South Carolina Law Review

Volume 62 | Issue 1 Article 5

Fall 2010

Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy

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PREACHING WHAT THEY DON'T PRACTICE: WHY LAW FACULTIES' PREOCCUPATION WITH IMPRACTICAL SCHOLARSHIP AND DEVALUATION OF PRACTICAL COMPETENCIES OBSTRUCT REFORM IN THE LEGAL ACADEMY

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We are at a critical juncture in the history of American legal education. Recent years have seen significant growth in the number of law schools, faculty members, and law students. Currently 200 accredited law schools exist in the United States[1] with more than 10,000 full-time faculty[2] and over 140,000

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1. *See Approved Law Schools*, A.B.A., http://www.abanet.org/legaled/approvedlawschools/alpha.html (last visited Oct. 6, 2010).

2. According to the Association of American Law Schools' (AALS) data, in the 2008–2009 academic year, there were 10,268 full-time law professors (including deans and law librarians) employed by AALS member institutions in the United States. Pati Abdullina, *2008–2009 AALS Statistical Report on Law Faculty*, ASS'N OF AM. LAW SCH., http://www.aals.org/statistics/2009dlt/titles.html (last visited Oct. 6, 2010). A comparison of AALS member schools and law schools accredited by the ABA reveals that all the AALS schools are also accredited. *Compare Approved Law Schools*, *supra* note 1 (listing all 200 accredited schools), *with Member and Fee-Paid Schools*, ASS'N OF AM. LAW SCH., http://www.aals.org/about_memberschools.php (last visited Oct. 6, 2010) (listing the 161 AALS member schools in good standing).

matriculating law students seeking J.D. degrees[3]—the vast majority of whom will join the more than one million practicing attorneys in the United States.[4] On the surface, these numbers suggest that the legal profession is thriving and that law schools are doing their jobs well. And the recent appointment of Elena Kagan, a former law professor and dean, first as Solicitor General of the United States and subsequently as an associate justice of the Supreme Court of the United States,[5] might cause a casual observer to believe that the legal academy and the legal profession are working closely in step. But, as I discuss below, that is certainly not the case. The academy—both in terms of its preparation of law students to enter the profession and in the type of scholarship its professoriate is producing—has lost its practical moorings.[6]

As discussed in Part I below, in response to years of complaints that American law schools have failed to prepare students to practice law,[7] several prominent and respected authorities on legal education, including the Carnegie Foundation for the Advancement of Teaching,[8] recently have proposed significant curricular and pedagogical changes in order to bring American legal education into the twenty-first century[9]—indeed, some would say simply into the twentieth century.[10] The proposed reforms primarily call for more real-world and skills training and more effective teaching practices.[11]

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3. During the 2008–2009 academic year, there were 142,922 J.D. candidates enrolled in 200 American Bar Association (ABA) accredited law schools. *Enrollment and Degrees Awarded*, A.B.A, 1, http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf (last visited Oct. 6, 2010). In 1992, the year that the author graduated from law school, there were 176 accredited law schools and 129,580 law students. *Id.*

4. According to data from the American Bar Association, in 2009 there were 1,180,386 "active" licensed attorneys in the United States. *See National Lawyer Population by State*, A.B.A, 4 (Dec. 31, 2008), http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf.

5. Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST, Aug. 6, 2010, at A1.

6. *See infra* Part II.

7. *See, e.g.*, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4 (1992) [hereinafter MACCRATE REPORT] (noting complaints by the practicing bar of the inability of recent law school graduates to handle basic legal matters).

8. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

9. *See* CARNEGIE REPORT, *supra* note 8, at 185–202; Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909–10 (2008) (noting recent "thorough critiques of legal education"); Elena Kagan, *A Curriculum Without Borders*, HARV. L. BULL., Winter 2008, at inside front cover ("Our goal was to keep what continues to work—principally our techniques of making people 'think like lawyers'—but also to recognize and impart the new skills and areas of knowledge needed today to perform most effectively as lawyers and in the other positions of leadership our graduates hold. Our goal, in short, was to transform our curriculum—and indeed legal education itself—to fit the 21st century.").

10. *See* Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007) ("The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by

In this Article, I will not attempt to add substantially to such well-reasoned and constructive criticisms, with which I fully concur. Rather, as set forth in Parts II and III below, my thesis is that it will not be possible to implement such proposed curricular and pedagogical reforms if law schools continue their trend of primarily hiring and promoting tenure-track[12] faculty members whose chief mission is to produce theoretical, increasingly interdisciplinary scholarship for law reviews rather than prepare students to practice law.[13] Such "impractical scholars,"[14] because they have little or no experience in the legal profession and further because they have been hired primarily to write law review articles rather than to teach, lack the skill set necessary to teach students how to become competent, ethical practitioners.[15] Indeed, law school faculties—excluding clinicians, legal research and writing (LRW) faculty, and adjunct professors—increasingly resemble graduate school faculties at major research universities, whose primary mission is to produce academic scholarship and whose secondary educational mission is to produce more academic professors.[16] Especially at law schools in the upper echelons of the *U.S. News & World Report* (*USNWR*) rankings, the core of the faculties seems indifferent or even hostile to the concept of a law school as a professional school with the primary mission of producing competent practitioners.[17] Attempts by law schools to compensate for the decreasing number of tenure-track professors with practical backgrounds or inclinations by allocating practical teaching to a discrete, small pool of clinicians and LRW instructors and also by outsourcing such teaching to adjunct professors have not achieved and will not achieve a healthy balance within modern law faculties. Rather, such practical components of the faculty possess a separate and unequal status in the vast majority of American law schools.[18] The gulf between the main faculty and these second and third class members of the legal

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Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the Internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole; not just before Foucault, but before Freud; not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*. There have been modifications, of course; but American legal education has been an astonishingly stable cultural practice." (footnote omitted)).

11. *See, e.g.*, CARNEGIE REPORT, *supra* note 8, at 12 ("We are convinced that this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice. We therefore attempt in this report to imagine a more capacious, yet more integrated, legal education.").

12. For simplicity's sake, I use the term "tenure-track" broadly to mean both those professors who are on the track to obtain tenure, but who have not yet attainted it, as well as those professors who have obtained tenure.

13. *See infra* Part II.B.

14. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession* (pt. 1), 91 MICH. L. REV. 34, 35 (1992).

15. *See infra* Part II.B.

16. *See infra* notes 102–05, 123 and accompanying text.

17. *See infra* notes 99–100, 102 and accompanying text.

18. *See infra* Part III.A.

academy in terms of practical experience and inclination is widening at the very time when it needs to be shrinking.

The recent economic recession, which did not spare the legal profession,[19] has made the complaints about American law schools' failure to prepare law students to enter the legal profession even more compelling; law firms no longer can afford to hire entry-level attorneys who lack the basic skills required to practice law effectively.[20] In the coming years, hoards of ill-prepared law school graduates with huge debts will be realizing little or no return on their massive law school investments. In Part IV below, I propose significant changes in both faculty composition and law reviews aimed at enabling law schools to achieve the worthy goals of reformists such as the Carnegie Foundation.

I. TWENTY-FIRST CENTURY REFORMISTS

Toward the end of the last century, the American Bar Association's *Legal Education and Professional Development—An Educational Continuum* (*MacCrate Report*), which proposed substantial reforms in American legal education, recognized that "practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation."[21] In 2007, two other influential reports about American legal education found that the situation had not improved in the ensuing fifteen

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19. *See, e.g.*, Brian Tamanaha, *Wake Up, Fellow Law Professors, to the Casualties of Our Enterprise*, BALKINIZATION (June 13, 2010, 6:48 PM), http://balkin.blogspot.com/2010/06/wake-up-fellow-law-professors-to.html ("Many [recent] graduates can't get jobs. Many graduates end up as temp attorneys working for $15 to $20 dollars an hour on two week gigs, with no benefits. The luckier graduates land jobs in government or small firms for maybe $45,000, with limited prospects for improvement. A handful of lottery winners score big firm jobs. And for the opportunity to enter a saturated legal market with long odds against them, the tens of thousands newly minted lawyers who graduate each year from non-elite schools will have paid around $150,000 in tuition and living expenses, and given up three years of income. Many leave law school with well over $100,000 in non-dischargeable debt, obligated to pay $1,000 a month for thirty years."); Douglas S. Malan, *Law School Grads Urged to Not Fixate on Large Firms*, CONN. L. TRIB., May 17, 2010, at 1 ("Two years after the beginning of a significant shakeup in the legal industry, there's no guarantee that new grads will start their careers in law firms that historically scooped up talent a year or more before anyone passed the bar exam. These days, graduates should be prepared to find alternative opportunities in the law, or even take a non-legal job to pay the bills and get experience through pro bono work, say career development directors at several law schools in the region.").

20. *See* Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 108–13 (2010); Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 625 (2010) ("There is growing evidence that law firms will substantially reduce initial salaries and bonuses, encourage students to enroll in firm-based 'apprenticeship-programs' in which additional training will be provided, . . . and respond to major corporate clients that no longer wish to pay for or rely upon uninformed novice advice." (footnote omitted)); *id.* at 632 ("[F]irms must increasingly confront the reality that their corporate clients . . . [are demanding that they] bill for only the work of associates with appropriate levels of experience to contribute to needed work.").

21. MACCRATE REPORT, *supra* note 7, at 5.

years.[22] "Law schools are not producing enough graduates who . . . are adequately competent, and [who] practice in a professional manner."[23] As the *Carnegie Report* explained:

> At present, . . . a law degree requires no experience beyond honing legal analysis in the classroom and taking [written] tests. In most schools, this leaves direct preparation for practice entirely up to student initiative. Too often, the complex business of learning to practice is largely deferred until after entry into licensed professional status.[24]

The practical competencies that the vast majority of American law schools undervalue or ignore include basic litigation skills such as oral advocacy and the questioning of witnesses, factual investigation, negotiation, and counseling.[25] These skills, of course, are the very ones that a typical practicing lawyer uses on a daily basis.[26] And it is not simply that American law schools are failing to teach students these skills; more fundamentally, law schools are failing to afford students "systematic training in effective techniques for learning law from the experience of practicing law."[27]

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22. *See* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 24 (2007) [hereinafter BEST PRACTICES]; CARNEGIE REPORT, *supra* note 8, at 88.

23. BEST PRACTICES, *supra* note 22, at 24.

24. CARNEGIE REPORT, *supra* note 8, at 88.

25. *See* MACCRATE REPORT, *supra* note 7, at 138–40.

26. Despite the trend in recent decades toward fewer civil and criminal trials, *see* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004), it appears that a substantial percentage of American lawyers today, perhaps even a majority, still engage in litigation-related activity as a portion of their law practice. *See* Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 98 & n.160 (2010). Much of that activity involves the preparation and filing of pleadings (e.g., complaints and summary judgment motions) and the settlement of lawsuits. *See* Galanter, *supra*, at 485, 515 (citing Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994)). Even among those attorneys who never set foot into a courtroom, many seek to avoid litigation by counseling clients about their options and by adequately drafting contracts, wills, and other legal instruments. *See generally* Jeffrey W. Stempel, *Theralaw and the Law—Business Paradigm Debate*, 5 PSYCHOL. PUB. POL'Y & L. 849, 849–52 (1999) (discussing lawyers who practice preventative law in order to avoid unnecessary litigation). Many others represent clients in various modes of alternative dispute resolution. *See id.* at 854–55. To effectively represent clients in such activities, attorneys must possess the same basic skill set required to succeed in litigation (i.e., effective written and oral advocacy and the ability to effectively negotiate). *See* Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 855–62 (1990).

27. Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984). Experiential education, if properly done, is not simply focused on skills training. Rather, it teaches law students *how to learn* through the application of legal and ethical principles in real-world situations. *See, e.g.*, Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 215 (1981) ("Increased interest in clinical education has tended, however, to focus increased attention on the importance of learning how to learn and the importance of developing and nurturing good habits of learning.").

As a result of this enduring belief that American law schools consistently have failed to prepare students to practice law, respected authorities, including the Carnegie Foundation and the Clinical Legal Education Association, have renewed the call for significant reforms in legal education.[28] Similar proposals, such as those set forth in the *MacCrate Report* in 1992, have been made before,[29] although not with the same level of specificity in terms of proposed changes to better prepare students to become competent practitioners.[30]

Educating Lawyers (*Carnegie Report*) and *Best Practices for Legal Education* (*Best Practices*), the leading critiques of twenty-first century

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28. *See* BEST PRACTICES, *supra* note 22, at 24 ("We encourage law schools to expand their educational objectives to more completely serve the needs of their students and to provide instruction about the knowledge, skills, and values that will enable their students to become effective, responsible lawyers."); CARNEGIE REPORT, *supra* note 8, at 88–89 (arguing that law school curriculums need to "better integrate the learning of legal reasoning with the grasp of practice"); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 235–55 (2007) (discussing several critiques of, and proposed reforms for, legal education); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 363–410 (2007) (same); Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867, 870–77, 882–1006 (2009) (same); Nat'l Inst. for Trial Advocacy, *The Future of Legal Education: A Skills Continuum* (Oct. 20, 2009), http://www.nita.org/library/documents/PDF/Future_of_Legal_Education.pdf (proposing curricular changes in law school and, in particular, recommending adoption of practical elements of the medical school and business school models).

29. As Dean Chemerinsky has observed:

> This is not the first time that there has been an effort to reform legal education and make it more practical. In 1921, a study, supported by the Carnegie Foundation for the Advancement of Teaching, called for more professionally relevant training in law schools. In 1933, Yale law professor and later federal court of appeals judge Jerome Frank proposed the idea of a clinical law school. In 1944, a report for the Association of American Law Schools, edited by the eminent Karl Llewellyn, stressed the need for greater skills training for lawyers. In 1992, the MacCrate report, prepared for the American Bar Association (ABA), emphasized the same themes. The Carnegie Commission report, for all the attention that it has received, is just the latest in a series that makes the same basic points about the need for more training in practical skills and more experiential learning.

Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 37 (2009) (footnotes omitted) (citing ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 276–81 (1921); MACCRATE REPORT, *supra* note 7, at 4–5; Comm. on Curriculum, Ass'n of Am. Law Sch., *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 345–46 (1945); Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907, 911–23 (1933)).

30. MACCRATE REPORT, *supra* note 7, 233–304. Although the 1992 *MacCrate Report* was the most significant of the prior calls for reform, it, like the other proposals, including the most recent ones,

> fail[ed] to deal directly with the growing imbalance between practical and impractical scholarship and teaching in legal education. The Report seems not to comprehend that there are many academics in legal education who would reject or ignore its goals because they do not really view legal education as a form of *professional training.*

Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561, 570 (1994).

American legal education, contend that law schools focus too much on teaching substantive legal doctrine using the "case-dialogue method,"[31] and not enough on developing practical competencies through simulations, clinics, and other types of experiential education.[32] The *Carnegie Report* notes that, although in recent years law schools have offered more courses "with the purpose of preparing students to practice," such courses are almost always optional rather than mandatory and, as a result, most students fail to take advantage of them.[33] Furthermore, such practical courses are "most often taught by faculty other than those teaching the so-called substantive or doctrinal courses of the curriculum."[34] The report also makes an indisputable, common-sense observation: law professors are students' primary role models.[35] "On any law school campus, the faculty is influential in conveying what the profession stands for and what qualities are important for a member of that profession."[36] The *Carnegie Report* urges law faculties to do a better job of serving as positive role models for aspiring practitioners.[37]

In addition to recommending more practical education, the authors of *Best Practices* propose several specific pedagogical reforms for law schools, including (1) lower student-teacher ratios; (2) more effective teaching methods (including more active learning opportunities) and better training of professors to be effective teachers; and (3) more meaningful feedback to, and assessments of, students than the traditional single end-of-semester examination.[38] The central

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31. BEST PRACTICES, *supra* note 22, at 207; CARNEGIE REPORT, *supra* note 8, at 76–77.

32. BEST PRACTICES, *supra* note 22, at 167 ("Experiential education is a powerful tool for forming professional habits and understandings. We encourage law schools to expand its use."); CARNEGIE REPORT, *supra* note 8, at 24 ("With some important exceptions, the underdeveloped area of legal pedagogy is clinical training, which typically is not a required part of the curriculum and is taught by instructors who are themselves not regular members of the faculty."); *id.* at 165 ("[L]aw schools' heavy emphasis on academic training, in contrast to the education in settings of practice . . . heightens the likelihood of a disparity between learning to be a law student and learning to be a lawyer."). A recent ABA committee that has proposed reforms in the accreditation standards has agreed with this assessment: "Focusing predominantly on . . . the cognitive or intellectual [development of law students]—exacerbates the gap between what practitioners and the academy value. It deprives the students of forming the skills necessary to take abstract principles which were learned in law school and apply them in real-life . . . contexts." Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, AM. BAR ASS'N, 8 (July 27, 2008), http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf.

33. CARNEGIE REPORT, *supra* note 8, at 87; *see also infra* notes 183–86 and accompanying text.

34. CARNEGIE REPORT, *supra* note 8, at 87–88.

35. *Id.* at 157.

36. *Id.* at 156; *accord* David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 384–85 (2001) ("In academe, law teaching often involves skills and attitudes on the part of the teacher that may be poor role models for the student to emulate as he or she moves into the practice of law." (quoting Norman Redlich, *Professional Responsibility of Law Teachers*, 29 CLEV. ST. L. REV. 623, 624 (1980))).

37. CARNEGIE REPORT, *supra* note 8, at 156–57.

38. BEST PRACTICES, *supra* note 22, at 3–9.

theme of these proposals is that "law schools should become more student-centered and should recognize and reward good teaching more than most do today."[39]

As an initial step toward reform, which antedated both the *Carnegie Report* and *Best Practices*, the ABA's Section on Legal Education and Admissions to the Bar revised accreditation Standard 302 in 2005 so as to require law schools to offer students "substantial instruction" in the "professional skills generally regarded as necessary for effective and responsible participation in the legal profession," including "live-client or other real-life practical experiences."[40] Yet, as noted, students are not *required* to take such experiential courses; schools merely must offer them.[41] As of mid-2010, the ABA is considering taking further steps to promote law students' learning of the practical skills needed to achieve competency as entry-level practitioners.[42] Although certain law schools have begun to implement some reform measures in addition to the bare minimum required to satisfy the revised Standard 302,[43] most law schools have

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39. *Id.* at 5.

40. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 302 (2010–2011), *available at* http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf; *see also* Katz, *supra* note 9, at 909 (discussing the 2005 amendment of Standard 302).

41. *See* CARNEGIE REPORT, *supra* note 8, at 87.

42. In mid-2010, the Standards Review Committee of the Section of Legal Education and Admissions to the Bar circulated a draft of proposed amendments to the accreditation standards governing law schools' curricula and pedagogy. Standards Review Committee, Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Student Learning Outcomes Subcommittee May 5, 2010 Draft*, A.B.A. 1 (2010), http://www.abanet.org/legaled/committees/comstandards.html (follow "Standards 301–307: Student Learning Outcomes" hyperlink). Those proposals—which, if adopted, would constitute a "quantum shift in the structuring of the law school accreditation process"—focus on an outcome-oriented assessment process (i.e., measuring what students have learned in terms of knowledge, skills, and professional values) rather than on a process, as currently exists, that primarily measures inputs (e.g., the number of volumes in the law library). *See* Carpenter et al., *supra* note 32, at 61. The proposed revision to Standard 302(b) states in pertinent part that:

> (b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:
> (1) knowledge and understanding of the substantive law and procedure;
> (2) competency in the following skills:
> (i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;
> (ii) the ability to recognize and resolve ethical and other professional dilemmas; and
> (iii) a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession.

See Standards Review Committee, *supra.*

43. *See* Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GER. L.J. 717, 741–46 (2009) (discussing some U.S. law schools' recent curricular changes aimed at improving "lawyering skills" among law students); Wegner, *supra* note 20, at 945–47, 951–54 (discussing large-scale reforms instituted by some U.S. law schools); Kagan, *supra* note 9 (discussing recent changes to Harvard Law School's curriculum). As discussed in Part IV, while a positive development, such

not made significant efforts at reform.[44] If the ABA modifies its accreditation standards to require that law schools actually demonstrate *results* in better preparing students to practice law, the remaining law schools will be forced to attempt to implement reforms such as those proposed by the *Carnegie Report* and *Best Practices*.

Although they each recognize the systemic problems in legal education, neither the *Carnegie Report* nor *Best Practices* appears to acknowledge the enormous obstacle standing in the way of their proposed reforms: law schools' increasing practice of primarily hiring impractical professors whose chief mission is to produce theoretical legal scholarship and who not only lack practical skills, but also feel indifference toward (or in some cases outright disdain for) both practicing attorneys and practical components of the law school faculty such as clinicians.[45] As discussed in Parts III and IV, unless the composition and culture of law faculties change—including abolition of the separate and unequal status of clinicians and LRW instructors, the primary faculty members capable of teaching students how to become competent, ethical practitioners—the proposed curricular and pedagogical reforms stand little chance of succeeding on a broad scale.

II. THE ASCENDANCY OF IMPRACTICAL SCHOLARSHIP AND IMPRACTICAL SCHOLARS

A. Impractical Law Review Scholarship

> "I haven't opened up a law review in years," said Chief Judge Dennis G. Jacobs of the federal appeals court in New York. "No one speaks of them. No one relies on them."[46]

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curricular improvements alone will not achieve meaningful reform without a fundamental shift in law faculties from impractical to practical professors.

44. *See, e.g.*, BEST PRACTICES, *supra* note 22, at 7 ("[M]ost law schools are [still] not committed to preparing students for practice.").

45. *See, e.g.*, Edwards, *supra* note 14, at 35 ("[M]any 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law.'"); Paul D. Reginold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 2004 (1993) ("For clinical teachers, who approach the legal world from the practitioner's perspective, . . . the law school environment was unfriendly, and often downright hostile . . . . Most of the faculty, including many of the older, more doctrinal faculty members, resisted the clinical movement, fearing that the admission of nonacademic practitioners would degrade the law school's standing in the academic community.").

46. Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8. "In a cheerfully dismissive presentation, [Chief] Judge Jacobs and six of his colleagues on the United States Court of Appeals for the Second Circuit said in a lecture hall jammed with law professors at the Benjamin N. Cardozo School of Law . . . that their scholarship no longer had any impact on the courts." *Id.*

Law professors, as a class, express themselves as scholars in law review articles much more so than in scholarly books and typically are evaluated for promotion and tenure based solely on such articles.[47] In that way, they differ from other types of professors, especially those in the humanities, who consider books the highest form of scholarship and the measure by which they typically judge their peers.[48]

There are nearly 1,000 law reviews in the United States, the vast majority of which are traditional student-edited journals.[49] Those law reviews publish approximately 150,000 to 190,000 pages per year.[50] Yet the majority of those pages—I submit the vast majority—provide little if any social utility (other than to their authors) and represent a colossal amount of wasted resources and opportunity costs.[51] Although somewhat hyperbolic, Chief Judge Jacobs's remarks reveal that, unlike in the past, when more of a "symbiosis between the professoriate" and the profession existed,[52] relatively few members of the bench

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47. *See* ALAN WATSON, THE SHAME OF AMERICAN LEGAL EDUCATION 91 (2d ed. 2006); Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 566 (2007) ("Law schools require professors to publish as a condition of tenure. The traditional rule is for three scholarly articles in law reviews of sufficient quality."); Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 661 (1998) ("Law reviews are the primary outlet for legal scholars, and the law review *system* is unique to legal education.").

48. *See, e.g.*, Joyce Seltzer, *Honest History*, 90 J. AM. HIST. 1347, 1348 (2004) ("Tenure and promotion decisions depend on publications, and, in most history departments, that means books rather than articles.").

49. According to Washington and Lee University School of Law's Associate Law Librarian John Doyle, who maintains a website devoted to ranking law reviews, as of late-2010, there were 641 student-edited law reviews published in the United States. *See* Law Journals: Submission and Rankings, WASH. & LEE U. SCH. OF L., http://lawlib.wlu.edu/lj/index.aspx (select "US" from drop down menu; then select "Student-edited" and "2009"; then follow "Submit" hyperlink) (last visited Sept. 6, 2010). There are another 335 peer-edited or refereed law reviews published in the United States. *See id.* (select "US" from drop down menu; then select "Peer-edited," "Refereed," and "2009"; then follow "Submit" hyperlink) (last visited Sept. 6, 2010); John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 180 (2009) (discussing the robust growth of American law journals).

50. Day, *supra* note 47, at 567–68 (citing Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681, 684 (1997)).

51. *Cf.* Frank H. Wu, *How to Become a Law Professor*, 46 PRAC. LAW., Sept. 2000, at 15, 18 ("A law review article takes about a year of work, even for a dedicated scholar who is being encouraged in the endeavor.").

52. Louis H. Pollak, *The Disjunction Between Judge Edwards and Professor Priest*, 91 MICH. L. REV. 2113, 2113 (1993); *see also, e.g.*, William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 227 (1965) ("I have a special affection for law reviews, . . . and I have drawn heavily from them for ideas and guidance as practitioner, as teacher, and as judge."); Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962) (arguing that law reviews are very useful to judges in developing the law); Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941) ("It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical."); BENJAMIN N. CARDOZO, INTRODUCTION TO SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND

and bar or legal policymakers today rely on law review scholarship in meeting the demands of their jobs.[53] In addition, significantly fewer members of the bench and bar seem to be writing law review articles than in the past.[54] Even in the rarified intellectual atmosphere of the Supreme Court, law review scholarship has fallen from grace.[55] As noted by former Solicitor General Seth Waxman, "at the Supreme Court, academic citations are viewed as largely irrelevant—only a true naif would blunder to mention one at oral argument."[56]

The growing practical irrelevance of law reviews became noticeable toward the end of the last century.[57] Many of the intellectual giants in the legal

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ENGLISH LEGAL PERIODICALS vii (Assoc. of Am. Law Sch. ed., 1931) (noting utility of law reviews to courts). There were critics of law reviews during that earlier era, most notably Fred Rodell, *see* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962), but they were few and far between compared to the modern era.

53. *See infra* notes 56–60 and accompanying text.

54. *See* Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 365 (1996) ("In 1960, judges or practicing attorneys authored as many articles as law professors (a ratio of 1:1) . . . . In 1985, law professors authored 2.24 times as many articles as judges or practicing attorneys, a statistically significant increase."). I am not aware of an updated version of this study, but the ratio surely has grown even more since 1985.

55. *See* Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1909 (2002); Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. (Apr. 7, 2010, 7:20 PM), http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/ ("Roberts said he doesn't pay much attention to academic legal writing. Law review articles are 'more abstract' than practical, and aren't 'particularly helpful for practitioners and judges.'").

56. *Id.*

57. Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) ("This survey reveals a 47.35% decline in the use of legal scholarship by courts over the past two decades, the most notable decline occurring in the past ten years."); Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1010 (2000) ("We find a continuing decline in number of times the [Supreme] Court cited legal periodicals and a noticeable decrease in citations to the top tier of law journals."); *see also* Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 117 (2004) ("If one excludes the small group of four fairly heavily cited articles from the calculation, then the overall average citation frequency for this large set of contract law articles published predominantly in very top-tier law reviews is only 0.7 cites per article."); Thomas L. Fowler, *Law Reviews and Their Relevance to Modern Legal Problems*, 24 CAMPBELL L. REV. 47, 49–50 (2001) (discussing author's study of citations to articles appearing in North Carolina-based law reviews by the North Carolina Supreme Court, which showed a dramatic reduction in annual citations from a high of twenty-six citations in 1965 to two citations in 2000); Gerald F. Uelmen, *The Wit, Wisdom, and Worthlessness of Law Reviews*, CAL. LAW., June 2010, at 24, 25 ("I did my own count recently of the California Supreme Court opinions published during the past five years that relied on law reviews as authority: There were just six. This despite—or perhaps because of—the fact that law reviews have tripled in number since the 1970s.").

A recent empirical study of reported decisions (i.e., not including unpublished decisions) of the United States Courts of Appeals asserts that, at least in the case of those courts, they are actually citing (and thus using) law review articles more frequently than they did in past years. *See* David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An*

profession who have shown mastery both as judges or practitioners *and* legal scholars, and who span the ideological spectrum have commented critically on law reviews' decreasing utility to the bench and bar.[58] Even one of modern law

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Empirical Study, 96 CORNELL L. REV. (forthcoming 2011) (manuscript at 9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640681. The study examined 296,098 reported decisions from 1950–2008. *Id.* In the reported decisions issued between 1950–79, 3.4% cited at least one law review article; in decisions issued between 1980–2008, 4.8% cited at least one law review article. *Id.* (manuscript at 20). The study also noted that "roughly 50%" of all the reported decisions citing law review articles during the 1990–2008 period were written by a mere 13.74% of the circuit judges sitting on the courts of appeals. *Id.* (manuscript at 28–29).

This study, while informative of trends in reported decisions, is seriously flawed in its conclusion that circuit courts are using law review articles as much or more than they did in prior decades. *Id.* (manuscript at 9). The study's methodology fails to account for the modern practice of unpublished decisions, which did not begin until the 1970s, *see* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 63 (2009) ("In the mid-1970s, the members of the judiciary fundamentally changed the nature of precedent in the federal courts. They did so relatively quickly and quietly: first, by issuing decisions not designated for publication and not citeable, and then, by denying these decisions precedential status."); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1168–72 (1978), and which has become much more common during the last three decades (with over eighty percent of all decisions on the merits coming in unpublished dispositions), *see* Cleveland, *supra* ("The number of . . . unpublished decisions had risen to over eighty-four percent of all circuit decisions in 2006."). In other words, the study's comparison of the older cases to the newer cases is flawed because the vast majority of opinions in the first time period (including virtually *all* of them until the mid-1970s) were published—including countless routine cases not likely to warrant much discussion. *See* Deborah Jones Meritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals*, 54 VAND. L. REV. 71, 75 & n.13 (2001) ("[U]ntil the mid-1970s, courts of appeals continued to publish a substantial majority of their opinions."). Common sense suggests that such routine appeals involving settled law or fact-specific situations (i.e., the type of appeals warranting unpublished decisions today) would not likely be candidates for citing law review articles. *See* Schwartz & Petherbridge, *supra* (manuscript at 11 n.30) ("Unreported (or nonprecedential opinions) are historically not recognized as part of the formal evidence of the decisional law. . . . [I]t is strongly intuitive that judges should only very rarely use legal scholarship in unreported opinions since they are not intended to add to the law."). Thus, a comparison of the two time periods is flawed because it involves a comparison of "apples" with "oranges." The larger percentage of modern reported decisions in which law review articles were cited is based on a qualitatively different dataset—one in which routine and fact-specific appeals presumably have been excluded and relegated to unpublished decisions, unlike the older dataset.

58. *See, e.g.*, Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008) (criticizing some modern legal scholarship as decreasingly relevant to the legal profession); Edwards, *supra* note 14, at 36 ("Because too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers."); Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 850–51 (2009) ("'[A]ll around us, there is more, vastly more, of nothing happening than ever before [in law reviews].' . . . [O]ne encounters an increasing tendency, especially at elite law schools, for law professors to write exclusively for other law professors." (first alteration in original) (quoting Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 805 (2009))); Waxman, *supra* note 55, at 1906 ("[L]aw

reviews' defenders, Erwin Chemerinsky, who stands among those giants,[59] does not dispute the growing irrelevance of law reviews to the legal profession[60] but contends that such scholarship nonetheless serves important purposes within the legal academy.[61]

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review literature—and much of the work done in law schools—largely [operates in] a closed universe, with little or no input from, or effect on, the outside world.").

During a recent oral argument in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), Justice Scalia joined the chorus of critics, albeit with humorous flair, in asking one of the attorneys whether he was "bucking for a . . . place on some law school faculty" by making a legal argument that found no support in 140 years of legal precedent, but that was a "darling of the professoriate." Transcript of Oral Argument at 7, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf; *see also* Michael C. Dorf, *Justice Scalia Suggests that the Legal Academy is Out of Touch: Is He Right?*, FINDLAW (Mar. 8, 2010), http://writ.news.findlaw.com/dorf/20100308.html ("Although it looks as though Gura will likely win the case [for his client in *McDonald*], even Justices who were sympathetic to his cause were vexed by his tactics during the [oral] argument, deeming them better suited to a law school faculty workshop than to the Court.").

59. Dean Chemerinsky is one of the nation's foremost constitutional law scholars and regularly has been involved in litigation, including repeatedly arguing before the Supreme Court. *See, e.g.*, Scheidler v. Nat'l Org. for Women, 547 U.S. 9, 12 (2006) (listing Erwin Chemerinsky as counsel); Tory v. Cochran, 544 U.S. 734, 735 (2005) (same).

60. *See* Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 885 (2009) ("Over the twenty-nine years that I have been a law professor there has been a shift. Faculty scholarship has become far more interdisciplinary and more abstract, and interdisciplinary scholarship is more highly valued than traditional doctrinal scholarship, especially at elite institutions. Edwards wrote his critique over fifteen years ago, and I think that the trends that he identified have increased since then. The reality is that legal scholarship, especially from elite faculty and in elite law reviews, is even more disconnected from the issues that judges and lawyers face." (discussing Edwards, *supra* note 14)); *id.* at 886 ("The legal academy—especially the elites—have increasingly come to value scholarship directed primarily or exclusively at law professors (and maybe those in other disciplines). Correspondingly, the legal academy places little value on books or articles written for students, for lawyers, for judges, [or] for the general public.").

61. Dean Chemerinsky gives several reasons why, in his opinion, the current type of legal scholarship that predominates in law reviews is appropriate:

> [First,] as legal academics, we write to add significant, original ideas to the analysis and understanding of the law; as people, we write to understand ourselves and the world in which we live. Ideally, scholarly writing offers insights that are useful to others, but at the very least, it helps the author understand an area better and clarify his or her thoughts. Frequently, that greater knowledge and understanding helps in teaching as well.

Id. at 882–83. Additionally,

> [t]here is potentially great value in writings that advance legal understanding and knowledge, even if the immediate audience is only professors of law or other disciplines. Works of legal history or legal philosophy, for example, may not have practical utility for judges, but they contribute to the academy's understanding about the legal system. Knowledge and understanding is desirable, even if it is only part of a scholarly dialogue that informs other academics.

Id. at 889. Finally, "[w]riting, even in the often stilted tones of law review articles, is an act of self-definition. What we choose to write about, the voice we employ, the points we choose to make, all are important expressions of self." *Id.* at 893. Below, I will discuss why these reasons, which focus primarily on benefiting the professoriate rather than law students and the legal profession, do not justify the current state of legal scholarship.

Members of the legal profession are not the only group that finds law reviews increasingly useless. Members of the legal academy, who write the vast majority of the articles, decreasingly use (or even read) a large percentage of law review articles published each year, and many are critical of the poor quality of the interdisciplinary works that some of their fellow professors are producing.[62] A recent empirical study of all of the law review articles contained in the Lexis-Nexis database found that 43% of them have never been cited *even once* in other law review articles or reported cases.[63] It seems, in the words of one critic, that many law professors "are not even talking to each other but to the mirror."[64] In addition to its growing irrelevance, much of the legal scholarship being

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62. Edwards, *supra* note 14, at 36 ("Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."); Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 79–80, 91 (1992) ("[T]he dramatic rise in interdisciplinary work has witnessed a considerable amount of sub-standard scholarship.... More objectionable, however, is another class of sub-standard interdisciplinary work whose most striking feature is what I call its 'intellectual voyeurism': superficial and ill-informed treatment of serious ideas, apparently done for intellectual 'titillation' or to advertise, in a pretentious way, the 'sophistication' of the writer.... There is too much 'fancy' philosophy and literary theory and too little serious engagement with the primary and secondary texts of other disciplines."); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1927 (1993) (discussing the poor quality of most interdisciplinary legal works). *See generally* Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* 71 L. & CONTEMP. PROBS. 17, 27 (2008) ("[F]rom a scholarly perspective [the student-edited law review system] has been roundly criticized by law professors and social scientists alike.... Such criticism has only intensified as law reviews have begun publishing more specialized interdisciplinary and empirical work." (footnotes omitted)); Friedman, *supra* note 47, at 661 ("I share [the] astonishment [of people in other academic fields]; and I think the [law review] system is every bit as crazy, in some ways, as they think it is."); Kenneth Lasson, Commentary, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990) ("Even cursory observation of the literature leads to an inescapable conclusion: the number of whole-grain scholars is much smaller than that suggested by the burgeoning reviews, the number of whole-grain journals but a fraction of the fruited plains currently being harvested in law libraries across the land."); Schlag, *supra* note 58, at 804 ("American legal scholarship today is dead—totally dead....").

63. Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007); *see also* Ezra Rosser, *On Becoming "Professor": A Semi-Serious Look in the Mirror*, 36 FLA. ST. U. L. REV. 215, 223 (2009) ("Judges, law clerks, practitioners, policymakers, students, other faculty, and even family members do not read or care about law review articles."). Additional empirical research on law review articles' influence, or lack thereof, is in the offing. *See* Olufunmilayo Arewa et al., *The Production, Consumption and Content of Legal Scholarship: A Longitudinal Analysis*, at 1 (unpublished paper), *available at* http://www.utexas.edu/law/academics/centers/clbe/assets/LegalScholarshipProject.pdf ("Our goal is to construct a large-scale relational database of legal scholarship from 1928 to the present that will allow examination of the production, consumption, content and evolution of legal scholarship generally and interdisciplinary legal scholarship in particular.").

64. Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools are Not Expressive Associations*, 14 WM. & MARY BILL RTS. J. 415, 473 (2005).

published today uses a different vocabulary from that used by members of the bench and bar, causing critics to characterize legal scholarship as increasingly pedantic.[65]

During recent decades, particularly at highly ranked law schools, the content of law review articles has changed from being primarily practical or doctrinal[66]—that is, discussing cases, statutes, or administrative regulations using traditional tools of legal analysis—to being mostly abstract or theoretical[67] and often interdisciplinary.[68] In a 2007 study, editors of the *Cardozo Law*

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65. *See, e.g.*, Roger J. Miner, *A Significant Symposium*, 54 N.Y.L. SCH. L. REV. 15, 18 (2009–2010) ("[I]f I saw the word 'normative' in one more law review article, I would scream."). Perhaps an even better example is the scholarly-sounding word "hermeneutic," which a great number of legal academics strive to include in their articles. As of September 3, 2010, a search of this term in Westlaw's "jlr" directory (which includes many law reviews and journals) yielded 3,584 articles, while a search of the term in the "all cases" (state and federal cases) directory on Westlaw yielded only 176 cases. Similarly, the terms "epistemological" or "epistemology" appear in 7,831 articles in the "jlr" directory but only appear in only 246 cases in the "all cases" directory.

66. Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321 (2002) ("Traditional doctrinal scholarship is disvalued at the leading law schools. They want their faculties to engage in 'cutting edge' research and thus orient their scholarship toward, and seek their primary readership among, other scholars, not even limited to law professors, though they are the principal audience."); *see also* Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 496 n.92 (2004) ("[A]t 'non-elite schools,' interdisciplinary scholarship 'has gained less of a foothold.'" (quoting J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 951 (1996))).

67. David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 767 (2005) ("Some scholars estimate that while at one time there were five practical articles for every theoretical one, today the ratio is one to one." (citing Harnsberger, *supra* note 50, at 693)). The ascendancy of theoretical legal scholarship in the twenty-first century was predicted—and championed—in the 1980s by Professor George L. Priest. *See* George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681, 681 (1988–1989) ("Legal education . . . has become specialized and sophisticated in the application of the social sciences and social theory to criticize legal analysis and the legal system."); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 441 (1983) ("The [American] law school will be comprised of a set of miniature graduate departments in the various disciplines. . . . [A] wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without.").

68. *See, e.g.*, Chemerinsky, *supra* note 60, at 885 ("In the past two decades, elite law schools have emphasized theoretical, interdisciplinary scholarship. . . . [S]imply perusing the table of contents of law reviews—from elite and non-elite institutions—it is obvious that there are a significant number of abstract articles being published that are unlikely to be useful to judges or lawyers."); Edwards, *supra* note 14, at 42–43 ("There has been a clear decline in the volume of 'practical' scholarship published by law professors. 'Practical' legal scholarship, in the broadest sense, has several defining features. It is *prescriptive*: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform. It is also *doctrinal*: it attends to the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker." (footnote omitted) (citing Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847–53 (1988))); Hricik & Salzmann, *supra* note 67, at 768–69 ("Too much of legal scholarship is becoming 'law professor scholarship,' a discourse among theorists with little

Review examined articles published in five of the most cited law reviews (*California Law Review*, *Columbia Law Review*, *Harvard Law Review*, *New York University Law Review*, and *The Yale Law Journal*) in 1960, 1980, and 2000.[69] The editors classified the articles as "practical," "theoretical," or "both practical and theoretical."[70] Their study found that, in 1960, the five law reviews published a total of 48 "practical" articles, 36 "both practical and theoretical" articles, and 21 "theoretical" articles.[71] By 2000, the journals published 6 "practical" articles, 45 "both practical and theoretical" articles, and 68 "theoretical" articles.[72]

In Justice Breyer's words, "there is evidence that law review articles have left terra firma to soar into outer space."[73] Judge Richard Posner, whose renown as a prolific legal scholar, federal appellate judge, and public intellectual is unrivaled,[74] has spoken in even harsher terms: "In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution."[75]

The distinction between "practical" and "theoretical" is, to some degree, illusory, which has led some critics of modern legal scholarship to suggest a

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practical application. . . . Some law reviews are becoming nothing more than battlegrounds for theoretical camps where the members fight over their ideas with passionate publications that have no intent of engaging the profession or legal decision-makers. The demise of the law review article as a player in doctrinal development is clear." (footnote omitted)); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–33 (1995) ("[There] was a time when legal scholarship was understood to be doctrinal scholarship, and the more technical and intricate the doctrine, the better. . . . Doctrinal scholarship as a fraction of all legal scholarship underwent a dramatic decline to make room for a host of new forms of legal scholarship—interdisciplinary, theoretical, nondoctrinal . . . .").

69. *See* Carissa Alden et al., *Trends in Federal Judicial Citations and Law Review Articles*, 1 (Mar. 8, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf.

70. *Id.* at 1–2. According to the authors, the "practical" categorization encompassed "articles addressing narrowly doctrinal questions of law or concrete solutions to relevant legal problems," while "theoretical" articles "relate[d] to an abstract legal issue or focuse[d] on the intersection of law and other disciplines." *Id.* Articles that were both practical and theoretical "may have [had] practical application, but approache[d] the legal issue through a more conceptual lens." *Id.*

71. *Id.* at app. D.

72. *Id.*

73. Breyer, *supra* note 58, at 33.

74. Justice Elena Kagan has referred to Judge Posner as "the most important legal thinker of our time." Elena Kagan, Commentary, *Richard Posner, the Judge*, 120 HARV. L. REV. 1121, 1121 (2007). She also was careful to note, "Richard Posner . . . is not only a theorist. He is also a practitioner . . . ." *Id.* From 1981 to 2009, Judge Posner authored six articles critical of modern legal scholarship. *See supra* notes 58, 62, 66, 68 and accompanying text; *infra* notes 81, 84 and accompanying text. The fact that the most important legal thinker of our time has done so should be enough by itself to cause serious concern among the professoriate.

75. Posner, *supra* note 66, at 1314 (quoting Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 192 (1991)).

different dichotomy.[76] Although the concept of "theoretical" is somewhat like what obscenity was in Justice Potter Stewart's eyes,[77] Professor Lawrence M. Friedman best captured the notion when he stated:

> [P]eople who talk about legal "theory" have a strange idea of what "theory" means. In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore subject to proof. When legal scholars use the word "theory," they seem to mean (most of the time) something they consider deep, original, and completely untestable.[78]

That said, unquestionably some legal scholarship is legitimately theoretical in that it competently employs analytical tools from the social sciences to test theories about relevant legal issues, and it occasionally may serve practical needs of the bench and bar.[79] Yet doctrinal legal scholarship that addresses case law, statutes, or administrative regulations using traditional legal analysis in the context of actual legal problems is more likely to be useful to judges, practitioners, and policymakers than scholarship that eschews such a practical approach. After all, such legal analysis is the bulk of the daily grind of the bench and bar. Furthermore, theoretical scholarship—indeed, any legal scholarship—is more likely to be relevant and useful if its author has a real-world understanding of the context in which the law applies.

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76. For example, Professors David Hricik and Victoria S. Salzmann reject the distinction between "practical" and "theoretical," and instead employ the phrase "engaged scholarship" (as opposed to unengaged scholarship) to refer to scholarship that "addresses problems related to the law, legal system, or legal profession that affect a significant portion of society or the legal community. It identifies current legal issues, offers possible solutions to legal problems, or meaningfully informs decision-makers on the issues before them." Hricik & Salzmann, *supra* note 67, at 764 (footnote omitted); *see also* James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1970 (1993) ("[F]or me the relevant line is not between the 'theoretical' and 'practical,' . . . but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not."). Mark Tushnet has set forth a three-part taxonomy of legal scholarship: (1) "traditional legal advocacy" (using traditional tools of legal analysis); (2) "advocacy augmented with concepts drawn from nonlegal fields of thought"; and (3) "the study of law as a phenomenon." Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1208 (1981). The second and third species that he identifies comprise the bulk of what others consider theoretical legal scholarship. *See, e.g.*, Alden et al., *supra* note 69, at 2 ("[A theoretical] article relates to an abstract legal issue or focuses on the intersection of law and other disciplines.").

77. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . . .").

78. Friedman, *supra* note 47, at 668.

79. *See* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 237 (2010) ("[Interdisciplinary legal scholarship in the areas of] antitrust and originalism in constitutional law provide[s] anchors where courts were previously adrift."); Posner, *supra* note 62, at 1925–26 (discussing how law and economics scholarship since the 1960s has contributed significantly to developments in several areas of the law, including antitrust, civil remedies, and employment discrimination).

Judge Posner—a proponent of theoretical legal scholarship, provided it is competently produced and edited, and also balanced in the law reviews with practical scholarship[80]—contends that the current system of law reviews is built to fail with respect to most theoretical scholarship.[81] He points to the fact that the vast majority of the reviews still rely on law students to select and edit articles for publication[82] and argues that such neophyte editors are ill-equipped to perform these tasks when it comes to interdisciplinary scholarship (as opposed to traditional doctrinal scholarship, which involves analysis of case law and statutes—something at which a good law student becomes reasonably proficient by her second year of law school).[83] Judge Posner has proposed faculty-run, peer-reviewed law reviews for interdisciplinary articles.[84]

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80. *See* Posner, *supra* note 62, at 1927–28.

81. *See* Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, LEGAL AFFAIRS, Nov./Dec. 2004, at 57, 57–58 ("The system of student-edited law reviews, with all its built-in weaknesses, has persisted despite a change in the character of legal scholarship that has made those weaknesses both more conspicuous and more harmful to legal scholarship. . . . The result of the system of scholarly publication in law is that too many articles are too long, too dull, and too heavily annotated, and that many interdisciplinary articles are published that have no merit at all.").

82. *See id.* at 57. Critics also have contended that the selection process for student editors—which is based primarily on first-year grades—is seriously flawed. *See, e.g.*, Day, *supra* note 47, at 570 ("The method of selection for membership on the law review has been criticized as arbitrary and unfair[.] Law reviews may not choose the most talented writers, editors, or researchers on the basis of grades or the writing competition. The management and people skills required to publish law reviews are not part of the selection matrix. A number of critics believe the automatic elevation to the law review on the basis of grades is capricious and unfair, resulting in a tainted honor." (footnote omitted)).

83. *See* Posner, *supra* note 81, at 58; Posner, *supra* note 68, at 1132 ("It should be obvious that in the performance of these tasks the reviews labor under grave handicaps. The gravest is that their staffs are composed primarily of young and inexperienced persons working part time: inexperienced not only as students of the law but also as editors, writers, supervisors, and managers."); Posner, *supra* note 62, at 1927 ("I am not starry-eyed about the new interdisciplinary legal scholarship. Much of it is bad, in part because a form of scholarship that is so difficult for most law students to understand places severe strain on the system for publishing legal scholarship, a system dominated by student-edited law reviews, and impedes the gatekeeper function that scholarly journals are supposed to perform."). Judge Posner is not alone in his criticisms of the structure of student-edited law reviews. *See, e.g.*, Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229, 231 (2009) ("It really is extraordinary that students pick articles in areas in which they have little expertise.").

84. *See* Posner, *supra* note 81, at 58; Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1124 (1981) ("The publication system in the social sciences [involving peer-review and professional faculty editors] is superior to that in legal scholarship even for doctrinal analysis. But it is clearly sub-optimal to process social scientific studies of the legal system in the manner of conventional legal scholarship—not given at workshops, not submitted to peer-edited journals, and not refereed. The lack of competent evaluation and criticism results in the publication of social scientific papers on law that should not be published at all, in the occasional failure to publish good papers, and in the publication of papers that would have been improved greatly by the publication process characteristic of academic fields other than law.").

Exacerbating this problem is that, because of the voluminous number of submissions to law reviews in the electronic era[85] and, in particular, the amount of interdisciplinary articles being submitted,[86] student editors tend to rely on the prestige of the law school at which an author is employed or the law school from which she graduated as proxies for an article's quality.[87] Furthermore, most law school faculties and deans are greatly concerned about—some would say obsessed with—their school's place in the annual *U.S. News & World Report* rankings,[88] and it is commonly believed that a significant factor in a school's

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85. *See* John P. Zimmer & Jason P. Luther, *Peer Review as an Aid to Article Selection in Student-Edited Legal Journals*, 60 S.C. L. REV. 959, 963–64 (2009) (describing the electronic submission process).

86. *See* Edwards, *supra* note 14, at 36.

87. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 584 (2008) ("[E]ditors use author credentials extensively to determine which articles to publish."); *see also* Rachel J. Anderson, *From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews*, 20 HASTINGS WOMEN'S L.J. 197, 208–16 (2009) (discussing how biases of student-editors can affect the article selection process); Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power—Student Editors*, 59 S.C. L. REV. 175, 188 (2007) ("Overall, the [survey] results show that law review editors, particularly those at higher ranked schools, are heavily influenced by author credentials."); *id.* at 188–93 (noting that an author's credentials include "where an author teaches," "where an author graduated from law school," and the "ranking of other schools where an author has published"); Frank T. Read & M.C. Mirow, *So Now You're a Law Professor: A Letter from the Dean*, 2009 CARDOZO L. REV. DE NOVO 55, 61 n.18, http://www.cardozolawreview.com/content/denovo/Mirow_2009_55.pdf ("'Good' [as a quality of scholarship] will often have less to do with the content of the work and more with its placement in a highly ranked law review. Placing law review articles has become an art and the system is stacked against certain topics and faculty at lower ranked law schools." (citing Nance & Steinberg, *supra*, at 571; Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 160 (2000); Dan Subotnik & Glen Lazar, *Deconstructing The Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601, 605–09 (1999); William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 190 (2000))); Luigi Russi & Federico Longobardi, *A Tiny Heart Beating: Student-Edited Legal Periodicals in Good Ol' Europe*, 10 GER. L.J. 1127, 1137 (2009) ("[T]he incredible amount of submissions top U.S. law reviews receive sometimes forces editors to consider other extrinsic data as a proxy for an article's quality. In this respect, an author's previous publication history, or the law school he/she is affiliated with may sometimes doom an article to rejection at a highly ranked law review." (footnotes omitted)).

88. *See* Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 326 (2006) ("[T]he *U.S. News* ranking has become the '800-pound gorilla' of legal education affecting just about everything we do."); Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1510 (2004) (reviewing MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003)) ("*U.S. News & World Report* law school rankings quickly became (and remain) the eight-hundred-pound gorilla in legal education."); Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL UNIV. L. SCH., http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm (last visited Oct. 7, 2010) ("We all hate to admit it, but the U.S. News rankings have become an entrenched part of life . . . .").

The *U.S. News* ranking system has been subject to manipulation by some law schools that have attempted to increase their ranking. Steven R. Smith, *Gresham's Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 183–84 (2008) ("[S]everal law schools [have] engaged in

overall ranking is the prestige of its law review.[89] Whether true or not, the perception that the reputation of a school's law review is an important contributor to a law school's overall ranking could put institutional pressure on student editors to select articles based on the reputation of the author or the author's law school affiliations, rather than on the article's merits. This pressure could also drive student editors to select the type of article that is held in high regard by most law professors: an impractical, usually theoretical work. To make matters even worse, the current ubiquitous practice of law professors "trading up" to a more highly ranked review on an expedited basis after a "lesser" review has made an offer of publication[90] flies in the face of the rigor of the professionally edited journal common in other disciplines.[91] This non-

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questionable practices to make themselves look better. Northwestern and Indiana University law schools, for example, briefly hired some of their own graduates for short internships to make its employment statistics look better and the University of Illinois incorrectly attributed the difference between the Lexis educational rate and commercial rate as a law school expenditure and a contribution to the law school. Deans sometimes say in private that they feel they must fudge figures or engage in other inappropriate academic behavior because other law schools are doing so and will get ahead of them. It is a sad commentary that the ABA [A]ccreditation Standards had to be changed to indicate that law schools were required to provide honest and correct data regardless of where the information was published." (footnotes omitted) (citing Alex Wellen, *The $8.78 Million Maneuver: How Water Bills, Temp Jobs and Backdoor Admissions Help Law Schools Scale the Rankings at U.S. News*, N.Y. TIMES, July 31, 2005, § 4A, at 18; STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 5.09 (2006))).

89. Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003–2007*, 78 U. COLO. L. REV. 35, 35 (2007) ("[E]specially for the . . . top fifty schools [as ranked by *U.S. News & World Report*], there is a high correlation (.88) between citations to the schools' main law reviews, as measured by citations in other journals, and the *U.S. News* peer reputation rank."); *id.* at 48 ("Given the close connections between law review rank and law school peer assessment scores, schools should be mindful that their law reviews contribute to the legal community's perception of their institution and that their schools are likely to be judged on the basis of their reviews."). *But cf.* Ronen Perry, Response, *Correlation Versus Causality: Further Thoughts on the Law Review/Law School Liaison*, 39 CONN. L. REV. 77, 83–84 (2006) ("[I]t seems that law review citations make no notable impact on law school reputation. Apparently, the correlation between these two variables is not the result of a common response to an unobserved variable. So the only logical conclusion is that law school reputation is usually the cause whereas law review success is the effect." (footnote omitted)).

90. *See* Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 978–79 (2007) (discussing the "trading up" strategy in the electronic submission process).

91. *See* Posner, *supra* note 81, at 57 (noting that, unlike student-edited law reviews, most other scholarly journals will not permit simultaneous submission of the same article to multiple journals); Posner, *supra* note 84, at 1123–24 (contrasting the peer review and referee processes used by most social science journals with the process used by the vast majority of student-edited law reviews). A handful of student-edited law reviews recently have begun to experiment with peer review in the selection process. *See, e.g.*, Zimmer & Luther, *supra* note 85, at 960 (noting that the *South Carolina Law Review* recently "institut[ed] . . . a rigorous peer review system, displaying most hallmarks of peer review publishing in academia, including double-blind review by external experts"). Under a system of peer review, the student editors

> ask subject matter experts to evaluate manuscripts for scholarly merit. . . . Editors then use the completed evaluations to help decide which manuscripts are most worthy of

rigorous—some would say arbitrary—selection method can seriously affect the careers of some legal academics, particularly at more highly ranked law schools.[92]

Finally, and perhaps most significantly, little modern law review scholarship serves any meaningful pedagogical purpose with respect to training law students to become competent lawyers.[93] Furthermore, there is only a marginal benefit conferred upon those members of the student body selected to be on law reviews. True, they learn the minutiae of *The Bluebook*, gain some experience in line editing, and incidentally are exposed to some substantive law (about which they are not tested), but surely such knowledge and skills could be learned in a much more efficient manner.[94] Although some may contend that law professors gain more substantive expertise as teachers when they research and write law review articles, practical experience (e.g., actually litigating cases rather than just reading about them) is surely a superior way of gaining such expertise.

> publication. . . . Thus, freed from the unreasonable aspects of their traditional 'gatekeeping' function, student editors can instead focus on judgments better suited to their level of experience, namely, vetting for writing quality and proofreading for grammatical, typographical, factual, and citation errors.

Id. at 961.

92. Cameron Stratcher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y.L. SCH. L. REV. 349, 351 (2007–2008) ("It is certainly difficult to imagine medical students selecting articles for publication in the prestigious *New England Journal of Medicine*, and then editing those articles, making or breaking careers along the way. Yet law students make these decisions every day at the *Harvard Law Review*, *The Yale Law Journal*, and nearly every other law review in the country."). Alan Watson, a long-time law professor at the Universities of Pennsylvania and Georgia, *see* WATSON, *supra* note 47, at viii, contends that the law review selection process also occasionally suffers from faculty members putting pressure on student editors to accept or reject a particular professor's submission. *See id.* at 90. Watson claims that "[t]his is a subject much discussed in private by professors but not in public." *Id.*

93. *See* Chemerinsky, *supra* note 60, at 886 ("[S]cholarship directed at the audience of law students . . . is no longer highly valued in the academy."); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 161–62 (2008) ("[S]cholarship and teaching have increasingly diverged. . . . The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.").

94. Those who contend that student editors gain important knowledge by cite-checking and reading the sources cited by the authors, *see, e.g.*, Joshua Baker, *Relics or Relevant?: The Value of the Modern Law Review*, 111 W. VA. L. REV. 919, 930–31 & nn.83–89 (2009) ("Law review membership strengthens and advances reading comprehension, logical reasoning, and analytical thinking through all of its assorted functions." (citing *About the LSAT*, LAW SCH. ADMISSIONS COUNCIL, http://www.lsac.org/JD/LSAT/about-the-LSAT.asp (last visited Oct. 7, 2010)), fail to appreciate that this mode of learning not only is inefficient (e.g., spending hours making sure that certain quotations appear on particular pages of a case or article), but also defies well-established norms of higher education (e.g., no meaningful assessment or feedback accompanies the editing and usually no meaningful supervision by a faculty member occurs).

B. Impractical Scholars

> [T]he vocation of the legal scholar has shifted from that of priest to theologian.[95]

Not coincidentally, at the very time that law reviews began publishing a larger percentage of theoretical, increasingly interdisciplinary articles, the composition of modern law school faculties began reflecting the same shift away from the practical.[96] This trend began around 1970 and picked up steam in the past two decades; it primarily has affected legal scholarship but has influenced law schools' curricula as well.[97] Not only are there fewer tenure-track law professors today with significant practical experience gained before (or after) entering the tenure-track faculty[98]—an issue that I will further discuss

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95. Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1217 (2002).

96. *See, e.g.*, Posner, *supra* note 58, at 854 ("With the rise of interdisciplinary legal studies, . . . the old system of faculty recruitment faltered. Eventually it was largely replaced, especially at elite law schools (but at many nonelite ones as well), by a system more like that found in the standard academic fields. Now many new legal academics begin their teaching career after obtaining a Ph.D. in economics, or history, or some other field related to law, or after a two-year teaching and research fellowship at a leading law school, and invariably they have done some substantial academic legal writing, preferably published, before being hired for a tenure-track position."); Waxman, *supra* note 55, at 1909 ("Increasingly, law professors [at elite law schools] see themselves more as colleagues of sociologists, economists, and philosophers than of judges and lawyers.").

97. Posner, *supra* note 66, at 1316 ("What was new was the number and density of the external approaches that began to take hold in the legal academy around 1970 and the number and seriousness of their practitioners. I shall call the new approaches 'interdisciplinary,' in contrast to the 'doctrinal' scholarship that until then had the field of academic law pretty much to itself."); *id.* at 1317 ("[I]nterdisciplinary scholarship looms very large . . . . Already there are signs that it is changing the internal perspective of the academic legal profession by infiltrating doctrinal scholarship and changing the professoriat's understanding of what constitutes good doctrinal scholarship and good teaching of core law courses . . . ."); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession* (pt. 2), 91 MICH. L. REV. 2191, 2198 (1993) ("[T]he problem began in the late '60's when an increasing number of individuals who aspired to become history professors or economics professors or philosophy professors or political science professors or literature professors discovered that there were few, if any, opportunities in those fields. After spending several years doing graduate work, they finally faced reality and attended law school. Most of these individuals had no real interest in law or in becoming a lawyer, but many were excellent students. As a result, they were hired by law faculties, . . . in increasing numbers. After obtaining tenure, many of them began moving back toward[] their real academic interests—philosophy, political science, economics, history, literature, etc. This led to an explosion of interdisciplinary work in law, as well as to an increasing rejection of the importance of doctrinal analysis even in mainstream courses." (quoting Letter from unnamed law school dean to author (Dec. 4, 1992) (on file with author))).

98. *See infra* note 107. A rare modern exception of a legal academic who has "jumped several times between the academic and professional spheres" is Justice Kagan, a former tenured law professor and dean of Harvard Law School. *At the HLS Helm*, HARV. MAG., July–Aug. 2003, at 66, 66. Her professional endeavors (in addition to serving as a law clerk for a D.C. Circuit judge and a Supreme Court Justice) have included being a law firm associate, associate White House

immediately below—there also is disdain for practitioners and judges among some full-time faculty members.[99] This disdain is sometimes reflected in the message conveyed to students,[100] which may affect the student editors who select law review articles for publication.[101]

The typical twenty-first century law professor has the self-identity of a "university professor"—one of the humanities—rather than a practitioner–teacher.[102] This identity has slowly developed over time since the beginning of law schools as components of universities in the late 1800s[103] and culminated with the influx of impractical scholars during recent decades;[104] law professors increasingly have felt the need to prove themselves as legitimate academicians in the university lest they be perceived as mere teachers at a trade school.[105]

Several empirical studies of the prior practical experience of tenure-track law professors hired during the past three decades or so consistently have shown that the typical professor practiced law for only a relatively short time before

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counsel, deputy assistant to the President (in the Executive Office of the President), and Solicitor General of the United States. *See* Sheryl Gay Stolberg et al., *A Pragmatic New Yorker on a Careful Path to Washington*, N.Y. TIMES, May 10, 2010, at A1. In total, she spent approximately a decade in practice and approximately fifteen years as a legal academic. *See id.*

99. Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 632 (2004) ("One of the most unfortunate collateral effects of the tendency for law professors to identify first and foremost as scholars and academicians and to distance themselves from practicing lawyers is the apparent disdain many professors feel and perhaps even express towards practice and practitioners."); Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2011 (1993) (identifying "the contingencies of political elections and the 'capture' of the judiciary, in the last decade especially, by a political party with which most legal academics do not identify" as one of the factors contributing to "the growing disengagement between scholars and judges"); *see also supra* note 45 and accompanying text.

100. *See* Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?*, 45 S. TEX. L. REV. 753, 767 (2004) ("Many law professors do not like the practice of law, and consistently denigrate it to their students."); Edwards, *supra* note 14, at 37 ("The situation is even worse now than [before] because now we see 'law professors' hired from graduate schools, wholly lacking in legal experience or training, who use the law school as a bully pulpit from which to pour scorn upon the legal profession.").

101. *See generally* Christensen & Oseid, *supra* note 87, at 193 ("None of the Top 15 [highest-ranked law review] respondents considered an author's practice experience in making publication decisions, and only a slim majority of the other top-ranked segments answered 'yes' to this question. In contrast, this factor had more influence on editors among the 3d Tier and 4th Tier school segments.").

102. *See* Feldman, *supra* note 66, at 473 ("[L]aw professors' sense of themselves as primarily lawyers is crumbling. Our claimed connection to legal and judicial practices, our imagined participation in the legal system, increasingly appears spurious. . . . But if we are not lawyers, what are we? The most likely answer . . . appears to be that we are university professors."). *See generally* Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 2004 (1993) ("[T]he *teaching* of the practice of law was at least as marginalized and denigrated as the practice of law itself.").

103. *See* Feldman, *supra* note 66, at 478–79.

104. *See id.* at 492–93.

105. *See id.*

becoming a full-time member of the legal academy.[106] Studies using data of the Association of American Law Schools (AALS) from the mid-1970s and late 1980s showed that, although the vast majority of law professors had some practical experience before being hired as full-time faculty members, the average number of years of such experience was only about 5.[107] The study of professors hired in the late 1980s noted that "[p]rofessors at the nation's highest-ranked schools are even less likely to have practice experience than their peers at lower-ranked schools."[108] A more recent study of AALS data concerning new full-time, tenure-track law professors (which excluded the vast majority of clinicians and LRW professors) hired between 1996 through 2000 showed the same trend:

> For those with [prior] legal practice experience [86.6% of all new hires], the average number of years' experience was 3.7.... There is a negative relationship between the number of years in practice and the [ranking] of the hiring law school [with the new hires at "top twenty-five" law schools having only 1.4 years of prior practical experience].[109]

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106. *See* Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 218–19 (1991); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 511 (1980).

107. *See* Borthwick & Schau, *supra* note 106, at 217 & n.71 (noting that AALS data from the late 1980s showed that 80% of full-time professors, excluding clinical "instructors" and all legal research and writing instructors, but including a small number of clinical "professors," had prior experience in law practice that averaged 5.4 years of practical experience); Fossum, *supra* note 106, at 511 (discussing AALS data from the 1975–76 academic year that showed that 67.2% of full-time tenure-track faculty had prior practical experience and that the median number of years of such experience was five years).

108. Borthwick & Schau, *supra* note 106, at 219. This study reported data on the "top seven" schools, which showed an average of 4.3 years of prior practical experience for the 63.0% of professors with some amount of prior experience; the faculty at the remaining 168 law schools showed somewhat greater amounts of prior practical experience—approximately 80% of those professors had practiced law before becoming legal educators and their average number of years of experience was 5.5 years. *See id.* at 219 tbl.20.

109. Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600, 601 & tbl.3, 602–12 (2003). The rankings referred to in the study are from *U.S. News & World Report*'s annual rankings of law schools. *See id.* at 598 n.16. A smaller scale study using a random selection of AALS data from the 2003–04 academic year found that nonexperiential full-time faculty members had similarly meager amounts of prior practical experience before becoming law professors. *See* Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 329, 336–39 (2005) (categorizing average prior work experience in terms of law firm experience, public interest law experience, and governmental law experience). A 2009 "informal empirical study" of the new faculty members of representative highly-ranked schools by Dean Thomas M. Mengler revealed similar results. *See* Thomas M. Mengler, *Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L.J. 337, 340 n.18 (2009) ("I undertook an informal empirical study . . . by looking at the recent appointments at five of the top law schools in the country: California-Berkeley (Boalt), Columbia, Michigan, Northwestern, and Virginia. I looked at the faculty profile website

My own somewhat limited study[110] of the average amount of prior practical experience of entry-level, tenure-track, non-experiential[111] law professors (i.e., a typical "assistant professor of law") initially hired between 2000 and 2009[112] revealed a similar profile. I focused on such professors because, as explained elsewhere, non-experiential, tenure-track professors are the dominant class of professors on the typical American law faculty who teach the bulk of classes, particularly in the first year of law school. I used a sample of data from forty law schools in all four "tiers" of the *USNWR* rankings in 2010.[113] The data showed that the typical non-experiential, tenure-track professor had only 3 years of practical legal experience before being hired as a full-time faculty member.[114]

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for each of these five law schools to evaluate the legal practice experience of Assistant and Associate Professors who taught anything other than clinical courses. The number of faculty at those ranks who either (1) lacked any legal professional experience or (2) lacked any attorney experience other than a year or two clerking for a judge are as follows: Boalt: 6 of 12; Columbia: 4 of 6; Michigan: 2 of 7; Northwestern: 5 of 9; and Virginia: 4 of 8.").

110. My study had limitations because my sources were resumes and biographical information on law school websites or in the *AALS Directory of Law Teachers 2009–2010*, *see* ASS'N OF AM. LAW SCHS., AALS DIRECTORY OF LAW TEACHERS 2009–2010 (2009–2010). Because the biographical information was incomplete for some professors (often significantly), certain judgment calls had to be made regarding which professors qualified as "non-experiential" and "tenure track" when information was not entirely clear. In cases where relevant information was missing entirely (e.g., the professor's start-date at a law school), I excluded the professor from the study. Although I requested access to the AALS computer database—which would have permitted a more complete and rigorous study—I was denied such access. *See* Email from Pati Abdullina, Research Assoc., Am. Ass'n of Law Sch., to author (Apr. 28, 2010) (on file with author).

111. I excluded the following types of faculty members: (1) those with "skills," "clinical," "legal writing," or other practical appellation in their titles; (2) those who primarily taught experiential courses (e.g., clinics, legal research, and legal writing), regardless of their title; and (3) "lecturers in law," "practitioners in residence," "instructors," and other members of law faculties whose titles traditionally are not associated with being on the tenure-track. I also excluded visiting professors and lateral hires; thus, I only considered professors who had never previously been hired as a full-time professor, other than for a short-term, non-tenure track position such as a fellow or untenured "visiting assistant professor" (VAP) . Finally, I excluded law librarians and deans of law schools who had no prior full-time academic experience. The former do not ordinarily teach law students, and the latter, even if they teach classes, cannot fairly be described as "entry-level", tenure-track law professors.

112. Because of limitations in the available data, my study did not include entry-level professors first hired in 2000 or afterwards who subsequently left the initial law school that hired them before the beginning of the 2009–10 academic year. Thus, I studied only current members of the schools' faculties who were initially hired by those schools. I have no reason to believe that this excluded group would have different characteristics in terms of practical experience than the included group.

113. I chose the first ten schools in tier one and also ten schools beginning at number fifty in the rankings (what is commonly called "tier two," although *USNWR* does not so label schools ranked from fifty to ninety-nine). *See Schools of Law: The Top 100 Schools*, 2011 U.S. NEWS & WORLD REPORT (SPECIAL ISSUE) 28–32 (2010). Because *USNWR* does not numerically rank schools in tiers three and four (other than by simply including them in the lower two tiers), *see id.*, I randomly selected ten schools from each of those tiers.

114. Three years is the median. The mean (average) was 4.4 years. The median more accurately reflects the typical professor because a small number of professors with extensive prior experience (e.g., 15–30 years) results in the mean being significantly higher than the median.

The amount of prior practical experience differed significantly by tier. For instance, for the schools in tier one, the median was only 1 year and the mean was 1.79 years; 45.6% of the entry-level, tenure-track professors hired by these schools since 2000 had *no* prior practical experience. Conversely, for the schools in tier four, the median years of prior practical experience was 6 years and the mean was 7 years; nearly 86% of those professors had some amount of prior practical experience.

The data concerning the meager amount of practical experience of typical tenure-track law professors hired during the past thirty years is consistent with Professor Alan Watson's assertion that most of them entered the academy because they had "a strong distaste for the practice of law."[115] For those professors with only a few years of practical experience—typically gained while working as an associate at a law firm[116]—such limited experience usually would not have permitted much significant professional development:

> [A]ssuming their brief careers were at large law firms, these individuals faced very few practical issues themselves. During their first three or four years at large firms, many lawyers do not see the inside of a courtroom, seldom have client contact, and often perform document review and other similar tasks. A professor with limited experience at a large law firm will not have tried many, if any, cases, argued many, if any, appeals, or negotiated many, if any, deals. Most of the time, she will have conducted research, drafted memos or briefs, reviewed documents, or revised agreements.[117]

Particularly notable in the shift from practical to theoretical is the large percentage of tenure-track faculty in recent years who have Ph.D.'s in addition to

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My definition of "practical experience" is the following: with one exception, any type of full-time professional experience (other than that associated with law teaching) requiring a U.S. law license. The one exception is the time that a recent law graduate spent working as an associate in a law firm or as an entry-level attorney for another type of legal employer while awaiting the results of the bar examination. Copies of all of the biographical information used in the study as well as the calculations of the average years of practical experience are on file with the author.

It should be noted that the vast majority of professors listed their prior practical experience in years and did not include the months of the year in which their employment began and ended (e.g., "Associate, ABC Law Firm, 2000–02" rather than "August 2000–June 2002"). In such cases, I assumed that they worked twelve months for each year listed except for the terminal year (e.g., "2000–02" equaled twenty-four total months). This assumption is based on the fact that most law school graduates begin working for a law firm or other legal employer in July or August of the year, and most new faculty members likewise begin their teaching jobs in July or August.

115. WATSON, *supra* note 47, at 29.

116. Professor Redding's study showed that, of those newly hired professors who had prior practical experience, approximately half worked only for law firms. *See* Redding, *supra* note 109, at 601 tbl.3.

117. Hricik & Salzmann, *supra* note 67, at 769.

(or, occasionally, instead of) a law degree.[118] In the late 1980s, 5% of full-time law professors had Ph.D.'s in areas other than law.[119] By the end of the twentieth century, 10.4% of new tenure-track hires had Ph.D.'s (13.2% at schools ranked in the top twenty-five).[120] Just a decade later, by 2010, that percentage had grown significantly, particularly at the highly ranked schools. My own study of a representative sample of entry-level, tenure-track professors hired between 2000 and 2009 (excluding clinicians, LRW professors, and other "practical" faculty) revealed that 18.9% possessed Ph.D.'s in addition to or in lieu of a law degree. Professors with Ph.D.'s constituted 35.5% of such tenure-track faculty members hired since 2000 by the first ten schools in tier one of the *USNWR* rankings.

Regardless of whether they possess a Ph.D., a vastly disproportionate number of new law professors graduated from so-called "elite" law schools,[121] which not coincidentally employ the largest percentage of impractical faculty.[122] "Law professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1Ls, and preferably ones taken at elite 'national' law schools."[123] Some critics contend this homogeneity in law school faculties has resulted in an ethos of perceived intellectual superiority and classism[124] and has

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118. *See* Rubin, *supra* note 93, at 160 ("More than half the entry level faculty members hired by the thirty top-ranked law schools in the last few years have had Ph.D.s in addition to, or occasionally instead of, the J.D. degree."); Wendel, *supra* note 88 ("There are some areas in which it is becoming almost impossible to get a job at a top national law school without a Ph.D. in a relevant discipline.").

119. Borthwick & Schau, *supra* note 106, at 213.

120. Redding, *supra* note 109, at 600 tbl.1.

121. *See* Redding, *supra* note 109, at 600 tbl.1 (noting that 66.2% of all new hires, including clinicians, graduated from a "top twelve" law school and 86.2% graduated from a "top twenty-five" law school; only 1.9% graduated from a 3rd or 4th tier school"); Wendel, *supra* note 88 ("Getting a [tenure-track] teaching position with a J.D. from a school significantly farther down the [rankings than the top dozen or so schools] would be akin to walking on water, unless you are [first] in your class, have a graduate degree in law or some other discipline, and have a record of good publications."); Lucinda Jesson, *So You Want to Be a Law Professor*, 59 J. LEGAL EDUC. 450, 450, 452 (2010) (noting that, even though she had practiced law twenty-three years, including as a law firm partner and a deputy state attorney general, before being hired as a full-time law professor, hiring committees at law schools "cared where I earned my J.D. . . . and whether I was on *the* (not just *a*) law review").

122. *See* Edwards, *supra* note 14, at 36, 48–51.

123. Schuwerk, *supra* note 100, at 762.

124. *See A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 73 (2004) ("I also believe that there are still too many legal scholars who tend to discuss material from non-law disciplines without situating it in a meaningful legal context. I think that some of this is attributable to a misguided sense of intellectual superiority."); Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocractic Oligarchy*, 19 WIDENER L.J. 137, 149 (2009) ("The AALS hiring system reinforces the existence of a plutocratic oligarchy in legal education: a group of law professors who are the product of wealth-based education control the hiring of more law professors who are also the product of wealth-based education. The facult[ies] of American law schools remain[] dominated by graduates of a few law schools. . . . An American

made full-time professors, at least those with tenure, jealous of their privileged positions.[125] Other critics contend that many law professors are so absorbed in their scholarly pursuits that they are largely unconcerned with students' needs—academic[126] or otherwise.[127]

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law-teaching oligarchy exists with implications for legal education hiring practices. The graduates of a small number of American law schools must be hiring the graduates of the same small number of American law schools." (footnote omitted)); Rosser, *supra* note 63, at 222 ("Privilege is infused in every conversation [among the professoriate] and is an understood shared reference, yet is never acknowledged."); *id.* at 223–24 ("Law professors engage in self-study to determine who others acknowledge to be smart or to see which journals publish more prominent authors. Blogs on professor gossip such as lateral moves are checked regularly so that everyone can keep track of who seems the smartest." (footnotes omitted)); Wegner, *supra* note 20, at 971–72 ("On another level, a hesitancy to embrace 'practice' in the law school context may reflect discomfort with those of other socio-economic classes or professional profiles, with the term a proxy for divisions of a deeper sort. Modern practice-oriented legal education is often associated with the rise of clinical education in the 1960s and 1970s, during a time when foundations and the federal government funded efforts to reduce poverty and the legal establishment allowed legal aid societies and law schools to take on clients without the means to pay. Those who entered the academy as clinical faculty in that era brought with them a commitment to service and a pragmatic hope to educate young lawyers while providing needed services to the poor. Differences in academic credentials, professional experiences, values and priorities thus marked the beginning of practice-oriented instruction in recent memory, and preconceptions dating from that era may influence the ability of many to look beyond resulting chasms to this day.").

125. *See* Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 363 (2006) ("There's no question that life for a tenured professor at a research university has to be one of the all-time best deals in the world: as long as the university can afford to keep running . . . the freedom that the professor has is unparalleled. No boss can dictate to the professor what her field of research should be; most of the time, the professor teaches in areas that complement her research interests; and the service components of the job are often interesting . . . . Even another one of the all-time great jobs—that of an Article III federal judge—pales in comparison. The lifetime tenure is the same, but the cases before the judge somewhat dictate the issues that the judge gets to consider . . . ."); Mengler, *supra* note 109, at 344 ("Full-time [law school] faculty members usually teach three or four (and sometimes fewer) courses per year . . . . This teaching load contrasts with the very different expectations at 'teaching' universities or liberal arts colleges, where the typical full-time professor's teaching load is usually six to eight courses per year."); Postlewaite, *supra* note 87, at 159 ("The receipt of tenure bestows on the recipient benefits and riches that few in society can ever realize. Although the dean can make life difficult for a faculty member who does not adhere to the institutional agenda, the available sanctions are nothing compared to the ability to terminate employment."); Read & Mirow, *supra* note 87, at 62 ("Law school teachers have relatively light teaching loads, at least compared to what goes on in other disciplines.").

126. *See, e.g.*, Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 535 (2007) ("With the exception of students aspiring to become legal academics, many professors do not communicate with students about the relationship of their academic work to their professional aspirations and goals. Nor, as we pointed out above, are faculty generally rewarded for playing this integrative, mentoring role in students' lives. Instead, law schools assign the role of professional mentoring and advising primarily to administrators, particularly deans of student services, placement, and public interest."); *id.* at 538 ("[T]he reward structure for tenure-track faculty discourages them from taking the time to provide the ongoing, prompt, qualitative and individualized feedback that enables students to learn from their errors and to advance intrinsic learning goals. Professors receive limited

In addition to the threshold requirement of possessing a law degree from an "elite" law school, publication of impractical law review scholarship *after* graduating has become a prerequisite for getting hired in the first place.[128] Legal scholarship has become the "coin of the realm" in the hiring of entry-level faculty.[129] To facilitate the hiring of new professors who already have post-graduate scholarly publications, several law schools have created post-graduate fellowship programs, commonly called "visiting assistant professorship" (VAP) programs, in which aspiring professors are hired for a year and given the chance to write law review articles while teaching a class or two.[130] According to Professor Brad Wendel, a member of Cornell Law School's hiring committee,[131]

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rewards for excellent teaching, particularly for working closely with students outside of class, efforts that will not even show up in course evaluations.").

127. *See, e.g.*, Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 112 (2002) ("There is a wealth of what should be alarming information about the collective distress and unhappiness of our students and the lawyers they become. We appear to be practicing a sort of organizational denial because, given this information, it is remarkable that we are not openly addressing these problems among ourselves at faculty meetings and in committees, and with our students in the context of courses and extracurricular programs."); Schuwerk, *supra* note 100, at 764–66 ("Most law professors are not familiar with the ever-increasing literature documenting the extreme levels of mental illness and substance abuse that develop among law students while in law school . . . . Many of those who are familiar with this body of work either do not believe that it is true or else attribute it to [other] causes . . . ."). *See generally* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 358–59 (2009) (discussing problems of psychological distress among law school students).

128. *See A Conversation with Judge Harry Edwards*, *supra* note 128, at 73–74 ("[A] significant problem that I have noted in recent years is the prevalence of hiring policies heavily favoring candidates who have published major articles prior to beginning the application process. This necessarily favors persons who have earned [Ph.D.'s] and excludes bright young lawyers with significant practice experience. This exacerbates the distressing disconnection between legal education and legal practice. I do not understand why law schools would consciously adopt hiring policies that effectively preclude brilliant practitioners from entering the teaching market. Law schools are professional schools, not graduate schools. We grant [J.D.'s, not [Ph.D.'s]. Upon graduation, our students are qualified to seek licenses not available to persons who do not have a legal education."); Wendel, *supra* note 88 ("[T]eaching candidates must have a least one post-law school publication (i.e., not a student note) published in an academic law review, not a publication intended primarily for practitioners. At one time this was considered icing on the cake. Now, at the better schools, it's becoming a [de facto] requirement for serious consideration. . . . In general, . . . one or two solid law review articles is a requirement to get . . . pulled for interviews."); *id.* ("Now it is not the case that your chances of getting an interview will increase if you have publications. Rather, it is a prerequisite almost everywhere.").

129. Wu, *supra* note 51, at 18.

130. *See Teaching Fellowships for Aspiring Law Professors*, TAXPROF BLOG (Dec. 4, 2007), http://taxprof.typepad.com/taxprof_blog/2007/12/teaching-fellow.html (providing a list of law schools with such programs as of 2007).

131. *See* Curriculum Vitae, Bradley Wendel (July 12, 2010), http://ww3.lawschool.cornell.edu/faculty/faculty_cvs/Wendel.pdf.

> [T]ime spent in a VAP [is becoming] an essential step or credential in the hiring process, at least in top school hiring. Unfortunately that's had the effect of making it incredibly competitive to get into a VAP program, and that means the original purpose of these programs has been undermined. . . . Now it's important to have gotten some writing done before even applying [for a VAP position].[132]

Professor Wendel also describes the importance of a prospective law professor's interest in producing legal scholarship to law school hiring committees:

> If there is one thing that [law] schools are looking for, it is someone with fire in his or her belly to produce scholarship about some intellectually significant issue. This matters because at any school with aspirations to be more than a bar-preparation service for in-state practitioners . . . *the name of the game is scholarship*. Teaching is of secondary importance only. In fact, I sometimes tell students not to think of their goal as getting a "teaching" job at all. It's really a *writing* job. You will be hired, evaluated, given tenure, promoted, and recognized in the profession based almost entirely on the quality of your scholarship.[133]

It is not simply publishing, but publishing in an "elite" law review that matters. Much like the manner in which student editors view an author's law school affiliation as a proxy for quality,[134] hiring and promotion committees often view the rank of a law review in which an article was published as a proxy for the article's quality.[135]

Significant practical experience generally is *detrimental* to a non-clinical, tenure-track candidate's chances of getting hired and eventually being promoted and receiving tenure.[136] The same is true of a record of publishing "practical" scholarship.[137]

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132. Wendel, *supra* note 88.

133. *Id.*

134. *See* Nance & Steinberg, *supra* note 87, at 584.

135. *See* Brophy, *supra* note 83, at 230 ("The legal academy's obsession with law reviews continues. It may even be growing. . . . Much of the obsession rests on an assumption that there are better reviews and that it is desirable to publish in a better review than a worse one. For purposes of career promotion, there is likely truth to this. For purposes of job placement and pay increases, it is not unreasonable to assume that articles placed in more prominent journals are more useful, as a general matter, than articles placed in less prominent journals. In fact, some schools are reputed to pay bonuses for articles placed in highly regarded journals. This is because evaluators use journal placement as a proxy for article quality.").

136. *See* Dina Awerbuch, *Professor Levinson Demystifies the Path to Legal Academia*, HARV. L. SCHOOL REC. (Oct. 19, 2007), *available at* http://www.hlrecord.org/2.4463/prof-levinson-demystifies-the-path-to-legal-academia-1.577999 (stating that "[e]ven practical legal experience is not a good predictor of scholarly ability" and that, according to then-Harvard Law School Professor Daryl Levinson, it "is pretty nearly disqualifying" in terms of a candidate's chances of getting hired

Several empirical studies have shown that, once tenure is awarded to a professor, her rate of law review publication (and scholarly publication generally) on average declines.[138] However, many tenured professors continue to publish impractical law review articles in highly ranked reviews because such publications yield benefits even after tenure.[139]

(internal quotation marks omitted)); Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 BYU EDUC. & L.J. 171, 204 n.108 ("Based on my own anecdotal experience, people on the law school tenure-track job market are often advised to practice law for no more than five years or so."); Schuwerk, *supra* note 100, at 762 ("Neither practice skills nor 'real world' experience matter. Indeed, apart from judicial clerking, they may even be seen as detrimental."); Wendel, *supra* note 88 ("One of the oddities of the legal teaching market is that candidates for classroom positions are considered tainted if they have too much of a background in practice. Because of the obsession, . . . with being perceived as legitimate by their colleagues in the arts and sciences, law faculties are not looking for people with extensive practice experience as classroom teachers."); Wu, *supra* note 51, at 22 ("With rare exceptions, former judges, elected officials, and partners at the prestige law firms likely will start as assistant professors at almost the bottom of the pay scale.").

137. *See* Wendel, *supra* note 88 ("[I]n the eyes of [law school faculty] appointments committees, there's a significant difference between practical and theoretical scholarship. In fact 'practical' has an almost pejorative connotation in law school hiring."); Wu, *supra* note 51, at 18 ("While materials for practitioners . . . are better than nothing at all [in the selection of a potential faculty member based on her record of scholarship], they are barely better than nothing at all. They may be taken as a sign of misunderstanding the nature of academic work and a preference for alternative venues that are popular rather than academic.").

138. *See* Jeffrey L. Harrison, *Post-Tenure Scholarship and Its Implications*, 17 U. FLA. J.L. & PUB. POL'Y 139, 141 (2006) ("I found that nearly seventy percent of [professors] surveyed wrote less per year in their post-tenure period than in their pre-tenure period. In other words, in an effort to determine what makes for a productive post-tenure career, I discovered that the majority of those surveyed were less productive scholars after becoming tenured than before."); *id.* at 143 (noting that the random sample selected for this survey consisted of one hundred "tenure-track [law] professors with enough time in teaching to establish a 'track record.'"); Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 (1985) ("Over 44 percent of the entire population of [1,950] senior law faculty members had zero publications."); *cf.* Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL'Y REV. 387, 387 (1998) ("Recently, . . . academics have argued that shielding the performance of tenured faculty from serious review potentially may be a disservice to the academic institution. . . . Senior faculty members who are extremely underproductive or detached from their work (in teaching, scholarship, and/or service to the law school and broader university communities) arguably represent the worst form of deficient performance."). *See generally* James R.P. Ogloff et al., *More than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 146–51 (2000) (discussing several studies analyzing data on publications by law school faculty).

139. *See* Rubin, *supra* note 93, at 141–42 ("[V]irtually all the material rewards that tenured faculty members receive, other than basic job security, depend on their research production. The quality of their research, as measured largely by the attention that it attracts from other academics, determines their salary raises, their summer grants, their supplementary expense funding, and their access to funds for organizing conferences or speaker series that are of interest to them. It also determines whether they receive competing offers from other law schools, which not only provide the psychic reward of recognition, but also generally include a salary increase, and even if not accepted, can be used to extract further salary increases from their home institution. In some cases, these competing offers can also alter the balance between teaching and research in a direct way,

Despite the extensive post-secondary education possessed by many law professors hired during the last decade,[140] the quality of teaching by such faculty members (as a class) is deficient, particularly in preparing students to actually practice law (which should be the primary mission of a professional school for future attorneys). This is disturbing, considering the importance of educating students who, after graduation, will be responsible for their clients' lives, liberties, and property. Although undoubtedly there are some excellent legal educators who have little or no practical experience, significant deficits in teaching by most full-time professors should not be surprising for two related reasons. First, as noted, most law professors today are impractical scholars with little, if any, interest in (and, in some cases, disdain for) the actual practice of law.[141] Thus, they lack the knowledge and interest in the practice of law required to teach effectively students to become competent practitioners.[142] Even for those tenure-track professors who have had several years or more of prior practical experience before joining the legal academy, their ability to teach students how to practice law may be impaired over time if they focus on impractical scholarship at the expense of practical works. Second, as also discussed previously, tenure-track faculty today are hired and promoted almost exclusively based on their record of publishing impractical scholarship.[143] Human nature dictates that, when an employee is rewarded almost exclusively for performing a certain task, the employee will focus on that task to the detriment of other tasks that do not accrue similar benefits.[144]

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because a highly valued faculty member can use competing offers to bargain for a reduced teaching load." (footnote omitted)).

140. *See* Rubin, *supra* note 93, at 160 ("More than half the entry level faculty members hired by the thirty top-ranked law schools in the last few years have had Ph.D.s in addition to, or occasionally instead of, the J.D. degree."); Wendel, *supra* note 88 ("There are some areas in which it is becoming almost impossible to get a job at a top national law school without a Ph.D. in a relevant discipline.").

141. *See supra* Part II.B.

142. *See infra* Part III.

143. *See* Read & Mirow, *supra* note 87, at 59 n.13 ("Sadly, at most institutions—even those espousing 'excellence in teaching' as a goal—scholarship is now king. Teaching takes a distant second place. No one in the past twenty years has heard of a promotion or a lateral move based solely on 'excellence in teaching.'"). Many law professors appear to share Professor Owen Fiss's opinion: "Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover." Letter from Owen M. Fiss, Professor of Law, Yale Law Sch., to Paul D. Carrington, Dean and Professor of Law, Duke Univ. Sch. of Law *in* Peter W. Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 26 (1985).

144. *See* Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 65–66 (2003) ("Law schools generally fail to meet expectations about teaching. They neither offer incentives for good teaching nor even define it. The only consistent feedback on their teaching that law teachers receive comes from end-of-term student evaluations. . . . Instead, [law schools] encourage faculty to focus primarily on scholarship—researching, writing, and publishing—and they create, through the tenure process, a very real disincentive for faculty to expend more than minimal energy on teaching. In decisions on hiring, promotion, tenure, and salary, scholarship is the weightiest factor; significant publications more

Although the professoriate gives lip service to "excellence" in teaching,[145] law schools actually devote little effort to developing effective pedagogies.[146] Furthermore, in non-clinical courses, which constitute the vast majority of law schools' curricula,[147] most professors still primarily rely on the "case-dialogue" method (i.e., the Socratic method that Langdell and Ames instituted in the late 1800s or some ersatz version of it).[148] Such a pedagogical method, which typically involves a large class size and a single examination at the end of the semester, is inexpensive to implement and requires relatively little effort of law professors compared to the pedagogy in other areas of professional education,[149]

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than make up for barely passable teaching." (footnote omitted)); Sturm & Guinier, *supra* note 126, at 538 ("[P]rofessors measure their worth in publications, and it is widely recognized that this incentive structure places serious constraints on any innovation that will require faculty to devote time and energy to teaching at the expense of scholarship.").

145. *See* ASS'N OF AM. LAW SCH., 2008 HANDBOOK 92–93 (2008).

146. *See* James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 51–52, 61 (2006) ("Researchers working in the fields of education and social psychology, among others, have long recognized the vital influence of . . . socio-emotional effects in the classroom context. The emerging consensus holds that these considerations may play the greatest role in determining whether, and how much, our students learn. . . . More specifically, things such as teacher expectations, support, encouragement, and warmth toward students can have a profound effect on their success in school. Law school teachers, however, have been slow to appreciate the power and importance of these considerations. . . . In part, this is due to the fact that scholarship, rather than teaching, has paramount importance at most schools." (footnotes omitted) (citing Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 373 (1990) ("[S]cholarship does not simply share a co-equal position with classroom teaching . . . but has come to dominate the equation."))); Wegner, *supra* note 20, at 874 ("The professoriate . . . has very little training in educational effectiveness or assessment principles."); *id.* at 885 ("Most legal educators are ignorant about the profound developments in the 'learning sciences' (psychology, cognitive and neurological studies, physiology, and more) that have occurred since they attended law school.").

147. *Compare* ASS'N OF AM. LAW SCHS., AALS DIRECTORY OF LAW TEACHERS 2007–2008, at 1218–27 (2007–2008) (providing a list of nearly 1,400 full-time faculty teaching clinical courses), *with* Abdullina, *supra* note 2 (finding over 10,000 law faculty members).

148. *See* Henderson, *supra* note 144, at 64 ("The Langdellian case method remains the predominant pedagogy at American law schools . . . ."). *But see* Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 2 (2005) ("Popular myth has it that [the] Socratic method is pervasive in American law schools. But nothing could be further from the truth. The fact is that teaching and learning by genuine dialog has all but disappeared from the second and third years of law school, and is fast disappearing from the first. . . . Professors are substituting other pedagogical forms: One—the lecture—transmits facts and principles, but not the essentials of legal education, which require teacher-student and student-student interaction. A second—the pro-forma dialog—is a disguised lecture, structured around a series of questions which the teacher asks and then answers himself. A third—the avuncular dialog—is one conducted by a kindly professor who, in his desire to be loved, avoids making any significant demands upon his students." (footnote omitted)).

149. *See* John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 274 (2010) ("The current doctrinal courses are relatively inexpensive, as most such courses can be taught in a large lecture format. One professor can teach one hundred students or more at one time, using a combination of lecture and Socratic discussion. By contrast, skills and clinical courses are much more labor-intensive and require much smaller student-faculty ratios to provide closer

particularly when a typical law professor teaches only three or four courses per year.[150]

This low-cost teaching method has enabled law schools to allocate significant resources to producing impractical scholarship by faculty members.[151] Although it is common for law professors to assert that their scholarship enhances their teaching prowess,[152] a 2008 study of the teaching effectiveness of full-time law professors (as evidenced in student evaluations) showed that there is no significant correlation between professors' records of publishing and their teaching effectiveness.[153] Although further studies are warranted, and student evaluations should not be the sole measure of teaching effectiveness,[154] the results of this study are consistent with anecdotal accounts of experienced legal educators.[155]

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interaction and observation." (footnote omitted)); Michael Martinez, Note, *Legal Education Reform: Adopting a Medical School Model*, 38 J.L. & EDUC. 705, 708–09 (2009) (contrasting law school and medical school teaching models). *See generally* Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609, 614 (2007) (noting that law schools pay "their faculty members salaries that are positively bountiful by academic standards").

150. *See* Mengler, *supra* note 109, at 344 (noting that a typical law professor teaches only three or four courses per year).

151. *See* Rubin, *supra* note 149, at 614.

152. *See, e.g.*, Dennis R. Honabach, *Responding to "Educating Lawyers": An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. TOL. L. REV. 311, 319 (2008) ("So strong has the culture of scholarship become in legal education that one can rarely attend a discussion on scholarship these days without hearing someone espouse the belief that scholarship is essential for good teaching.").

153. *See* Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL LEGAL STUD. 619, 619 (2008) ("[T]here is either no correlation or a slight positive correlation between teaching effectiveness and any of the . . . measures of research productivity."). The author's study included nineteen public law schools from all four tiers in the *U.S. News & World Report*. *See id.* at 623 (listing schools); U.S. NEWS & WORLD REPORT, *supra* note 88, at 28–32 (grouping law schools into four tiers with one school from the survey in each tier). *See generally* Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 767 (1998) ("Consistent with many other studies in this field, the article finds no significant relationship between excellence in teaching and distinction in scholarship. Instead, teaching excellence appears difficult to predict, at least with currently available predictors, while scholarly distinction relates most strongly to earlier achievement in scholarship."); Fred R. Shapiro, *They Published, Not Perished, But Were They Good Teachers?*, 73 CHI.-KENT L. REV. 835, 839–40 (1998) ("It is hard to escape the judgment that while, generally, praise of teaching is a nearly universal feature of tributes to law faculty, for the most highly cited scholars, it is often completely absent from their tributes, and this despite the fact that such scholars typically are accorded much longer tributes than is the norm. Good teaching, indeed teaching period, was not part of the story of many of their lives. . . . [I]n a reward system based, in law schools as in universities as a whole, on published scholarship credentials, emphasis on teaching inevitably perishes, and those who succeed admirably in the scholarship game may nonetheless have some kind of problem with the task of teaching law students." (footnote omitted)).

154. *See generally* Caron & Gely, *supra* note 88, at 1528 ("We note, . . . that the [empirical] literature [about legal education] is surprisingly bereft of work assessing [law] teaching."); *id.* at n.262 ("A serious inquiry into the teaching component of faculty performance could raise interesting questions about the relationship of teaching and scholarship as well as the value of

In sum, there is an unmistakable pattern in the twenty-first century legal academy, with a prevalence that grows as a school's place in the rankings increases: (1) law schools hire impractical scholars with little, if any, record of practicing law and charge them with the mission to write theoretical law review articles and publish them in as highly ranked law reviews as possible; (2) student editors feel pressured to select theoretical articles, preferably written by professors at highly ranked schools, rather than practical articles so as to increase the law review's and, concomitantly, the school's reputation among other law schools; and (3) law faculties grant promotion, including the "brass ring" of tenure, to professors who have published several such articles in highly ranked law reviews, and pay little attention to whether such professors have proven themselves as effective teachers or whether they have produced any scholarship (or otherwise engaged in any activity) that has meaningfully benefited the legal profession.

III. CURRENT LAW FACULITIES' INABILITY TO ACHIEVE MEANINGFUL CURRICULAR AND PEDAGOGICAL REFORMS

"Remember, it's not really a teaching job[,] . . . it's a writing job."[156]

Modern law faculties' preoccupation with publishing impractical law review articles—and law schools' pattern of hiring impractical scholars better suited to write such articles rather than to teach students the full array of skills, knowledge, and values that they will need to become competent, ethical practitioners—will frustrate the implementation of the recent curricular and

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individual faculty members to their institutions."); Peter A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281, 305 (1981) ("[W]e can safely say that student ratings . . . are a valid index of instructional effectiveness. Students do a pretty good job of distinguishing among teachers on the basis of how much they have learned. Thus, the present study lends support to the use of ratings as one component in the evaluation of teaching effectiveness.").

155. *See, e.g.*, Rubin, *supra* note 93, at 154–55 ("For every professor who conveys a sense of excitement to the students because she is engaged in active research, there is another who is so intrigued or distracted by his research that he is entirely uninterested in teaching[.] . . . Conversely, examples abound of master or even legendary teachers who never carried out research, but devoted their considerable talents and energies to their classroom performance. Thus, while there is almost certainly a connection between knowledge and teaching ability, the connection between research and teaching ability is attenuated at best, and the great likelihood is that these two skills vary almost independently of one another."). The nearly universal practice of recent law school graduates taking commercial bar exam preparation courses also suggests that law schools are not providing students with even the basic substantive knowledge necessary to pass the bar exam. *See* Lauren Solberg, *Reforming the Legal Ethics Curriculum: A Comment on Edward Rubin's "What's Wrong with Langdell's Method and What to Do About It,"* 62 VAND. L. REV. EN BANC 12, 22 (2009), *available at* http://www.vanderbiltlawreview.org/articles/2009/04/Solberg-62-Vand-L-Rev-En-Banc-12.pdf ("Bar preparation courses exist, and are successful, because students do not expect law school to prepare them fully for the bar exam.").

156. Wendel, *supra* note 88.

pedagogical reforms discussed in Part I above. Law school administrations and faculties apparently believe that these reforms can be accomplished through the use of "practical" faculty, namely, clinicians, legal research and writing (LRW) professors, and adjunct faculty members. Much like traditional Indian society, the Brahmins (i.e., the tenure-track faculty) wish to use the lower castes of the legal academy to do the "dirty work."[157] Barring some significant changes in the low status and number of such relatively small segments of the faculty, however, it is highly unlikely they will be able to carry the water for the impractical scholars, who constitute the bulk of most law schools' faculties today.[158] Even those relatively few law schools that have made significant strides in reforming their curricula to include more practical courses[159] will not be able to accomplish the reforms that the *Carnegie Report* and *Best Practices* call for if they continue to hire primarily impractical scholars.

A. Separate and Unequal: Clinicians, LRW Faculty, and Adjuncts

Dean Chemerinsky has rightly proclaimed, "There is no better way to prepare students to be lawyers than for them to participate in clinical education."[160] Clinical education involves more than mere skills training; it "give[s] students systematic training in effective techniques for learning law from the experience of practicing law,"[161] which is vastly superior to learning from reading appellate cases and then listening to a professor lecture or employ the case-dialogue method in a large classroom. A 2009 survey of recent law school graduates confirms that "those law school experiences that involve the use of and training in skills that practicing lawyers use in their work are the experiences that new lawyers rate as most helpful for making the transition to practice."[162]

Since the 1970s, law schools grudgingly have realized that clinics are necessary to afford students with the experiential education that traditional tenure-track faculty members have failed to provide.[163] When "main" faculty

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157. *See* Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 12, 13–17 (2002) (describing the "seven castes in most American law schools" as tenured and tenure-track faculty, deans, clinical faculty, legal writing faculty, law librarians, adjunct faculty, and staff).

158. *See supra* Part II.B.

159. *See supra* notes 43–44 and accompanying text.

160. Chemerinsky, *supra* note 29, at 35.

161. Amsterdam, *supra* note 27, at 613.

162. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 87 (2009); *see also id.* at 85 tbl.1 (showing that 62% of new attorneys surveyed rated clinical courses as being "helpful to extremely helpful" as part of their preparation for becoming a practitioner, while only 48% rated upper level doctrinal classes and only 37% rated first-year courses in that manner).

163. *See* Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97, 98 (2009); Reingold, *supra* note 102, at 2003–04 ("The coincidence of the timing of these two events—(1) the shift

members lack the experience and knowledge to teach students about law practice, clinical faculty members are assigned that task. Ironically, the creation—and delegation—of "practical" teaching to clinicians has provided the impractical professors with "one more excuse to do what they wanted to do all along"—theoretical scholarship.[164]

Both the relatively small number of clinical professors—nearly 1,400 full-time clinicians[165] out of over 10,000 full-time law professors[166]—and their second-class status in most law schools will prevent them from shouldering the burden that the main faculty seeks to delegate to them. Only 40% of full-time clinical law faculty members are either tenured or on a tenure track (either a regular tenure track or a special "clinical" species of the tenure track).[167] The remainder either are hired under presumptively renewable contracts, non-presumptively renewable short-term contracts, or are post-graduate fellows.[168] In a 2007–2008 survey of clinical faculty members, only 30.7% reported having full voting rights in matters of faculty governance, while 33.7% reported having limited voting rights (but not on matters of hiring, promotion, and grants of tenure); the remainder reported having no voting rights.[169]

Such a second-class status is permitted under the ABA's accreditation rules, which do not require tenure or equal voting rights for clinical faculty in matters of faculty governance and, instead, only require something "reasonably similar" to tenure as job security (which, according to the ABA, includes presumptively renewable contracts).[170] Even this second-class status has been considered too generous by some members of the traditional professoriate, including the American Law Deans Association.[171]

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toward theory that has all but eliminated the hiring of new professors with substantial backgrounds or interests in practice (while the elders with those backgrounds or interests vanish by attrition and nonreplacement); and (2) the ascension of clinics, and the consequent admission to the faculty of small numbers of practicing lawyers—seems too great to ignore.").

164. Reingold, *supra* note 102, at 2004.

165. *See* Kuehn & Joy, *supra* note 163, at 98 (citing ASS'N OF AM. LAW SCH., *supra* note 146, at 1218–27 (listing approximately 1,362 clinical teachers)).

166. *See supra* note 2 and accompanying text.

167. Task Force on the Status of Clinicians and the Legal Acad., Section on Clinical Legal Educ., Am. Ass'n of Law Sch., *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy* 16–17 (2010) [hereinafter AALS, *Report on Clinical Faculty*], *available at* http://www.abanet.org/legaled/committees/comstandards.html (follow "AALS Task Force Report on Status of Clinical Faculty in the Legal Academy, June 2010" hyperlink).

168. *See id.* at 19–20.

169. David A. Santacroce & Robert R. Kuehn, Ctr. for the Study of Applied Legal Educ., *Report on the 2007–2008 Survey* 31 (2008), *available at* www.csale.org/files/csale.07-08.survey.Report.pdf.

170. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 405(c) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%204.pdf.

171. *See Calling in the Big Guns*, INSIDE HIGHER ED (Mar. 2, 2009), http://www.insidehighered.com/news/2009/03/02/lawprof (discussing the opposition of the American Law Deans Association to the ABA's standards for faculty hiring and employment).

In the words of the 2010 AALS Task Force on the Status of Clinicians and the Legal Academy (Task Force on the Status of Clinicians), "despite great strides in the growth of clinical legal education in the last [thirty] years, equality between clinical and non-clinical faculty remains elusive."[172] "At many law schools there is a rigid divide between the clinical faculty and the academic tenure track faculty[,]"[173] and there generally exists "a marginalization of both clinical courses and faculty teaching those courses in legal education."[174] Traditionally, and continuing at many law schools today, clinical programs are "relegated to law school basements"[175]—literally and figuratively.

The Task Force on the Status of Clinicians contended that "each status model other than [regular] tenure communicates to students that the role clinical faculty have . . . can never be as valuable as that provided by non-clinical faculty[,]"[176] which sends a clear message to law students that their professional role models should not be clinicians and, instead, should be impractical scholars who dominate most law faculties.[177] The Task Force report also advocated affording clinicians full voting rights regarding matters of faculty governance,[178] which is particularly important in view of the recent proposals for reform of law schools' pedagogies and curricula that recommend the incorporation of the teaching of practical skills both in doctrinal courses and in more experiential courses.[179] This void is one that clinicians are best equipped to fill.

The second-class status of clinicians and clinical courses is further evident in the fact that most law schools do not make such courses an integral part of the curriculum. According to a 2007–2008 survey of clinicians at seventy U.S. law

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172. AALS, *Report on Clinical Faculty*, *supra* note 167, at v (footnote omitted).

173. Chemerinsky, *supra* note 29, at 40.

174. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 231 (2008); *see also* WATSON, *supra* note 47, at 139 ("[C]linical teachers, even if they have tenure, are regarded by professors as separate from the main enterprise."); Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) ("The theory/practice dichotomy in law school teaching, scholarship, and mission relegates clinical-lawyer instruction to the periphery of legal education and consigns clinical faculty to a subordinate caste status differentiated by inferior compensation, limited governance, and segregated space."); Chemerinsky, *supra* note 29, at 39 ("The emphasis on inter-disciplinary study, which I applaud, means more law professors with a Ph.D. as well as a law degree, but with no practice experience. . . . An ever smaller number of law faculty are actively involved in briefing and arguing cases or handling transactions. This, I fear, translates into less of an appreciation for clinical education . . . ."); Schuwerk, *supra* note 100, at 767 ("[M]any law professors denigrate the value and talent of 'legal research and writing,' 'lawyering skills,' and 'clinical' professors, both at their own institutions and elsewhere.").

175. Daphne Eviatar, *Clinical Anxiety*, LEGAL AFFAIRS, Nov./Dec. 2002, at 37, 37.

176. AALS, *Report on Clinical Faculty*, *supra* note 167, at 33 (citing CARNEGIE REPORT, *supra* note 8, at 87–88).

177. *See* CARNEGIE REPORT, *supra* note 8, at 156 ("[T]he faculty is influential in conveying what the profession stands for and what qualities are important for a member of that profession.").

178. AALS, *Report on Clinicial Faculty*, *supra* note 167, at v, 32–33.

179. *See supra* Part I.

schools,[180] 50% reported that, in a given semester, 10% or fewer of their school's students were enrolled in a clinical course.[181] In contrast, only 3% reported that more than 50% of their students were enrolled in a clinical course in a given semester.[182] Even more remarkable is the survey's finding that only "[j]ust over *2%* of schools *require* students to enroll in an in-house, live client clinic" as a graduation requirement.[183] It is estimated that only one-third of all law students today are receiving any structured clinical education and that only approximately half of all law students are receiving clinical education or some other type of experiential "live client" education (e.g., interning for a public defender office).[184] The ABA so far has not required, for purposes of accreditation, mandatory student enrollment in at least one clinical course before graduation.[185] As Dean Chemerinsky has commented, "It is frightening to imagine medical schools training doctors who had never seen patients before their graduation. Yet, although most law schools have clinics, only a minority of students participate[s]. "[186]

At most law schools that both award tenure and afford equal voting rights in matters of faculty governance to clinicians, clinical faculty generally must "publish or perish," just like the traditional academic faculty.[187] Some clinicians have "devot[ed] their teaching, scholarship, and service" to practical legal issues, yet such "efforts have received a less enthusiastic, and often chilly, response from conventional colleagues."[188]

Even more so than clinical faculty, LRW professors have struggled to gain acceptance in the legal academy.[189] Notwithstanding the important skills that

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180. Santacroce & Kuehn, *supra* note 169, at 1.

181. *Id.* at 7.

182. *See id.*

183. *Id.* at 10 (emphasis added).

184. *See* Sandefur & Selbin, *supra* note 162, at 78 ("[A]pproximately one-third of contemporary law students are participating in clinics, and perhaps fifty percent or more are participating in some kind of live client (not simulated) experiential education.").

185. *See* Chemerinsky, *supra* note 29, at 41 (recommending that the ABA standards make clinical enrollment a requirement for graduation).

186. *Id.* at 36.

187. *See* Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 542 (2002) ("With some exceptions, senior faculty and administrators expect tenure-track clinicians and activists to publish according to traditional legal academic criteria, namely heavily footnoted law review articles in 'respectable' law journals. The more elite the journal, the more likely that nonclinical colleagues will be impressed. Many clinicians have accepted this reality and have demonstrated a wide range of success in meeting these long-standing promotion criteria.").

188. *Id.* at 541–42.

189. *See* WATSON, *supra* note 47, at 72–73 ("Although I have taught as a tenured law professor in the United States for rather more than 25 years, . . . I had no knowledge of the legal writing program until I began [writing about it]. I have had no social dealings with the instructors and know of no law professors—with one limited exception—who have . . . . I have never heard their role discussed by faculty colleagues. . . . Seldom have they been mentioned to me by students but any such mention has always been with the perception that students learned more about law

they teach to law students and the ABA's *requirement* of substantial instruction in legal research and writing for a law school's accreditation,[190] some law schools provide "[LRW] faculty a less secure form of employment than that afforded [to] clinical faculty."[191] Such LRW faculty also are typically paid much less than traditional faculty[192] and in a vastly disproportionate manner comprise female professors (particularly in relation to the percentage of female faculty members on the "main" faculty).[193] At the bottom of the order of law faculty are adjunct professors, who generally "are treated like nobodies by the regular law faculty."[194] ABA accreditation standards restrict the number of courses that adjunct professors may teach and also generally limit them to teaching elective courses; thus, the tenure-track, full-time faculty are assigned to teach the most important courses—the first-year mandatory classes.[195] Adjunct professors

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from the program than they did from all their other first-year classes."); Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 385 (2007–2008) ("[I]t is no secret that most law school faculties in the United States have well-defined hierarchies and that legal writing professors often are relegated to low positions within those hierarchies." (footnote omitted)).

190. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 302(a)(3) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%203.pdf.

191. Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE UNIV. L. REV. 281, 283 (2007); *see also id.* at 294 ("[T]he ABA requires instruction in legal research and writing as an essential component of legal education, and . . . it is undisputed that legal analysis and the communication of that analysis is a competency that must be achieved in legal education . . . ." (footnote omitted) (citing STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 302(a)(3) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%203.pdf)).

192. *Compare* Ass'n of Legal Writing Dirs., *2009 Survey Results*, LEGAL WRITING INSTITUTE, at v (2009), http://www.lwionline.org/uploads/FileUpload/2009SurveyResults.pdf (finding that the average salary of legal writing and research faculty in 2009 was $70,657), *with* Soc'y of Am. Law Teachers, 2008–2009 *SALT Salary Survey*, 2009 SALT EQUALIZER 1, 1–3 (Mar. 2009), *available at* http://www.saltlaw.org/userfiles/SALT_salary_survey_2009.pdf (listing faculty salaries for assistant professors predominantly falling within the $80,000, $90,000, and $100,000 range). *See generally* Ann C. McGingley, *Reproducing Gender on Law Faculties*, 2009 BYU L. REV. 99, 102 n.4 (2009) (noting the results of the Association of Legal Writing Directors and SALT surveys).

193. *See* Abdullina, *supra* note 2, at 17; Ass'n of Legal Writing Dirs., *supra* note 192, at 1 (noting that 78.3% of 166 respondents were female).

194. Wendel, *supra* note 88; *see also* Hricik, *supra* note 36, at 418 ("A more fundamental issue is the apparent disdain some full-time academicians have toward adjuncts and the subjects they teach and the effect this has on the education process. Some have observed that tenured faculty do not associate much, if at all, with adjunct professors who 'exist on the periphery of most law school operations' and who are 'ignored as part of the intellectual and social life of the school.' I have felt this anti-adjunct attitude first hand and have heard it is prevalent in some of the best law schools." (footnotes omitted) (quoting Karen L. Tokarz, *A Manual for Law Schools on Adjunct Faculty*, 76 WASH. U. L.Q. 293, 296–97 (1998))).

195. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 403(a) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%204.pdf ("The full-time faculty shall teach

generally are paid a pittance per course taught compared to the salary of full-time faculty members (from a per-course standpoint).[196] Of course, unlike full-time faculty, adjuncts are not expected to publish and thus are not compensated for scholarly pursuits (or for other tasks performed by full-time faculty, such as serving on committees).[197] Because full-time professors spend the overwhelming majority of their time either teaching or writing,[198] the question arises whether the small amount paid per course to adjuncts[199] either reflects law schools' low valuation of the adjuncts' worth or reflects the low valuation put on teaching generally (whether by an adjunct or a full-time professor)—or both.

Although "[t]here has been very little systematic study or collection of data on the effects of adjunct teaching in law schools,"[200] students commonly say that adjunct professors on average are more effective law teachers than full-time

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the major portion of the law school's curriculum, including substantially all of the first one-third of each student's coursework."). *But see* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 403(c) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%204.pdf ("A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program."). *See generally* David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815, 816–18 (2009) (discussing the "growing but ambivalent" role of adjuncts in American legal education).

196. *See* David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 U. DAYTON L. REV. 285, 289 (2008) ("[A]djuncts are usually easy on the school's budget. . . . For a two-hour course, roughly half of the [schools that the author surveyed] paid [adjuncts] between $1,501 and $3,000; a few paid less than $1,501; one-fifth of the schools paid between $3,001 and $5,000; and a small number paid over $5,000. For a three-hour course, one-fifth of the schools paid over $5,000 and one-third paid between $3,000 and $5,000. . . . Therefore, it is clear from the survey results that the expansion of the curriculum and the increased number of offerings, made possible by the use of adjuncts, is provided at bargain basement rates.").

197. *Cf.* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., Standard 404 (2009–2010), *available at* http://www.abanet.org/legaled/standards/2009-2010%20Standards WebContent/Chapter4.pdf (outlining responsibilities for full-time law faculty members, which include "participation in the governance of the law school"); John O. Sonsteng et al., *supra* note 30, at 464 ("In order to increase the resources devoted to teaching without raising the already substantial cost of legal education, the composition and structure of the faculty must change. One way to change the faculty is to change the rules for tenure: require less scholarship, less governance, less public service, and substantially more teaching."). *See generally* Lander, *supra* note 196, at 291 ("[A]lthough some schools may work to integrate adjuncts into the school and faculty, adjuncts are typically less-coordinated into the faculty and the curriculum."); Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 6 (2008) ("Salaries are the major operating expense of a law school, and senior faculty salaries have risen well ahead of inflation in the past three decades. Law professors are paid approximately double the average of college and university professors generally. . . . As salaries have risen for law professors, teaching loads have gone down.").

198. *See supra* Part II.B.

199. *See* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 619 (2010) ("[A] law school could hire twenty-five adjuncts [assuming they are paid $5,000 per course taught] for every full professor earning salary and benefits of $125,000 a year.").

200. Siegel, *supra* note 195, at 817.

tenure-track law faculty members.[201] Because usually they are active practitioners, adjuncts are "well-suited to help schools integrate the practical and theoretical aspects of legal education."[202] According to my student evaluations over the course of a decade at the University of Houston Law Center (during which I taught over two dozen courses), which provided not only my own numerical evaluations but also the average numeric evaluations for all tenure-track and all adjunct faculty members for each semester, adjuncts as a group received higher ratings than full-time faculty as a group two-thirds of the time.[203] Although, as noted above, student evaulations are only one measure of teaching effectiveness,[204] and the dataset mentioned here involved only a single law school,[205] the results warrant further research into the teaching effectiveness of part-time adjuncts compared to full-time professional legal educators.

B. Impractical Professors' Inability to Effectively Teach Practical Knowledge, Skills, and Values

Although it is possible to incorporate the teaching of some practical skills into doctrinal courses (particularly those with small student-teacher ratios),[206] effective teaching of real-world skills—and, just as important, providing students "systematic training in effective techniques for learning law from the experience of practicing law"—requires experiential education.[207] Realizing the importance

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201. *See, e.g.*, Hricik, *supra* note 36, at 385 ("In my own experience, students—particularly those at more theoretically-oriented schools—crave teaching by those who actually know how to practice law.").

202. Thies, *supra* note 199, at 619.

203. *See* MEASUREMENT & EVALUATION CTR., UNIV. OF HOUS. LAW CTR., LAW CTR. INSTRUCTOR EVALUATION (Fall 2001–Spring 2009) (on file with the author). The University of Houston Law Center's evaluation used a scale of one through five, with one being the highest score and five being the lowest score. *Id.* With respect to the question, "Overall, this instructor was:"—with options ranging from (1) "outstanding" through (5) "unsatisfactory"—adjuncts received an average score of 1.7285 and tenure-track faculty received an average score of 1.8614. *Id.* These responses represent the twenty-one semesters in which I taught from the 2000–2001 academic year through the 2008–2009 academic year. *See id.*

204. *See supra* note 154 and accompanying text.

205. *See supra* note 203 and accompanying text.

206. *See* Roger J. Dennis, *Building a New Law School: A Story from the Trenches*, 61 RUTGERS L. REV. 1079, 1084 (2009) (citing Terry Jean Seligmann, *Teaching What We Wish We Had Learned in Law School*, DREXEL L. BRIEF #6, http://earlemacklaw.drexel.edu/law/PDFs/Drexel-law-brief-no6-seligmann.pdf (last visited Oct. 15, 2010)) ("Through a mix of traditional classroom teaching and an aggressive agenda based on experiential education, we hope our students [at the Earle Mack School of Law at Drexel University] develop a rich client-centered approach to legal problem solving. Our students need to deeply understand theory, doctrine, analysis, and modes of argumentation. We want them also to be effective written and oral communicators, legal researches, fact investigators, transaction cost engineers, and counselors. Some of the skills can be taught in the traditional classroom, some can best be taught through experiential education models."); *id.* ("Many of the first year doctrinal professors also require students to participate in a significant number of more practical skills exercises such as drafting or oral argument.").

207. Amsterdam, *supra* note 27, at 613.

of experiential education, the *Carnegie Report* recommends that "[b]oth doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the complementary area."[208] This recommendation begs the question of whether a typical non-clinical, tenure-track law professor today could effectively teach both doctrinal and experiential courses.[209] The answer to that question, of course, depends on whether such a professor possesses the skill set to teach an experiential course. Because practical skills are an essential component of that skill set, and further because such skills are honed by significant practical experience, it is highly unlikely that most tenure-track professors—particularly the new breed of interdisciplinary theoreticians—could effectively teach such a course.

This assertion is perhaps best supported by posing a series of questions about a typical tenure-track, non-clinical law professor hired during recent decades: Could such a professor whose primary scholarly interest is criminal law and procedure effectively prosecute or represent a criminal defendant at a felony trial? Could such a professor who writes law review articles about the First Amendment effectively represent a client in civil rights litigation? Could a professor whose expertise is securities regulation effectively represent a client in an SEC enforcement action? Imagine such professors being first-chair counsel in complex civil or criminal litigation that requires them to interview potential witnesses, take depositions, engage in electronic discovery, file and respond to summary judgment motions, conduct voir dire, present the testimony of an expert witness, cross-examine—and impeach—hostile witnesses, and make closing arguments to a jury.[210] There are some full-time, non-clinical law professors capable of competently representing clients in real cases,[211] but they are the exception, not the rule, particularly among professors hired in recent years at highly ranked law schools.

How can we expect law students to become competent practitioners if the core of full-time law faculties, notwithstanding its scholarly prowess, does not

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208. CARNEGIE REPORT, *supra* note 8, at 196.

209. I am unaware of any study of the effectiveness of traditional law faculty members who teach "practical" courses, such as clinics. This result is likely because so few have taught such courses. The *Carnegie Report*'s recommendation also begs the converse question of whether clinical faculty could effectively teach doctrinal courses. Traditionally, few law schools have permitted their clinical faculty to do so on a regular basis. Yet the fact that law schools regularly employ adjuncts to teach doctrinal courses suggests that clinicians could do so as well.

210. The examples that I have given obviously all are litigation scenarios. I did so because the majority of classes in law school are litigation-oriented and are taught using casebooks. *See* CARNEGIE REPORT, *supra* note 8, at 3. Similar examples could be imagined in corporate, transactional, or administrative law contexts. My examples also only concern using practical skills and knowledge and do not implicate the *business* of law practice (e.g., developing and maintaining clients)—another area in which few full-time law professors are competent to teach law students.

211. Most professors who engage in real-world litigation appear to do so at the appellate level (e.g., filing amicus curiae briefs). The skill set of a typical tenure-track professor is more suited for appellate advocacy (which involves more written advocacy than oral advocacy and also does not require factual development) than representation of a client at the trial court level.

itself possess even the basic skills required to practice the type of law about which it teaches and writes? How can we expect law students to become competent and ethical practitioners when the faculty members best suited to teach them the necessary practical skills and ethical lessons from real-world cases—clinicians, LRW professors, and adjuncts—are marginalized and even openly held in disdain by some members of the "main" faculty? What message do the primary faculty role models communicate to law students?

IV. PROPOSED CHANGES IN FACULTY COMPOSITION AND THE LAW REVIEWS

Because, presently, "[l]aw schools are run primarily for the benefit of law professors [and] not for the benefit of law students"[212]—enabling a privileged existence for professors devoted to research and writing based on their chosen agenda with relatively minor teaching and other obligations compared to professors in other academic disciplines[213]—major change from within the professoriate will be difficult to achieve.[214] Nevertheless, some basic proposals for reform follow inexorably from the above recounting of the fundamental problems in the legal academy. First, law schools should create two types of tenure-track professorships, "research" professors and "teaching" professors, with equal opportunities in the tenure-track system (although evaluated differently for tenure),[215] equitable voting rights in faculty governance, and equivalent salaries.[216] Unlike the current system, which routinely assigns the bulk of teaching responsibilities to faculty members who have been hired to be

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212. Schuwerk, *supra* note 100, at 761.

213. *See supra* Part II.B.

214. *See* Sturm & Guinier, *supra* note 126, at 519, 524 ("Many brilliant reforms do not take root because they overlook the crucial role of law school culture in determining their meaning and impact. The worldview reflected in many curricular innovations does not square easily with the shared cultural assumptions that are embedded in the law schools' routines and values."); Rapoport, *supra* note 125, at 366 (contending that significant reforms in legal education will be difficult to achieve because of "tight regulation" by the ABA and "university accrediation standards"). *See generally* Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 483 (2009) ("So much already having been said (and the sickness apparently not going away in response), one might wonder what remains to be written about, or recommended to repair, the blight on American legal education and the legal profession.").

215. Because of differing areas of expertise, each type of law professor would be chiefly responsible for evaluating its own type for hiring, promotion, and tenure. *Cf.* Posner, *supra* note 84, at 1122–23 ("The difficulty that doctrinal analysts face in evaluating the work of social scientists comes not only from a lack of understanding of the theories and empirical tools of the social scientists but also from a difference in outlook or culture. . . . The doctrinal analyst and the social scientist differ in the emphasis they place on scholarship relative to teaching.").

216. *Cf.* Edwards, *supra* note 14, at 571 ("[T]he entire legal academic community must work collectively to find a middle ground where a greater number of practical scholars flourish alongside their theory-oriented counterparts in an environment of mutual respect; both should contribute to an education for students that better prepares them for practice, and both should share the fundamental belief that scholarship that seeks to inform and guide practitioners, legislators, other policymakers, and judges is a valuable, indeed necessary, component of any law school's mission.").

impractical scholars,[217] the proposed system would permit a certain segment of the faculty, at most one-third, to focus on what they do best: theoretical, interdisciplinary research and scholarship. Such research professors, only a small percentage with both a Ph.D. and a law degree,[218] would carry lesser teaching loads than teaching professors, and in addition would only teach courses in their areas of expertise (e.g., statistics and econometrics for lawyers).[219] However, as I discuss immediately below in connection with my proposed reforms of law reviews, such scholarship would be subject to peer review before publication and should have meaningful relevance to the legal system. Such research professors would not teach doctrinal courses (first-year or upper-level), such as contracts, criminal law, civil procedure, and evidence.

Conversely, teaching professors, who would constitute at least two-thirds of the faculty, would be expected to teach a disproportionately larger load of classes,[220] including all doctrinal, clinical, and LRW courses (except for those courses that adjunct faculty taught). The demarcation between the faculty members assigned to teach clinical, LRW, and doctrinal courses would be erased.[221] A typical teaching professor would be able to competently teach any of the three types of courses and would be expected to integrate issues of

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217. *See supra* Part II.B.

218. Although some research professors would appropriately have a Ph.D.—such as those who specialize in quantitative analysis or economics—too many Ph.D.'s on a law faculty (particularly those without a law degree) detract from the mission of law school as a professional school. Furthermore, a J.S.D. degree, rather than a Ph.D., should be the norm for research professors. Professors with Ph.D.'s whose scholarly interest is law ordinarily should join political science or history departments and, at most, possess a joint appointment at their university's law school.

219. *See* Posner, *supra* note 84, at 1123 n.30 ("Because the demand by law students for instruction in the social sciences is limited, the law school may be quite willing to offer the social scientist a reduced teaching load. The social scientist also escapes the burden of supervising Ph.D. dissertations, though, as I have suggested, this involves a loss as well as a gain. If, however, the social scientist appointed to a law faculty comes to share the law professors' preoccupation with teaching, his scholarly career may be seriously compromised."). Although in 1981 Posner encouraged "[t]he appointment of more economists, of philosophers, and perhaps of other nonlegal scholars such as anthropologists, sociologists, and statisticians, to full-time positions on law school faculties[,]" he also believed that "doctrinal analysts" should remain the primary faculty. *Id.* at 1129. He believed his proposal would "enhance the research function of the law school without impairing its primary mission of professional training . . . ." *Id.* at 1130.

220. *Cf.* Mengler, *supra* note 109, at 345 ("I am arguing, . . . against the requirement that every law school must be a research law school. . . . [O]ther models might include the teaching-intensive law school, in which all or most full-time faculty teach six to eight courses per year.").

221. *Cf.* Rubin, *supra* note 149, at 663 ("[T]he subject matter of skills and clinical courses is not integrated with traditional lecture courses. The clinic is a separate physical facility in most law schools, often located off-site to be more accessible to the clients. Most faculty members have only a vague idea of what the clinic is teaching and how those experiences might relate to their own materials. Skills courses, although physically located in regular law school classrooms, are often taught by practitioners who are equally isolated from the regular faculty. . . . A modern approach to legal education would integrate experiential learning into the regular educational program." (footnote omitted)).

professional responsibility into all classes. To enable this level of teaching competence, a teaching professor would have a significant amount of meaningful practical experience (typically a decade or more) and would have earned a reputation as a competent, ethical practitioner before joining a law school's full-time faculty. Such teaching professors also typically would have first proven themselves as effective law teachers while serving as adjuncts or visiting professors. Teaching professors would be expected to publish legal scholarship, but not to the same degree as research professors. Moreover, the type of publications expected of teaching professors for promotion and tenure would be practical works, such as doctrinal law review articles and legal treatises. Their scholarship would be evaluated not only by other academics, but also by prominent members of the bench and bar.

For all professors (including adjuncts), law schools would actively promote teaching excellence—including training teachers in the latest advances in the science of adult learning—and would make teaching competence an integral part of the assessment of a faculty member for promotion and tenure, particularly for teaching professors. Consistent with the recommendations of the *Carnegie Report* and *Best Practices*, the case-dialogue method would occupy a much smaller role in legal pedagogy,[222] and clinical and other experiential education would assume a much larger portion of the educational experience of law students, somewhat like the medical school model.[223] Many members of the "main faculty" would thus actively work on real cases (whether pro bono or in clinics), thereby providing students with an appropriate role model as a teacher–practitioner.[224] Because the bulk of the faculty would be hired primarily to teach and secondarily to publish, class sizes would be smaller so that feedback to and assessments of students[225] would dramatically improve from the current

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222. *See* BEST PRACTICES, *supra* note 22, at 132; CARNEGIE REPORT, *supra* note 8, at 198–200.

223. *See* Martinez, *supra* note 149, at 708 ("Law schools should use a modified version of the medical school educational model. Its application in law schools would cure those inadequacies in legal education that spring from the case-dialogue method, namely the lack of practical experiences for students and the lack of practical experience on the part of law school faculties."); Waxman, *supra* note 55, at 1910 ("[T]he lack of balance [between practical and theoretical legal scholarship] has too often intensified the increasing separation of the academy from the rest of the legal world. That doesn't have to be the case. Take medical schools, for example. Many, if not most, members of the medical faculties are also practicing physicians . . . . There is certainly room for law schools to move in that direction.").

224. *See generally* Cohen, *supra* note 99, at 643 ("[A]t a minimum, law professors should be encouraged, if not required, to stay connected to the world of practice. Law professors could spend a sabbatical in practice, engage in some outside work while teaching, or simply observe, study, or communicate regularly with those who are actively engaged in the practice of law. If seen as a form of class preparation or as an inspiration for scholarship, such time will be well-spent and should enrich both teaching and scholarship.").

225. *See* BEST PRACTICES, *supra* note 22, at 125–27, 174–77 (recommending prompt feedback for law students).

situation.[226] Finally, adjunct faculty would assume a more significant status in the legal academy. Selective hiring of adjuncts and efforts to integrate them into the faculty—beginning with more pay and greater expectations (i.e., that they would participate in the law school community more than by simply showing up to teach a night class)—would become the norm. Highly regarded, experienced practitioners and judges would become typical adjuncts (as they currently are at many of the highly ranked schools). From this group of adjuncts, the best would be recruited to become full-time senior teaching professors subject to a shorter tenure track than younger practical faculty members.

The second proposed reform concerns law reviews. Just as I have proposed a bifurcated faculty with an emphasis on the practical component, I likewise propose a bifurcated system of law reviews along the same lines. The traditional species of law review, the student-edited journal, would publish student works and articles by the teaching professors—along with articles written by members of the bench and bar (who would be brought back into legal academy in greater numbers)—and would focus on practical topics, such as case law and statutory analysis. Doctrinal scholarship would cease its current preoccupation with decisions of the Supreme Court of the United States and would expand its focus by tapping the deep well of decisions of the federal circuit courts and state appellate courts, which to date have been largely ignored.[227] More attention also would be paid to the state and federal legislative process, which has been given inadequate treatment in law reviews.[228] Students would continue to serve as law review editors, yet they would work much more closely under faculty supervision than currently is the case.[229]

The other species of law review would be peer-reviewed and faculty-edited by research professors, and would publish theoretical and interdisciplinary

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226. As Dean Chemerinsky has recognized, if law professors spent less time producing legal scholarship, "[m]ore time and attention could be paid to students and to instructional materials. . . . In fact, if law professors wrote much less, teaching loads could increase, faculties could decrease in size, and tuition could decrease substantially." Chemerinsky, *supra* note 29, at 881.

227. *Cf.* Posner, *supra* note 81, at 58 ("[T]he profession, including the judiciary, would benefit from a reorientation of academic attention to lower-court decisions. Not that the Supreme Court isn't the most important court in the United States. But the 80 or so decisions that it renders every year get disproportionate attention compared to the many thousands of decisions rendered by other appellate courts that are much less frequently written about, especially since justices of the Supreme Court are the judges who are least likely to be influenced by critical academic reflection on their work."). Judge Posner also contends that too many student-written articles focus on "hot" topics such as constitutional law and neglect "equally important commercial subjects that cry out for informed doctrinal analysis." *Id.* (internal quotation marks omitted).

228. *See* Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679 (1999) ("Notwithstanding the importance of the legislative process to complete, sophisticated legal analysis, the legal academy focuses very little of its attention on Congress and state legislatures.").

229. *Cf.* Posner, *supra* note 81, at 58 ("Ideally, one would like to see the law schools 'take back' their law reviews, assigning editorial responsibilities to members of the faculty. Students would still work and write for the reviews, but they would do so under faculty supervision.").

articles—although works with relevance to the legal system,[230] such as empirical studies of factual assumptions underlying laws and legal policies using rigorous econometric and statistical tools.[231] Because teaching would assume a larger role in a majority of faculty members' daily existence, the amount of law review articles and, presumably, the number of law reviews likely would decrease over time from their current bloated number.

These proposals, if implemented, would fully comport with the ABA accreditation standards—both the current ones and the proposed revisions discussed above.[232] In particular, law faculties would be required to (1) effectively teach substantive law, practical skills, professional values, and relevant topics in the social sciences (such as economics, statistics, accounting and finance, and psychology);[233] and (2) produce a reasonable amount of legal

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230. *See generally* Posner, *supra* note 66, at 1317 ("I also argue that [interdisciplinary legal scholarship's] future, . . . depends on the ability of the [authors] of this scholarship to influence practice, rather than merely to circulate their ideas within the sealed network of a purely academic discourse."); *id.* at 1326 ("My conclusion is that interdisciplinary legal scholarship is problematic unless subjected to the test of relevance, of practical impact.").

231. *See generally* Chambliss, *supra* note 62, at 24 (arguing that empirical legal studies benefit socio-legal scholarship); Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311, 312 (2003) (making numerous recommendations for "improv[ing] empirical analyses in the law"); Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1474 (2009) ("[D]issemination and "sharing of research can link the academy and practicing lawyers."); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 876 (discussing the "predominant direction of change in legal scholarship and . . . the role of theory and empirical and experimental methods in the study of the law").

232. *See supra* notes 40–42 and accompanying text.

233. *See* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 302 (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%203.pdf. *See generally* Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 597–98 (2008) ("The most important change in legal education since I was a law student thirty years ago is the recognition that law is inherently interdisciplinary and must be shaped by understanding fields such as economics, philosophy, and psychology. Law schools still do too little to bring these disciplines into their classes in a systematic way."); Kagan, *supra* note 9 ("Great lawyers are great problem-solvers. And great problem-solving requires a combination of analytical skills, hands-on experience and interdisciplinary tools, as well as an understanding of the full range of legal institutions and sources of law, both domestic and international. . . . Integral to this approach are greatly expanded opportunities for clinical and interdisciplinary work in the second and third years. Students benefit from seeing how legal problems look—and how they can be solved—in real-world settings. So, too, do they learn from seeing how law connects to a range of other subject matters, including business and economics, government and politics, and technology and medicine."); Mara Merlino et al., *Science in the Law School Curriculum: A Snapshot of the Legal Education Landscape*, 58 J. LEGAL EDUC. 190, 191–92 (2008) ("[B]road changes within the practice environment of the U.S. legal system have changed not only the kinds of cases that are being litigated, but also the skills needed by legal professionals . . . . In the current climate of fast-paced scientific and technological discovery, attorney and judicial competence in the area of expert testimony has become even more multi-faceted, encompassing a broader range of knowledge and skills than ever before.").

scholarship that benefits not only the author but also the legal profession.[234] If implemented, these reforms would not turn law schools into lowly "trade schools" nor result in an "anti-intellectual" triumph, as some law professors have claimed.[235] Rather, they would become bona fide professional schools that would regain the respect of the legal profession.[236]

Although my proposals are compatible with the current ABA accreditation standards, they stand no realistic chance of succeeding under the current standards. As noted, the current ABA standards permit law schools to relegate clinical and LRW faculty to a separate and unequal status.[237] That second-class status would need to be abolished before such practical faculty would be able to become equal players in law faculties. Although the accreditation standards recently were improved to require the teaching of practical skills in addition to substantive law, they still have not gone far enough and required students to take clinical and other experiential courses.[238] Until such changes in the accreditation standards force law schools to retool their curriculums and graduation requirements so as to mandate a substantial number of experiential courses for all students, law schools will continue to primarily hire impractical scholars whose primary mission is to produce impractical scholarship.

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234. *See* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 402(a) (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%204.pdf. *See generally* Smith, *supra* note 63, at 207 ("The argument for an ABA . . . research requirement [for accreditation] rests on several assumptions. First, the assumption is made that research will serve the public interest by being the source of 'pure' research in law. The second assumption is that it is appropriate for entrants to the legal profession to bear the burden of that expense in the cost of their legal education. Third, the assumption is that the benefit to the public is less than the increase in costs to students. The argument against an ABA research requirement is that one or more of these assumptions fails. If, for example, law school research efforts serve the public interest only very marginally at great cost to students, then there would not be a good argument for licensing-related accreditation requiring research.").

235. *See, e.g.*, Leonard J. Long, *Resisting Anti-Intellectualism and Promoting Legal Literacy*, 34 S. ILL. U. L.J. 1, 5 (2009) ("For the anti-intellectual traditionalists in legal education, the dominant purpose of law schools, and the nearly exclusive aim of legal education, is training law students to become practicing lawyers. This purpose falls within the realm of anti-intellectualism because it demonstrates hostility towards intellectual pursuits in legal education when such pursuits are not directly, and obviously, relevant and transferable to the task of lawyering. It is hostile to merely forego the encouragement of intellectual pursuits and intellectual cultures because these are not deemed relevant to law practice."); *id.* at 24 (arguing that some reforms would turn law schools into "glorified trade school[s]").

236. *See* Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. REV. 1421, 1423 (2006) ("Law schools are professional schools, not graduate schools. We grant J.D.'s, not Ph.D.s.").

237. *See supra* note 172–75 and accompanying text.

238. *See* STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 302 (2010–2011), *available at* http://www.abanet.org/legaled/standards/2010-2011%20Standards/2010-2011%20ABA%20Standards%20pdf%20files/Chapter%203.pdf.

The legal community owes it to the public to reform legal education so as to make law students, rather than law professors, the primary beneficiaries of law schools. In the words of the *Carnegie Report*:

> The calling of legal educators is a high one: to prepare future professionals with enough understanding, skill, and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens' loyalty; that is, to uphold the vital virtues of freedom with equity and extend these values into situations as yet unknown but continuous with the best aspirations of our past.[239]

The community also owes it to law students. The enormous amount of tuition that law students pay per year has dramatically outpaced inflation in recent years[240] and has resulted in huge average educational debts by law graduates.[241] As a result of the recent global economic downturn, there has "been a very substantial decrease in employment of lawyers,"[242] and law firms (and their clients) have responded by demanding greater skills from entry-level attorneys.[243] Furthermore, because fewer firms are hiring new attorneys than in the past—at the very same time that law schools are producing more graduates than ever—many neophyte attorneys will be forced to hang out their own shingles and attempt to make it as solo practitioners. For their own financial well-being as well as for the good of the public, such attorneys obviously need to be proficient in practical skills.

A significant amount of the tuition that law students pay currently serves as a cross-subsidy that allows professors to spend most of their time researching

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239. CARNEGIE REPORT, *supra* note 8, at 202.

240. *See* Dolin, *supra* note 28, at 231 ("From 1985 to 2005, public law schools' annual tuition and fees have increased from a median of $1792 to a median of $13,107, while private law schools' annual tuition and fees have increased from a median of $7385 to a median of $30,670."). According to an ABA survey:

> Since the early 1970's, there has been a steep and persistent rise in the costs of legal education and in the tuitions law schools charge students. During the period 1992–2002, the cost of living in the U.S. has risen 28%, while the cost of tuition for public law schools has risen 134% (for residents) and 100% (for non-residents) and private law school tuition has increased 76%.

Comm'n on Loan Repayment and Forgiveness, Am. Bar Ass'n, *Lifting the Burden: Law Student Debt as a Barrier to Public Service* 10 (2003), *available at* http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf.

241. *See* Ind. Univ. Ctr. for Postsecondary Research, *Law School Survey of Student Engagement*, 14 & fig.7 (2009), *available at* http://lssse.iub.edu/pdf/LSSSE_Annual_Report_2009_forWeb.pdf (summarizing the 2009 Annual Survey Results and noting that, in 2009, 29% of law students will graduate with law student loans in excess of $120,000 and approximately 40% will graduate with loans between $60,000 and $120,000).

242. Bennett, *supra* note 20, at 111.

243. *Id.* at 108–13.

and writing impractical law review articles rather than effectively teaching students the knowledge, skills, and professional values they will need to be competent (and employable) lawyers.[244] This state of affairs is unacceptable. A healthy balance must be reached between law schools' dual roles as learning institutions and producers of legal scholarship. The latter's current dominance, which has spawned a generation of mostly impractical law faculties, must cease before the pedagogical and curricular reforms such as those proposed in the *Carnegie Report* can be realized.[245] The professoriate must practice before it preaches.

The changes that I propose will likely not occur without support from several stakeholders in the legal profession and legal academy who have the power to influence law school deans and faculties (as well as the ABA's accreditation authority).[246] Judges (particularly those who hire law clerks), law firms and other employers of law school graduates, and law students all must demand change. Judges and law firms should make it clear to law schools that students need to graduate with better practical skills, which means that law schools should stop hiring a disproportionate number of impractical scholars and refocus their efforts on practical courses and teaching excellence. In hiring law clerks and entry-level lawyers, judges and firms should stop reflexively looking

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244. Rubin, *supra* note 93, at 139, 141 ("Law schools are predominantly financed by student tuition payments, yet a significant proportion of their expenditures do not directly benefit the students, but rather support faculty research. . . . Thus, that great bete noir of economists, the cross-subsidy, seems to be operating in force—students are paying for something that does not benefit them, and they are being compelled to do so by means of an intra-institutional transfer that they cannot control. . . . There can be equally little doubt that a significant proportion of these ever-increasing tuition payments support faculty research."); Smith, *supra* note 88, at 205–07 ("[T]he research mission of most law schools is quite expensive. It results in substantial reductions in the teaching loads of faculty, libraries with resources many times what would be required for a simple teaching mission, and a variety of support services for research. . . . Law schools are unusual among graduate and professional schools in that the vast majority of research and scholarship in law schools is funded by tuition. . . . The tuition that is used to cover legal research is, for most students, the equivalent of an involuntary fee that they must pay in order to obtain a law degree and law instruction. It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are generally borrowing the money to do this and they are the least able of all those in the profession to pay for it." (footnote omitted)). More so than other parts of the university system, law schools generally are revenue generators. *See* Nicholas S. Zeppos, *2007 Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325, 325 (2007) ("[T]he fact that law schools are largely tuition-supported means that they do not need to receive funding from central university sources. In fact, they can be regarded as a source of funds for other university programs— . . . they are cash cows."). Dean Chemerinsky has recognized that "tuition could decrease substantially" if law faculties reallocated resources from scholarship to teaching. Chemerinsky, *supra* note 60, at 881.

245. *See* CARNEGIE REPORT, *supra* note 8, at 185–202.

246. As another critic of modern legal education has astutely observed, "It should come as no surprise that the ABA committees that set law school standards are dominated by those who have succeeded and are comfortable in the current system: law school deans and professors." Dolin, *supra* note 28, at 236 (citing Roy Stuckey, *Why Johnny Can't Practice Law—And What We Can Do About It: One Clinical Law Professor's View*, B. EXAMINER, May 2003, at 32, 41 n.8).

to highly ranked law schools and instead make hiring decisions based on whether law schools have prepared students to be competent practitioners. Law students also need to demand changes in the composition of law faculties. They should insist that their tuition dollars be substantially reallocated from subsidizing impractical scholarship to the creation of more practical courses and the hiring of more practical professors with skill sets better suited to preparing students to practice law in a proficient and ethical manner. Prospective students should eschew law schools that fail to take seriously the paramount educational mission of preparing students to be competent practitioners.

As a final note, I realize that all of what I have proposed here is much easier said than done, particularly when it seems that all of the stakeholders are buying into the *USNWR* rankings (which empowers the most impractical law schools). I also recognize that, even if law schools were amenable to such change, it would take many years to implement my proposals because turnover in law faculties (most of which possess tenure)[247] usually occurs through the slow process of attrition.[248] Yet, as is true with respect to any fundamental reform, change begins with articulating the problems that exist and proposing specific reforms to remedy those problems.

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247. Unlike some other critics of legal education, I do not propose that tenure in law schools be abolished. *See, e.g.*, Paul Boudreaux, *Time Machine: Emma's Legal Education, 2025*, 59 J. LEGAL EDUC. 454, 455–56 (2010) (posing the question of whether tenure for law professors may be abolished in the future based on current economic and technological trends); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 413 (1984) (discussing Professor Duncan Kennedy's proposal that tenure be abolished). The American Association of University Professors has adopted the following position:

> Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 3 (10th ed. 2006), *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf. Although I agree with this proposition, I believe that some type of limited post-tenure review would be appropriate. *Cf.* Robbins, *supra* note 138, at 388 (suggesting serious consideration of post-tenure review as a means to prevent post-tenure decline in faculty productivity).

248. *See, e.g.*, Donald E. Lively, *The Provisional Approval Experience: Lessons for Legal Education in Darwinian Times*, 52 J. LEGAL EDUC. 397, 438 (2002) ("[T]he limited turnover of faculty [is] a function of tenure . . . ."); Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 18 (2006) ("[A]cademic employment is characterized by longer tenure, and less turnover, than in many other industries . . . .").