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Litigation Bias

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INTRODUCTION

Litigation bias pervades American law schools. Litigation-based assignments in skills courses outnumber transactional-based assignments nineteen to one.[1] Litigation-based clinical opportunities outnumber transactional-based opportunities nine to one.[2] And doctrinal courses are often taught focusing primarily on appellate case law, usually at the expense of discussing or drafting underlying agreements critical to transactional practice.[3]

Such litigation bias has two primary negative impacts: the first on the student, and the second on the profession. First, litigation-focused teaching does not necessarily respond to student desires, student needs, or employer requirements. Of incoming law students, 63% desire an interdisciplinary education[4] and 46% indicate an interest in transactional-based legal practice (compared to 41% for litigation-based legal practice).[5] For graduates, approximately 50% practice in transactional settings.[6] Despite this demonstrated interest in

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[1] Based on the most recent study. *See* Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 71 (2007). Even those assignments categorized as "transactional-based" are often rooted in litigation settings, such as drafting a settlement agreement or drafting an agreement based on information found in case law. Truly "transactional-based" assignments can include drafts of transactional documents, such as contracts, lease agreements, or other commercial agreements.

[2] Based on the ABA list of clinics, approximately 119 are transactional-based clinics out of a total of approximately 1,092 clinics. *See Public Interest Clinics*, A.B.A., https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/ [https://perma.cc/AD3H-6RYM] (Aug. 1, 2022). Although not every school reports its clinical offerings on this list, that data seems representative. This data roughly matches similar data on a smaller scale, where CUNY litigation-based clinics outnumber transactional clinics ten to two. *See Clinical Programs*, CUNY SCH. OF L., https://www.law.cuny.edu/academics/clinics [https://perma.cc/2REW-S7WL] [hereinafter CUNY].

[3] *See* Rachel Arnow-Richman et al., *Integrating Transactional Skills Training into the Doctrinal Curriculum*, 18 TRANSACTIONS 439 (2016).

[4] *See Kaplan Survey: What Pre-Law Students Want in Law School Culture Might Be at Odds with Law School Reality*, KAPLAN, INC. (Dec. 3, 2014), https://www.kaptest.com/blog/press/2014/12/03/kaplan-survey-what-pre-law-students-want-in-law-school-culture-might-be-at-odds-with-law-school-reality/ [https://perma.cc/SJ94-ZKWK] (explaining that 63% of pre-law students wanted an interdisciplinary law school education).

[5] *See* Schulze, *supra* note 1.

[6] *See* Lynnise Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N.U. L. REV. 61, 62 (2014) (identifying the number of law school graduates that go on to practice in transactional settings).

transactional work and need for transactional training for law students, law schools largely do not answer the call: employers report that recent law school graduates entering transactional practice are 44% less prepared for practice than their litigation counterparts,[7] establishing a true and measurable gap in transactional preparedness.[8]

Second, litigation bias existing in law schools affects the legal profession in three ways. First, litigation bias encountered in law schools influences how lawyers regulate the profession, including in the content and administration of the bar exam and the Model Rules of Professional Conduct.[9] Second, litigation bias encountered in law schools influences how lawyers practice, potentially fostering a propensity to litigate in certain practices where collaboration or negotiation could be more successful.[10] Finally, litigation bias encountered in law schools influences how and who lawyers serve, predisposing lawyers to litigation-based pro bono service through teaching and clinical opportunities and leaving important transactional pro bono needs unmet.[11]

This Article contributes to existing scholarship on legal education reform by examining litigation bias in law schools and detailing its impacts on the legal profession, including in its regulation, practice, and service. Existing scholarship has examined topics such as the need to teach more transactional skills,[12] including preventive writing (i.e.,

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7 Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 211–12 (2012). According to this survey conducted by Carl Circo and the Professional Development Consortium, law firm training and development professionals indicated that nearly 60% of students entering transactional practice were "poorly" or "very poorly" prepared for transactional careers whereas only 16% of law students were "poorly" or "very poorly" prepared for careers in litigation.

8 In addition to the gap that litigation bias presents for transactional lawyers, litigation bias can also present a gap for litigators. In fact, some of my colleagues that have taught Contracts courses have noted that students who wish to be litigators often are reticent to look at contracts or discuss contractual issues, because they believe such knowledge is unnecessary for their practice. By addressing litigation bias and demonstrating that all students can learn from a variety of modes and contexts, it is likely that all students would benefit.

9 *See infra* Section II.A.

10 *See infra* Section II.B.

11 *See infra* Section II.C.

12 *See generally* Tina L. Stark, *Transactional Skills Education: Mandated by the ABA Standards*, 20 TRANSACTIONS 693 (2018) (describing the need to teach transactional skills in law schools); Carol Goforth, *Transactional Skills Training Across the Curriculum*, 66 J. LEGAL EDUC. 904 (2017) (addressing the need to teach transactional skills in law schools); Pantin, *supra* note 6, at 72–73 (advocating for a need to teach transactional skills in the legal writing or legal practice curriculum); Lynnise E. Pantin, *The First Year: Integrating Transactional Skills*, 15 TRANSACTIONS 137, 138 (2013) (discussing how to integrate

the type of legal writing lawyers use to prevent a future legal issue from arising, typically referred to as contract drafting, and used in a variety of practices, such as in the drafting of contracts, settlement agreements, incorporation documents, employment agreements, and wills, among others)[13] in legal writing courses;[14] the gap related to teaching transactional research tasks and methodologies in research courses;[15] the desire to develop more transactional clinics;[16] a call for increased teaching of transactional skills in doctrinal courses;[17] and the

transactional skills into the first-year curriculum); Circo, *supra* note 7 (discussing the history of the movement to introduce more skills into the law school curriculum); Wayne Schiess et al., *Teaching Transactional Skills in First-Year Writing Courses*, 10 TRANSACTIONS 53, 55 (2009) (describing the need to teach transactional skills in the first-year legal writing course); David V. Snyder, *Closing the Deal in Contracts: Introducing Transactional Skills in the First Year*, 34 U. TOL. L. REV. 689, 689 (2003) (discussing the need to teach transactional skills in the formative first year of law school); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002) (discussing teaching transactional skills in the legal writing curriculum); Adam N. Eckart, *Deal Me In: Leveraging Pedagogy to Integrate Transactional Skills into the First Year Legal Research and Writing Curriculum*, 21 U.C. DAVIS BUS. L.J. 125 (2020); Jean Whitney et al., *Across the Curriculum: Integrating Transactional Skills Instruction*, 14 TRANSACTIONS 383, 387 (2013) (describing how to use the problem method in Legal Research and Writing courses to introduce transactional skills).

13 *See* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 3–4 (4th ed. 2015) (describing types of legal writing, including preventive writing).

14 *See, e.g.*, Pantin, *supra* note 6; Eckart, *supra* note 12.

15 *See* Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463, 484–85 (2015) (discussing the underrepresentation of transactional research instruction in Legal Research and Writing courses); AARON KIRSCHENFELD ET AL., *Transactional Law Research*, *in* PRINCIPLES OF LEGAL RESEARCH (3d ed. 2020) (discussing specialized research tasks required for transactional lawyers and resources available for transactional lawyers); Lori Johnson et al., *Research Instruction and Resources in the Transactional Skills Classroom*, 18 TRANSACTIONS 635, 636–38 (2016) (discussing the lack of a robust textbook focused on or dedicated to transactional research topics).

16 *See* Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551 (2018) (detailing the rise in experiential required credits in law schools); *see also* Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85 (2014) (describing how law schools experienced significant growth in transactional clinics nationwide in the last decade, with over 140 transactional clinics in place at law schools by 2012); Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & POL'Y 11, 16 (2015) (discussing how transactional clinics serve communities and the need for additional transactional clinics in law schools).

17 *See* Arnow-Richman et al., *supra* note 3 (discussing four potential ways to incorporate the teaching of transactional skills in the doctrinal classroom); Adam N. Eckart, *Teaching Transactional Skills in First-Year Doctrinal Courses (and Beyond)*, *in* LAWYERING SKILLS IN THE DOCTRINAL CLASSROOM: USING LEGAL WRITING PEDAGOGY TO ENHANCE TEACHING ACROSS THE LAW SCHOOL CURRICULUM 209 (Tammy Pettinato Oltz ed., 2021) (describing ways that doctrinal professors can integrate transactional skills into the doctrinal classroom).

duty to incorporate more transactional perspectives in the classroom.[18] This Article, however, is the first of its kind to examine litigation bias in law schools, discuss the effect of litigation bias on legal practice and pro bono service, and offer constructive solutions to address litigation bias in law schools, including in curricular and hiring reforms.[19]

Litigation bias existing in law schools needs to be addressed head-on. This Article argues that there is pervasive litigation bias in law schools, and that such bias negatively affects the work of lawyers, including how lawyers are regulated, how lawyers practice law, and how lawyers serve their communities through pro bono and advocacy work. Part I traces the origins of litigation bias, including back to Christopher Columbus Langdell's case method model, and argues how such bias impacts legal curricula, course offerings, and experiential opportunities for students today. Part II argues how litigation bias in the law school negatively affects the work of lawyers, providing examples of how litigation bias pervades certain types of practices, including family law and antitrust practices. That Part also demonstrates how litigation bias imparts a bias in lawyers' service to their communities, including through pro bono and advocacy work, and how transactional pro bono work is often discarded or underrepresented because of a focus on more litigation-style pro bono work. Finally, Part

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[18] *See generally* Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223 (2004) (describing how the litigation-centric instruction of law schools teaches students to think like litigators rather than all types of lawyers, including transactional lawyers); Victor Fleischer, *supra* note 12, at 477–78 (describing how students often study transactional documents, such as contracts or wills, in law school but rarely have the opportunity to draft those documents in doctrinal courses); Celeste M. Hammond, *Integrating Doctrine and Skills in First-Year Courses: A Transactional Attorney's Perspective*, 17 J. LEGAL WRITING INST. 409, 411–12 (2011) (discussing opportunities available for transactional students in law school); Susan M. Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C. L. REV. 247 (2019) (discussing how techniques of narrative and storytelling apply in contexts in addition to persuasive writing for litigation, including in transactional drafting contexts); Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016) (describing the role of narrative in transactional drafting); Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN'S L. REV. 845 (2017) (discussing the role of persuasive writing and narrative theory to the work of transactional lawyers); Adam Eckart, *From the Courtroom to the Boardroom: Transactional Oral Advocacy*, THE SECOND DRAFT, Aug. 2021, at 1 (discussing how litigation -style oral advocacy instruction can be converted to apply to transactional contexts as well).

[19] Although some prior scholarship has named litigation bias, scholarship has not examined it in depth across practices or contexts. That said, many of the calls for action, demands for change, and appeals for reform are consistent with the examination of litigation bias addressed in this Article. One of the first to name litigation bias in the context of legal education reform was Lynnise Pantin. *See generally* Pantin, *supra* note 12; Pantin, *supra* note 6.

III examines how law schools should address litigation bias, including in specific reforms to the law school curriculum and positions of power in legal academia.

I
LITIGATION BIAS IN LAW SCHOOLS

A. How It Started: Christopher Columbus Langdell

To analyze where litigation bias in law school pedagogy began, one need look no further than Christopher Columbus Langdell, a Harvard Law graduate, who, after practicing in New York City and joining Harvard Law School's faculty, introduced the "case method" in 1870.[20] Before Langdell's innovation, law school pedagogy focused on lectures by experienced practitioners and judges (as opposed to full-time faculty members) on the "black letter" of the law—a rather straightforward lecture on what the law was and the rules that resulted from common law.[21] Langdell, however, focused on exploring how the law was formed, centering in-class discussions on the examination of appellate court cases.[22] To supplement his own novel teaching method, Langdell published *A Selection of Cases on the Law of Contracts* in 1871, a predecessor to today's modern casebook used to facilitate the case method of teaching.[23]

While these changes, among others that Langdell initiated at Harvard Law, were unpopular at first, the case method improved over Langdell's twenty-five-year tenure as Professor (and then Dean) at Harvard Law, which resulted in good jobs for Harvard graduates, and

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[20] Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 242 (1992) (discussing the origins of the Langdell-based case method, first introduced at Harvard Law School, which expanded to every law school across the country over time). At the time of Langdell's innovation and until 1890, no other U.S. law school used the case method. Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890–1915*, at 46 HIST. EDUC. Q. 192 (2006) (stating that 40% of American law schools had adopted the Langdellian method by the beginning of World War I, with another 24% partially accommodating the Langdellian model, and the remainder of law schools being marginal, less influential law schools, all which converted to the model in the next decade).

[21] Moskovitz, *supra* note 20.

[22] Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643 (2013) (detailing the how professors call on students to answer questions about cases, court decisions, and legal theory in an effort to facilitate discussion of the case, theory or law involved).

[23] Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2322 (2017).

raised both the status of Harvard Law and of Langdell's case method.[24] As more of Langdell's students succeeded, more and more became law school professors themselves, serving as ambassadors of Langdell's model and spreading its use throughout the nation.[25]

As a result of Langdell's innovation in legal pedagogy over 150 years ago, the law school experience began to shift its focus from practice-oriented training, which included the drafting of transactional documents, to a more academic and theoretical discussion of legal concepts, relying instead on the appellate opinion to guide discussion.[26] In addition to this change, law schools began to adopt Langdell's casebook as the center of their teaching resources, further emphasizing the importance of the appellate opinion at the expense of the underlying transactional document.[27] Finally, students increasingly learned the law from professors who were trained academics rather than practitioners, increasingly fostering a movement toward the appellate opinion and away from underlying transactional documents.[28]

B. How It's Going: Today's Law School Classrooms

As Langdell's innovations gained credibility and popularity, litigation-focused methodology became entrenched in law schools. Since that time, additional factors have contributed to continued litigation bias in today's law schools. Contributing factors include which courses are required, what experiential- and practice-based opportunities are available to students in upper-level courses, and the

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24 Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2283 (2017).

25 *Id.* This trend is among one of the first of litigation biases that resulted from the teaching of law via the case method, with more law school professors coming from academia rather than from practice.

26 *Id.*

27 *See generally* Jennison, *supra* note 22.

28 The case method approach to legal education has long been criticized for a variety of reasons in addition to the litigation bias that it brings to the classroom. *See generally* Kathleen Elliott Vinson, *What's Your Problem?*, 44 STETSON L. REV. 777 (2015) (arguing that the case law method focuses students on evaluating case law rather than on problem solving); Suzanne Kurtz et al., *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 DALHOUSIE L.J. 797 (1990) (arguing that the case law method leaves students to see events only through those distilled in court opinions rather than in real life); Moskovitz, *supra* note 20 (arguing that the case law method fails to teach students problem solving skills); Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648 (1996) (arguing that the case method teaches students to think like judges rather than practicing lawyers who represent clients).

backgrounds and pedagogical approaches of the faculty members teaching such courses.

1. Litigation Bias in Mandatory Courses[29]

Traditional first-year doctrinal courses such as Civil Procedure, Contracts, Criminal Law, Property, and Torts are typically biased toward litigation either in content or through instruction.[30] Some of these courses are simply designed primarily for litigators; fairly few transactional lawyers will need to know the specifics behind civil procedure or criminal law, for instance. Although these courses are not unimportant and may provide helpful context about the law and our legal system to all students, a more balanced legal education, with an introduction to various types of legal practice and theory, would be more beneficial to more students.

Where courses, such as Contracts and Property, are applicable to transactional lawyers, however, litigation bias often creeps in. For instance, professors teaching these courses often present the material in a disproportionate way: overemphasizing litigated cases and the perspective of a litigator at the expense of discussing transactional samples, underlying transactional documents, and experiences of a transactional lawyer. After all, in these courses students often learn legal doctrine without seeing or drafting an actual agreement, deed, covenant, or contract.[31]

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[29] Although many law schools structure their courses differently, for the purposes of this Article these "mandatory" courses focus primarily on the required first-year courses that law school students take, which typically include Civil Procedure, Constitutional Law, Contracts, Criminal Law, Legal Writing, Property, and Torts. Should additional courses be added, I recognize that the first year may not have enough credits to accommodate additional requirements and some courses may need to take place in the second year.

[30] Scholarship generally discusses the failure to teach transactional skills both in the skills context and in the doctrinal context. *See generally* Pantin, *supra* note 12 (discussing the bias in using litigation assignments over transactional assignments); Schiess et al., *supra* note 12 (exploring litigation bias in first-year curriculum based on assignments given); Goforth, *supra* note 12 (addressing the need to teach transactional skills in law schools); Pantin, *supra* note 6, at 72–73 (advocating for a need to teach transactional skills in the legal writing or legal practice curriculum); Circo, *supra* note 7 (discussing the history of the movement to introduce more skills into the law school curriculum); Kosuri, *supra* note 15 (discussing the underrepresentation of transactional research instruction in Legal Research and Writing courses); Hammond, *supra* note 18, at 412.

[31] Why? Many state that this occurs because the professor often never practiced or never practiced in a transactional setting. *See infra* Section I.B.3. I'll never forget a conversation that I had with a friend while I was studying for a Contracts final. A non-law student friend asked what I was studying for. I said, "Contracts." She said, "Oh, so you have to draft a contract for your final exam? What type?" Then there was silence. That said, many of my colleagues at Suffolk University Law School and throughout the nation have begun to

With respect to Contracts and Property courses in particular, scholars have long critiqued the use of the case method as the predominant means of instruction.[32] Although the modern Contracts and Property casebooks contain a multitude of other materials, including examples and applications, the appellate opinion remains the concentration[33] and continues to be the focus of in-class time for many such courses.[34] Accordingly, the case method—without significant augmentation from other materials—leaves first-year students to assume that case law is the entirety of the law, and that engaging in adversarial litigation constitutes the significant majority of a lawyer's time.[35] In addition, some even argue that the disproportionate focus on case law shifts the focus of the course itself, arguing that Contracts courses taught using solely the case method are more about how contractual disputes are settled rather contracts themselves.[36] Although a case law approach in these courses helps facilitate a discussion of common law principles, "worst case" scenarios, and important drafting considerations, an effective approach to teaching these and other similar courses cannot rely primarily on the case method.

Outside the doctrinal classroom, scholarship focused on the legal writing classroom has long pointed out the overwhelming use of

change this narrative. For example, some Property professors teach students how to search the Registry of Deeds in order to demonstrate a transactional and practice-oriented approach to Property. However, I understand that this approach represents a minority of Property professors.

32 *See generally* Lawrence A. Cunningham, *Reflections on* Contracts in the Real World*: History, Currency, Context, and Other Values*, 88 WASH. L. REV. 1265, 1272 (2013); Jennifer S. Taub, *Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students*, 88 WASH. L. REV. 1427 (2013); Gerald P. López, *Transform—Don't Just Tinker with—Legal Education*, 23 CLINICAL L. REV. 471 (2017); Lisa Penland, *The Hypothetical Lawyer: Warrior, Wiseman, or Hybrid?*, 6 APPALACHIAN J.L. 73 (2006). Scholars have long criticized the use of the case method in other courses as well. *See, e.g.*, Rachel Arnow-Richman, *Employment Law Inside Out: Using the Problem Method to Teach Workplace Law*, 58 ST. LOUIS U. L.J. 29 (2013).

33 *See* Cunningham, *supra* note 32.

34 Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27 (1996) (discussing findings of a national survey detailing that 97% of professors used the case method for first-year courses and approximately two-thirds of in-class lectures was devoted to the case method).

35 Penland, *supra* note 32, at 78.

36 *See* Taub, *supra* note 32, at 1429–30, 1458–61. By focusing only on how contractual disputes are settled, Contracts courses fail to cover a range of other issues that practitioners grapple with, including modern business practices and regulation and how courts allow businesses to use boilerplate agreements to the disadvantage of consumers. *Id.* at 1430.

litigation assignments in the first-year curriculum,[37] where Legal Research and Writing courses typically focus on three skills: objective writing, persuasive writing, and oral advocacy. Although these skills are transferrable to many practices, the legal writing classroom typically teaches these skills with only the litigation perspective in mind. For example, most legal writing courses only teach objective writing for litigation practice (e.g., predicting an outcome of a case but not whether a client has a regulatory filing), persuasive writing for litigation practice (e.g., drafting motions but not persuasive transactional documents), and oral advocacy for litigation practice (e.g., performing oral arguments in a courtroom but not persuading in a board room (or, relatedly, how to come to a collaborative solution)).[38] Similarly, Legal Research and Writing courses also employ litigation bias in teaching legal research, focusing on using commercial databases to research statutes and case law and seldom teaching students how to use publicly available sources to locate information relevant to transactional lawyers, including public company information, public real estate information, federal regulations and interpretations, or transactional precedent (such as information necessary for drafting agreements).[39] Finally, few legal writing programs even teach preventive writing or transactional drafting, leaving students without any (or very limited) instruction in a key type of legal writing that practitioners—including litigators and transactional lawyers alike—use in their practice every day.[40]

Data identifying what is taught in the legal writing classroom supports the conclusion identified in scholarship. As many as 95% of

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37 *See* Pantin, *supra* note 12, at 138 (discussing the overwhelming use of litigation assignments in the law school curriculum); *see* Schiess et al., *supra* note 12 (finding that in a survey of 330 practicing lawyers, approximately 80% of respondents indicated that their legal writing course in law school did not teach transactional drafting but approximately 85% did teach litigation-based brief writing).

38 *See generally* Eckart, *supra* note 18 (discussing how legal writing courses typically only teach oral advocacy in litigation perspectives, using oral arguments as the only exercise or assessment in such portion of a course, effectively suggesting to students that oral advocacy in transactional contexts is less important). Similar to this oral advocacy example, few legal research and oral advocacy courses teach students how to conduct legal research for transactional matters (e.g., researching public company information, publicly available real estate land records, or federal agency interpretations or advice) or draft objective or persuasive memo assignments based on transactional fact patterns (e.g., whether a party has a filing requirements versus whether a party is likely to prevail in a contested litigation).

39 *See generally* KIRSCHENFELD ET AL., *supra* note 15 (describing transactional research skills).

40 Eckart, *supra* note 12 (describing how few legal writing programs dedicate significant portions of their mandatory first-year syllabus to preventive writing).

all assignments in the Legal Research and Writing classroom are litigation-based, with fewer than 5% of such assignments categorized as "transactional-based."[41] In addition, fewer than 10% of all first-year Legal Research and Writing courses devote significant time to preventive writing.[42]

Finally, in addition to considering how mandatory first-year courses are taught and what assignments are used in teaching them, some scholars have also questioned the mix of mandatory first-year courses themselves, noting inherent litigation bias in the list of mandatory first-year courses.[43] Scholars have noted the importance of Business Organizations[44] courses in preparing for the bar exam,[45] serving as a

41 *See* Schulze, *supra* note 1. Even those assignments categorized as "transactional-based" are often rooted in litigation settings, such as drafting a settlement agreement or drafting an agreement based on information found in case law. Truly "transactional-based" assignments can include drafts of transactional documents, such as contracts, lease agreements, or other commercial agreements. I tweeted about this topic in September 2021, asking fellow legal research and writing professors whether they have assigned objective memo assignments. Despite a great amount of interest in the responses from professors across the country, only one professor indicated that they had assigned a problem of this nature, which was a noncompete agreement. What is different about a noncompete agreement assignment, however, is that the problem is still rooted in case law and litigation, since students must research case law to determine what elements are required for noncompete enforceability (whereas an objective memo regarding the availability of a tax exemption would likely be based on federal regulation and agency guidance rather than case law).

42 Eckart, *supra* note 12 (detailing the results of a novel survey and research assignment which surveyed the required first-year Legal Research and Writing courses of all accredited ABA law schools to determine which schools offered a transactional component or assignment in their first-year Legal Research and Writing course).

43 *See generally* Jen Randolph Reise, *Moving Ahead: Finding Opportunities for Transactional Training in Remote Legal Education*, 47 MITCHELL HAMLINE L. REV. 32 (2021). Although scholars argue that the set of mandatory first-year courses are justified in their first-in-line status because of the way the courses are taught, focusing on the common law, such an assertion only has merit if one agrees that Langdell's model is superior. In fact, according to a report on the passage of the Uniform Bar Exam in New York State, completing first-year doctrinal courses did not increase bar passage rate—only completion of Corporations and Evidence correlated with bar passage rate. *See* THE N.Y. STATE BD. OF LAW EXAM'RS (NYBOLE) & ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE (2021), https://www.accesslex.org/NYBOLE [https://perma.cc/NF3H-6UEL] [hereinafter NYBOLE].

44 Suffolk University Law School titles this course as "Business Entity Fundamentals" to recognize the importance not just of corporations, but many schools title the course as "Business Organizations" or "Business Associations."

45 Reise, *supra* note 43, at 43. *See also MEE Subject Matter Outline*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F227 [https://perma.cc/2N3U-DYZ8].

prerequisite of important upper-level business law courses,[46] and introducing students to the fundamentals of transactional practice early on in their education.[47] Despite this, many law schools only "encourage" the completion of Business Organizations, while simultaneously requiring similarly situated litigation-focused courses.[48]

2. Litigation Bias in Electives

Although students can learn a variety of skills and doctrine outside mandatory first-year courses, the options for upper-level courses available to students are often inherently biased toward litigation as well. In one respect, many of the course offerings available to students as electives reflect the careers of their professors rather than the careers reflected in the majority of practice today.[49] In another respect, many of the course and experiential offerings available to students today remain the same as they have been for years because of the long-held and pervasive litigation bias.[50]

As one example, many law schools have more than one course aimed at appellate practice, including courses on appellate practice, judicial process for appeals, wrongful convictions, and legal writing for appellate

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46 Therese H. Maynard, *Educating Transactional Lawyers*, 10 TRANSACTIONS 23, 27 (2009).

47 Reise, *supra* note 43, at 43. *See also* Schulze, *supra* note 1, at 91 (exemplifying the need to prepare all types of students, including students who expect to practice in litigation, with a basic background in corporate entity formation, corporate entities, and corporate work). At Columbia Law School, for example, approximately 90% of graduates work in a corporate transactional practice or are litigators who serve a corporate client within their first five years of practice.

48 Although many law schools suggest taking Business Organizations, data suggests that a minority of schools actually require the course (or one similar). *See* Reise, *supra* note 43. In addition, few law schools require the completion of Trusts & Estates, Family Law, Taxation, or Real Estate Conveyancing courses. This is surprising because many law school graduates, including 30% of Suffolk University Law School's 2020 graduates, go on to practice in small or solo law firms of twenty-five lawyers or fewer (which constitutes the largest percentage of lawyers in any one discipline as compared to graduates employed in large law firms, government, business and industry, clerkships, and education). *See* SUFFOLK UNIV. L. SCH., EMPLOYMENT SUMMARY FOR 2020 GRADUATES (2021), https://www.suffolk.edu/-/media/suffolk/documents/law/career/aba-summary-2020.pdf [https://perma.cc/8HZT-KLGK].

49 In many law schools, professors are hired to fill vacancies left by predecessors who taught the same elective course. This approach often serves to replace retiring or exiting professors with professors who are similarly situated in practice experience. Accordingly, in some cases, such hiring limits opportunities to offer new electives.

50 *See generally* Tremblay, *supra* note 16 (discussing how litigation clinics have far outpaced transactional clinics in number of offerings, despite calls for change and opportunities to provide legal assistance to numerous community members through transactional clinic work).

practice (to name of few). By comparison, however, fewer law schools have courses (or more than one course) on real estate transactions.[51] Such is reality in law schools, but not in the market: after all, in 2020, there were approximately 1,200 appeals heard in the Massachusetts court system[52] as compared to approximately 60,000 residential real estate transactions in Massachusetts in the same year.[53]

In terms of legal writing electives, the number of opportunities for students to learn how to draft a transactional document has increased over time but still lags behind the availability of advanced legal writing courses aimed at litigation drafting. According to surveys, only 60% of law schools offer at least one transactional or contract drafting elective, while nearly 80% of law schools offer upper-level electives in litigation drafting, and 78% report they offer an upper-level elective specific to appellate advocacy.[54] Despite these numbers, transactional or contract drafting electives are reported to be the most popular, often oversubscribed and overflowing with student interest.[55]

Some may argue that law school is also an opportunity for students to explore intellectual pursuits that are not focused on developing legal skills or making lawyers "practice-ready." Although this is true for some, it is a luxury many cannot afford due to the rising prices of law school and the insurmountable debt in which many graduates find themselves.[56]

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51 Some schools have eviction-based courses or clinics that are focused on real estate work, but it appears few schools have robust offerings that prepare real estate conveyancing lawyers, with courses such as "Real Estate Transactions" or "Real Estate Conveyancing," although some schools offer one of those courses (but not more).

52 *See Appeals Court Case Statistics*, COMMONWEALTH OF MASS., https://www.mass.gov/service-details/appeals-court-case-statistics [https://perma.cc/2BF5-YBJX].

53 *See* Colin A. Young, *Mass. Home Sales Hit 16-Year High During Pandemic*, WBUR (Jan. 19, 2021), https://www.wbur.org/news/2021/01/19/massachusetts-real-estate-homes-sold-increase [https://perma.cc/HXR2-ZF48].

54 *See* ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI LEGAL WRITING SURVEY, 2019–2020: REPORT OF THE INSTITUTIONAL SURVEY (2020), https://www.lwionline.org/sites/default/files/ALWD%20LWI%202019-20%20Institutional%20Survey%20Report%20FINAL%20Nov%2023%202020.pdf [https://perma.cc/5LHP-LJKR].

55 *See id.* (reporting that nearly 40% of contract drafting courses had more demand than seats available, the highest such percentage of any legal writing elective course and six percentage points higher than the next most popular course). In the #1 ranked Legal Research and Writing program, as ranked by U.S. News and World Report, at the University of Nevada Las Vegas, only one professor is teaching contract drafting and the course is overenrolled each time it has been offered over the past ten years.

56 *See* A.B.A. & ACCESS LEX INST., STUDENT DEBT: THE HOLISTIC IMPACT ON TODAY'S YOUNG LAWYER (2021), https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf [https://perma.cc/W2PA-QYG5] (reporting that 90% of law school students borrowed student loans to finance their law school

Experiential offerings available to upper-level students in electives are also often biased toward litigation. While the last several decades have brought a rise in the number of clinics aimed at transactional practices, including through the development, availability, and popularity of transactional, community economic development (CED), and entrepreneurship clinics,[57] such clinics are typically overwhelmingly outnumbered at law schools by litigation-oriented clinics. In fact, based on the ABA's list of clinics, transactional-based clinics represent just 10% of all clinics.[58] At CUNY School of Law, ranked as the best law school for clinical training by U.S. News and World Report,[59] only one of the school's twelve clinic offerings is transactional in nature.[60] Each of the other clinics, based on the

education, owing an average of $108,000 in law school loans at graduation). Because of this significant debt, many of the students I talk with emphasize that they choose courses based on what will get them a job or help them prosper in that job rather than what they may be interested in intellectually. To me, this indicates that many more students are focused on becoming "practice-ready" lawyers rather than exploring intellectual pursuits while in law school.

57 *See* Joy, supra note 16 (detailing the rise in experiential required credits in law schools); *see also* Jones & Lainez, *supra* note 16 (describing how law schools experienced significant growth in transactional clinics nationwide in the last decade, with over 140 transactional clinics in place at law schools by 2012); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 260 (2004) (discussing how the rise in transactional programs is related to the mistakes or shortcomings of the litigation paradigm, which, over time, had not delivered on its ability to solve societal problems, including poverty, among others); *see generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf [https://perma.cc/2UC6-NUG5] (calling for more active learning techniques in the classroom and for practical skills courses to be required instead of optional electives).

58 *See* A.B.A., *supra* note 2 (listing approximately 119 transactional-based clinics out of a total of approximately 1,092 clinics).

59 *See 2023 Best Clinical Training Law Programs*, U.S. NEWS & WORLD REP. (2022), https://www.usnews.com/best-graduate-schools/top-law-schools/clinical-training-rankings [https://perma.cc/R98Y-ZHFA].

60 *See* CUNY, *supra* note 2. The one non-litigation clinic, according to a brief review, is CUNY's Community and Economic Development (CED) Clinic, which is focused on addressing structural inequities in New York City through a variety of representations, including transactional representation. Even still, some portion of SUNY's CED clinic work engages in litigation. As a contrast, some law schools do have greater transactional clinical offerings. At Harvard, the Transactional Law Clinics (TLC) is made up of the Business and Nonprofit Clinic, the Real Estate Clinic, the Entertainment Law Clinic, and the Community Enterprise Project. *See* TRANSACTIONAL L. CLINICS, HARV. L. SCH., https://clinics.law.harvard.edu/tlc [https://perma.cc/VA27-KPZN] (describing some transactional law clinic offerings).

description of the clinic on the law school's website, is rooted in adversarial and litigation-focused work.[61]

3. Litigation Bias in Faculty

Langdell's case method model was spread throughout the country over 150 years ago through a network of academic lawyers who focused on teaching a litigation-focused style of the law. In the 150 years since, many law school professors still teach in the same manner. In fact, one of the largest drivers perpetuating litigation bias may be law school faculty themselves.

First, many professors in law schools today rely on litigation perspective or litigation-styled teaching because they came from litigation practices themselves, have little experience in transactional work from practice, never practiced at all, or simply teach as they were taught.[62] In fact, law school deans have even recognized such challenges in the past, pointing out the importance of varied professional backgrounds in promoting diversity in law faculties.[63] Despite this, transactional lawyers still make up relatively small percentages of faculty populations; legal writing faculty seldom have transactional practice backgrounds,[64] clinicians with transactional experience are far outnumbered by clinicians with litigation experience,[65] and many doctrinal faculty have experience in litigation,

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61 Despite this trend, some law schools do a better job of balancing transactional and litigation-based clinic offerings. For example, at the University of Tennessee College of Law, three of the law school's eight clinics are focused on transactional work. *See Legal Clinic*, THE UNIV. OF TENN. COLL. OF L., https://law.utk.edu/clinics [https://perma.cc/7TPD-UU47].

62 Pantin, *supra* note 6, at 87 (framing the challenges regarding teaching transactional skills as a "human resources" issue because many lack the necessary practice experience to teach transactional skills).

63 Deans have previously pointed out the importance of varied professional backgrounds in promoting faculty diversity. *See generally* Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549 (2011).

64 Based on a review of the top five legal writing programs, as ranked by U.S. News and World Report, approximately 17% of legal writing instructors have transactional practice experience. At several programs, including at the #1 ranked program at UNLV and at the #4 ranked program at Suffolk University Law School, only one professor at each school (out of a total of five and nine, respectively) has transactional practice experience.

65 *See supra* Section I.B.2 (discussing the number of litigation and transactional clinics in law schools). Because clinicians typically have the same practice background as the focus of their clinics, it follows that clinicians typically possess greater litigation experience than transactional experience.

appellate work, or academia rather than in transactional practices.[66] Even members of law school appointments committees have noted that the number of applicants for faculty positions with litigation-based backgrounds far outnumber the number of applicants with transactional-based backgrounds.[67]

Second, litigation bias in faculty might be a question of leadership. Although a review of the backgrounds of all law school deans was not conducted for this Article, a review of the law school deans in positions of power, including as Officers and Executive Committee Members of AALS for the calendar year 2022, found that deans in these positions of power are typically former litigators. Based on a review of the biographies of the nine deans and former deans who were part of the 2022 AALS leadership slate, only three were individuals with significant transactional experience, while the other six members included former litigators, judges, and appellate lawyers.[68]

Finally, the bias among faculty members may be a matter of economics. Law professors may naturally come from public interest and government service, where many jobs are litigation-focused, because salaries in those fields are more similar to those in academia—rather than from Big Law or corporate America, where transactional lawyers typically earn a multiple of a law school professor's salary.[69]

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66 It is difficult to ascertain the exact percentages of professors with experience in transactional work as many professor biographies do not mention the professor's practice experience, if any. Although data could be gathered from applicant data through the AALS Faculty Appointments Register or through individual law school appointments processes, access to such information was not granted for the purposes of sharing on an anonymized and aggregated basis in this Article.

67 *See* Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 434 (2009) (discussing that, as a member of his law school's faculty appointments committee, he noticed the lack of transactional applicants in traditional channels for faculty recruitment). Having sat on Suffolk University Law School's Appointments Committee for the 2021–2022 academic year, I can confirm that this observation remains true today.

68 *See Governance*, THE ASS'N OF AM. L. SCHS., https://www.aals.org/about/governance [https://perma.cc/Z8CH-5RP7]. For purposes of clarification, the individuals reviewed included Erwin Chemerinsky, Mark Alexander, Vincent Rougeau, Austen Parrish, Melanie Wilson, Danielle Conway, Daniel Filler, Kevin Washburn, and Eloisa Rodriguez-Dod.

69 According to data from Salary.com, the average salary for a public defender in Boston, Massachusetts is $60,010 per year (in 2021) whereas the average salary for an associate general counsel in Boston, Massachusetts is $325,196 (in 2021). Since the average salary of an entry-level assistant professor of law in Boston, Massachusetts is $107,317 (in 2021), it may be the case that in-house counsel lawyers may be less likely to accept such a job based on economics alone. *See* SALARY.COM, https://www.salary.com [https://perma.cc/2MQE-SKCE]. This data is largely corroborated by recent studies showing that the average law professor (after receiving tenure) received, on average, a salary from $100,000 to $124,999.

Since it may be more economically difficult for transactional lawyers to transition from the boardroom to classroom, as compared to litigators transitioning from the courtroom to the classroom, the result simply may be that transactional lawyers are less willing to join the legal academe.

II
EFFECTS OF LITIGATION BIAS

Although litigation bias as discussed in Part I may seem limited to individual areas of legal education, scholarship suggests that litigation bias is pervasive in the profession as well, including in areas which ultimately affect the clients and communities that lawyers serve. The approach to teaching, practice, and service may even inform society as a whole, which has increasingly become more litigious in recent history.[70] This Part will focus on three effects of litigation bias on lawyers: the way lawyers govern the profession, the way lawyers serve clients, and the way lawyers serve their communities.[71]

See THE AM. BAR FOUND., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES (2011), https://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-_final-_abf_4.1.pdf [https://perma.cc/2XQZ-BKT6].

70 *See* Michael J. Boyle, *6 Reasons Healthcare Is So Expensive in the U.S.*, INVESTOPEDIA, https://www.investopedia.com/articles/personal-finance/080615/6-reasons-healthcare-so-expensive-us.asp [https://perma.cc/J298-9SLH] (Jan. 31, 2022) (citing that physicians and hospitals have an interest in preventing lawsuits, and, as a result, a significant amount of health care coverage is "defensive" or preventive, aimed at ensuring that a patient would not be successful in a lawsuit against the physician or hospital); *see generally* Ron Fournier & Nat'l J., *In Congress, Compromise Is a 4-Letter Word*, THE ATL. (Jan. 17, 2013), https://www.theatlantic.com/politics/archive/2013/01/in-congress-compromise-is-a-4-letter-word/461649 [https://perma.cc/7FYX-GEKC] (exemplifying the nature of an "us" versus "them" mentality in United States politics akin to a "zero sum game" in litigation); *Neighbor Wins $500,000 Judgment in Lawsuit over Barking Dog*, ABC 13 EYEWITNESS NEWS (Feb. 10, 2015), https://abc13.com/lawsuit-joke-barking-dog-loud/511454/#:~:text=In%20the%20sprawling%2036%2Dpage,infliction%20of%20emotional%20distress%2C%20and [https://perma.cc/DR2Q-5KEB] (exemplifying the litigation-prone nature of Americans, seeking to reap a large litigation reward rather than solve a dispute amicably with a neighbor). Transactional lawyers can be combative and prone to disagreement as well, but this is often the minority in transactional work because client goals are often aligned: both clients want to make the real estate transaction happen, both employee and employer wish to start a relationship, and, in some cases, only one party is necessary (such as when drafting a will or incorporating a business).

71 The way in which litigation bias affects society is part of my future scholarly work. Areas for consideration include how litigation bias drives higher health care costs due to heightened insurance litigation costs, how litigation bias drives disharmony in society and a "winner-take-all" attitude, and how litigation bias leads to reduced collaboration, including in everyday legal matters, such as real estate, trusts and estates, and others.

A. Litigation Bias in the Way Lawyers Govern

What law schools teach and the way law schools teach predispose students and lawyers to litigation bias. Once lawyers enter the profession, this bias affects the way legal professionals are regulated. First, litigation bias is present in licensing requirements that dictate baseline standards for competency required to enter the profession, including the bar exam. Second, litigation bias is present in ethical rules that govern the profession, including the Model Rules of Professional Conduct.

1. Litigation Bias on the Bar Exam

The bar exam often serves as a capstone to a formal legal education and marks the official entry of students into the profession as licensed lawyers.[72] Each year, the vast majority of law school graduates sit for the bar exam, a multiday test to determine a person's knowledge of law and skills needed to practice in the profession.[73] Although every state may adopt its own standards for its bar exam, over the last decade, states have been moving toward a Uniform Bar Exam (UBE), established by the National Conference of Bar Examiners (NCBE).[74] Each of the three portions of the UBE—the Multistate Bar Exam

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72 Unlike almost any other licensing exam in today's society, the results of the bar exam are closely watched. In Massachusetts, the names of students who pass the bar are published after each administration of the exam in *Massachusetts Lawyers Weekly*. As a result, when individuals fail the bar, their failings are often widely publicized. When John F. Kennedy Jr. passed the New York Bar Exam on his third try after two failed attempts, the story made national headlines. *See Nation in Brief: New York: John F. Kennedy Jr. Passes Bar Exam*, L.A. TIMES (Nov. 4, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-11-04-mn-5683-story.html [https://perma.cc/MU66-EL74]; *see also* Jack Guy, *Kim Kardashian Passes California's 'Baby Bar' Law Exam at Fourth Attempt*, CNN (Dec. 13, 2021, 6:22 PM), https://www.cnn.com/2021/12/13/entertainment/kim-kardashian-law-exam-scli-intl/index.html [https://perma.cc/UP5Q-N2DJ] (detailing even the public nature of lower-stakes exams, including Kim Kardashian's passage of the California "baby bar" exam on her fourth attempt).

73 Although some students choose not to take the bar exam after graduating from law school, according to ABA data, over 80% of 2020 law school graduates took the bar exam in 2020. *See* A.B.A., FIRST TIME BAR PASSAGE CALENDAR YEAR 2020 (2020), https://www.americanbar.org/groups/legal_education/resources/statistics [https://perma.cc/55AN-LMXR] (click "2020 First Time Taker Bar Pass Data" to access the report). When factoring in "ultimate bar passage," which considers a three-year period where students can sit for the bar exam, that percentage is significantly higher, with approximately 95% of law school graduates taking a bar exam within three years of graduation. *See id.*

74 *See Uniform Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/ube [https://perma.cc/YV2L-JGNG]; *see also* Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1 (2019) (discussing the rise in the adoption of the UBE and predicting that the UBE will be used in all states within a short period of time).

(MBE), the Multistate Essay Exam (MEE), and the Multistate Performance Test (MPT)—are biased toward litigation in their selection of testing subjects, frequency of testing subjects, and format of assessment.

The MBE focuses on seven subjects that are equally tested: contracts and sales, constitutional law, criminal law and procedure, civil procedure, evidence, real property, and torts.[75] Of these seven subjects, five cover topics relevant to litigation-oriented careers, focusing on trial work (such as evidence and civil and criminal procedure) and work often subject to litigation (including constitutional law, criminal law, and torts). Only two of the MBE subjects relate to most transactional lawyers (property and contracts). Topics related to the work of so many other transactional lawyers (e.g., business organizations and trusts and estates) are omitted from the MBE.[76]

The next portion of the bar exam, the MEE, tests twelve areas of law: business associations, civil procedure, conflict of laws, constitutional law, contracts, criminal law and procedure, evidence, family law, real property, torts, trusts and estates, and secured transactions.[77] Although the MEE topics are more balanced than those of the MBE, and the mix of questions on each administration of the MEE appear to be split evenly between litigation and transactional topics over the last several MEE administrations,[78] some suggest that litigation-oriented subjects, like civil procedure, are the most tested on the MEE when looking at data over several years.[79]

Finally, the last portion of the bar exam, the MPT, focuses on lawyering skills required in many practices: problem solving, legal analysis and reasoning, factual analysis, communication, organization and management of legal tasks, and recognizing and resolving ethical dilemmas.[80] Although these skills relate to a variety of practices,

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75 *See Multistate Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mbe/preparing [https://perma.cc/842L-FPWF].

76 *See id.*

77 *See id.*

78 *See id.* On this page, the NCBE provides sample questions as well as questions and analyses from older examinations. A review of the last several MEE administrations tends to suggest that each MEE evenly splits its six questions between transactional and litigation topics.

79 *See What Subjects Are Tested on the Multistate Essay Exam?*, JD ADVISING, https://jdadvising.com/subjects-tested-on-the-multistate-essay-exam [https://perma.cc/9H3B-R9KE]. A chart on this page lists civil procedure as the most frequently tested subject on the MEE. *Id.*

80 *See MPT Skills Tested*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/dmsdocument/54 [https://perma.cc/8MUJ-HAWG].

including transactional practice, the form of their assessment on the MPT largely resembles litigation practice rather than transactional practice. In a review of the last ten MPT examinations that included twenty MPT questions, only five questions—approximately 25% of all MPT questions—were rooted in facts or circumstances related to transactional practice, while the remaining 75% of questions were rooted in litigation practice.[81] In addition to the lack of transactional context on the MPT, the MPT also largely fails to test transactional-specific skills, such as preventive writing.[82] In the last twenty MPT questions, only one question—just 5% of the MPT questions over the last ten examinations—has included a preventive writing assignment.[83]

The critiques of legal licensing exams, such as those mentioned in this Article, are not new; longstanding arguments that legal licensing exams do not accurately or representatively test transactional subjects or skills remain relevant today.[84]

2. Litigation Bias in Model Rules of Professional Conduct

Once applicants are admitted to the bar, litigation bias affects the way lawyers work and the way lawyers are regulated. The Model Rules of Professional Conduct (the "Model Rules") are written almost entirely for litigators and fail to cover professional conduct specific to transactional lawyers in three major ways, including in defining competence, identifying conflicts, and determining where a lawyer may practice.[85]

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[81] *See id.* On this page, the NCBE lists summaries of MPT questions from recent examinations. The five transactional-oriented problems were related to assignments asking students to draft an objective memorandum, an opinion letter, or articles of incorporation related to a transactional problem. The remainder of problems asked students to write objective memoranda, persuasive memoranda, bench memos, closing arguments, briefs or other litigation-style documents designed to respond to a potential claim by one party or another.

[82] Instead, the focus of the MPT is typically objective writing and persuasive writing, either in office memoranda or in court documents, such as briefs.

[83] In the second MPT question on the July 2018 bar exam, examinees were asked to draft articles of association for a rugby owners and players association. No other MPT question on the last ten MPT administrations has asked examinees to engage in preventive writing, a necessary skill for all transactional lawyers and many litigators.

[84] *See Lawyers Speak Out in Bar-Survey Finale*, 31 MONT. LAW. 6, 32 (2005) (describing how Montana practitioners have previously advocated for a "stiffening" of the bar exam in transactional areas in order to produce more effective transactional lawyers in the state).

[85] These are just three examples of the ways in which the Model Rules are written with litigation bias and therefore leave transactional lawyers without guidance. *See generally* Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227 (2014). In addition, since students in many law schools take a Professional Responsibility course and

First, although the Model Rules contemplate a lawyer's duty to provide competent legal advice,[86] the Model Rules do not require lawyers to have knowledge about nonlegal concepts relevant to their client, such as a lawyer's duty to understand basic business concepts.[87] The Model Rules do not require that a lawyer possess a basic understanding of business concepts and do not consider a lawyer's failure to connect legal advice with appropriate business knowledge as incompetence.[88] After all, a lawyer is only successful in their representation of a client if in executing a merger agreement the lawyer understands the business and executes a merger agreement between the appropriate entities in a corporate organization.[89]

Second, although the Model Rules address conflicts of interest, transactional lawyers are left with little guidance on navigating conflicts because the rule is written largely for litigators and focuses only on litigation contexts where two parties are directly adverse to each other.[90] Because transactional lawyers are more likely to represent clients who are not directly adverse and because transactional lawyers often conceptualize conflicts of interest differently, transactional

students in forty-nine jurisdictions must take and pass the Multistate Professional Responsibility Exam, an exam developed by the NCBE, as a prerequisite to taking the bar exam, students are often left to think of the Model Rules only as governing litigation practice and often fail to consider how the rules apply to transactional lawyers. For more information about the Multistate Professional Responsibility Exam, see *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mpre/ [https://perma.cc/Y652-QGJK]. Note that there are several other examples of the ways in which the Model Rules are written with litigation bias. *See generally* Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 VILL. L. REV. 159 (2020) (discussing questions regarding the helpfulness of the Model Rules as governing technology competence requirements for transactional lawyers).

86 MODEL RULES OF PRO. CONDUCT r. 1.1 (A.B.A. 2020).

87 Lisa L. Dahm, *Ethics in Contract Drafting: Should We Fix What's Broken or Start Over and Create Something Better?*, 61 S. TEX. L. REV. 1, 2–3 (2020).

88 *Id.* (discussing shortcomings in the Model Rules as related to transactional practices and the considerations necessary for transactional lawyers).

89 *See id.*

90 MODEL RULES OF PRO. CONDUCT r. 1.7 (A.B.A. 2020). *See also* Katelyn K. Leveque, *A Clumsy Couple: The Problem of Applying Model Rule 1.7 in Transactional Settings*, 96 IND. L.J. SUPP. 88, 89 (2020) (discussing litigation bias in Model Rule 1.7, including questions regarding transactional conflicts). Comment 6 indicates that direct adversity means that one may not "advocate in one matter against a person the lawyer represents in some other matter," but the comment also indicates that two clients with differing economic interests are not necessarily adverse. *See id.* (begging the question of the nature of conflicting matters for transactional lawyers, including whether a lawyer can represent two competing entities, two parties to a real estate transaction, or two parties in a will, for example).

lawyers are left without significant guidance in this area.[91] And where conflicts do exist, transactional lawyers must then consider whether that conflict can be resolved with informed consent—a process that is unclear for many transactional lawyers, including where the parties do not understand the informed consent process or where the parties have disparate sophistication.[92]

Third, although the Model Rules provide guidance on the "temporary"[93] authorized practice of law by lawyers outside their licensed jurisdiction, such rules are written primarily for litigators arguing one specific case in front of one specific court and are not helpful for transactional lawyers, who must wonder where they may practice and for how long.[94] For transactional lawyers, where they can practice without being admitted can be difficult to ascertain.[95] Transactional work is often cross-jurisdictional, and determining where a lawyer must be admitted to appropriately counsel a client can be difficult.[96] After all, a transactional lawyer must wonder whether she

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91 *See generally id.* (describing how the Model Rules consider a variety of litigation scenarios but often take into consideration few transactional scenarios).

92 *Id.*

93 Whatever "temporary" means. The Model Rules, including Comment 6, indicate that there is "no single test" to determine what is "temporary" and, even more confusing, that "temporary" may include providing services in the jurisdiction on a recurring basis or for an extended period of time over the course of a lengthy matter. MODEL RULES OF PRO. CONDUCT r. 5.5 (A.B.A. 2020). The Comment, however, only specifies that such practice may occur "as when the lawyer is representing a client in a single lengthy negotiation or litigation." *Id.* Does a "negotiation" in this context cover a transactional matter, even if the matter is purely internal to one client's organization?

94 *Id.*; *see also* Jones, *supra* note 57, at 307 (discussing how litigation is more easily identifiable as to "where" the work is taking place, as state-based licensing is reliant on where a litigation is filed in court, and transactional work is harder to identify "where" the work is taking place—for transactions often relate to multijurisdictional companies that sell products, have multiple locations, or have customers in a variety of jurisdictions).

95 Jones, *supra* note 57, at 308; James Geoffrey Durham & Michael H. Rubin, *Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach*, 81 LA. L. REV. 679 (2021).

96 *See generally* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (12th ed. 2020); Jones, *supra* note 57. For instance, in a merger like the ones I worked on in private practice, businesses typically held hundreds of assets in various jurisdictions. Must lawyers be licensed to practice in each jurisdiction in which they reviewed a commercial lease? In the $3.2 billion deal where Bain Capital acquired Outback Steakhouse and related brands like Carrabba's Italian Grill and Bonefish Grill, the restaurants were located in twenty-one countries and all fifty states. *See* Michael J. de la Merced, *Parent of Outback Steakhouse Is Sold in $3.2 Billion Deal*, N.Y. TIMES (Nov. 7, 2006), https://www.nytimes.com/2006/11/07/business/07food.html [https://perma.cc/4D23-2P9M]. Was it necessary for a real estate associate reviewing the corporate leases of each restaurant to be licensed in each jurisdiction?

can file incorporation papers for a client in a new state where it is establishing a subsidiary, even if the lawyer is not licensed there, or whether she can close a real estate transaction in a new state where a client is purchasing a manufacturing facility.[97]

B. Litigation Bias in the Way Lawyers Practice

The litigation bias existing in law schools impacts various practices of law, including those that involve both transactional-focused work and litigation-focused work. Because of litigation bias in instruction, practicing lawyers are often predisposed to litigate, even where a more collaborative approach could prove more successful.

This Section will discuss two examples in which litigation bias impacts legal practice: family law, where litigation bias influences a lawyer's predisposition to litigate rather than resolve an underlying issue through collaboration or mediation, and antitrust law, where litigation bias affects how antitrust authorities resolve anticompetitive concerns in mergers and acquisitions.[98]

1. Litigation Bias in Family Law

Litigation bias exists in the education of family law practitioners and in the practice of family law, including in two contexts relevant to many family law practitioners and family law clients: prenuptial agreements and divorce.[99]

Family law is an area of law, often practiced by small firms or solo practitioners, that focuses on family matters and domestic relations, including matters of marriage, divorce, adoption, surrogacy, custody, juvenile law, and paternity, among others.[100] While Family Law

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97 Some may note that incorporation and real estate work may not require licensure in all states, but even this fact reflects litigation bias in licensing requirements. After all, transactional legal work should require that clients are protected and that professionals completing this work are properly trained and knowledgeable about the work.

98 Although this Article discusses only two areas of law that exhibit litigation bias in their preparation of students and in the way that the law is practiced, such examples should not be intended to convey that these are the only practices that exhibit litigation bias. Other practices that include both transactional and litigation work are bankruptcy, business restructuring and creditor's rights, consumer protection, employment law, intellectual property, securities law, and tax law, among others.

99 *See generally* Mark B. Baer, *The Amplification of Bias in Family Law and Its Impact*, 32 J. AM. ACAD. MATRIM. LAWS. 305 (2020).

100 *See generally* Laura T. Kessler, *Family Law by the Numbers: The Story That Casebooks Tell*, 62 ARIZ. L. REV. 903 (2020) (detailing various elements of family law practice and their representation in family law casebooks).

courses in law school typically use the case method to introduce and discuss major elements of family law practice, a vast majority of family law matters, including about 95% of divorce disputes, are negotiated and settled with no litigation.[101] And while the practice of family law has changed over the years, moving away from litigation and toward mediation and collaborative work, family law instruction in law schools has largely remained the same—focused on the adversarial nature of the practice.[102]

Two examples in family law illustrate where lawyers are biased toward litigation but where collaborative work could be more effective. First, in highly emotional and stressful divorce matters, conflicts often end in contentious litigation.[103] Family lawyers, however, can often succeed in resolving disputes in a non-adversarial manner by dictating the trajectory of a matter, diffusing rather than exacerbating a "win versus loss" mentality, utilizing a counseling and problem-solving approach, and exploring methods of alternative dispute resolution before engaging in litigation.[104]

Second, in other family law matters, such as prenuptial agreements, an adversarial model can start the matrimonial relationship off on the wrong foot.[105] By starting the relationship at a point of collaboration rather than litigation, however, family lawyers can help start the

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101 Rome Neal, *The Divorce Process*, CBS NEWS (Nov. 4, 2002, 1:40 PM), https://www.cbsnews.com/news/the-divorce-process [https://perma.cc/894J-BSEV] (stating that only 5% of divorces are settled in court, with the remaining 95% settled via other means outside court).

102 Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524 (2006) (describing the nature in which family law is still taught with an adversarial nature that often fails to recognize the collaborative work and current focus on family law practice).

103 One need not look any further than their Netflix account to see an example of a contentious divorce litigation. *Dirty John: The Betty Broderick Story* depicts the real-life chain of events of marriage, divorce, and murder that took place during the contentious divorce of Elisabeth (Betty) Anne Broderick and Daniel Broderick III. Betty Broderick was ultimately convicted of murdering ex-husband Daniel Broderick III and his second wife, Linda Broderick on November 5, 1989. *Dirty John: The Betty Broderick Story*, NETFLIX (2018), https://www.netflix.com/title/80241855 [https://perma.cc/2UHF-LY8M].

104 *See* Baer, *supra* note 99. Some jurisdictions, such as New York, New Jersey, and California, now require mandatory mediation prior to litigation. *See id.* at 338–39.

105 In fact, many consider prenuptial agreements to predict doom in marriages, often because of their adversarial approach. *See* Beth Potier, *For Many, Prenups Seem to Predict Doom*, THE HARV. GAZETTE (Oct. 16, 2003), https://news.harvard.edu/gazette/story/2003/10/for-many-prenups-seem-to-predict-doom [https://perma.cc/U4P6-52XC]; *see generally* Susan M. Chesler & Karen J. Sneddon, *The Power of a Good Story: How Narrative Techniques Can Make Transactional Documents More Persuasive*, 22 NEV. L.J. 649 (2022).

relationship from a better place.[106] For some couples, starting the relationship in a collaborative way may increase benefits to the couple, thereby ultimately preserving the relationship.[107]

Troubled by litigation bias inherent in the instruction of Family Law courses and spilling over into the practice of family law, approximately twenty years ago, the Family Law Education Reform Project (the "Project") looked at litigation bias inherent in the practice of family law.[108] The Project embarked on an initiative to better prepare new family lawyers: help law schools understand that family law was no longer litigation-focused; and advocate for more effective tools in the interdisciplinary practice of family law, including using alternative dispute resolution approaches.[109]

The Project found that by teaching family law in a format that over-emphasized the case method, students were predisposed to thinking that litigation was the only dispute resolution option in such cases.[110] And just learning the law by reading cases did not adequately prepare future practitioners.[111] The Project found that family law curricula should not be litigation-centric, and instead should be redesigned away from the dominant focus on case-based analysis and toward a family-based structure, looking at issues not in "isolation of a triggering action or sudden reaction but rather as interconnected events woven into a life story," using a real or simulated family to illustrate related issues over time.[112]

Collaborative law advocates argue that family law, including divorce matters, is a ripe area for collaboration, due to the common interests, limited resources, tight-knit bar, and need to preserve ongoing relationships present in family law cases, but that many practitioners in divorce matters rush to litigation without fully pursuing collaboration

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106 *See* Donna Beck Weaver, *The Collaborative Law Process for Prenuptial Agreements*, 4 PEPP. DISP. RESOL. L.J. 337 (2004).

107 *See id.* (describing the potential for prenuptial agreements, as well as other agreements, in their effective use for collaborative lawyering).

108 O'Connell & DiFonzo, *supra* note 102.

109 *Id.* (describing how family law practice is no longer centered on litigation in resolving disputes but rather includes negotiation, mediation, and other non-litigation practices and skills).

110 *Id.* at 527–29.

111 *Id.* at 531.

112 *Id.* Additionally, this more holistic approach is similar to the multidisciplinary school of legal theory and practice called therapeutic jurisprudence, which favors outcomes that advance human dignity and psychological well-being. *See* David Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. MIAMI L. REV. 660 (2021).

or alternative dispute resolution avenues.[113] In fact, one of the largest factors in stunting the growth and expansion of collaborative law in family and divorce matters is reported to be the adversarial culture of litigation practice, emphasizing the individual client "win" over the productive resolution of a matter for all.[114]

2. Litigation Bias in Antitrust Law

Like with litigation bias in family law, litigation bias also exists in some antitrust practices, including in how anticompetitive concerns in mergers are resolved in the United States.[115]

Antitrust law is an area of law that regulates the conduct of businesses and industries to promote fair competition and prevent unfair competition and monopolies.[116] Although Antitrust courses in law school typically focus solely on the case method to review cases and discuss the role of antitrust litigation in breaking up industry throughout history,[117] significant work in antitrust law is spent away from court too, including in counseling businesses to ensure that their mergers, acquisitions, and combinations adhere to antitrust laws.[118]

Data on the number of merger transactions reported to the Department of Justice and the Federal Trade Commission (collectively, the "Agencies") compared to the number of challenged mergers supports this assertion. In fiscal year 2019, 2,089 merger transactions

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113 *See generally* David A. Hoffman, *Collaborative Law in the World of Business*, MOTSAY & LAY: ATT'YS AT L. (2003), http://www.motsayandlay.com/articles/CL_in_the_World_of_Business.pdf [https://perma.cc/L8UU-EWVB] (discussing that family law matters have (1) common interests because the parties often share the desire to protect any children and reduce costs in order to maintain the estate; (2) limited resources because the parties often need to fund two lawyer's fees from one household's income (unlike other civil matters); (3) a tight-knit bar where collegiality and familiarity foster collaboration; and (4) the need for an ongoing relationship, as families are often required to co-parent and coordinate on other matters even post-divorce (as compared to nonfamily matters that do not require ongoing relationships post-settlement)).

114 *Id.* Hence, litigation bias in law schools impacts clients on a daily basis.

115 *See* Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165 (2010).

116 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/HJR7-WBCK].

117 Including several classic cases, such as Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

118 I spent my tenure in the antitrust practice group at Ropes & Gray LLP where I worked on the transactional side of antitrust practice, including representing multinational business entities, health care organizations, pharmaceutical companies, and private equity companies from a variety of jurisdictions in financial and strategic acquisitions of all types, including leveraged buyouts, stock acquisitions, joint venture formations, and initial public offerings.

were reported to the Agencies.[119] By comparison, only thirty-eight total mergers were challenged by the Agencies—less than 2% of all reported mergers.[120] Of the thirty-eight challenged mergers, only three were litigated by the Department of Justice and only two involved the Federal Trade Commission initiating administrative or federal court litigation.[121] The remaining challenged mergers were abandoned without litigation or remedied to address concerns of the Agencies.[122]

While litigation bias inherent in learning the letter of antitrust law may not hurt the antitrust bar regarding substantive knowledge, what litigation bias does impart on antitrust practitioners, including and especially antitrust lawyers employed by the Agencies, is a predisposition to resolve anticompetitive concerns through litigation rather than cooperation and negotiation.[123]

In fact, the disposition of antitrust cases is influenced by litigation bias of antitrust practitioners. While many companies abandon their transaction or negotiate a merger remedy with the Agencies to avert a legal challenge of the proposed merger, many companies are effective in proposing merger remedies after the government sues.[124] In these instances, courts have consistently sided with defendant companies in approving their unilateral "fixes" of anticompetitive concerns, including over objections of the Agencies.[125] Accordingly, in many such cases, the government could have saved significant time, money, and effort in collaboratively negotiating merger remedies with the parties in these cases rather than jumping to litigation. And based on their own track record of success in formulating successful merger remedies, the government would be better served in collaboratively negotiating merger remedies rather than litigating deals where

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119 *See* JOSEPH J. SIMONS, FED. TRADE COMM'N & MAKAN DELRAHIM, DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf [https://perma.cc/5ZJ2-JJHC].

120 *See id.*

121 *See id.*

122 *See id.*

123 *See* Horton, *supra* note 115 (describing the propensity of the antitrust bar to litigate, even though such litigations are often unsuccessful). In law schools, some transactional Merger and Acquisitions courses may have the opportunity to discuss counseling about antitrust concerns, but—from my understanding—few such courses discuss this topic.

124 *See id.*

125 *See id.*

anticompetitive concerns arose.[126] In the Federal Trade Commission's most recent Merger Remedies Report, which studied and analyzed whether the merger remedies instituted during the period of 2006 through 2012 succeeded when revisited five-to-ten years after consummation, the commission found that 100% of the remedies succeeded in protecting competition.[127]

C. Litigation Bias in the Way Lawyers Serve

The focus on the case method, the emphasis on litigation, and society's predisposition to litigate each impact how lawyers serve communities, including through pro bono work. Because of litigation bias, lawyers are predisposed to focus on litigation strategies to advance the work lawyers do in service to their communities, including in efforts to advance social justice, leaving opportunities for transactional pro bono work untapped and underrepresented.

When lawyers think of service or pro bono work, many think of litigation-based work: pro bono projects where lawyers represent underserved populations or indigent clients in litigation.[128] While pro bono work offers many well-documented rewards, including skill development and trial experience, such rewards are more beneficial to litigation lawyers than transactional lawyers.[129] After all, such skill development is not as helpful for transactional lawyers because the skills required in their practice are different. Accordingly, an

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126 *See* FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006–2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf [https://perma.cc/6Q29-3EE5].

127 *See id.*

128 This work is often thought of as big and important work like impact litigation, whether submitting an amicus brief, or assisting an organization like the GLBTQ Legal Advocates and Defenders ("GLAD") or The Innocence Project. GLAD seeks to "create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation." *See Mission and Values*, GLBTQ LEGAL ADVOCS. & DEFS., https://www.glad.org/about [https://perma.cc/L69U-HEPR]. Mary Bonauto, the Civil Rights Project Director at GLAD since 1990, argued several groundbreaking cases on behalf of GLAD over the last thirty years, including but not limited to *Goodridge v. Department of Public Health* before the Massachusetts Supreme Judicial Court (making Massachusetts the first state where same-sex couples could marry) and *Obergefell v. Hodges* before the United States Supreme Court (requiring states to license and recognize same-sex marriage). *See Mary L. Bonauto*, GLBTQ LEGAL ADVOCS. & DEFS., https://www.glad.org/staff/mary-bonauto [https://perma.cc/P9RQ-WN5B].

129 *See* Deborah L. Rhode et al., *Corporate Pro Bono*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 315 (2020) (discussing the benefits of pro bono work for lawyers and why transactional pro bono work is also important for transactional lawyers).

overemphasis on litigation-based pro bono opportunities forces lawyers skilled in transactional and private contract work to either learn new skills or sit on the sidelines.[130]

Contrary to this perception, however, transactional pro bono work is available and impactful. In law schools, Community Economic Development (CED) clinics are often on the front lines of this work.[131] CED clinics provide transactional public interest legal services to clients seeking to promote economic opportunity and mobility in the community.[132] Such work may be accomplished through advising community nonprofits, farmers, community gardens, artists and entrepreneurs, neighborhood associations, or others in transactional matters that establish, support, and provide ongoing advice to individual clients or broad swaths of the community.[133] In corporate legal practice, transactional attorneys can also engage in impactful pro bono transactional work. In fact, the 2021 Report on the Law Firm Pro Bono Challenge Initiative[134] named several types of transactional pro bono work completed in the wake of the COVID-19 pandemic.[135] This work included advising small businesses and nonprofits, supporting frontline workers in drafting living wills, and providing small businesses assistance on racial justice matters.[136]

These types of transactional pro bono work demonstrate that transactional pro bono work exists, and that transactional lawyers can meet the needs of their communities through providing transactional

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130 In my time as a big-firm lawyer, few pro bono opportunities were available for transactional lawyers. Nearly all the pro bono opportunities that were available—and certainly the ones that were most plentiful—were public interest and litigation based. Based on discussions with other transactional lawyers, including one who helped nonprofits sell property that was donated to them, similar experiences regarding the infrequent availability of transactional pro bono opportunities occurred in other big firms.

131 *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001).

132 *See* Susan R. Jones et al., *Viewing* Value Creation by Business Lawyers *Through the Lens of Transactional Legal Clinics*, 15 U.C. DAVIS BUS. L.J. 49 (2014).

133 *See id.*

134 The Law Firm Pro Bono Challenge Initiative asks large law firms (with over fifty lawyers) to sign on to a pledge to dedicate at least 3% of annual billable hours (on a firm-wide basis rather than a lawyer-by-lawyer basis) to pro bono work. *See Law Firm Pro Bono Challenge Initiative*, PRO BONO INST., https://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge [https://perma.cc/BU4U-5J4S].

135 *See* PRO BONO INST., 2021 REPORT ON THE LAW FIRM PRO BONO CHALLENGE INITIATIVE (2021), http://www.probonoinst.org/wp-content/uploads/www.probonoinst.orgwppswp-contentuploads2021_Challenge-ReportV8june15-FINAL.pdf [https://perma.cc/GXS4-X6TB].

136 *See id.*

pro bono service. There are significant opportunities for transactional lawyers to serve their communities in pro bono work in these areas, including both in direct client representation and in advocacy on behalf of communities, if only the relevant opportunities are harnessed and law students are prepared to tackle them.

1. Litigation Bias in Direct Client Representation

Direct client pro bono representation is often thought of individually: a client faces a legal challenge, and a lawyer must respond to it. However, such an impression perpetuates litigation bias.[137] There are just as many pro bono clients who need legal representation but are not in legal trouble—instead, they have a legal issue that requires preventive work.[138] This includes, but is not limited to, representing and incorporating community nonprofits;[139] representing underrepresented creatives and inventors, including those who are women or are from underrepresented groups;[140] representing incarcerated individuals on estate planning matters;[141] and working on social issues, such as working with local businesses to support the

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[137] In addition to the bias that this impression perpetuates, much discussion (which is not otherwise covered in this Article) considers whether this work is truly impactful in the first place. Although litigation-style pro bono work focuses on giving voice to the indigent or marginalized in court, it often does not fundamentally alter the conditions leading to the person's appearance in court. *See* Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 514–15 (1996).

[138] *See generally* Alina Ball, *Primary Care Lawyers: A Holistic Approach to Pro Bono Business Lawyering*, 17 U.C. DAVIS BUS. L.J. 121 (2017) (discussing the need to provide businesses with holistic transactional pro bono representation rather than simply focusing on the "acute" needs of the business at the time of a legal issue).

[139] *See* Rebecca Nieman, *A Fraction of a Percent: A Call to Legal Service Providers to Increase Assistance to Community Nonprofits Using BigLaw Pro Bono*, 40 U. ARK. LITTLE ROCK L. REV. 355 (2018) (describing the need for transactional pro bono representation of community nonprofits and the lack of pro bono services such organizations have received when compared to other litigation-based individual pro bono services, such as eviction cases).

[140] *See* Victoria Phillips, *Sea Change: The Rising Tide of Pro Bono Legal Services for the Creative Community*, IP THEORY, Summer 2020, at 1 (discussing the historic lack of access to intellectual property, technology, and related pro bono services available to those needing such assistance).

[141] *See* Zayne Saadi, *Born Sinners Versus Born Winners: The Need for Estate Planning Inside Texas Prisons*, 12 EST. PLAN. & CMTY. PROP. L.J. 471 (2020) (discussing the need for estate planning pro bono services for incarcerated individuals to ensure the wellbeing of spouses, children, and other family members living on the outside).

transgender population,[142] among others.[143] In each working manner, transactional lawyers can offer direct pro bono representation to clients to assist with their legal needs.

One area where transactional lawyers can serve their communities is assisting community leaders with establishing, advising, and supporting community nonprofits.[144] Small nonprofits make up approximately 75% of the nonprofit sector and provide a range of critical resources and services to individuals in their communities—from health care, education, and religious activities to a diverse offering of arts and cultural opportunities.[145] Although such organizations are plentiful, historic pro bono commitment to this area of the community has received less than one percent of pro bono assistance in recent years.[146] In a 2012 survey, 92% of nonprofits surveyed indicated that they needed transactional legal assistance.[147] Accordingly, the needs remain—lawyers could help nonprofits, which are typically on a budget and have little to no funding for legal assistance, aimed at a range of issues that would advance societal good while also helping the communities in which people live. Efforts in the legal community regarding nonprofit work have ranged from

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142 *See generally* Alex Binsfeld, *Transgender Rights: Shifting Strategies in a Changing Nation*, 17 HASTINGS RACE & POVERTY L.J. 177 (2020) (discussing the role of pro bono lawyers in supporting transgender people, which transactional lawyers can also do).

143 Some argue that law firms do not take such cases simply because they do not lend themselves to publicity. *See generally* Leonore F. Carpenter, *"We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L.J. 37 (2010) (describing how law firm pro bono coordinators may be inclined to take cases that can end up in the law firm newsletter instead of cases that seem "boring").

144 *See* Nieman, *supra* note 139.

145 *Id.* at 380–81. Most are familiar with a wide range of small community nonprofits, including "athletic clubs, little leagues, meals on wheels, boys and girls clubs, scouting groups, summer camps, rescue squads, and many more." *Id.* at 381 (quoting BRICE MCKEEVER, URBAN INST., THE NONPROFIT SECTOR IN BRIEF 2015: PUBLIC CHARITIES, GIVING AND VOLUNTEERING 5 (2015), https://www.urban.org/research/publication/nonprofit-sector-brief-2015-public-charities-giving-and-volunteering [https://perma.cc/8HBS-3JJH]).

146 Nieman, *supra* note 139.

147 *See* WASH. ATT'YS ASSISTING CMTY. ORGS., THE LEGAL NEEDS OF NONPROFITS SERVING LOW INCOME COMMUNITIES 4–5 (2012), https://wayfindlegal.org/wp-content/uploads/2014/03/The-Legal-Needs-of-Nonprofits-Serving-Low-Income-Communities-FINAL.pdf [https://perma.cc/6FQH-UYK2].

establishing nonprofits for community gardens[148] to those that support transgender youth.[149]

A second area that transactional lawyers can serve is with respect to supporting small businesses and entrepreneurs, including farmers, in historically disadvantaged communities—like communities of color and immigrant communities. Protecting heirs' property and promoting the preservation of economic interests held in property is one type of work that lawyers can do in this area.

Heirs' property includes property that is passed to family members through inheritance when the landowner dies, typically without a will or an estate planning strategy.[150] Without a will, the property passes to the surviving heirs as a tenancy in common, and in order to exit common ownership and sever the tenancy in common, an individual can force a sale of the property through partition law.[151] As a result, heirs' property strips various communities of the possibility of wealth accumulation, leaving individuals vulnerable.[152] This vulnerability is then compounded by the lack of legal services provided to these

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148 *See generally Environmental Justice Pro Bono Work for Transactional Lawyers: An Overview and Recent Success Story*, BOSTON BAR ASS'N, https://bostonbar.org/membership/events/event-details?ID=9170 [https://perma.cc/2KE5-XT27].

149 *See generally* Binsfeld, *supra* note 142.

150 *See Heirs' Property*, CTR. FOR AGRIC. & FOOD SYS., http://www.farmlandaccess.org/heirs-property [https://perma.cc/74G6-8B6K]. Significant scholarship in this area focuses on the Uniform Partition of Heirs Property Act (UPHPA), which was approved and recommended for enactment in all fifty states in 2010 by the National Conference of Commissioners on Uniform State Laws. *See* Jesse J. Richardson, Jr., *The Uniform Partition of Heirs Property Act: Treating Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507 (2017). Although the UPHPA would alleviate many issues inherent with heirs' property, it may not solve them all. This Article discusses how creation of documents, such as wills, can help alleviate issues, and does not consider the enactment of the UPHPA. Property loss associated with heirs' property has a disproportionate impact on historically underserved and underrepresented populations, including those in rural areas and those in urban areas. *See also* Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV 191 (2019) (stating that a significant portion of what is considered wealth, as opposed to income, comes from real property ownership).

151 *See* Richardson, *supra* note 150. Under partition law, a successful partition action can have two results: partition in kind, where the judge orders the parcel divided up into separate titled properties which are then allocated to individuals with ownership interest, and partition by sale, where the property is forcibly sold, and the proceeds of the sale are distributed amongst the individual owners. *See id.* Significant scholarship has addressed various considerations involving how legal constructs impact wealth. *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021) (discussing, among other things, disparities between wealth held in white families as compared to Black families, based on tax code and other considerations).

152 *See* Richardson, *supra* note 150.

communities to avoid or remedy the issues created from lack of estate planning.[153]

While significant legal reforms are contemplated in this area,[154] identifying opportunities for students (and practicing lawyers) to help, and preparing them to do so through transactional pro bono work, could help curb the rising tide of inequity related to heirs' property. And although many transactional clinics, organizations, and entities are already working in this area,[155] there is more work to be done. According to the U.S. Department of Agriculture, since 1910, over 80% of farmland owned by African Americans has been lost through heirs' property.[156] In 2021, the Biden administration announced an investment of $67 million to help resolve land ownership and succession issues attributed to heirs' property through the Heirs' Property Relending Program.[157]

Roles for transactional lawyers to assist with these issues are prevalent: corporate associates at large law firms, attorneys at small firms, and solo estate planning lawyers could help address any of the needs identified above, but it seems like few do it. In searching the

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153 Spivack, *supra* note 150 (stating that one solution to address this problem is the formation of LLCs and land trusts, which would allow for a voting system or disposition of partial rights in an entity rather than the disposition of the underlying real estate, which is the driver of the wealth). Other scholarship suggests that the choices for solving this problem are even more varied: including creating LLCs, trusts, cotenant buyout agreements, family settlement agreements, and inter vivos transfers. *See* R. Shaun Rainey, *Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay*, 13 EST. PLAN. & CMTY. PROP. L.J. 233 (2020).

154 *See* UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010). The Act's adoption in states would help protect those at risk of a forcible sale and loss of land by creating remedies for the owners while simultaneously allowing the owners to access the wealth in their land. Thomas Mitchell suggested another legal method that involves converting such tenancy in common interests to limited liability company interests, avoiding the issue with partition sale and requiring a greater consensus (as determined by the limited liability company's operating documents) to sell a property.

155 Examples include, but are not limited to, the University of Arkansas at Little Rock's Bowen School of Law Heirs' Property Preservation Clinic (started in 2018) and the Georgia Heirs Property Law Center, a not-for-profit law center started in 2015. Other organizations, such as the Land Loss Prevention Project, focus on advocacy and legislative changes with respect to heirs' property.

156 Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south [https://perma.cc/5QF9-JHYU].

157 *See Biden Administration to Invest $67 Million to Help Heirs Resolve Land Ownership and Succession Issues*, U.S. DEP'T OF AGRIC. (July 29, 2021), https://www.fsa.usda.gov/news-room/news-releases/2021/biden-administration-to-invest-67-million-to-help-heirs-resolve-land-ownership-and-succession-issues [https://perma.cc/ANV9-YGLA].

AmLaw Top 25 law firm websites for key words describing this work, "heirs' property" returned only three search results on one firm's website (by comparison, "death penalty" returned results on every law firm's website, except for one, totaling 292 search results—9,733% more than the results for "heirs' property").[158]

2. Litigation Bias in Advocacy Work

Besides direct client representation work, lawyers can also advocate for communities and provide pro bono services through advocacy work. Many opportunities for high-profile advocacy work are litigation-focused: bringing cases before the Supreme Court or filing amicus briefs on behalf of individuals or organizations when their rights are infringed or threatened. Although this is important advocacy work, transactional lawyers can also advance societal good through advocacy work advocating for more effective or efficient tax treatment for small businesses, advocating for more favorable licensing regimes, advocating for greater fairness in the ability to become registered as a business (including through the high barriers to entry established by many states), or advocating for diversity, equity, and inclusion efforts in business dealings.[159]

One example of such great work emanates from the 2018 Academy Awards, where actress Frances McDormand advocated for inclusion riders when accepting her Academy Award for her leading role as

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158 According to Law.com, the AmLaw Top 25 firms (as ranked by gross revenue for 2020) are (in order from 1 to 25): Kirkland & Ellis; Latham & Watkins; DLA Piper; Baker McKenzie; Skadden, Arps, Slate, Meagher & Flom; Sidley Austin; Morgan, Lewis & Bockius; White & Case; Hogan Lovells; Jones Day; Ropes & Gray; Gibson Dunn; Norton Rose; Simpson Thacher; Davis Polk; Greenberg Traurig; Weil; Cooley; Paul Weiss; King & Spalding; Mayer Brown; Goodwin Procter; McDermott; Covington; and Reed Smith. *See The 2021 Am Law 100: Ranked by Gross Revenue*, THE AM. LAW. (Apr. 20, 2021), https://www.law.com/americanlawyer/2021/04/20/the-2021-am-law-100-ranked-by-gross-revenue [https://perma.cc/V5TQ-ZTGJ]. The results from McDermott were omitted from these results since both searches returned hundreds of irrelevant results. The search for "death penalty" returned search results on each firm's website, except for Baker McKenzie. King & Spalding had the most results for "death penalty" with fifty-three. Greenberg Taurig had the second-most results connected with "death penalty" with twenty-seven. Only Morgan Lewis's website returned search results for the keyword "heirs' property." The results included three pages: one lawyer's biography and two "LawFlash" publications discussing federal legislative developments from April and September 2021.

159 Kalpana Kotagal, *Inclusion Rider Work Must Continue in Hollywood and Beyond*, LAW360 (Feb. 21, 2019, 12:26 PM), https://www.law360.com/articles/1130015/inclusion-rider-work-must-continue-in-hollywood-and-beyond [https://perma.cc/CB7Q-24YD] (discussing the use of inclusion riders and the role of transactional lawyers in drafting such provisions).

Mildred Hayes in *Three Billboards Outside Ebbing, Missouri*.[160] Developed by Dr. Stacy Smith and the Annenberg Inclusion Initiative, inclusion riders attempt to counteract bias in interviewing and hiring in the entertainment industry by encouraging the consideration of candidates from historically underrepresented groups then hiring and casting individuals from underrepresented backgrounds.[161] By utilizing private contracts to require the consideration and casting of individuals from underrepresented backgrounds, transactional lawyers can assist their clients at the forefront of diversity, equity, and inclusion efforts through inclusion riders.[162]

D. A Step in the Right Direction

Despite these challenges, many cutting-edge clinics[163] and courses effectively tackle various needs of communities—not with a litigator's oration, but with a transactional lawyer's pen.

As one example, at Alabama Law, the Entrepreneurship and Nonprofit Clinic (E-Clinic) focuses on improving economic development for low income communities in the Alabama Black Belt.[164] The E-Clinic serves many goals that similar clinics across the country also serve, providing workshops to promote general legal knowledge besides direct legal services, researching state and federal initiatives to improve economic development, and working directly

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160 Colin Dwyer, *What's an Inclusion Rider? Here's the Story Behind Frances McDormand's Closing Words*, NPR: THE TWO-WAY (Mar. 5, 2018, 2:12 PM), https://www.npr.org/sections/thetwo-way/2018/03/05/590867132/whats-an-inclusion-rider-here-s-the-story-behind-frances-mcdormand-s-closing-wor [https://perma.cc/2DA7-N5YH].

161 Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV 45, 63 (2019).

162 *Id.* at 62–63 (describing the origins and uses for inclusion riders, including the recently announced company-wide policy to increase diversity on-screen and off-screen by Warner Brothers).

163 In this instance, "cutting-edge" refers to the novel and impactful work that transactional lawyers are completing in transactional clinics. "Cutting edge" could also imply working with technology to increase scope and scale of matters, which is also being done in the transactional clinic space. *See generally* Jones, *supra* note 57, at 294 (discussing the ability for technology to provide scale to legal matters, which can provide additional legal services to communities).

164 Casey E. Faucon, *Economic Empowerment in the Alabama Black Belt: A Transactional Law Clinic Theory and Model*, 7 TENN. J. RACE, GENDER, & SOC. JUST. 225, 250 (2018). The Alabama Black Belt is part of a national "Black Belt" region, spanning from Texas to Virginia, that is historically home to "the richest soil and the poorest people" in the United States. *See Alabama's Black Belt Counties*, THE UNIV. OF ALA. CTR. FOR ECON. DEV., http://www.uaced.ua.edu/uploads/1/9/0/4/19045691/about_the_black_belt.pdf [https://perma.cc/LNG7-5XLZ].

with entrepreneurs and community development organizations on issues affecting small businesses and nonprofit organizations.[165]

As another example, at Pace University, the Food and Farm Business Law Clinic (formerly the Food and Beverage Law Clinic) represents farmers, community and grassroots groups, and "mission-oriented" food and beverage entrepreneurs with transactional legal services.[166] Through this work, the clinic helps clients in their efforts to expand access to local, healthy foods in underserved communities, start and expand business ventures aimed at food sustainability, and preserve farmland for future generations of farmers, among other initiatives.[167]

Despite clinics like these and other similar experiential opportunities for students,[168] the needs of communities continue to be unmet. For example, there is a need to develop entrepreneurial businesses on Indian reservations, keep dollars on reservations, and "buy Indian."[169] In North Dakota, where there is a shortage of lawyers, lawyers are needed to help rural communities establish, advise, and sustain

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165 Faucon, *supra* note 164, at 252–53. In many respects, these clinics empower individuals and the businesses in which they operate to drive economic development and advance social justice goals in their communities.

166 *Jonathan Brown Hired to Be Director of New Food and Beverage Law Clinic*, PACE UNIV. (Nov. 3, 2016), https://law.pace.edu/news-and-events/news/jonathan-brown-hired-be-director-new-food-and-beverage-law-clinic [https://perma.cc/3PVX-45PB].

167 *Food and Farm Business Law Clinic*, PACE UNIV., https://law.pace.edu/food-and-beverage-law-clinic [https://perma.cc/2SGA-2Q6K]. Many other examples of successful transactional clinics are available as well. For instance, Hofstra's Professor Michael Haber and some students from his Community Enterprise Development Clinic published a mutual aid legal toolkit in 2020. Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide*, HOFSTRA U. LEGAL STUD. RSCH. PAPER SERIES, May 31, 2020, at 2, https://ssrn.com/abstract=3622736 [https://perma.cc/M6N4-24XY]. Additionally, Harvard's Transactional Law Clinics, and specifically the Community Enterprise Project, recently published helpful and impactful toolkits and guides: one on public education and two on the Payroll Protection Program. *See The Community Enterprise Project*, TRANSACTIONAL L. CLINICS, HARV. L. SCH., https://clinics.law.harvard.edu/tlc/for-clients/community-enterprise-project [https://perma.cc/7CRD-8LWF].

168 *See generally* Gowri J. Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE, GENDER, & SOC. JUST. 206 (2018) (discussing clinical opportunities and opportunities for transactional lawyers to address a variety of social justice efforts, including immigration-related efforts in the wake of President Trump's election in 2016).

169 Robert J. Miller, *Creating Sustainable Economic Development on Indian Reservations Is an "Access to Justice" Issue*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 494 (2019) (discussing that without legal representation, small businesses are more difficult to begin and sustain, making goals such as "Buy[ing] Indian" difficult).

businesses.[170] Women-owned businesses, now the fastest growing segment of the small business economy, are more likely to be small and under five years old and often need early legal intervention.[171]

The value in understanding the power of transactional pro bono and advocacy work exists not just with the individuals served but with the communities served.[172] After all, one pro bono litigation client typically only serves themselves and their family, but a pro bono matter serving a business or nonprofit entity often provides long-term benefits not just for the individual pro bono client but for the community around it[173] by paying taxes, providing jobs or opportunities, and providing needed services.

III
ADDRESSING LITIGATION BIAS

In this Article, Parts I and II have identified and discussed litigation bias in law schools and its effect on clients and communities. The question then becomes: how can lawyers and legal educators address litigation bias in law schools to combat this problem?

First, lawyers must recognize the bias. Implicit bias training often explains that individuals must first recognize their biases before they can change their behavior.[174] Here, law schools must likewise first recognize their bias. By recognizing pervasive litigation bias, legal educators can begin to approach course design and course selection

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170 Alexandra P. Everhart Sickler, *A Rural State Perspective on Transactional Skills in Legal Curricula and Access to Economic Opportunity*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 499, 499 (2019). At the University of Maine, the Rural Lawyer Project has worked to address the rural legal gap, including in eastern Maine (which includes my hometown) and northern Maine (since the majority of lawyers in Maine are concentrated in the more urban southern Maine). In 2019, the Rural Lawyer Project received continued funding from the Betterment Fund. *See Maine Law's Rural Lawyer Project Awarded Three-Year Grant from the Betterment Fund*, UNIV. OF ME. SCH. OF L. (Oct. 22, 2019), https://mainelaw.maine.edu/news/maine-laws-rural-lawyer-project-awarded-three-year-grant-from-the-betterment-fund/ [https://perma.cc/A3C5-FUFU]. Although the Rural Lawyer Project involves a variety of work, one area of transactional work addressed is real estate, corporate, and organization work.

171 Jones, *supra* note 57, at 254–55.

172 Tremblay, *supra* note 16.

173 Jones, *supra* note 57, at 291 (discussing the far-reaching impacts of transactional legal services).

174 Betsy Mason, *Curbing Implicit Bias: What Works and What Doesn't*, KNOWABLE MAG. (June 4, 2020), https://knowablemagazine.org/article/mind/2020/how-to-curb-implicit-bias [https://perma.cc/XEB7-C9N9]. Psychologist Anthony Greenwald of the University of Washington describes how discretion elimination, a decision process using predetermined, objective criteria that are rigorously applied, can reduce disparities. *Id.*

differently, hire professors who have experiences outside the courtroom rather than inside it, and consider how effectively law schools are preparing students for all practices in law.

After recognizing litigation bias, law schools must mobilize to tackle four areas: (1) recruiting and hiring transactional lawyers to serve as professors, (2) teaching transactional-oriented skills, (3) teaching transactional perspective and addressing the overreliance on the case method, and (4) working to foster transactional pro bono work and service.

A. Recognizing Litigation Bias in Law Schools' Hiring Practices

Law schools must recognize that litigation bias, in addition to a myriad of other biases, is often perpetuated in law school hiring. In order to address such bias, law school hiring and appointments committees must consider the process through which candidates are identified and evaluated. There are two ways to address such biases that are discussed here.

First, law schools should, at all levels of hiring, strongly consider diversity of practice background when considering candidates, giving candidates with transactional backgrounds additional consideration to balance out the existing imbalance of professor credentials. The faculty, with a greater transactional perspective, can increase awareness of litigation bias and work to counteract it. Additionally, having greater transactional perspective among the faculty can ensure that the reforms suggested throughout this Part are possible, as faculty will be needed to teach new courses, run new clinics, and support other transactional-focused programs.

Second, law schools must work to promote professors with transactional experience into positions of power, including in the Dean's suite and in professional associations, to increase the voices of transactional lawyers throughout academia. Law schools should advocate to the members of legal associations related to the work of law schools, such as AALS,[175] that they should strongly consider and advocate for the advancement of legal professionals with backgrounds in transactional work when appointing and nominating individuals to serve in leadership capacities.

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[175] Additional associations could include, for example, the Legal Writing Institute, the Association of Legal Writing Directors, the Association of Academic Support Educators, the Clinical Legal Education Association, and the American Bar Association, to name just a few.

B. Teaching Transactional Skills

To ensure that law school curriculum is not biased toward litigation, and that law schools adequately prepare all types of lawyers, law schools must ensure that students have a variety of opportunities to learn skills relevant to transactional lawyers, not just litigators. Although there are many paths to parity, three considerations are discussed here.

First, law schools should mandate the teaching of preventive writing in their mandatory first-year Legal Research and Writing course, since preventive writing often serves as the unknown and invisible third leg of the legal writing stool (with objective and persuasive writing playing leading roles).[176] Although many in the profession do not have practice experience in teaching preventive writing from a transactional standpoint, many do have experience in drafting preventive documents, such as settlement agreements, and could teach such skills with a transactional lens. By increasing the exposure to preventive writing, first-year legal research and writing programs would ensure greater skill development for all law students and would ensure that all law students are prepared for practice.[177]

Second, law schools should increase the number of transactional-based advanced legal writing courses available to students.[178] Additionally, law schools should consider whether such courses should be "mandatory" to augment the first-year Legal Research and Writing course, perhaps requiring a student to choose from one upper-level Legal Research and Writing course on either litigation or transactional work.[179] With an increased focus on diversifying law school hiring, including hiring more legal research and writing professors with

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[176] Only 7% of law schools currently focus a major portion of their legal research and writing curriculum on preventive drafting. *See* Eckart, *supra* note 12 (stating the importance of the need to teach transactional skills throughout the first-year curriculum, including in the first-year Legal Research and Writing course where transactional drafting could be integrated into assessments to ensure that students receive a wide range of skills to prepare students for a wide range of practices after graduation).

[177] As opposed to only focusing on objective and persuasive writing at the expense of failing to discuss preventive writing.

[178] As noted *supra* Part I, transactional-based legal writing electives are the most popular legal writing electives despite being offered at fewer schools and being outnumbered by litigation-based legal writing electives.

[179] Many schools already take such an approach, including Case Western Reserve University School of Law, which requires students take one additional Legal Research and Writing course in the second year focused on either litigation or transactional skills.

transactional experience, greater proportions of faculty could teach such courses.

Finally, law schools should increase the number of transactional clinics available to students. When new clinics are proposed or new clinical hirings are made, law schools should closely evaluate whether such clinics or clinicians can be added in the transactional area to support transactional skill development.[180]

C. Teaching Transactional Perspective

Besides teaching transactional skills and doctrine on an increased level and frequency, law schools, when teaching both doctrine and skill, must teach not only skills related to each type of practice but also important practice perspectives. Although many different paths could achieve these goals, four considerations are discussed here.

First, law schools must do a better job in teaching therapeutic jurisprudence,[181] problem-solving,[182] alternative dispute resolution,[183] facilitation skills, and other fields of law and legal theory that demonstrate the lawyer's role in solving a client problem outside the courtroom with well-being and collaboration in mind.[184] In particular, law schools should consider incorporating these skills and theories earlier in the law school curriculum to introduce students to these concepts and skills early on in their legal careers.[185]

Second, law schools should consider making Business Organizations or similar courses mandatory, requiring that students take such a course

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[180] Not to mention how such a clinical program offering can also assist a community in the ways discussed *supra* Part II. A variety of transactional-based clinics include, but are not limited to, entrepreneurship clinics, community and economic development clinics, heirs' property clinics, and nonprofit clinics. Each law school in the country could easily have three or four transactional-based clinics without having overlap in subject matter.

[181] *See* Yamada, *supra* note 112.

[182] *See generally* KATHLEEN ELLIOTT VINSON ET AL., MINDFUL LAWYERING: THE KEY TO CREATIVE PROBLEM SOLVING (2018).

[183] *See generally* Bobbi McAdoo et al., *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J.L. & POL'Y 39 (2012); Mary Dunnewold & Mary Trevor, *Escaping the Appellate Litigation Straitjacket: Incorporating an Alternative Dispute Resolution Simulation into a First-Year Legal Writing Class*, 18 J. LEGAL WRITING INST. 209 (2012). One may argue that this introduction of alternative dispute resolution should also discuss negotiation and facilitation skills, which are especially relevant to transactional practice, rather than a focus on mediating adversarial disputes.

[184] *See generally* SHAILINI JANDIAL GEORGE, THE LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL (2021).

[185] Many of the sources cited have proposed incorporating these skills and theories in the first-year curriculum. *See, e.g.*, Dunnewold & Trevor, *supra* note 183.

in the second year of law school.[186] Although taking such courses has correlated to better bar results in some jurisdictions,[187] requiring such courses would also likely increase student ability to understand transactional work, structures of organizations, and necessary business acumen needed in any field of law.

Third, doctrinal professors should strive to teach not only legal doctrine through the case method but also through practice-based problems that invoke the transactional work involving such documents, samples, or other work product.[188] For example, Property professors could show students several examples of an easement after reviewing case law on the topic and ask students to classify the easement examples into the different types of easements discussed in-class.[189] Additionally, in Contracts, professors could show students several examples of a contract after discussing matters of consideration and ask students to determine whether consideration exists for each contract.[190]

Finally, law schools must ensure that skill-based courses, such as Legal Research and Writing courses, cover both litigation-specific and transactional-specific perspectives. This includes, for example, drafting objective memoranda not only on the likely outcome for a potential lawsuit but also the likely outcome for a potential filing obligation. In addition, it includes teaching oral advocacy not in the

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186 Although many law schools already require the completion of Business Organizations, some merely suggest it, sending a message to students that it is not as fundamental as required litigation-specific courses. *See generally* Reise, *supra* note 43 (describing the current status of Business Organization courses, including whether such courses are required, and describing the benefits of the course to students, including in bar exam preparation).

187 According to a report on the passage of the UBE in New York State, completing first-year doctrinal courses did not increase bar passage rate, but completion of Corporations and Evidence did correlate with bar passage rate. *See* NYBOLE, *supra* note 43.

188 This includes, for example, drafting a contract with a proper consideration clause rather than just using case law to determine what constitutes consideration. Although some professors already incorporate practice-based problems and work in their courses, based on my understanding, such incorporation is not universal and can be improved.

189 *See generally* Eckart, *supra* note 17.

190 *See generally id.* A minority, but some professors have begun to step away from the case method and now teach doctrinal courses using a problem-based model. As one example, Professor Douglas Leslie at the University of Virginia Law School uses a problem-based model he developed called "CaseFiles," which involve mini-simulations for issues faced in practice and are discussed in-class. Instead of using appellate cases to teach concepts around ideas delineated on a syllabus, the problem-model uses simulations and hypotheticals to show the evolution of a client representation, requiring students to spot, assess, and address issues and legal risks. *See* Gouvin, *supra* note 67, at 441.

vacuum of litigation[191] but also teaching oral advocacy skills for transactional lawyers (e.g., for the boardroom).[192] These more balanced approaches signal to students that the skills learned and developed are important, regardless of practice.

D. Fostering Transactional Service

Because of pervasive litigation bias in law schools, law school students rarely have opportunities to serve transactional pro bono clients.[193] With this in mind, law schools should work to ensure that transactional pro bono opportunities and opportunities to advance social justice are more prevalent and more available. There are several steps law schools can take, three of which are discussed here.

First, law schools must expand opportunities for law students to assist with direct client representation, including on issues such as land loss resulting from heirs' property and other related legal issues. Expanding such opportunities allows law students to assist underserved populations with basic transactional lawyering work, including advising on wills, trusts, business organization and formation, tax, and other related work. Law schools can work with bar organizations, local nonprofits, or others in their communities to identify opportunities for students to learn about these opportunities and lend their assistance.

Second, law schools must expand transactional clinical offerings. By expanding the offerings law schools provide to students, students will become more aware of transactional pro bono work and opportunities and will more likely be willing and able to tackle such work once entering the legal profession. By increasing the parity between the litigation-style clinics and the transactional clinics, law schools can greatly increase the ability for lawyers to serve these pro bono clients.

Finally, law schools must work to foster advocacy on behalf of the transactional and entrepreneurial community, including but not limited to increased legal scholarship on such topics and the promotion of

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191 Nearly all Legal Research and Writing courses teach oral advocacy using an appellate or trial-level oral advocacy assignment, such as an oral argument. Based on my experience and knowledge, few Legal Research and Writing courses focus on transactional-oriented oral advocacy assignments, such as presenting to a client or a counterparty in a "boardroom" setting.

192 Eckart, *supra* note 18 (describing how transactional perspective may be taught in connection with skills necessary for litigators and transactional lawyers).

193 *See supra* Sections I.B.2 and II.C discussing, respectively, (1) the lack of transactional clinic opportunities available for students (compared with litigation clinic opportunities), and (2) the need for transactional pro bono lawyers and the unmet need for transactional pro bono clients.

greater awareness and advocacy.[194] Increased representation of former transactional lawyers as law school professors could help bolster representation of legal advocacy in this area and could focus on topics at the intersection of transactional work and advocacy that many scholars have raised in recent scholarship.[195]

CONCLUSION

Pervasive litigation bias in law schools, including in law school pedagogy and curriculum, is the result of years of inclination to discuss case instead of contract, brief writing over transactional drafting, and courtroom advocacy in place of boardroom presentation. As a result, law school litigation bias has led to litigation bias in the profession—leaving lawyers with litigation-centric licensing exams and professional rules of conduct that do not accurately reflect, model, or advise transactional practice; client outcomes that are unnecessarily shaped by litigation instead of through alternative dispute resolution; and needs of communities unmet.

Law students, legal professionals, and those inside legal academia must work to change the narrative within law schools in order to recognize and address litigation bias, and then root it out by offering diverse perspectives on who should stand at the law school podium, which courses law schools should offer to students, how pedagogy for such courses should be designed, and what types of experiential opportunities students should have in law school. By providing students with a more well-rounded law school experience, and by offering parity with respect to litigation-based and transactional-based experiences, law schools can better prepare the next generation of lawyers.

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194 Generally speaking, law professors appear to write more about litigation than they do about transactional matters. A simple keyword search on Lexis Advance for "litigation" (limited to law reviews and journals) resulted in 496,933 hits. A simple keyword search for "transactional" (limited to law reviews and journals) resulted in 25,231 hits.

195 Such scholarship could expand upon a variety of topics that scholars of all types have recently addressed in scholarship and their related impacts on society, including how the legal academy can improve access to capital for entrepreneurs (including individuals from historically underrepresented groups), how corporate counsel and transactional lawyers can participate in pro bono matters, and the use of narrative in transactional drafting. *See generally* Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419 (2018); Rhode et al., *supra* note 129; Chesler & Sneddon, *supra* note 18.