reviewing changes in the profession.<sup>28</sup> The legal profession has changed profoundly over the last several decades, but the structure and coverage of bar exams have not kept up with these breathtaking changes.<sup>29</sup> Bar exams consist of multiple-choice questions, essays, and performance tests, the same components of the bar exam I took in California

---

<sup>25</sup> *State Bar Examination Questions*, 2 AM. L. SCH. REV. 524 (1911) (OH 12/7-8/1909).

<sup>26</sup> “Test design generally starts with an adequate definition of the occupation or specialty . . . Then the nature and requirements of the occupation, *in its current form*, are delineated.” 2014 STANDARDS, *supra* note 1, at 174-75 (emphasis added).

<sup>27</sup> Question 34 of the 1910 Pennsylvania bar exam illustrates that novice attorneys had less law to learn in the early 20<sup>th</sup> Century: “Briefly explain the leading principles, or rules of law, applicable to the interpretation of the Constitution of the United States, and in what respects, if any, these rules differ from the rules applicable to the interpretation of the Constitution of the state of Pennsylvania.” 2 AM. L. SCH. REV., *supra* note 24, at 571 (PA 12/6-7/1910).

<sup>28</sup> “Practice in professions and occupations often changes over time. [ . . . ] Each profession or occupation should periodically reevaluate the knowledge and skills measured in its examination used to meet the requirements of the credential.” 2014 STANDARDS, *supra* note 1, at 176-77.

<sup>29</sup> Bar examiners have been more successful in keeping up with the evolving standards for high-stakes testing concerning more professional question design, test administration, and scoring, especially related to reliability. Bar examiners have focused on reliability, making sure that a score’s meaning stays the same, but not yet sufficiently on validity, making sure that the exam tests what it purports to test, minimum competence to practice law. Testing the law that lawyers need to know is a validity requirement.

in 1980. The doctrinal subjects tested are the same, too, although often in more detail today.

More rules are tested today than thirty years ago because there are more rules to be tested. The amount of law has exploded. This growth has changed the profession by leading to ubiquitous specialization in uncountable settings. This radical dispersion of our profession – *we are everywhere* – means that the legal doctrine used in practice differs profoundly from one lawyer to the next. Considering this extreme diffusion of lawyering roles, if a core doctrinal knowledge base likely to be used in practice exists, it is small. Perhaps changes in the profession are sufficiently profound that a specific doctrinal knowledge base required of all competent attorneys has vanished along with lawyers who do not specialize. Technological changes and the diversity of position and role may have rendered obsolete the quaint notion of a common knowledge core required for competence.

This shift should not be surprising. The encyclopedic books of rules to be memorized for bar exams cover much more than what is typically even mentioned in required law school courses, but even these thick books do not reach the law that most attorneys will use in practice. Specialization is the main reason that a common core of required knowledge is obsolete, but the growth of the regulatory state is also very important. Statutes and regulations dominate legal practice but are typically ignored on bar exams.

Another complication arises from the differences between the general rules tested on the multistate tests versus the state rules tested on state-specific questions. Applicants in many states today must memorize one set of general rules for the MBE and conflicting state rules for state-constructed essays. The Uniform Bar Exam eliminates that problem by testing only general rules. Of course, these rules memorized for the bar exam are not specific to any state, which is why critics dub the doctrine tested by the Uniform Bar Exam as “the law of nowhere.”

If bar examiners were correct that competence is established by memorizing and applying rules that will be used in practice, these many layers of differences between what is tested and what is used would be deeply problematic. But reconceptualizing the level of knowledge required for licensing—replacing recall with familiarity—eliminates the problem of differences between the law learned for the test and the law to be used in practice.

## XII. KNOWLEDGE AS FAMILIARITY, NOT MEMORIZATION

A broad doctrinal knowledge base is highly relevant to attorney competence if we understand “knowledge” to mean familiarity. Competent lawyers are adept at the categorical thinking or legal method we identify as “issue spotting.” Exposure to multiple doctrinal subjects helps attorneys recognize categories of problems, or spot issues. In this way a wide doctrinal

knowledge base is very useful for issue spotting, a foundational lawyering skill. Bar examiners confuse the doctrinal knowledge that should be familiar with the doctrinal knowledge that must be memorized.<sup>30</sup>

Bar examiners resent and resist the characterization of bar exams as tests of memorization, insisting instead that bar exams test legal analysis.<sup>31</sup> But current tests do both. Bar examiners test legal analysis by requiring applicants to memorize the online equivalent of thick books of rules. Memorization of these rules is unnecessary and, worse, directly contrary to the habits of relentless authority checks required for competence in law practice. This is especially true now that everyone with a smart phone carries a complete law library in their pocket. Memorization is particularly wrongheaded when we consider the rules being memorized may conflict with the rules that apply in the jurisdiction doing the testing.

The technical fix for eliminating memorization is easy: examiners can move to open book licensing tests, as are used in Ontario<sup>32</sup> and by some Uniform Bar Exam jurisdictions to test state-specific doctrine.<sup>33</sup>

### XIII. MOVING FORWARD

Very fast but shallow legal reasoning – applying uncontested facts to artificially stable (and memorized) rules -- is the hallmark of today's bar examinations. Mechanical application of legal rules to new facts is a crucial and foundational aspect of attorney competence that should be tested by licensing authorities. But this is the skill of a novice law student, not a novice lawyer. Real lawyering requires creative judgment to handle uncertain facts and ambiguous law. Licensing authorities should test the foundational skill of mechanical application of facts to legal rules as a first stage of licensing.<sup>34</sup> This basic skill of legal analysis can be tested using a subset of doctrine, perhaps Torts, Contracts, and Civil Procedure as covered in four-unit

---

<sup>30</sup> Cognitive domains and knowledge are more complex than my simple distinction between familiarity and memorization suggests. *See, e.g.*, A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES (Lorin W. Anderson, et al. eds., 2001) (describing the cognitive process dimension as lower to higher order thinking skills of remembering, understanding, applying, analyzing, evaluating and creating and the knowledge dimension as factual, conceptual, procedural, and metacognitive knowledge).

<sup>31</sup> *E.g.*, Rebecca White Berch, *Letter from the Chair*, 87 THE BAR EXAM'R 1-2 (2018), available at <https://thebarexaminer.org/article/summer-2018/letter-from-the-chair/>.

<sup>32</sup> *See* L. SOC'Y OF ONTARIO, *supra* note 6; Curcio et al., *supra* note 6.

<sup>33</sup> For example, New York supplements the Uniform Bar Exam with the New York Licensing Exam, a two-hour, open book multiple-choice test of New York law. *See* N.Y. ST. BRD. OF L. EXAM'RS, *Uniform Bar Exam, New York Law Course, and New York Law Exam*, <https://www.nybarexam.org/UBE/UBE.html> (last visited Jun. 23, 2019).

<sup>34</sup> *See* Howarth & Wegner, *supra* note 2, at 425-27.

courses. This first stage licensing exam could be given as soon as the applicant has finished these courses.

This early test to ensure basic legal reasoning ability opens possibilities for later assessment of higher order thinking skills and a broader range of lawyering skills. For example, a later post-graduation bar exam could be comprised entirely of performance tests that align more closely with legal practice than essay or multiple-choice questions. Performance tests today provide candidates with a case file and library of legal sources to be used to complete lawyering tasks, such as client letters, memos, or discovery documents.<sup>35</sup> The performance test is the only bar exam component not designed to test substantive doctrinal knowledge. Legal methods, including critical reading of cases, statutes, and regulations can be assessed by performance tests. Providing both relevant and irrelevant materials in the library would test more advanced legal analysis and legal research skills.

Bar examiners could encourage familiarity with a broad range of doctrinal areas by providing a list in advance of the potential subjects of the performance tests, which could be extensive. Candidates could also be motivated to familiarize themselves with the variety of legal documents listed as potential performance test tasks. In these ways bar exams would more closely simulate law practice.

#### XIV. CONCLUSION

Bar examiners continue to operate as though memorization of a broad base of legal doctrine will prepare novice attorneys to handle whatever legal problems they may confront. This premise makes bar exams difficult for the wrong reasons (memorization of encyclopedic books of rules and requirements of high speed) and otherwise too easy, especially for excellent multiple-choice test-takers. Attorney licensing will become more aligned with minimal competence and thus offer better public protection when examiners reconceptualize how and why doctrinal knowledge is important.

The primary purpose of bar exams should be to test competence in legal methods, including legal analysis, not legal knowledge. The crucial purpose for doctrinal knowledge in bar exams is to provide the platform to test legal analysis. And, regarding knowledge, bar exams will be better when their focus expands to forms of legal knowledge beyond doctrine, including knowledge of methods, skills, and strategy. Attorneys should be familiar with a broad swath of legal doctrine in order to spot legal issues, but the ability to memorize all those rules is no measure of competence.

The most valuable aspect of knowledge-based competence in an attorney today is understanding what we do not know and then how to find

---

<sup>35</sup> See NAT'L CONF. OF BAR EXAM'RS, *Multistate Performance Test*, <http://www.ncbex.org/exams/mpt/> (last visited Jun. 23, 2019).

it, understand it, and use it. More than ever before, knowing when and how to find legal knowledge is more critical than the knowledge itself.