

Fall 2012

## The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure

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### Recommended Citation

Brent E. Newton, The Ninety-Five These: Systemic Reforms of American Legal Education and Licensure, 64 S. C. L. Rev. 55 (2012).

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**THE NINETY-FIVE THESES:  
SYSTEMIC REFORMS OF AMERICAN LEGAL EDUCATION AND LICENSURE**

Brent E. Newton\*

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I. INTRODUCTION

Knowledgeable and respected authorities, both inside and outside the legal academy, are correctly describing the American system of legal education as being in a state of “crisis”<sup>1</sup> and in need of dramatic reform.<sup>2</sup> Yet many, if not

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1. See, e.g., Editorial, *Legal Education Reform: The Economic Downturn Is Forcing Overdue Changes in Training for Lawyers*, N.Y. TIMES, Nov. 26, 2011, at A18 (“American legal education is in crisis.”); Akhil Reed Amar & Ian Ayres, *Paying Students to Quit Law School*, SLATE (Nov. 18, 2011, 2:53 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/11/law\\_schools\\_should\\_pay\\_students\\_to\\_quit.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/law_schools_should_pay_students_to_quit.html) (“A crisis is threatening legal education.”); Karen Sloan, *NY Judge Offers AALS a Cure for What Ails It*, N.Y. L.J. (Jan. 10, 2012), [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537923242&NY\\_Judge\\_Offers\\_AALS\\_a\\_Cure\\_for\\_What\\_Ails\\_It](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537923242&NY_Judge_Offers_AALS_a_Cure_for_What_Ails_It) (quoting Judge José Cabranes, *AALS 2012 Annual Meeting Luncheon: Judge Jose Cabranes Keynote Address* (Jan. 6, 2012)) (noting Second Circuit Judge José Cabranes’ speech at the 2012 meeting of the Association of American Law Schools (AALS) in which he stated that U.S. law schools “are in something of a crisis”).

most, within the legal academy consider the burgeoning calls for reform to resemble Don Quixote's fighting windmills<sup>3</sup> more than Martin Luther's instigating the Reformation.<sup>4</sup> Despite the academy's intransigence,<sup>5</sup> I feel

2. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 24 (2007) [hereinafter BEST PRACTICES] (urging law schools to, among other things, "expand their educational objectives to more completely serve the needs of their students"); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87 (2007) [hereinafter CARNEGIE REPORT] (noting that law schools should aim to help students become "apprentice practitioner[s]"); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS, at xii (2012) (noting that inequities and problems abound in legal education); David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 250 (2010) (noting the need for change in legal education in response to the recent economic downturn); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 108 (2010) ("Over time, the legal profession has increasingly demanded change in the academy—not to become more theoretical, inter-disciplinary and divorced from the 'real world,' but to focus more on lawyering, professionalism and inculcating values."); Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651 *passim* (2012) (discussing the changes needed in American legal education); Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 736 (2011) ("This is a time . . . to undertake a comprehensive and unflinching evaluation . . . of legal education, a system that has utterly failed to adapt its pedagogy, culture, and economics to the current and devastating reality facing law students."); 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) (citations omitted) (discussing several critiques of, and proposed reforms for, legal education); Judith S. Kaye, *2011 James P. White Lecture on Legal Education: A Chief Judge's After-Life: Reflections on Educating Lawyers Today*, 45 IND. L. REV. 291, 297–99 (2012) (advocating for several structural reforms of the American system of legal education in order to produce "practice-ready lawyers" upon graduation); 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) (citations omitted) (noting the need for broad-sweeping legal education reform). Such calls for reform, while particularly noticeable in the past five years, have antecedents from earlier decades. See, e.g., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 234–35 (1992) [hereinafter MACCRATE REPORT] (noting the types of practical skills that should be emphasized during law school); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–35 (1992) (noting that law firms and law schools are "moving in opposite directions").

3. MIGUEL DE CERVANTES, DON QUIXOTE 44 (Peter Motteux trans., rev. by John Ozell, 1930) (1605) ("Pray look better, Sir, quoth *Sancho*; those things yonder are no Giants, but Wind-mills . . .").

4. See generally MARTIN LUTHER, *The Ninety-five Theses: Disputation of Dr. Martin Luther Concerning Penitence and Indulgences*, in BASIC LUTHER 5, 5–13 (1984) (advocating widespread change in the practices of the Catholic Church, which eventually served as the spark that ignited the Protestant Reformation).

5. See 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."); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007) ("[H]istory is littered with failed reform efforts of

compelled to nail the following Theses to the academy's door in hopes of hastening, however slightly, the glacial movement towards meaningful reform. The Theses comprise six major themes: the first five concern the legal academy, and the sixth concerns the legal profession itself. Specifically, Part II.A addresses defects in the law school admissions process. Part II.B details structural problems resulting from the excessive number of law schools, the American Bar Association (ABA) accreditation process, the current manner of law school faculty governance, and the current system of ranking law schools. Part II.C relates to defects in law schools' curricula, pedagogical methods, and assessments of students. Part II.D analyzes deficiencies in the professoriate at law schools. Part II.E explores problems related to legal scholarship and law reviews. Part II.F seeks to call attention to the flaws in the bar exam and licensure process, as well as in the process of graduates' transitioning from law school to the job market. Most of the problems are interrelated and result in a negative synergy that increasingly threatens the health of the legal profession.<sup>6</sup> As a result, the only way to effect meaningful change that is likely to persist is to implement *systemic* reform—root to branch.<sup>7</sup>

Some Theses are based on strong empirical evidence or undisputed—or virtually undisputed—facts, while others are admittedly subjective opinion (yet rooted in common sense and voiced by many others, too). The ninety-five Theses proceed chronologically from the period immediately before law school, the final portion of undergraduate education and the law school admissions process, to the period immediately after law school, the bar exam and the transition from graduation to practice.

My vision of legal education is informed by having had one foot in the legal profession and the other in the legal academy during the majority of my two-decade-long legal career. I have practical legal experience, having served as a federal appellate law clerk, a trial attorney who handled several hundred cases in federal court, an appellate attorney who argued at all levels of the state and federal court systems—including the Supreme Court—and, currently, the deputy director of staff at a federal agency in Washington, D.C. During the same time, as an adjunct professor, lecturer, and visiting professor, I have taught over three dozen semester courses—doctrinal, experiential, and interdisciplinary—at three different law schools and have also taught several “pre-law” courses at the undergraduate level. I have published legal books and articles on a wide variety

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this type.”); *id.* at 524 (“Law schools are extremely conservative institutions that are quite resistant to fundamental change.”).

6. See Edwards, *supra* note 2, at 34 (quoting Letter from Felix Frankfurter, Professor, Harvard Law School to Mr. Rosenwald (May 13, 1927) (on file with Harvard Law School Library), *quoted in* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989)) (“In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”).

7. Cf. Carasik, *supra* note 2, at 762 (“Reform must be holistic and comprehensive . . .”).

of topics, including legal education;<sup>8</sup> published experiential course materials that have been used at several law schools;<sup>9</sup> and served for a decade on the editorial board of the faculty-edited *Journal of Appellate Practice and Process*. I also was a member of the adjunct faculty subcommittee of the ABA's Section on Legal Education and Admissions to the Bar from 2004 to 2007. In preparation for this Article, I have surveyed the curricula of several dozens of American law schools, studied trends in the hiring of law faculty during the past four decades, and conversed extensively with law professors—full-time and adjunct, doctrinal and experiential—and law students at many law schools throughout the country.

Not every Thesis below applies to all American law schools. Some law schools have started the process of meaningful reform,<sup>10</sup> although no single law

8. Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012) [hereinafter Newton, *Law Review Scholarship*]; Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010) [hereinafter Newton, *Preaching What They Don't Practice*].

9. BRENT E. NEWTON, CRIMINAL LITIGATION AND LEGAL ISSUES IN CRIMINAL PROCEDURE: READINGS AND HYPOTHETICAL EXERCISES (3d ed. 2009).

10. I highlight several law schools that have made significant efforts at reform. See Peggy Cooper Davis, *Desegregating Legal Education*, 26 GA. ST. U. L. REV. 1271, 1293 (2010) (discussing New York University School of Law's first-year, two-semester "lawyering" simulation course taught by professors who have significant practical experience); 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>) ("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 researchers, 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. . . . 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."); Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 741–46 (2009) (noting that, among others, Case Western Reserve University School of Law, Drake University School of Law, Southwestern University School of Law, William and Mary School of Law, Washington & Lee University School of Law, and the University of New Mexico School of Law have created "lawyering" skills courses, "problem-solving" courses, and/or legal practicum courses); John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. L. & SOC. CHANGE 101, 115–26 (2009) (citations omitted) (discussing the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law in which students take a non-traditional, largely experiential sequence of courses and are subject to summative and formative assessments, including those based on a portfolio of their work accumulated over the course of their law school careers); David E. Van Zandt, *The Evolution of J.D. Programs—Is Non-Traditional Becoming More Traditional?: Keynote Address Transcript*, 38 SW. U. L. REV. 607, 611–16 (2009) (noting several recent changes at Northwestern University School of Law, including a twenty-four month accelerated J.D. program; the requirement of personal interviews of all applicants as part of the admission process; and several meaningful curricular reforms). These law schools, together with several others, recently have formed a

school has articulated a comprehensive vision for reform that accomplishes what I believe is necessary to bring legal education into the twenty-first century. Some law schools have been reactionary and have gone in the opposite direction of reform in some of the most important areas: by hiring more and more professors whose primary mission is to write academic law review articles rather than excel at teaching law students what they need to know to become competent practitioners; by dramatically increasing tuition while cutting the teaching loads of full-time professors; and by obsessing over the *U.S. News & World Report* rankings (at some schools to the point of misrepresenting their data in an attempt to rise in the rankings).<sup>11</sup> Unfortunately, some deans and law professors are digging in their heels and defending significant parts of the current model of legal education.<sup>12</sup>

The recent economic recession has resulted in what appears to be long-term structural changes in the legal employment market<sup>13</sup> that make the systemic failures of American legal education even more glaring and inequitable to law students. Legions of law school graduates, saddled with massive student loans,<sup>14</sup> lack the skills to be competent entry-level practitioners. Increasing numbers of legal employers, in both the private and public sectors, are no longer able or willing to hire such graduates and provide the post-graduate training needed to bring such neophyte attorneys up to speed.<sup>15</sup> In addition, because lawyer and

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“consortium” called Educating Tomorrow’s Lawyers. See Univ. of Denver, *About ETL*, EDUCATING TOMORROW’S LAWYERS, <http://educatingtomorrowslawyers.du.edu/about-etl/> (last visited Sept. 15, 2012) (“ETL leverages the Carnegie Model and the work of law schools and professors committed to legal education reform to align legal education with the needs of an evolving profession by providing a supported platform for shared learning, experimentation, ongoing measurement and collective implementation.”).

11. See *infra* Theses 11, 15, 53–55, 69–70.

12. See, e.g., Larry Kramer, *From the Dean*, STAN. LAW., Oct. 28, 2011, available at <http://stanfordlawyer.law.stanford.edu/2011/10/from-the-dean-5/> (“It is true that tenured and tenure-track faculty still teach a broad array of doctrinal classes in the traditional way. We do so because it remains as efficient and effective a method as anyone has found to teach the overarching theoretical structure of a field.”). But see *infra* Theses 19–22, 28–29, 46–49 (addressing the many problems with the traditional way of teaching).

13. William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., July 2011, at 40 (“The legal profession is undergoing a massive structural shift . . .”); accord Barnhizer, *supra* note 2, at 255–56 (discussing the impending transformation in the practice of law); Bennett, *supra* note 2, at 109–12 (describing how law firms are hiring and retaining fewer law school graduates); Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2290–91 (2010) (emphasizing changes in law firms such as increased firm size and “shifting models of competition and management”).

14. See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble*, A.B.A. J., Jan. 2012, at 30, 32; Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125k; It’s Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012, 5:29 AM), [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m/](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/).

15. See, e.g., Judith Welch Wegner, *Response: More Complicated than We Think*, 59 J. LEGAL EDUC. 623, 625, 632 (2010) (noting “major corporate clients that no longer wish to pay for

law student populations have grown to unsustainable numbers, many graduates either are unable to obtain any legal employment or have taken inferior types of legal employment—mostly short-term “contract lawyer” jobs without benefits or even unpaid positions in the hope of eventually landing a paid position.<sup>16</sup> More and more desperate graduates are attempting to service their debts and eke out a living by establishing solo practices;<sup>17</sup> because they lack the necessary competencies as practitioners, many will endanger the property or liberty of their clients. Because most law schools have not adequately responded to the growing calls for reform and the number of law schools<sup>18</sup> and law students<sup>19</sup> continues to increase, or at least remains at unsustainable levels, the already negative situation will only worsen in the future absent widespread structural changes or a miraculous, sustained economic recovery.

My goal in articulating the following Theses is to focus the debate about how we must systemically reform the current system—rather than tinker around the margins—to better prepare law students to become competent, ethical, and employable members of the legal profession. I hardly expect most readers to accept all of my points, but I hope that thoughtful readers will start looking at top-to-bottom change as the surest way out of the current mess. I also hope that readers will remember that the ultimate beneficiaries (or victims) of our system of legal education and licensure are members of the public. In the words of the Carnegie Foundation for the Advancement of Teaching:

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or rely upon uniformed novice advice” and that law firms “must increasingly confront the reality that their corporate clients [are demanding that firms] . . . bill for only the work of associates with appropriate levels of experience to contribute to needed work”).

16. See Barnhizer, *supra* note 2, at 278–79; see also James G. Leipold, *The Changing Legal Employment Market for New Law School Graduates*, 79 B. EXAMINER, no. 4, Nov. 2010, at 6, 7–10 (noting a significant increase in the number of 2009 law school graduates who were hired in short-term “contract” positions). Professor Paul Campos at the University of Colorado School of Law recently parsed employment data for 2011 law school graduates and estimated that two out of three graduates had not secured full-time, nontemporary legal employment within nine months of graduation. See Paul Campos, *Two Out of Three 2011 Law School Graduates Did Not Get Real Legal Jobs*, INSIDE THE LAW SCHOOL SCAM (June 8, 2012), <http://insidethelawschoolscam.blogspot.com/2012/06/two-out-of-three-2011-law-school.html> (examining recent employment data from NALP—The Association for Legal Career Professionals); see also *Class of 2011 Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice*, EMPLOYMENT FOR THE CLASS OF 2011—SELECTED FINDINGS (NALP—The Ass’n for Legal Career Prof’ls), 2012, at 1–2, available at <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf> (analyzing NALP’s Employment Report and Salary Survey for the Class of 2011).

17. See Leipold, *supra* note 16, at 8 (noting the increase of recent law school graduates going into private practice as solo practitioners).

18. Harvard Law Sch. Program on the Legal Profession, *Analysis of the Legal Profession and Law Firms (as of 2007)*, HARV. L. SCH., <http://www.law.harvard.edu/programs/plp/pages/statistics.php> (last visited Sept. 15, 2012) (indicating a 36% increase in the number of law schools from 1970–2007).

19. *Id.* (noting a 50% increase in law school graduates over the thirty year span from 1975 to 2005); see also *infra* Thesis 5 (discussing the excessive number of law students today).

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 values of freedom with equity and extend these values into situations as yet unknown but continuous with the best aspirations of our past.<sup>20</sup>

The current systemic failures of American legal education—many of which involve the exploitation and betrayal of law students by full-time faculty members at many schools—have deleterious effects on the ethical health of the profession.<sup>21</sup> Although structurally reforming legal education will not be a panacea, and significant reforms will also be necessary in the legal profession, dramatic improvements in the place where lawyers are made is the most obvious first step.

Finally, as discussed below, achieving meaningful and lasting reform will require two major structural changes in the American system of legal education. First, the ABA Section on Legal Education and Admissions to the Bar must amend the current law school accreditation Standards<sup>22</sup> in several significant ways.<sup>23</sup> Second, the current model of faculty governance in American legal education, whereby law school deans and other administrators typically require the concurrence of their faculties regarding major decisions affecting the law school,<sup>24</sup> must yield to a more corporate or executive model of governance, whereby the faculty's power to veto change must yield to the necessities of reform. Additionally, intervention by the federal government—in the form of reducing the amount of federal student loans available to law students and changing the antitrust and federal educational laws so as to permit the ABA

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20. CARNEGIE REPORT, *supra* note 2, at 202.

21. See Bourne, *supra* note 2, at 685. Recent practices, particularly in the context of admissions, tend to suggest that law schools have forgotten about, or are ignoring, the fiduciary duty they owe to their students. As noted by Professor Bourne:

Perhaps the most insidious [effect of these practices or violations] is the implicit messages they send . . . about professionalism and ethical behavior. The sense of betrayal these students feel toward the schools that were supposed to nurture them into joining a noble profession is palpable. When students see their teachers exploiting them, hiding from them the real costs of what they are doing, and ultimately using them for the self-promotion of the elites that run the schools, the hidden message is that clients exist to be exploited by their lawyers rather than to be served by them.

*Id.*

22. See generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. (2012–2013) [hereinafter ABA STANDARDS], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf) (showing the current ABA accreditation Standards).

23. See *infra* Theses 8–11, 61, 72, 77, 86.

24. See *infra* Thesis 10.



accreditation authority to limit the number of law schools and law students—may also prove necessary.<sup>25</sup>

## II. THE NINETY-FIVE THESES

### A. *Defects in the Law School Admissions Process*

1. *There should be undergraduate “pre-law” prerequisites or some other measure of basic knowledge of law, the legal system, and the legal profession by applicants for entrance into law school.*

Too many students go to law school without really knowing why they are charting that particular career path or for no articulable reasons other than that they want to make a lot of money or “are good at arguing.”<sup>26</sup> Undergraduate prerequisite courses could help students make an informed decision about attending law school. Compare our system of medical education, where several undergraduate course prerequisites are mandatory for admission into medical school.<sup>27</sup> Undergraduate pre-law prerequisites would serve two purposes: First, they would help students decide if law school, and a legal career, is the right option for them. Second, they would winnow out students who perform poorly in such courses. Courses such as judicial process<sup>28</sup> or legal process<sup>29</sup> come to mind as appropriate prerequisites for law school admission.<sup>30</sup> Ideally, a two-semester comprehensive undergraduate course would be created that would expose students to essential information about the law, namely legal reasoning,

25. See *infra* Theses 5–6; see also *infra* note 58 and accompanying text (explaining the ABA’s views on regulating law students).

26. RUTH LAMMERT-REEVES, GET INTO LAW SCHOOL: A STRATEGIC APPROACH 7 (5th ed. 2011) (noting that two “[b]ad reasons for going to law school” are “I’m good at arguing” and “financial lure”).

27. *Admission Requirements*, ASS’N OF AM. MED. COLLS., <http://www.aamc.org/students/applying/requirements/> (last visited Sept. 15, 2012).

28. See generally ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA (8th ed. 2011) (providing extensive coverage of the American judicial system and the politics that influence the courts). I have repeatedly taught Judicial Process to undergraduates and believe it offers an excellent introduction to the American legal system and legal profession.

29. See generally HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (textbook for a legal process course).

30. A more radical approach would be relegating most traditional first-year doctrinal law school courses (contract law, property law, torts, constitutional law, and criminal law) to the undergraduate level, which could reduce law school to two years. See *infra* Thesis 26 (contending that the third year of law school, in its current form, is unnecessary). With respect to those who contend that undergraduate education is not the proper place for legal training, such opposition flies in the face of legal education in the United Kingdom, where undergraduate legal education is the norm. Andrew Boon & Julian Webb, *Legal Education and Training in England and Wales: Back to the Future?*, 58 J. LEGAL EDUC. 79, 80 (2008) (“Law in England is an undergraduate rather than graduate education.”).

the legal system, and the legal profession. If law schools started requiring undergraduate prerequisites—and particularly if the ABA accreditation authority were to mandate it—there would be no shortage of qualified instructors to teach such courses.<sup>31</sup> Practicing attorneys could be brought on as adjunct professors, or full-time law professors could teach such courses at their universities or ones nearby. Alternatively, if such courses were not taken in college—in the case of second-career aspirants who, many years after college, decide to go to law school—applicants could take a qualifying examination that would assess their knowledge of relevant areas of the law, the legal system, and the legal profession (unlike the LSAT, which does not test such knowledge).<sup>32</sup> No doubt a commercial exam-preparation industry would sprout up if such a qualifying exam became the norm.

2. *Prospective law students should be required to work full-time, preferably in the legal field, for at least two years after receiving their undergraduate degree and before entering law school.*

Compare business schools, which typically require at least two years of full-time work experience in the business world.<sup>33</sup> Requiring “real-world” work experience (preferably, but not necessarily, in the legal field) by prospective law students would serve at least two important purposes: First, it would foster maturity and a real-world perspective among law students (many of whom currently go to law school in their early twenties, often straight from college). Second, it would cause prospective law students to appreciate the financial reality of spending \$100,000 or more to attend three years of law school<sup>34</sup> (in addition to the opportunity costs). Many law students today have never held any job other than part-time summer positions earning minimum wage.

3. *The LSAT should be jettisoned, or at least retooled, so as to serve as a better predictor of success as a lawyer.*

A recent study by two professors at the University of California at Berkeley makes a convincing case for abandoning or modifying the LSAT as a significant

31. *Cf. infra* note 46 (noting that, as of the 2008–2009 academic year, there were between 10,000 and 12,000 law professors in the United States).

32. See *The LSAT: About the LSAT*, L. SCH. ADMISSION COUNCIL, [www.lsac.org/jd/lsat/about-the-lsat.asp](http://www.lsac.org/jd/lsat/about-the-lsat.asp) (last visited Sept. 15, 2012) (indicating that the LSAT tests reading comprehension, analytical reasoning, and logical reasoning).

33. Brian Burnsed, *Get into Business School: Work Experience*, U.S. NEWS & WORLD REP. (Dec. 17, 2010), <http://www.usnews.com/education/best-graduate-schools/top-business-schools/applying/articles/2010/12/17/get-into-business-school-work-experience> (“Students at top business schools typically matriculate with at least one to two years of professional experience. As far as the nature of that experience is concerned, it’s usually in the form of full-time, paid positions.”).

34. See Brian Z. Tamanaha, Op-Ed., *How to Make Law School Affordable*, N.Y. TIMES, June 1, 2012, at A27 (“The average debt of law graduates tops \$100,000 . . .”).

part of the admissions calculus for law school.<sup>35</sup> As they note, and as the Law School Admission Council appears to confirm, the LSAT does not accurately predict an applicant's overall success in law school, but instead, only predicts first-year grades.<sup>36</sup> More importantly, the LSAT does not predict success in the legal profession<sup>37</sup> because it assesses only a narrow range of cognitive competencies.<sup>38</sup> Therefore, law schools should either abandon their heavy reliance on applicants' LSAT scores or, assuming it were possible, replace it with some type of assessment that considers the many types of intelligence needed to be a competent attorney.<sup>39</sup>

4. *The law school admissions process should give meaningful consideration to other types of intelligence besides those academic and analytical abilities tested in written form.*

In addition to "hard" analytical and cognitive skills, the successful practice of law requires many "soft" competencies such as "emotional intelligence,"<sup>40</sup> maturity, a strong work ethic, and integrity.<sup>41</sup> The law school admissions process, which currently focuses almost exclusively on undergraduate GPA and LSAT scores<sup>42</sup> (both of which are largely the product of written testing), should incorporate a meaningful assessment of an applicant's potential in these other areas. Such an assessment need not be done (and perhaps could not be done) in a standardized test. Instead, it could occur through an evaluation of a candidate's strengths and weaknesses evinced in other facets of his or her life, such as two

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35. See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 641 (2011). In an analogous manner, Indiana Law Professor Bill Henderson and his colleagues at LawyerMetrics.com are attempting to offer law firms a scientific, or evidence-based, method to hire and promote attorneys based on the types of competencies needed for a successful legal career. See Aric Press, *Getting Beyond the Conventional Wisdom: A New Look at Firm Recruiting, Hiring, and Promotion*, THE AM. LAW., Nov. 2010, available at <http://www.amlawdaily.typepad.com/amlawdaily/2010/11/pressconventionalwisdom.html>.

36. *LSAT Scores as Predictors of Law School Performance*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/JD/pdfs/LSAT-Score-Predictors-of-Performance.pdf> (last visited Sept. 15, 2012) ("The LSAT is a strong predictor of first-year law school grades . . .").

37. Shultz & Zedeck, *supra* note 35, at 641 (indicating that the LSAT "[was] not intended to predict lawyering effectiveness").

38. See generally *id.* at 622–23 (noting that the LSAT only assesses a narrow range of competencies).

39. See *infra* Thesis 4.

40. Jan Salisbury, *Emotional Intelligence in Law Practice*, 53 ADVOCATE, Jan. 2010, at 38 ("Of all the skills and knowledge required for success and exemplary performance in the practice of law, perhaps none is . . . so essential, as Emotional Intelligence.").

41. See Shultz & Zedeck, *supra* note 35, at 630 tbl.1 (identifying twenty-six factors important to lawyering effectiveness, as determined from interviews and focus groups).

42. *Id.* at 620 ("Law school admission decisions are heavily influenced by a student's undergraduate grade point average (UGPA) and Law School Admission Test (LSAT) score.").

years or more of full-time work experience between college and law school.<sup>43</sup> Additionally, law schools should conduct mandatory interviews of applicants, either live or via video conference, in order to assess their interpersonal and oral communication skills.<sup>44</sup>

*B. Structural Problems Resulting from the Number of Law Schools, the ABA Accreditation Process, Faculty Governance, and the System of Ranking Law Schools*

5. *There are too many law schools, too many law students, and too many law professors based on our country's current model of providing legal services.*

There are 200 ABA-accredited law schools with approximately 145,000 law students<sup>45</sup> and well over 10,000 full-time law professors.<sup>46</sup> At least based on our current economic model of providing legal services—primarily serving the upper-middle class and affluent individuals, as well as corporations<sup>47</sup>—our

43. See *supra* Thesis 2.

44. See Van Zandt, *supra* note 10, at 612 (noting Northwestern Law School does a personal interview of all applicants “in order to assess [prospective students’] communication skills, maturity, and judgment”).

45. During the 2011–2012 academic year, there were 146,288 J.D. candidates enrolled in 200 ABA accredited law schools. *Lawyer Demographics*, AM. BAR ASS’N, [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.aut_hcheckdam.pdf) (last visited Oct. 15, 2012). The total number of law students is even higher when students at unaccredited law schools are added. See, e.g., *Concord at a Glance*, CONCORD L. SCH., [http://info.concordlawschool.edu/Pages/At\\_A\\_Glance.aspx](http://info.concordlawschool.edu/Pages/At_A_Glance.aspx) (last visited Sept. 16, 2012) (noting approximately 1,200 students attending a non-accredited school).

46. According to the AALS, in the 2008–2009 academic year (the last year for which there is reported data), there were 10,268 full-time law professors (including deans and law librarians) employed by the AALS member and fee-paid institutions in the United States. *Titles, 2008–2009 AALS Statistical Report on Law Faculty*, ASS’N AM. L. SCHS., <http://www.aals.org/statistics/2009dlr/titles.html> (last visited Oct. 28, 2012). Of those full-time faculty, 505 were listed as “instructors” or “lecturers”; the rest were “professors” (full, associate, or assistant), deans (including vice, associate, and assistant deans), and law librarians. *Id.* With the addition of full-time law professors employed by both the other ABA-accredited law schools and the many unaccredited law schools throughout the country, the total number of full-time law professors likely exceeds 12,000. See *id.*

47. Very few attorneys today (other than court-appointed counsel guaranteed by the Constitution in criminal cases, the tiny percentage of civil attorneys who work for “legal aid”-type organizations and other nonprofits, and “for-profit” civil attorneys handling occasional pro bono cases) provide legal services to low- and middle-income Americans. See, e.g., Joanne Martin & Stephen Daniels, *A Brief Moment of Opportunity: The Effects of the Economic Downturn on the Delivery of Legal Services to the Poor*, 33 U. ARK. LITTLE ROCK L. REV. 435, 435 (2011) (citing BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 152–57 (1977)); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1787–90 (2001); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL’Y 47, 47–48 (2003)) (discussing the present lack of legal resources for the poor); see also *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 1–2, <http://www.lsc.gov/sites/default/files/LSC/pdfs>

society does not need nearly this many law students.<sup>48</sup> We have well over one million licensed attorneys in the United States (in excess of one for every 300 people)<sup>49</sup> and the rate of unemployment among attorneys is alarming, particularly for recent law school graduates.<sup>50</sup> Although the economic recession has led to a slight decrease in law school applications in recent years (around 12%),<sup>51</sup> “there were no empty seats in any of the 200 law schools in the country” at the beginning of the 2011–2012 academic year.<sup>52</sup> Yet, according to many, “the current turmoil in the legal job market reflects a permanent seismic shift rather than temporary economic conditions . . . [b]ecause law is a mature industry,” with a decreasing number of lawyers needed.<sup>53</sup> Law schools surely know this fact, and at least some are continuing to enroll the same number of students out of economic self-interest.<sup>54</sup> Market forces have not worked to control this economic inefficiency because law schools have not been subject to traditional economic forces.<sup>55</sup> The ABA accreditation process and the *U.S. News & World Report* ranking system have insulated them to some degree.<sup>56</sup> The latter has inspired many law schools to report misleading data about their graduates’ employment numbers, which, in turn has induced students to enroll.<sup>57</sup>

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/JusticeGapReportOverview120105.pdf (mentioning that the ratio of attorneys giving legal services to the general population is thirteen times greater than that of attorneys giving legal services to low-income people). The need for legal services by low- and middle-income Americans often goes unmet because legal services in this country, under the current economic model, are simply not affordable. See, e.g., Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 484 (2002) (discussing the unmet needs for affordable legal services for the middle class); Wallace B. Jefferson, *The State of the Judiciary*, TEX. B.J., Apr. 2011, at 282, 283 (“The increasing inaccessibility of legal services—for the poor, for even the middle class—undermines the rule of law for us all.”); Martin & Daniels, *supra*, at 435 (citing CURRAN, *supra* at 152–57 (1977)) (noting that, even before the recent recession, as much as 80% of the need for legal services among the poor went unmet).

48. See Stephen Bainbridge, *Go to Tech School, Not Law School?*, PROFESSORBAINBRIDGE.COM (Nov. 12, 2011, 3:07 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2011/11/go-to-tech-school-not-law-school.html> (citations omitted).

49. See *Lawyer Demographics*, *supra* note 45 (noting that in 2011, the last year of reported data, there were 1,245,205 licensed attorneys in the United States).

50. See Henderson & Zahorsky, *supra* note 13, at 40–42.

51. See Martha Neil, *Law School Apps Drop 11.5 Percent, a 10-Year Low*, A.B.A. J. (Mar. 16, 2011, 5:40 PM), [http://www.abajournal.com/news/article/law\\_school\\_apps\\_drop\\_11.5\\_percent\\_a\\_10-year\\_low/](http://www.abajournal.com/news/article/law_school_apps_drop_11.5_percent_a_10-year_low/).

52. David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

53. Bainbridge, *supra* note 48 (citing Stephen Bainbridge, *Is Law a “Mature” Industry?*, PROFESSORBAINBRIDGE.COM (July 9, 2009, 12:42 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2009/07/is-law-a-mature-industry.html>).

54. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1.

55. *Id.* (“The basic rules of a market economy . . . just don’t apply.”).

56. See TAMANAHA, *supra* note 2, at 80.

57. Jack Crittenden, *Angry Law Grads*, NAT’L JURIST, Oct. 2010, at 20; see also Daniel S. Harawa, *A Numbers Game: The Ethicality of Law School Reporting Practices*, 24 GEO. J. LEGAL

The former has done nothing significant to curtail the growth of new law schools or burgeoning law school populations at existing schools, when both are clearly unnecessary.<sup>58</sup> Additionally, there are excessive numbers of law students due to the current system of federally-guaranteed student loans.<sup>59</sup>

6. *The current system of providing federal student loans to law students has financed the bloated system of legal education and allowed law schools to avoid the negative financial consequences caused by the excessive number of graduates.*

Eighty percent of law students rely on student loans as the primary source of financing for their legal education.<sup>60</sup> The average private law school graduate in the 2010–2011 academic year had \$124,950 in law school loans, while the average public law school graduate had \$75,728 in such debt.<sup>61</sup> The vast majority of law students' loans—Stafford, Perkins, and GradPlus—which are difficult to discharge in bankruptcy,<sup>62</sup> are underwritten or guaranteed by the federal government, meaning that the taxpayers will end up paying if a law

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ETHICS 607, 607 (2011) (citing *Uncommonly Good*, LEWIS & CLARK L. SCH., [http://law.lclark.edu/offices/career\\_services/uncommon/](http://law.lclark.edu/offices/career_services/uncommon/) (last visited Sept. 16, 2012) (discussing how law schools' reports give students a false sense of security)).

58. The ABA asserts that it would be improper for it to consider the glut of attorneys and law students in its role as the agency that accredits new law schools. *Can't Regulate Number of Law Students, ABA Says*, THE VLW BLOG (July 22, 2011), <http://valawyersweekly.com/vlwblog/2011/07/22/cant%E2%80%99s-regulate-number-of-law-students-aba-says/>. Although the ABA may be correct that it would violate the antitrust laws and Department of Education (DOE) regulations by attempting to regulate the number of law schools and law students, Congress could remedy this by creating an exception to the antitrust statutes and DOE regulations for the law school accrediting authority. *Id.* In particular, Congress could authorize the accreditation agency, through its accreditation process, to limit the number of law schools and the size of law schools based on data regarding legal unemployment, a school's graduates' debt loads, and unmet legal needs in the United States generally as well as in particular markets.

In late 2009, an ABA Commission did, however, issue a paper warning aspiring law students to think carefully about going to law school. COMM'N ON THE IMPACT OF THE ECON. CRISES ON THE PROF. & LEGAL NEEDS, AM. BAR ASS'N, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL, (Nov. 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/lstd/legal\\_ed/value.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/lstd/legal_ed/value.authcheckdam.pdf).

59. See *infra* Thesis 6.

60. LAW SCH. ADMISSION COUNCIL, FINANCIAL AID FOR LAW SCHOOL: A PRELIMINARY GUIDE 2 (2005), available at [http://www.powerscore.com/lSAT/law-school-admissions/content/Financial%20Aid%20For%20Law%20School%20-20A%20Preliminary%20Guide%20\(LSAC\).pdf](http://www.powerscore.com/lSAT/law-school-admissions/content/Financial%20Aid%20For%20Law%20School%20-20A%20Preliminary%20Guide%20(LSAC).pdf).

61. *Average Amount Borrowed for Law School 2001–2010*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/avg\\_amnt\\_brwd.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf) (last visited Oct. 15, 2012).

62. *Student Loans and Bankruptcy*, STUDENT LOAN BORROWER ASSISTANCE, <http://www.studentloanborrowerassistance.org/bankruptcy/> (last visited Sept. 16, 2012) (“Student loans are difficult, but not impossible, to discharge in bankruptcy.”).

school graduate defaults.<sup>63</sup> As Professor Brian Z. Tamanaha, a leading critic of the current system of federal loans for law students, has observed:

[F]ederal loans are an irresistible (and life-sustaining) drug for revenue addicted law schools.

... [N]early all of it goes directly from federal coffers to law school bank accounts. The students are conduits for the money. These student-conduits bear the burden of the loans in the first instance, and the federal government thereafter. ... Law schools get their money up front ... [and] are engorging themselves on the federal loan program.<sup>64</sup>

Some law schools have even admitted students knowing full well that they will likely flunk out, or barely pass (through the equivalent of law school social promotion), and will end up owing a significant amount on student loans without a lawyer's salary to repay them.<sup>65</sup> A recent *New York Times* article summed up the problem with this state of affairs: "It is hard to imagine a 21-year-old without a steady income securing a private or federally guaranteed loan to buy a \$150,000 house, but sums like that are still readily available for just about anyone who wants a doctor of jurisprudence degree."<sup>66</sup> The federal government, which has been the enabler of law schools' addiction to students' borrowed tuition dollars, should significantly limit the amount of student loans that it underwrites to law students.<sup>67</sup> It could do so by shifting the burden to law schools to underwrite a significant amount of student loans themselves. For example, for every dollar of federal loans after a certain base amount, a law school could be required to guarantee a corresponding amount in loans. Law schools have profited handsomely from students' tuition dollars while simultaneously failing to provide graduates with a fair return on their large investments.<sup>68</sup> Thus, schools should have financial incentives to admit an appropriate number of qualified students, charge a fair amount in tuition, and provide students with a quality professional education that will facilitate sufficient employment to repay their loans.

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63. See Nom Sawyer, *The Guide to Law School Loans*, TOP-LAW-SCHOOLS.COM (Oct. 2010), <http://www.top-law-schools.com/guide-to-law-school-loans.html>.

64. Brian Z. Tamanaha, *What Federal Loans Do for Law Students and Law Schools*, NAT'L L.J. L. SCH. REV. (Nov. 3, 2011, 8:00 AM), <http://legaltimes.typepad.com/lawschoolreview/2011/11/what-federal-loans-do-for-law-students-and-law-schools.html>.

65. See Amar & Ayres, *supra* note 1 ("Especially troubling are allegations that some schools admit students they know are unlikely to repay their loans—leaving taxpayers (who guarantee some of these loans) holding the bag.").

66. Segal, *supra* note 52.

67. See TAMANAHAN, *supra* note 2, at 179–80 (urging a cap on federal law student loans—either per student or per school).

68. See *infra* Thesis 15.

7. *Law professors and deans should not dominate the ABA accreditation process.*

Systemic reform of legal education will require major changes in the ABA accreditation Standards.<sup>69</sup> This reform is unlikely to occur so long as the law school accreditation process is controlled by people with a vested interest in the status quo.<sup>70</sup> The current ABA accreditation authority, the Council of the ABA Section of Legal Education and Admissions to the Bar, has twenty-one voting members. Of the twenty-one, ten are full-time members of the legal academy, three are “public” members, one is a law student, and the remaining seven members are judges and practitioners.<sup>71</sup> Although members of the legal academy have yielded some power on the Council to non-academics in recent decades,<sup>72</sup> the composition of the Council needs to change yet again. A majority of the voting members of the Council (eleven of twenty-one)—as well as all standing committees, including the Accreditation Committee and Standards Review Committee—should be members of the legal profession who are not full-time law professors or deans. The legal academy has proved repeatedly that it cannot effectively reform itself. Because the ABA accreditation authority is the most potent potential agent for change,<sup>73</sup> the Council should return to its status in the early and middle parts of the 1900s, when it was controlled by members of the bench and bar rather than by legal educators.<sup>74</sup>

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69. See *infra* Theses 8–11, 61, 72, 77, 86.

70. See Barnhizer, *supra* note 2, at 310 (stating that the “accrediting agents in the ABA’s Section on Legal Education and Admission to the Bar . . . tend[] to be dominated by law school faculty and administrators”); Dolin, *supra* note 2, at 235–36 (citing Roy Stuckey, *Why Johnny Can’t Practice Law—And What We Can Do About It: One Clinical Law Professor’s View*, 72 B. EXAMINER 32, 41 n.8 (May 2003)) (“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.”).

71. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, THE LAW SCHOOL ACCREDITATION PROCESS 3 (Oct. 2010), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2010\\_aba\\_accreditation\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2010_aba_accreditation_brochure.authcheckdam.pdf). See generally 2012–2013 Council, AM. BAR ASS’N, [http://www.americanbar.org/groups/legal\\_education/about\\_us/leadership.html](http://www.americanbar.org/groups/legal_education/about_us/leadership.html) (last visited Sept. 16, 2012) (providing a current list of the Council’s members).

72. As a result of an antitrust lawsuit by the Department of Justice in the mid-1990s, full-time legal educators’ membership on the Council was limited to less than 50% (thus, the current limit of ten out of the twenty-one). Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1487 (2011) (citing *United States v. Am. Bar Ass’n*, 934 F. Supp. 435, 437 (D.D.C. 1996)).

73. See generally Stuckey, *supra* note 70, at 41 n.8 (explaining how the accreditation process controls the standards for law schools).

74. Areen, *supra* note 72, at 1486 (“For many years [in the early and mid-1900s], [members of the] bar and bench dominated the Council.”).



8. *The ABA's law school accreditation process should require schools to demonstrate that students are actually mastering the necessary knowledge, skills, and professional values.*

The current ABA accreditation process is primarily concerned with two criteria: “input” measures, such as the content of a law school’s curriculum and the number of volumes in its library, and a single “output” measure, namely, the bar examination passage rate of a school’s graduates.<sup>75</sup> Critics of this process have correctly contended that it fails to assess whether a law school’s students are actually mastering the knowledge, skills, and professional values necessary to become competent and ethical entry-level practitioners.<sup>76</sup> In mid-2010, the Standards Review Committee of the ABA’s Section of Legal Education and Admissions to the Bar circulated a draft of a proposed amendment to the accreditation Standards seeking to change the focus from “input” to “outcome” measures.<sup>77</sup> In the words of one of the members of the committee, if adopted, these new standards would constitute a “quantum shift in the structuring of the law school accreditation process.”<sup>78</sup> In particular, the proposed new process would measure what students have learned in terms of knowledge, skills, and professional values, beyond looking simply at bar examination results.<sup>79</sup> As of

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75. CATHERINE L. CARPENTER ET AL., AM. BAR ASS’N, REPORT OF THE OUTCOME MEASURES COMMITTEE 3 (July 27, 2008), *available at* <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>.

76. *See id.* at 5–6 (citations omitted).

77. *See generally* STANDARDS REVIEW COMM., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, STUDENT LEARNING OUTCOMES SUBCOMMITTEE MAY 5, 2010 DRAFT, *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/drafts\\_for\\_consideration/student\\_learning\\_outcomes\\_may\\_5\\_2010\\_draft.doc](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/drafts_for_consideration/student_learning_outcomes_may_5_2010_draft.doc) (providing an online document of the proposed amended standards).

78. CARPENTER ET AL., *supra* note 75, at 61.

79. *Id.* at 8, 61. Those proposed revisions of Standards 302–305 are summarized as follows:

1. Standard 302 provides that law schools identify desired learning outcomes. It provides substantial flexibility for law schools, consistent with each law school’s mission.

2. Standard 303 provides that law schools offer a curriculum that is designed to produce graduates that have attained the identified learning outcomes. The proposed standard, with a few exceptions (e.g., a required course in professional responsibility), leaves it to each law school to determine what that curriculum will be.

3. Standard 304 provides that law schools apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students. The determination of how to assess learning outcomes is left to the law schools. Schools are not required to measure the level of achievement of each student in each learning outcome.

4. Standard 305 provides that law schools review the pedagogical effectiveness of their curriculum and improve their curriculum with the goal that all students are likely to achieve proficiency in the identified learning outcomes.

Brenda D. Gibson, *Law Schools Are Better Prepared than Anticipated for the Proposed ABA Standards 302–305*, SYLLABUS (Section on Legal Educ. & Admissions to the Bar, Amer. Bar Ass’n, Chicago, Ill.), Winter 2011–2012 (citing Steven C. Bahls, Assessment and Student

late 2012, the proposed revised standards have not been adopted.<sup>80</sup> Assuming these broad and somewhat vague standards are ultimately adopted, the open question will be how law schools and the ABA accreditation authority will go about implementing them. As demonstrated in the many Theses that follow, American law schools must make enormous strides in terms of their curricula and pedagogies to effect the type of meaningful change in legal education necessary to actually achieve the broad aspirations set forth in the Standards Revision Committee's revised standards. Yet the proposed revisions to Standards 302–305, while by no means perfect, are a good start. The ABA should adopt the revised version of the Standards or some equivalent alternative forthwith.

9. *The ABA law school accreditation authority should permit alternative modes of legal education.*

Almost all of the 200 ABA-accredited American law schools “simply mimic the anemic methods of the schools just above them in the rankings.”<sup>81</sup> However, in one respect, the current system of legal education is already bifurcated: “Big Law” firms mostly employ graduates of top ranked law schools, while law schools lower in the rankings tend to send their graduates into “Small Law” careers—working for small firms or government agencies or as sole practitioners.<sup>82</sup> As a result, noticeable differences in American law schools exist based on the “tier” in which they are ranked.<sup>83</sup> It thus makes no sense that the

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Outcomes—Implications of Proposed ABA Standards on Student Learning Outcomes (May 27, 2010) (unpublished manuscript) (on file with author)), available at [http://www.americanbar.org/publications/syllabus\\_home/volume\\_43\\_2011-2012/winter\\_2011-2012/why\\_many\\_law\\_schools\\_are\\_better\\_prepared\\_than\\_anticipated\\_for\\_the\\_proposal.html](http://www.americanbar.org/publications/syllabus_home/volume_43_2011-2012/winter_2011-2012/why_many_law_schools_are_better_prepared_than_anticipated_for_the_proposal.html).

80. See generally Standards Review Comm. Agenda, Am. Bar Ass'n (Apr. 27–28, 2012), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/april2012/20120404\\_april12\\_src\\_meeting\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april2012/20120404_april12_src_meeting_materials.authcheckdam.pdf) (providing the agenda for the last time the Standards Review Committee met, April of 2012).

81. Bryan A. Garner, *Three Years, Better Spent*, N.Y. TIMES (July 25, 2011, 11:42 AM), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better>.

82. Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 864 (2006–2007) (“[T]he profession has a sharp and unbridgeable chasm, a divide which is mirrored in our law schools. On one side of the professional divide, lawyers represent large organizations, primarily corporations. These attorneys generally work in large firms. On the other side, lawyers represent individuals and small businesses. Lawyers in this part of the profession usually work in small firms or are solo practitioners. This professional chasm has produced a comparable divide in legal education. Graduates of high-prestige law schools primarily work on the corporate side, while those from what are often called ‘local law schools’ primarily represent individuals.”).

83. See, e.g., Newton, *Preaching What They Don't Practice*, *supra* note 8, at 129–30 (discussing the differences in faculty composition at the different schools depending on the ranking in the U.S. News & World Report system; faculties at more highly ranked schools have less practical

curricula and pedagogies of all American law schools should look essentially the same. In contrast, it is notable that American medical schools are not cast from the same mold.<sup>84</sup> The ABA accreditation Standards, which result in the high level of uniformity that currently exists,<sup>85</sup> should be amended to allow more flexibility and different models of legal education—such as cost-saving “teaching” law schools with a small core of full-time professors and the bulk of the faculty comprising part-time and adjunct faculty members who are not expected to publish legal scholarship.<sup>86</sup>

*10. The current model of “shared governance” at American law schools stands as a roadblock to systemic reform of legal education.*

In addition to the need for the ABA to change its current accreditation Standards in order to pave the way for reform,<sup>87</sup> law schools themselves must embrace change. The only realistic way for such internal reforms to occur is for the current model of faculty governance at law schools to change. That current model, which generally mirrors the traditional model of faculty governance in American higher education, is in theory one of “shared” or “collegial” governance between the law school’s administration, led by the dean, and those

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experience and tend to be more theoretical in their approach to teaching, while faculties at lesser ranked schools have more practical experience and tend to be more practical in their approach).

84. *Frequently Asked Questions*, LIAISON COMMITTEE ON MED. EDUC., <http://www.lcme.org/faqlcme.htm> (last visited Sept. 16, 2012) (“Medical schools [in the U.S.] differ greatly: whether they are private or state-supported, free-standing, or part of a parent university. They differ in their dependence on state appropriations, tuition, and income from clinical services and research; their relative emphasis on teaching, research, and medical practice; the size of their faculties and enrollments; the scope of their research and production of future scientists and teachers; and their emphasis on primary care and the training of future community physicians.”).

85. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 366 (2006) (“Part of the reason that law schools don’t try to stand out from the pack is that they can’t. The tight regulation that comes from the ABA [accreditation] Standards and university accreditation standards sets outside limits on experimentation.”); see also David Segal, *The Price to Play Its Way*, N.Y. TIMES, Dec. 18, 2011, at BU1 (stating that the current ABA Standards provide a “blueprint” whereby schools must comply “with a long list of standards that shape the composition of the faculty, the library and dozens of other particulars”—and, in the process, significantly drive up the cost of legal education).

86. See *infra* Thesis 77; see also Thomas M. Mengler, *Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L.J. 337, 344–45 (2009) (“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.”); Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1674 (2011) (contending that law schools must “abandon[] the uniformity that has gripped legal education since the ABA first promoted licensing and accreditation rules almost a century ago”).

87. See *supra* Theses 7–9.

members of the school's faculty who possess voting rights.<sup>88</sup> The current ABA accreditation Standards require, or at least strongly encourage, this system of shared governance.<sup>89</sup> In reality, depending on the law school, the dean often has little independent executive authority to do anything significant in law school governance without the virtual consensus of the faculty, or at least a majority of full-time faculty members with voting rights.<sup>90</sup> Because the status quo for law professors is, at least for now, very comfortable<sup>91</sup> and the changes necessary for meaningful reform would result in a significant realignment from law professors to law students as the primary beneficiaries of law school, it seems unlikely that the current model of faculty governance will allow for such necessary changes to occur. Therefore, in order for systemic reform to occur, the model of governance will need to change to one analogous to the "corporate" model—a powerful executive who, while not omnipotent, does not require the consensus of, or even the concurrence of a majority of, faculty members with respect to significant administrative matters such as hiring decisions, curriculum reform, and the like. Such corporate governance is the norm at American medical schools.<sup>92</sup> Of course, altering the model of faculty governance at law schools is far easier said than done.

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88. The "shared governance" model was created by the American Association of University Professors (AAUP) in the early twentieth century and has existed at the law school level for many decades. See Harry J. Haynsworth, *Faculty Governance—Reflections of a Retiring Dean*, 35 U. TOL. L. REV. 93, 95 (2003) (citing AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 220 (9th ed. 2001)).

89. See *id.* at 97–99 (citing SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Standards 203–206 (2002–2003)) (noting that ABA accreditation Standards 204 and 206 require a "shared governance" model at ABA accredited law schools); see also Cheryl Rosen Weston, *Legal Education in the United States: Who's in Charge? Why Does It Matter?*, 24 WIS. INT'L L.J. 397, 405 (2006) (quoting *Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership, Bylaw Section 6-5(a)*, ASS'N AM. L. SCHS., [http://www.aals.org/about\\_handbook\\_requirements.php](http://www.aals.org/about_handbook_requirements.php) (last visited Sept. 16, 2011)) (citing SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Standard 404(a)(3) (2005–2006)) [hereinafter 2005–2006 ABA STANDARDS] (noting that both ABA Standards and AALS Bylaws require shared governance at law schools).

90. See Haynsworth, *supra* note 88, at 99–100 (observing that "many" law school faculty members "think of shared governance as self-governance [by law professors] over everything"); Rapoport, *supra* note 85, at 370 (observing that law school faculty members ultimately decide the "strategic" matters and "policies" in law school governance); see also Erik Gerding, *Faculty Governance in Crisis*, CONGLOMERATE (Nov. 16, 2009), <http://www.theconglomerate.org/2009/11/faculty-governance-in-crisis.html> (discussing the traditional "[c]onsensus-based decision-making by [law] faculties" and observing that the "more hierarchical, corporate-type models for university governance do not sit well with professors").

91. See Rapoport, *supra* note 85, at 363 ("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 . . .").

92. See Steven J. Willing et al., *The Polity of Academic Medicine: A Critical Analysis of Autocratic Governance*, 1 J. AM. C. RADIOLOGY 972, 972 (2004). There are critics of this model, who contend that faculty governance at medical schools should be "democratic." See Steven J. Willing et al., *The Polity of Academic Medicine: Evidence-Based Democracy*, 2 J. AM. C. RADIOLOGY 358, 366 (2005).

11. *ABA accreditation Standard 509 should be further amended to require law schools to make good-faith efforts to accurately report data about recent graduates' salaries.*

One of the most important data points for prospective students to consider in choosing a law school is each school's post-graduate employment numbers—both the percentage of recent graduates who obtained full-time legal employment within a short time period following graduation and their average salary.<sup>93</sup> Because many law schools exploited the prior version of Standard 509<sup>94</sup> by reporting grossly misleading data about graduate “placement rates”—for instance, treating a graduate as “employed” when he worked full-time as a waiter or in a temporary post-graduate position created by his law school<sup>95</sup>—in August 2012 the ABA amended Standard 509 to provide that accurate “employment outcomes” of graduates must be reported in detail within the year following graduation.<sup>96</sup> The ABA also amended Rule 16 to expressly provide that noncompliant law schools may face sanctions for violating Standard 509.<sup>97</sup> Regrettably, the revised Standard does not require law schools to report average salaries or other salary data concerning recent graduates. Although they have never been required to publicly report salary information under Standard 509, many law schools have done so in a misleading manner, such as reporting only an unrepresentative sample of high-earning graduates.<sup>98</sup> An “interpretation” following the amended Standard seeks to prevent law schools from reporting misleading data concerning salaries by providing that: “Any information, beyond that required by the [Standard] regarding graduates’ salaries that a law school reports, publicizes or distributes must clearly identify the number of salaries and

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93. See Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Improving Transparency at American Law Schools*, 32 PACE L. REV. 1 *passim* (2012) (discussing how future job opportunities are important for a prospective law student to consider in making an informed decision).

94. The former version of Standard 509, in effect until August 2012, did not specifically require law schools to publish recent graduates’ rates of full-time legal employment and, instead, only vaguely required law schools to report “basic consumer information,” including employment “placement rates.” See Memorandum from Barry Currier, Interim Consultant on Legal Educ., Section on Legal Educ. & Admissions to the Bar, Am. Bar Ass’n, to Law Sch. Deans et al. 1–2, 4 (Aug. 29, 2012) [hereinafter ABA Memorandum], available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012\\_august\\_standard\\_s\\_revisions.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August%202012%20Council%20Open%20Session%20Materials/2012_august_standard_s_revisions.authcheckdam.pdf).

95. See, e.g., Paul Campos, *Served: How Law Schools Completely Misrepresent Their Job Numbers*, NEW REPUBLIC (Apr. 25, 2011, 12:00 AM), <http://www.tnr.com/article/87251/law-school-employment-harvard-yale-georgetown> (providing examples of how law schools have misrepresented employment statistics).

96. See ABA Memorandum, *supra* note 94, at 4–5, 7.

97. *Id.* at 7.

98. See Brian Tamanaha, *The Depth and Breadth of Misleading Employment Numbers by Law Schools (and How to Solve It)*, BALKINIZATION (Oct. 11, 2011), <http://balkin.blogspot.com/2011/10/depth-and-breadth-of-misleading.html>.

the percentage of graduates included in that information.”<sup>99</sup> While a good start, the new version of Standard 509 should be further amended to mandate that each law school make a good-faith effort to report accurate starting salary information regarding each graduating class in a manner that protects the privacy of graduates and employers.<sup>100</sup> Because the vast majority of law students receive federally-guaranteed student loans, the federal government could require, as a condition of the loans, that students report accurate salary information for a certain period of time after graduation in order to assure that law schools report accurate salary information.<sup>101</sup>

*12. Students should be afforded the option of withdrawing from law school after their first or second semesters and receiving a refund of a substantial portion of their tuition.*

For a variety of reasons, academic or otherwise, some students strongly regret their decision to attend law school after a semester or two. However, by that point—when they have spent tens of thousands of dollars financed by then-unforgiveable student loans—students feel as if they have no choice except to persevere to graduation and make the best of an unfulfilling legal career in order to pay off their debts.<sup>102</sup> To mitigate this situation, Yale Law Professors Amar and Ayres have proposed that law schools give students the option of withdrawing at the end of the first year and receiving a half refund of their

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99. ABA STANDARDS, *supra* note 22, Interpretation 509-3, at 40.

100. The Law School Transparency project has a proposal for law schools to report salary information in a manner that protects privacy interests. See *LST's Proposal: The Job Outcome List and a National Salary Database*, L. SCH. TRANSPARENCY (Mar. 29, 2011, 7:00 PM), <http://www.lawschooltransparency.com/tag/standard-509b/>.

101. Yale Law Professors Amar and Ayres recently made such a proposal:

All students who received federal loans should be required to report whether they passed the bar as well as their annual salary for the first 10 years after graduation. Law schools should be required to disclose this information in a standardized format, enabling applicants to better assess what their degree will be worth, long-term. This reform directly addresses the current problem of woefully incomplete disclosure. Law schools usually only report how well their most successful students do, and only for the first year after graduation.

In addition to reporting average results, schools should disaggregate data to avoid misleading applicants at greatest risk of failure. For example, how did previous applicants with low entering test scores and college grades fare after graduation? Anyone who starts law school with less than a 50 percent chance of passing the bar within three years of graduation should be required to sign a special waiver that he has been informed about the riskiness of his education investment. Warning high-risk applicants before they matriculate helps them protect themselves and reduces the government's risk of unpaid loans in the future.

Amar & Ayres, *supra* note 1.

102. See TAMANAHA, *supra* note 2, at 159 (noting the difficulty of dropping out after accumulating first-year debt); Amar & Ayres, *supra* note 1 (noting students “may be inclined to double down on a bad bet”).

tuition.<sup>103</sup> A similar approach would be to allow students the option of transferring credits from their relevant first-year courses—or apply already-spent tuition dollars in the case of courses that would not transfer—toward a different degree or certificate program within the law school.<sup>104</sup>

*13. Law schools should offer meaningful degree or certificate programs for professional paralegals and other law-related professionals.*

In addition to matriculating J.D. students, many law schools should concurrently matriculate students seeking a professional paralegal degree or some other non-J.D. degree or certificate for persons going into a career in which legal skills are an integral part of the job, such as human resources professionals and financial planners. Admission of such non-J.D. students should not be automatic but, instead, should require legitimate qualifications such as a sufficiently high undergraduate GPA. Including a separate professional paralegal degree—or other rigorous course of legal study of two or three semesters in duration—under the same roof as the regular law school would make sense, as the subject matters would be similar and the same professors could teach courses to both types of students. Although such non-J.D. students ordinarily would take classes separately from law students, occasionally the two types of students would take classes together—just as students in some physician assistant programs take certain classes together with medical students.<sup>105</sup> The legal services industry increasingly will depend heavily on paralegals in the future, and those who are formally trained will stand the best chance of getting good jobs and competently providing services to clients.<sup>106</sup> It may well be that

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103. Amar & Ayers, *supra* note 1 (“Law schools might . . . offer to rebate half of a student’s first-year tuition if the student opts to quit school at the end of the first year. (If the student has taken out government loans, this rebate would first go to repay this debt.) A half-tuition rebate splits the loss of an aborted legal career between the school and the student. Each has skin in the game, so students will not go to law school lightly, and law schools will have better incentives not to admit students likely to fail.”). They further state: “The government as lender might mandate first-year rebate offers to reduce the chance that students will take out loans that they will not be able to repay.” *Id.*

104. *See infra* Thesis 13.

105. *See, e.g., Physician Assistant Program*, U. MED. & DENTISTRY N.J. SCH. HEALTH RELATED PROFS., [http://shrp.umdnj.edu/dept/primary\\_care/paweb/](http://shrp.umdnj.edu/dept/primary_care/paweb/) (last visited Sept. 18, 2012) (noting that PA students “sit[] side by side with medical students [and are] expected to perform at the same level” in certain classes).

106. *See* BUREAU OF LABOR STATISTICS, 2010 OCCUPATIONAL OUTLOOK HANDBOOK 263–64 (2010–2011 ed.). According to the Bureau of Labor Statistics, the job outlook for paralegals is quite strong:

Employment of paralegals and legal assistants is projected to grow 28 percent between 2008 and 2018, much faster than the average for all occupations. Employers are trying to reduce costs and increase the availability and efficiency of legal services by hiring paralegals to perform tasks once done by lawyers. Paralegals are performing a wider variety of duties, making them more useful to businesses.

state regulators will eventually allow professionally trained and licensed paralegals to provide certain types of professional legal services that are analogous to the independent medical services currently provided by licensed physician assistants and nurse practitioners.<sup>107</sup> Allowing licensed, professional paralegals to provide a limited range of legal services would also help fill an existing gap in legal services for the poor and middle class in the United States.<sup>108</sup> In England, for instance, licensed paralegals are permitted to provide certain legal services to clients.<sup>109</sup>

14. *The U.S. News & World Report ranking system is fundamentally flawed, and its influence on legal education has been malignant.*

The *U.S. News & World Report* law school ranking system uses an algorithm based on certain input measures, such as the average undergraduate GPAs and LSAT scores of incoming students; “output” measures, namely graduates’ bar exam passage and employment rates; and a significant “reputational” score whereby deans and law professors from other law schools, as well as a tiny sample of judges and attorneys, subjectively rank the 200 ABA-accredited schools.<sup>110</sup> Because large numbers of law schools have nearly identical scores on most of the input and output metrics, the subjective and utterly unscientific reputational score—worth 25% of a school’s total score—is a critically important component.<sup>111</sup> This has led to a “prestige race” among law schools<sup>112</sup> and an obsession among administrators, faculty members, and law students over schools’ rankings.<sup>113</sup> It is nearly universally accepted that the *U.S.*

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Demand for paralegals also is expected to grow as an expanding population increasingly requires legal services, especially in areas such as intellectual property, health care, international law, elder issues, criminal law, and environmental law.

*Id.* at 263.

107. Janette A. Bertness, *Rhode Island Nurse Practitioners: Are They Legally Practicing Medicine Without a License?*, 14 ROGER WILLIAMS U. L. REV. 215, 215 (2009).

108. See Daly, *supra* note 47, at 484 (“Delivering affordable legal services to the middle class is a challenge that the legal profession has been unable to meet.”).

109. See *What Is a Licensed Paralegal?*, NAT’L ASS’N LICENSED PARALEGALS, [http://www.nationalparalegals.com/licensed\\_paralegal.htm](http://www.nationalparalegals.com/licensed_paralegal.htm) (last visited Sept. 18, 2012).

110. See Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1511 (2004) (reviewing MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003)) (citing *Law Methodology*, U.S. NEWS & WORLD REP. (Mar. 26, 2008), <http://www.usnews.com/education/articles/2008/03/26/law-methodology>) (discussing the *U.S. News & World Report* ranking system).

111. See Rapoport, *supra* note 85, at 368; see also Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News & World Report Ranking of ABA Law Schools* (1998), <http://www.aals.org/reports/validity.html> (describing how “ranks exaggerate[] small differences in quality among schools”).

112. Segal, *supra* note 52.

113. See, e.g., TAMANAHA, *supra* note 2, at 88–89 (“Another way the *US News* ranking has changed the face of legal academia is the [student] transfer phenomenon. Transfers were once rare in legal academia . . . . That was before the *US News* ranking [system]. Now transfers are sweeping



*News & World Report* ranking system has had several pernicious effects on American legal education—all related to the current fixation with the rankings.<sup>114</sup> After initially attempting to fight the influence of the rankings in the late 1990s,<sup>115</sup> most in legal academia eventually decided that if they couldn't beat them, they'd join them.<sup>116</sup> This acquiescence led many schools to engage in a wide variety of practices, some unethical and possibly illicit, to game or exploit the system,<sup>117</sup> further undermining the integrity of the ranking system. A superior ranking formula would give significant weight to not only the quality of incoming students but also the quality of legal education that students receive during their time at a particular law school (other than whatever valuation is reflected in the subjective, unscientific "reputational" score and the bar exam passage rate). Such a measure of the quality of graduating students would look at how seriously law schools take "teaching excellence"<sup>118</sup> and also assess a law school's approach to its curriculum and pedagogy with respect to how well the school prepares students to be "practice-ready."<sup>119</sup> Finally, an effective law

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across law schools . . . . Remarkably, a sign of how crazy things have gotten, even students at top-fifteen schools transfer up in the law school hierarchy.").

114. See, e.g., *id.* at 78 (describing law students' obsession over when the rankings are released); Louis H. Pollak, *Why Trying to Rank Law Schools Numerically Is a Non-Productive Undertaking: An Article on the U.S. News & World Report 2009 List of "The Top 100 Schools,"* 1 DREXEL L. REV. 52, 52, 59 (2009) (describing how the ranking system is counterproductive, yet an important consideration for prospective students); Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 211 (2006) (listing several of the pernicious effects the rankings cause); Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 508–09 (2007) (describing how a drop of one place in the rankings might influence a prospective student's decision on where to attend law school).

115. In the late 1990s, 150 law school deans, in a joint letter, and the AALS, in a report, criticized the *U.S. News & World Report* ranking system and its undue influence on legal education. See Stephanie C. Emens, Comment, *The Methodology & Manipulation of the U.S. News Law School Rankings*, 34 J. LEGAL PROF. 197, 197 (2009) (citing Seto, *supra* note 114, at 493–94).

116. 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."); Caron & Gely, *supra* note 110, at 1510; Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL L. SCH., <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm> (last updated Oct. 8, 2010) ("We all hate to admit it, but the *U.S. News* rankings have become an entrenched part of life . . .").

117. See Bennett, *supra* note 2, at 119 n.166; Steven R. Smith, *Gresham's Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 183–84 (2008) (citing Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18; 2005–2006 ABA STANDARDS, *supra* note 89, at Interpretation 509-4) ("[S]everal law schools [have] engaged in questionable practices to make themselves look better. . . . 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 accreditation 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.").

118. See *infra* Theses 55–58.

119. See CARPENTER ET AL., *supra* note 75, at 8; Garvey & Zinkin, *supra* note 10, at 129.

school ranking system would audit the information provided by law schools and not merely rely on data reported by the law schools, as *U.S. News & World Report* currently does.<sup>120</sup> Those law schools that refuse to allow the ranking organization to conduct an independent audit of the school's information should be excluded from the rankings.

*15. Law school tuition is too high and is wrongly allocated primarily to benefit law professors at the expense of law students.*

The average public law school's annual tuition and fees in the 2011–2012 academic year were \$22,116 (state resident) and \$34,865 (nonresident); the average private law school's tuition and fees were \$39,184.<sup>121</sup> Some law schools, including not only several of those ranked highly in the *U.S. News & World Report* system but also several ranked in the lower tiers, charge \$50,000 or more for annual tuition and fees.<sup>122</sup> These expenses, of course, only represent a portion of what law students end up paying (meaning, in most cases, borrowing) annually; books, room and board, and other living expenses also represent a significant sum of money.<sup>123</sup> The annual increases in tuition and fees, ranging between 6% and 15% per year,<sup>124</sup> have dramatically outpaced inflation during the past two decades, which has been around 3%.<sup>125</sup> Many law schools, despite being nonprofit institutions, have been “cash cows” for their universities and have profited on the tuition brought in.<sup>126</sup> Additionally, the typical tenured professor receives a handsome salary in return for contributing

120. See Seto, *supra* note 114, at 557 (“There is no audit process.”).

121. *Law School Tuition, 1985–2011*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/lstuition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lstuition.authcheckdam.pdf) (last visited Oct. 19, 2012).

122. See Abby Rogers, *The 20 Most Expensive Law Schools in America*, BUS. INSIDER (July 4, 2012, 8:05 AM), <http://www.businessinsider.com/the-20-most-expensive-law-schools-in-america2012-7?op=1>.

123. See, e.g., Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 WM. MITCHELL L. REV. 1185, 1199 (2012) (stating that for University of Louisville Brandeis School of Law in-state students, total costs are approximately \$20,000 more than just tuition alone).

124. See *Law School Tuition*, *supra* note 121.

125. *Historical Inflation Rate*, INFLATIONDATA.COM, [http://inflationdata.com/inflation/inflation\\_rate/historicalinflation.aspx](http://inflationdata.com/inflation/inflation_rate/historicalinflation.aspx) (last visited Sept. 20, 2012); see also TAMANAHA, *supra* note 2, at 108–09 (discussing the “meteoric rise” of law school tuition since the 1980s).

126. 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.”); accord Dolin, *supra* note 2, at 231 (citing David Franklin, *Trials of Socrates*, SLATE (July 31, 1997, 3:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/high\\_concept/1997/07/trials\\_of\\_socrates.html](http://www.slate.com/articles/news_and_politics/high_concept/1997/07/trials_of_socrates.html)) (also describing law schools as “cash cows”); 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, 495 (2004) (noting that law schools are very profitable, regardless of what the professors do).

relatively little to students' legal educations.<sup>127</sup> Law students are receiving an insufficient return on the large sums of money they are paying, and increasing numbers are not finding adequate employment to pay back their student loans.<sup>128</sup> Nonprofit institutions, particularly those responsible for producing licensed, learned professionals responsible for clients' lives, liberty, and property, should not work this way. As a general principle, tuition should be reduced to reflect the actual value of the services being provided by law schools, or schools should significantly improve the value of their services to students to be commensurate with the exorbitant tuition being paid.

16. *There is an unnecessary culture of stress in law school.*

The culture of cut-throat competition among law students, the undue focus on individualism, the high economic stakes (in terms of large student loans and dismal job prospects), and the traditional approaches to pedagogy and student assessments<sup>129</sup> have led to widespread mental health and substance abuse problems among law students, problems which continue after law school.<sup>130</sup> Although there have been efforts at many law schools to reduce the stress and attendant psychological problems among students,<sup>131</sup> more must be done. One approach worth seriously considering is abolishing traditional grades during the first year—or perhaps just the first semester—and afford students time to adjust to the new learning environment of law school by using a pass–fail system.<sup>132</sup>

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127. See *infra* Thesis 70.

128. See *supra* notes 15–17 and accompanying text.

129. See *infra* Theses 18, 48, 51.

130. See Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 883 (2007); see also Steven I. Friedland, *Trumpeting Change: Replacing Tradition with Engaged Legal Education*, 3 ELON L. REV. 93, 95 & n.17 (2011) (noting the “high levels of law student distress”).

131. See Friedland, *supra* note 130, at 95 & n.18 (citing *About LSSSE*, L. SCH. SURVEY STUDENT ENGAGEMENT, <http://lssse.iub.edu/about.cfm> (last visited Sept. 20, 2012)). Yale Law School offers students the services of a “therapy dog.” See Timothy Williams, *For Law Students with Everything, Dog Therapy for Stress*, N.Y. TIMES, Mar. 22, 2011, at A16. According to the *Times* article, not all of Yale’s law faculty were supportive: “‘I’m surprised to hear of it,’ said John Witt, a professor [at Yale Law School]. . . . ‘I’ve always found library books to be therapeutic. But maybe that’s just me.’”

132. See, e.g., Clinton W. Shinn, *Lessening the Stress of the 1L Year: Implementing an Alternative to Traditional Grading*, 41 U. TOL. L. REV. 355, 368–69 (2010) (citing *Academic Standards*, APPALACHIAN SCH. L., <http://www.asl.edu/The-Program/Academic-Standards.html> (last visited Sept. 20, 2012)) (discussing Appalachian Law School’s pass–fail system of first-year grades that is intended to reduce student stress).

17. *Most law schools fail to inform students about the realities of the legal profession and do not help them choose their career paths wisely.*

Even by the end of the third year of law school, most law students do not have a realistic understanding of what most lawyers do.<sup>133</sup> They possess only a general understanding of common legal careers—such as commercial litigators and prosecutors—and whatever specific knowledge they happened to have gained during internships, externships, and summer jobs.<sup>134</sup> Typical full-time law professors have practiced law for only a short period of time and, thus, are generally unable to convey such information in the courses they teach.<sup>135</sup> Unlike medical school, where students engage in “rotations” during their third year—directly exposing them to several different types of medicine<sup>136</sup>—legal education does not directly expose students to different areas of law practice.<sup>137</sup> Therefore, most law students are not in a position to make an intelligent decision about what career path they should follow and what elective courses they should take in law school, often falling into a particular career path because of happenstance.<sup>138</sup> For that reason, all law schools should have a mandatory pass–fail, one- or two-credit, concentrated course at the outset of law school—perhaps in the two or three weeks before regular classes begin—that explains in detail what lawyers really do and the types of legal employers that exist (with an ample amount of guest speakers from the legal profession). Such broad exposure to this type of information at the outset of law school would greatly benefit students in their academic and legal careers.

In a related manner, law schools should offer meaningful academic and career counseling services for students at the beginning and middle of law school. Often, law students choose internships, externships, and summer jobs

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133. See Dolin, *supra* note 2, at 219–20.

134. See, e.g., Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 85–86 (2009) (referencing data that indicated new lawyers believed their summer legal employment was the most helpful in making the transition from academia into the legal profession).

135. See *infra* Thesis 61.

136. *Medical School Training*, PRINCETON REV., <http://www.princetonreview.com/medical/allopathic.aspx> (last visited Sept. 21, 2012) (“In the third and fourth years, medical students do rotations at hospitals and clinics affiliated with their school. Students doing rotations assist residents in a particular specialty such as surgery, pediatrics, internal medicine or psychiatry.”).

137. See Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 327–28 (2011) (citing Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 351 (2010); Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295, 1335 & n.103 (2010); Lydia Nussbaum, Executive Summary, *The Professions and the Academy: Addressing Major Changes in Law Practice* (May 27, 2010) (unpublished symposium summary) (on file with the *Maryland Law Review*)).

138. See CARNEGIE REPORT, *supra* note 2, at 95.

without guidance from a knowledgeable and objective source.<sup>139</sup> Law schools should establish meaningful academic and career counseling offices—staffed with experienced, knowledgeable personnel—that mandate appointments with all students at different junctures of their academic careers in order to assess students’ academic and career trajectories. Current academic and career services at most law schools fail to offer that type of advice.<sup>140</sup>

18. *The recent trend toward merit-based scholarship programs in most law schools has had significant malign consequences.*

In response to their obsession with the *U.S. News & World Report* rankings, schools have switched from giving mostly need-based scholarships—which went to students from lower socioeconomic backgrounds—to awarding primarily merit-based scholarships<sup>141</sup>—which disproportionately go to students from higher socioeconomic backgrounds.<sup>142</sup> As a result, because most law schools operate primarily based on the tuition money they bring in, “the bottom half of the class subsidizes the education of the top half of the class,” even though the former are more economically disadvantaged to begin with and are less likely to receive preferable legal employment.<sup>143</sup> This “reverse-Robin Hood arrangement” has not been the only “malign consequence[.]” of the shift to merit-based scholarships.<sup>144</sup> It has also had a deleterious effect on many of the students receiving the scholarships.<sup>145</sup> Approximately four out of five schools offer large “merit stipulation,” or conditional, scholarships (such as half tuition) to a significant portion of their incoming students.<sup>146</sup> Such scholarships require students to maintain a minimum GPA—typically at a school that grades on a curve—or maintain a certain place in the student body’s ranking lest they lose all or part of the scholarship.<sup>147</sup> The primary purpose of such scholarships is to

139. See GARY A. MUNNEKE, *THE LEGAL CAREER GUIDE: FROM LAW STUDENT TO LAWYER* 27 (4th ed. 2002).

140. See *id.* at 167.

141. TAMANAHA, *supra* note 2, at 97 (citing Rick L. Morgan, *Statistics*, 2000–2001 ANN. REP. CONSULTANT ON LEGAL EDUC. TO AM. BAR. ASS’N 18).

142. See *id.* at 98 (quoting MICHAEL SAUDER & WENDY ESPELAND, LAW SCH. ADMISSION COUNCIL, *FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS* 12 (2009), available at <http://www.lsac.org/lisacresources/research/gr/pdf/gr-07-02.pdf>).

143. *Id.*

144. *Id.* at 99; see also Bourne, *supra* note 2, at 666–68, 673 (noting that in 2008, 95% of African-American law school graduates were in debt versus 81% of white graduates).

145. See Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. LEGAL EDUC. 173, 185 (2011).

146. David Segal, *Behind the Curve: How Law Students Lose the Grant Game, and How Their Schools Win*, N.Y. TIMES, May 1, 2011, at BU1; see also Organ *supra* note 145, at 183 & n. 15 (citing publicly available information that 122 of 160 law schools have reported variable conditions on renewable scholarships provided to first-year students).

147. See Organ, *supra* note 145, at 179.

attract incoming students with high undergraduate GPAs and LSAT scores—so as to increase a school's standing in the *U.S. News & World Report* ranking system (which is based in part on students' average undergraduate GPA and LSAT score).<sup>148</sup> The secondary purpose is to retain students who might otherwise transfer to a higher ranked law school in their second year, by giving them a financial incentive to stay.<sup>149</sup> “Of course, there is nothing inherently wrong with incentives that ask students to earn strong grades in exchange for a break on tuition.”<sup>150</sup> However, because of the tremendous expense of going to law school without a significant scholarship and the legitimate fear of being unable to service large law student loans after graduation because of the weak job market,<sup>151</sup> the anxiety that conditional scholarships create for many students has only added to the culture of stress in today's law schools.<sup>152</sup>

Even worse, many “law schools are keenly aware of the impact of a forced curve on first-year grades and know that they have offered scholarships to significantly more first-year students than can possibly renew their scholarships under the renewal conditions attached to the scholarships.”<sup>153</sup>

*C. Defects in Law Schools' Curricula, Pedagogical Methods, and Assessments of Students*

*19. The law school curriculum not only needs to develop cognitive competencies but also needs to teach the practical competencies required to be an effective, ethical practitioner.*

As a chorus of critics over the years has contended, law schools focus disproportionately on developing cognitive competencies—in particular, legal analysis and memorization of legal doctrine—at the expense of practical competencies such as courtroom skills, negotiation, client counseling, public speaking skills, and business acumen.<sup>154</sup> As a result, the typical law student

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148. *Id.* at 184.

149. *Id.* at 185.

150. Segal, *supra* note 146.

151. *See supra* Theses 6, 15.

152. *See* Organ, *supra* note 145, at 186–89 (citations omitted); *supra* Thesis 16.

153. *See* Organ, *supra* note 145, at 190.

154. *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 338 (2011) (“About law schools, judges were in general agreement. The most common response in each judge group was that law schools should provide more coursework oriented to instilling practice-oriented skills. The second most popular response was expansion of core curriculum—that is, courses required of all students—to ensure a stronger foundation for practice.”); *see also* NAT'L INST. FOR TRIAL ADVOC., THE FUTURE OF LEGAL EDUCATION: A SKILLS CONTINUUM 6 (2009), [http://www.nita.org/resources/docs/Future\\_of\\_Legal\\_Education.pdf](http://www.nita.org/resources/docs/Future_of_Legal_Education.pdf) (discussing several recommendations from the legal community on how legal education and skills development should evolve to meet the changing legal landscape); CARPENTER ET AL., *supra* note 75, at 6–10 (citations omitted) (analyzing the reports, *Best Practices* and *Carnegie Report*, that propose law schools should adapt more practical skills and assessments of

graduates with entirely too narrow of a skill set for the real world of legal practice.<sup>155</sup> In my experience, including the teaching of both law students and undergraduates in pre-law courses, the process of developing legal analytical skills, traditionally referred to as “thinking like a lawyer,” can be effectively done in a single academic year for the vast majority of students. Three years of law school certainly is not required to do so. The bulk of time in law school could be spent developing other skills in addition to cognitive competencies.

*20. Law school courses should emphasize problem solving, risk management, and strategic thinking.*

In addition to their traditional pedagogical mission to cause students to “think like a lawyer,” law schools should seek to develop larger problem-solving skills through the cultivation of strategic thinking<sup>156</sup> and the teaching of the science of risk management.<sup>157</sup> Practicing lawyers do not simply sit around cogitating legal issues; they solve problems for clients and deal with risk (and must do so in a manner that comports with the rules of legal ethics).<sup>158</sup> Such real-world skills should be taught to law students.

*21. The typical law school curriculum is focused disproportionately on litigation topics.*

Law schools’ curricula need to reflect what lawyers actually do in terms of practice areas. Unlike in the past, a large percentage of practicing attorneys today engage in little, if any, litigation work and, instead, engage in corporate,

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those skills as a change to the current methodology). *See generally* BEST PRACTICES, *supra* note 2 *passim* (discussing the need for overarching practical-based reform in legal education); CARNEGIE REPORT, *supra* note 2 *passim* (discussing the need for overarching practical-based reform in legal education). Perhaps the best abbreviated list of those competencies is the one set forth in the 1992 MACCRATE REPORT, which included the following “core competencies”: (1) problem identification and problem solving; (2) identifying legal issues (“issue spotting”), developing relevant legal theory, and argumentation; (3) legal research skills; (4) factual research and investigation skills; (5) effective written and oral communication; (6) client counseling skills; (7) negotiation skills; (8) knowledge of trial, appellate, and alternative dispute resolution (ADR) procedures; (9) practice management; and (10) professional ethics. MACCRATE REPORT, *supra* note 2, at 135.

155. *See* Rhee, *supra* note 137, at 328.

156. *See* Rhee, *supra* note 137, at 328–31 (2011) (citing Michael Kelly, *A ‘Gaping Hole in American Legal Education*, 70 MD. L. REV. 440, 447–50 (2011)); *see also* Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 488 (2011) (discussing how law students need problem-solving skills to aid in satisfying clients); Van Zandt, *supra* note 10, at 615 (noting a course on strategic thinking is now offered at Northwestern Law School).

157. *See* Anthony E. Davis, *Legal Ethics and Risk Management: Complimentary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 110 (2008) (discussing the importance of “risk management” education).

158. *See* Rhee, *supra* note 137, at 329; *see also* Davis, *supra* note 157, at 99 (noting four ways that lawyers deal with risk).

transactional, regulatory, or other non-litigation matters.<sup>159</sup> Law school curricula, including the mandatory first-year curricula, thus needs to include less litigation-oriented courses and more business law, transactional, and regulatory courses.<sup>160</sup> A likely explanation for the continued focus on litigation topics is that most law professors, even if they did not practice law for any significant period of time, clerked for a judge before becoming a law professor, where litigation was the only practice area to which they were exposed.

22. *The typical first-year law school curriculum is woefully outdated.*<sup>161</sup>

In the twenty-first century, it makes little sense to spend the bulk of the first year of law school focusing on common law, litigation-oriented courses, like property law, contracts, torts, and constitutional law. Most law schools still require students to take one or two semesters of these courses, in addition to criminal law, criminal procedure, civil procedure, and legal research and writing.<sup>162</sup> Rather than follow this outdated Langdellian model,<sup>163</sup> law schools should fundamentally revamp the first-year curriculum in two ways. First, the

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159. Although I know of no specific data regarding what percentage of attorneys are full-time “litigators,” it appears that most lawyers are not this type of attorney. See, e.g., David Randall, *Vanishing Trials*, FOOLISH CONSISTENCY (Nov. 29, 2006), <http://trudalane.net/2006/11/29/vanishing-trials/> (“For every lawyer in the litigation department of a large corporate firm there are often 5–10 lawyers in other practice areas. They are real estate lawyers, corporate lawyers, trusts and estates lawyers, tax lawyers, municipal finance lawyers, environmental lawyers, they almost never set foot inside a courtroom . . .”). But cf. Newton, *Preaching What They Don’t Practice*, *supra* note 8, at 109 n.26 (“[I]t 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.”).

160. See Rhee, *supra* note 137, at 328; Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59 (2007).

161. LEGAL EDUC. ANALYSIS & REFORM NETWORK (LEARN), GENERAL DESCRIPTION OF PLANNED PROJECTS 2009–2010, at 8 (2009–2010), available at <http://law.gsu.edu/ccunningham/Professionalism/Carnegie/LEARN-Outline.pdf> (“At present, more than ever, the Langdellian curriculum, including its mandatory first year that focuses almost exclusively on common law, is in need of serious re-thinking.”); see also 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 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.”).

162. See, e.g., *The First-Year Curriculum*, PRINCETON REV., <http://www.princetonreview.com/law/first-year-curriculum.aspx> (last visited Sept. 21, 2012) (listing these courses as typical of the first-year curriculum).

163. See generally CARNegie REPORT, *supra* note 2, at 4–6 (describing Christopher Columbus Langdell’s approach to legal training).



curriculum should be designed to expose students to as many different subject matters as is realistically possible, including not only the current first-year subjects, but also many subjects traditionally taught in upper-level courses.<sup>164</sup> In a related manner, law schools should divide the first-year substantive curriculum into two tracks—a litigation track and a non-litigation track. Second, the curriculum should seek to develop students’ analytical, writing, and oral communication skills through daily practical exercises, such as simulation exercises concerning negotiation and litigation as well as legal research and writing exercises. The latter component—taught as a daily experiential course—would incorporate the substantive law principles and doctrine being taught in the traditional classroom. Of course, such an intensive approach to the first-year curriculum would require a great deal of teaching time and coordination by the professoriate—something to which they are not accustomed.<sup>165</sup>

23. *Law schools should offer shorter modules in addition to semester-long courses.*

Rather than requiring students to take only semester-long doctrinal courses, schools should require students to take numerous intensive modules on specific subject matters, particularly in their first year. For instance, during the first year, students could take short four-week modules on the following: property law, tort law, contracts, remedies, constitutional law, civil procedure, criminal law, criminal procedure, corporate law, commercial law, labor law, securities law, legislation, federal courts, administrative law, evidence law, international law, intellectual property law, trusts and estates, real estate transactions, and legal ethics.<sup>166</sup> Such first-year modules, which would include subjects currently given short shrift at many law schools, would resemble the type of “black letter law” commercial bar review courses, or the types of modules taught in commercial education courses for new attorneys,<sup>167</sup> rather than the current first-year law school course, which spends an inordinate amount of time dissecting appellate cases.<sup>168</sup> Such modules would not be intended to make students experts on any particular subject but, instead, would simply expose them to essential points about each area of the law. Students could take more intensive upper-level courses on specific subjects that would further develop their substantive

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164. *See infra* Thesis 23.

165. *See infra* Thesis 69.

166. *See* Garvey & Zinkin, *supra* note 10, at 125 (discussing such an approach taken by University of New Hampshire School of Law in its Daniel Webster Scholar Honors Program).

167. One such commercial legal education company offering such “modules” (currently limited to corporate and transactional law) is Practical Law Company. *About PLC*, PRACTICAL L. COMPANY, <http://us.practicallaw.com/about/plc-about-us> (last visited Sept. 21, 2012); *see also* Steve Bradford, *Practical Law Company Materials*, BUS. L. PROF BLOG (June 20, 2011), [http://lawprofessors.typepad.com/business\\_law/2011/06/practical-law-company-materials.html](http://lawprofessors.typepad.com/business_law/2011/06/practical-law-company-materials.html) (describing what Practical Law Company provides).

168. *See* Rakoff & Minow, *supra* note 161, at 600.

expertise. Such an approach to first-year doctrinal courses also would allow students to better choose areas of concentration in upper-level courses.<sup>169</sup> Even after the first year, concentrated modules rather than traditional semester-long courses may prove to be a superior manner of conveying information and skills to law students, at least for certain topics that may not justify a two- or three-credit-hour course, such as negotiation skills. A mixture of traditional semester-long courses and shorter modules would make the best sense.

*24. The current upper-level elective curriculum at most law schools is uncoordinated and fails to provide students with appropriate opportunities for specialization.*

After completing their mandatory courses, law students at many schools are left at sea in choosing and scheduling courses. Often students end up taking a somewhat random combination of courses, the selection of which is a function both of what seems interesting in light of their developing career predilections and what happens to be available.<sup>170</sup> Students should be given more guidance on what courses to take in view of their career interests,<sup>171</sup> and appropriate courses and modules should be made available each year to all interested students. Upper-level curricula should include meaningful recommended “tracks” or “sequences” of courses and modules, such as a commercial litigation track, a criminal law track, and a corporate or transactional track.<sup>172</sup> Although students need not be required to take such tracks—and should be given the option of being “generalists”—they should at least be made fully aware of what courses and modules are relevant to each track.

*25. Law schools should employ “curriculum mapping” in order to assure that all students receive an equivalent educational experience and also avoid unnecessary duplication in different courses.*

A common complaint about law schools’ curricula is that they lack coordination of the courses being taught, and thus, schools are unable to ensure consistency and uniformity in what is taught in different sections of the same course, as well as avoid unnecessary overlap in different courses.<sup>173</sup> Such a lack of coordination could be avoided through the use of “curriculum mapping,” a process whereby a law school’s administration systematically assesses the

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169. See *infra* Thesis 24.

170. See Rhee, *supra* note 137, at 331.

171. See *supra* Thesis 17.

172. Cf. Rhee, *supra* note 137, at 336–37 (discussing the need for more “concentrated study programs”).

173. Debra Moss Curtis & David M. Moss, *Curriculum Mapping: Bringing Evidence-Based Frameworks to Legal Education*, 34 NOVA L. REV. 473, 475 (2010).

syllabi in all courses offered to ensure that all students taking different sections of the same course cover the same material and, in addition, that different courses do not contain unnecessary duplication of material.<sup>174</sup> Assuming the ABA adopts the “output-measure” amendments to Rules 302 through 305,<sup>175</sup> curriculum mapping should also be required to confirm that students in fact receive the full range of necessary instruction.<sup>176</sup> Similarly, law schools should create specific learning outcomes for each course in the curricular map, specifying, at the outset, the skills and knowledge that students should gain from successfully completing each course.<sup>177</sup>

26. *In its current model, American legal education cannot offer a compelling justification for the third year of law school.*

Three years of law school is unnecessary, or, at the very least, the third year as it currently exists at the vast majority of law schools does not add value in view of its significant direct and opportunity costs.<sup>178</sup> Suggestions for making the third year the equivalent of a medical residency program<sup>179</sup>—which makes sense—would require the ABA accreditation Standards to be amended so as to allow students to work for both pay and academic credit, as medical residents do, as well as, to permit them to work more than twenty hours per week.<sup>180</sup>

174. See generally *id.* at 474–80 (citations omitted) (discussing the principles of curriculum mapping and its historical development).

175. See *supra* Thesis 8.

176. See Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 231–32 (2011) (quoting BEST PRACTICES, *supra* note 2, at 93–94).

177. See *id.* at 236–38 (citations omitted).

178. Dolin, *supra* note 2, at 251 (“The third year of law school is a waste of time and needs to be radically restructured. . . . The evidence, both empirical and anecdotal, is that many [students] have mentally checked out and when they do physically attend their classes they are bored and unprepared.”) (citing Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244–45 (2001)).

179. See, e.g., Drew Coursin, Comment, *Acting Like Lawyers*, 2010 WIS. L. REV. 1461, 1496–98 (2010) (citations omitted) (proposing a third-year legal “residency” program for law students); Sloan, *supra* note 1 (quoting Cabranes, *supra* note 1) (discussing Second Circuit Judge José Cabranes’ proposal to the AALS that “they should introduce a two-year core law program followed by a yearlong apprenticeship . . . .”); see also James Bailey & Carl Leonard, *Adapt to New Payment Structure—or Pay for It*, WASH. BUS. J. (Nov. 18, 2011, 6:00 AM), <http://www.bizjournals.com/washington/print-edition/2011/11/18/adapt-to-new-payment-structure---or.html> (“This calls for a complete revamping of the way the legal profession educates its inductees. Business, architecture, accounting and medical schools all require internships, residencies or other forms of experiential learning.”).

180. In particular, Standard 304 would need to be amended for such a third-year “residency” program to occur. See ABA STANDARDS, *supra* note 22, Standard 304(b), at 22 (“Course of Study and Academic Calendar”) (requiring a total of “58,000 minutes of instruction time . . . [a]t least 45,000 [of which must occur] by attendance in regularly scheduled class sessions at the law school”); *id.* Standard 304(f), at 22 (“A student may not be employed for than 20 hours per week in

Although Washington & Lee University School of Law does not have a full-fledged third-year apprenticeship model, its third-year curriculum comes as close as any law school likely could today and still pass muster under the current ABA accreditation Standards.<sup>181</sup>

27. *Like business schools, law schools should offer courses requiring student collaboration.*

The current law school educational model unduly stresses individualism. Class participation—where it exists at all—typically involves an exchange between a professor and an individual student, and grades are based almost exclusively on a single end-of-semester exam in each course.<sup>182</sup> Other than ad hoc study groups and co-curricular activities such as moot court and law reviews or journals, students do not work together in law school.<sup>183</sup> Contrast business schools, where students often work collaboratively on projects for grades.<sup>184</sup> Because practicing attorneys in the real world often are required to work together, law schools should incorporate more structured student collaboration into the educational model, and students' grades should reflect, at least in part, their ability to work collaboratively.<sup>185</sup>

28. *The typical law school course fails to incorporate active or engaged learning and other proven methods of teaching adult learners.*

The typical law school class involves a large number of students sitting in a large classroom listening to a professor lecture or engage in some form of the Socratic method.<sup>186</sup> Assuming they are not on Facebook or playing computer

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any week in which the student is enrolled in more than twelve class hours.”); see also Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, 82 N.Y. ST. B.A. J. 20, 23 (Oct. 2010) (noting that the Standards Review Committee is considering lifting the ban on students working more than twenty hours per week and providing an option for students to obtain academic credit and monetary compensation for the same job).

181. See *The Third Year in Detail*, WASH. & LEE U. SCH. LAW, <http://law.wlu.edu/third-year/page.asp?pageid=651> (last visited Sept. 21, 2012).

182. See *infra* Theses 50, 51.

183. See Rhee, *supra* note 137, at 329.

184. See, e.g., *Diversity at Columbia*, COLUMBIA BUS. SCH. MBA PROGRAM, <http://www4.gsb.columbia.edu/mba/life/diversity> (last visited Sept. 22, 2012) (providing an example of the pedagogical approach, characterized by “[s]tudent collaboration that brings together a variety of perspectives and experiences[, which] leads to truly effective learning and leadership development.”).

185. See Rhee, *supra* note 137, at 337; see also Clifford S. Zimmerman, “Thinking Beyond My Own Interpretation:” *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957, 982–85 (1999) (discussing the ways that students' grades could reflect, or account for, collaboration).

186. See, e.g., CARNEGIE REPORT, *supra* note 2, at 2 (describing the typical law school class).

games, students spend the bulk of their time taking notes based on the lecture, which is usually based on assigned readings.<sup>187</sup> A minority of the students in a class each week may participate orally in response to questions or comments from the professor.<sup>188</sup> Such passive learning is not effective, particularly with a generation of twenty-something law students who require constant mental stimulation to be engaged.<sup>189</sup> Instead, active<sup>190</sup> or engaged learning<sup>191</sup>—of which a wide variety of methods are available, most based on the problem-based learning method<sup>192</sup>—is a superior mode of conveying information and skills.<sup>193</sup> Such active learning is an essential part of medical school education beginning with the first week of medical school.<sup>194</sup> It is also a prominent feature of other professional schools, including nursing, engineering, architecture, and dentistry schools.<sup>195</sup> The same should be true in law schools, where effective methods of teaching adult learners should be employed.<sup>196</sup> If lectures are necessary, they could be pre-recorded and students could listen to the lectures before coming to class, so as to facilitate active learning in the classroom itself.

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187. See Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. 568, 570–71 (1995).

188. See Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 65 (2003).

189. *Id.*; see also Bryan Adamson et al., *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. LEGAL EDUC. 481, 482 (highlighting the generational gap between current law students and traditional legal education methods).

190. Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 401, 402 (1999).

191. See generally Friedland, *supra* note 130, at 94 & 95 n.10 (“advocating a new legal education design and delivery system organized around what has been labeled ‘engaged learning’”).

192. See generally Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1, 2 (2009) (discussing the applicability of problem-based learning in the context of legal education).

193. See generally BEST PRACTICES, *supra* note 2, at 119–21, 146–48 (citations omitted) (noting the advantages of collaborative learning and problem-based learning).

194. Jennifer S. Bard, *What We in Law Can Learn from Our Colleagues in Medicine About Teaching Students How to Practice Their Chosen Profession*, 36 J.L. MED. & ETHICS 841, 843 (2008).

195. See, e.g., Richard K. Neumann, Jr., *Models from Other Disciplines: What Can We Learn from Them?* (July 27, 2001), in 1 J. ASS’N LEGAL WRITING DIRECTORS 165, 165 (2002) (describing how architect students work in a design studio as part of their education). See generally Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEG. COMM. & RHETORIC: JALWRD (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2016462](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016462) (offering downloadable manuscript under previous title).

196. See Hillary Burgess, *Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 QUINNIPIAC L. REV. 1, 2–3 (2011).

29. *The typical law school curriculum today fails to sufficiently develop “learning for transfer.”*

“Learning for transfer” is an educational construct that “refers to the extent to which one is able to transfer skills and knowledge from one context to another.”<sup>197</sup> Traditionally, in legal education, other than learning how to “think like a lawyer” (legal analysis), law students have learned the law in a discrete manner, namely, by taking a series of substantive courses on narrow topics that are assessed with a single end-of-semester exam.<sup>198</sup> What has been sorely lacking is the ability to engage in the “learning for transfer” to other, real-world contexts that students will encounter in the actual practice of law.<sup>199</sup> The science of adult learning, as applied to legal education, strongly supports the “movement away from empty mimicry of the traditional casebook method and Socratic Method,”<sup>200</sup> both of which have failed to afford students “systematic training in effective techniques for learning law from the experience of practicing law.”<sup>201</sup>

30. *Externships and clinical (or equivalent) education should be a graduation requirement.*<sup>202</sup>

One of the primary themes of both the *Carnegie Report*<sup>203</sup> and *Best Practices for Legal Education*<sup>204</sup> is that law schools need to require more experiential courses in their curricula.<sup>205</sup> According to a survey of associates in law firms across the country conducted by NALP—The Association for Legal

197. Aída M. Alaka, *Learning Styles: What Difference Do the Differences Make?*, 5 CHARLESTON L. REV. 133, 136 n.7 (2011) (citing SARAH LEBERMAN ET AL., *THE TRANSFER OF LEARNING: PARTICIPANTS’ PERSPECTIVES OF ADULT EDUCATION AND TRAINING 1* (2006); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 366 (2001)); see also Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 51–52 (2010) (discussing transfer of learning in a legal education context).

198. See, e.g., Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 657–58 (1997) (discussing the history of the course-end examination in legal education).

199. See Kowalski, *supra* note 197, at 52.

200. Alaka, *supra* note 197, at 171.

201. Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984); see also 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.”).

202. See Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 40–41 (2009) (suggesting that the ABA make clinical experience a mandatory requirement for graduation); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 268 (2009).

203. CARNEGIE REPORT, *supra* note 2.

204. BEST PRACTICES, *supra* note 2.

205. See CARNEGIE REPORT, *supra* note 2, at 87–89; BEST PRACTICES, *supra* note 2, at 165–206.

Career Professionals, the vast majority of participants reported that experiential education—clinics and externships—was helpful in their entry-level legal jobs.<sup>206</sup> However, only 2% of American law schools require students to participate in clinics as a graduation requirement,<sup>207</sup> and only one-third of law students in recent years have actually taken clinical courses.<sup>208</sup> While clinics are expensive and present other issues, such as potential malpractice liability and conflicts of interest,<sup>209</sup> meaningful simulation courses may be a viable substitute so long as they develop the same skills in students as do actual law school clinics.<sup>210</sup>

Clinical or quasi-clinical learning is the signature pedagogy of medical education.<sup>211</sup> Its use in legal education makes perfect sense.<sup>212</sup> 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[.]”<sup>213</sup> Clinics and externships traditionally have been limited to

206. See NALP—THE ASS’N FOR LEGAL CAREER PROF’LS, 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS 2, 26 & tbl.16 (2011) [hereinafter NALP EXPERIENTIAL LEARNING SURVEY], *available at* <http://www.nalp.org/uploads/2010ExperientialLearningStudy.pdf> (reporting that, when asked to rank each experiential program they took part in on a scale of 1 to 4, with 1 being “not at all useful” and 4 being “very useful,” 63.1% of respondents assigned their clinical courses a 4, and an additional 21.2% gave such courses a 3, while 60.1% of respondents assigned their externships a 4, and an additional 23.4% gave them a 3).

207. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 10 (2008), *available at* <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>.

208. Sandefur & Selbin, *supra* note 134, at 78 (noting that, based on various empirical studies, “approximately one-third of contemporary law students are participating in clinics”); NALP EXPERIENTIAL LEARNING SURVEY, *supra* note 206, at 6 (noting that “[s]lightly under one-third (30.2%) of the survey respondents reported that they had participated in at least one legal clinic during law school”).

209. See Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 473 (2004); Stephen Wizner & Dennis Curtis, “Here’s What We Do”: Some Notes About Clinical Legal Education, 29 CLEV. ST. L. REV. 673, 682 (1980) (discussing the expense of clinical programs).

210. See generally Karen Barton et al., *Authentic Fictions: Simulation, Professionalism, and Legal Learning*, 14 CLINICAL L. REV. 143, 187–91 (2007) (citations omitted) (discussing the use of simulation in legal education).

211. See Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 363–65 (2010) (citations omitted).

212. See *id.* at 362–63.

213. Chemerinsky, *supra* note 202, at 36. At least some law schools appear to be getting the message that clinical education and other forms of experiential education are important. An ABA-sponsored survey of law schools’ curricula from 2002–2010 reports an “increased commitment to clinical legal education” among many law schools. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 14 (Catherine L. Carpenter ed., 2012), *available at* [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf).

primarily low-income clients or government offices.<sup>214</sup> That need not be the case, however. Experiential education in the corporate and commercial law areas is certainly possible.<sup>215</sup>

31. *There should be a mandatory law school course, or module, concerning the fiduciary relationship between an attorney and the client (including both individual and institutional clients).*

Practicing lawyers do not merely work on cases; instead, they represent clients—individual, corporate, and governmental. An increasingly large percentage of American attorneys engage in “personal legal services” to clients.<sup>216</sup> As a result, law schools must recognize the client-centered nature of what lawyers do in the real world—which schools largely have failed to do since the inception of the law school in the late 1800s<sup>217</sup>—and provide for formal education on the attorney-client relationship, not simply from an ethical perspective but from a practical one as well.<sup>218</sup> Law students should be “client-ready”—a critical component of being “practice-ready”—upon graduation.<sup>219</sup>

32. *There should be a mandatory law school course, or module, on negotiation.*

Although most law schools offer a course on negotiation,<sup>220</sup> only one in ten law schools require such a course as a graduation requirement.<sup>221</sup> They should

214. Carl J. Circo, *An Educational Partnership Model for Establishing, Structuring and Implementing a Successful Corporate Counsel Externship*, 17 CLINICAL L. REV. 99, 102 (2010).

215. See e.g., *id.* at 100–01 (discussing the Corporate Counsel Externship program at the University of Arkansas School of Law).

216. William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 436 (2011).

217. See CARNEGIE REPORT, *supra* note 2, at 4.

218. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 362–63 (2011) (“Because the primary purpose of the lawyer is to serve her clients, clients should play a role in legal education.”).

219. See Garvey & Zinkin, *supra* note 10, at 129.

220. See Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. ON DISP. RESOL. 299, 300 (2010); Michael T. Colatrella, Jr., *A “Lawyer for All Seasons”: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93, 95 n.4 (2012) (citing SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002, at 34 (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculum/survey/Curriculum\\_Survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculum/survey/Curriculum_Survey.authcheckdam.pdf)).

221. Cf. Michael L. Colatrella, Jr., *A “Lawyer for All Seasons”: The Lawyer as Conflict Manager*, 59 SAN DIEGO L. REV. 93, 98 n.19 (2012) (citing an ongoing survey by Sean Nolon, Associate Professor of Law and Director of Dispute Resolution Program at Vermont Law School, indicating that only 10.9% of the ABA-accredited law schools in the United States participating in the survey require students to complete at least one non-litigation dispute resolution course in order to graduate). For an overview of the survey, see *Integrating Non-Litigation Dispute Resolution into the JD Curriculum: A Survey of U.S. ABA-Accredited Law Schools*, VT. L. SCH., <http://www.vermo>



be required at all schools, however, as effective negotiating is an essential skill for virtually all types of practicing attorneys.<sup>222</sup>

33. *There should be a mandatory law school course, or module, on alternative dispute resolution (ADR).*

ADR, including both arbitration and mediation, has increasingly supplanted litigation in a courtroom as a means of resolving legal disputes.<sup>223</sup> Yet only a small fraction of law students today take courses on ADR.<sup>224</sup> Because ADR is as or more important than litigation today, a course on ADR should be mandatory in law school.<sup>225</sup>

34. *There should be a mandatory law school course, or module, on quantitative methods and basic business education.*

The use of quantitative analysis is becoming pervasive in the practice of law.<sup>226</sup> In addition to being used by legal policymakers, as well as expert witnesses in a wide variety of litigation, business attorneys use quantitative analysis in connection with their clients' work.<sup>227</sup> Similarly, many attorneys

ntlaw.edu/Academics/Dispute\_Resolution\_Program/The\_NLDR\_Survey.htm (last visited Oct. 24, 2012).

222. John Lande, *Teaching Students to Negotiate Like a Lawyer*, 39 WASH. U. J.L. & POL'Y 109, 110 (2012) ("Considering how much of lawyers' work involves negotiation, in an ideal world, law schools should require every student to have extensive instruction."); see also Craver, *supra* note 220, at 300 (noting that "[l]awyers negotiate repeatedly" and in a wide variety of circumstances).

223. See Edward M. McNally & Barbara MacDonald, *The New Delaware Mediation Statute*, 21 DEL. J. CORP. L. 87, 89 (1996); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 265 (1995).

224. See Colatrella, *supra* note 221, at 98 n.19 (citing NALP EXPERIENTIAL LEARNING SURVEY, *supra* note 206, at 18 tbl.8) (noting a 2010 survey of law firm associates found that only 21.7% took an ADR skills course in law school).

225. 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, 294 (2010).

226. See Van Zandt, *supra* note 10, at 614 ("It is very difficult to be a lawyer in any area today without a rudimentary knowledge of [accounting, finance, and statistics]").

227. See, e.g., Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 182–83 (Fed. Jud. Ctr. ed., 2d ed. 2000), [http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/\\$file/sciman00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sciman00.pdf/$file/sciman00.pdf) ("Over the past several decades the use of multiple regression analysis in court has grown widely. Although regression analysis has been used most frequently in cases of sex and race discrimination and antitrust violation, other applications include census undercounts, voting rights, the study of the deterrent effect of the death penalty, rate regulation, and intellectual property."); U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 4 (2010), [http://www.ussc.gov/Research/Research\\_Publications/2010/20100311\\_MultivariateRegression\\_Analysis\\_Report.pdf](http://www.ussc.gov/Research/Research_Publications/2010/20100311_MultivariateRegression_Analysis_Report.pdf) (noting use of multivariate regression by policymakers).

who practice corporate and transactional law, or commercial litigation, must speak “the language of business” in order to provide their clients effective assistance.<sup>228</sup> A law school graduate thus should possess an elementary knowledge of finance, accounting, econometrics, and statistics—things that many law students never studied in their undergraduate years.<sup>229</sup> My review of law school course offerings revealed that, although most law schools offered an occasional course on “accounting for lawyers” or “statistics for lawyers,” most did not offer a single course that covered quantitative methods and basic business education.<sup>230</sup>

35. *There should be a mandatory law school course on legislation and administrative law.*

Since the advent of the Langdellian model of legal education in the late nineteenth century,<sup>231</sup> the American legal system has seen a dramatic shift from common law as the primary font of law to statutes and, increasingly, administrative regulations and administrative adjudication.<sup>232</sup> We now live in a “regulatory state.”<sup>233</sup> For that reason, it makes little sense to focus the law school curriculum, particularly in the first year, on common law courses—torts, property, and contracts. A mandatory course, or courses, on legislation and administrative law should exist at every school.<sup>234</sup>

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228. Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 363–65, 381 (2009) (contending that law schools “should teach a little more business and a little less law” and provide law students with a “basic literacy in essential [business] concepts”).

229. See Rhee, *supra* note 228, at 382. For an excellent (and relatively short) textbook for such a course, see ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* (2010).

230. Wake Forest University School of Law, however, offers such an elective two-hour credit course called “Analytical Methods for Lawyers” with the following course description: “This course introduces methods of analysis drawn from disciplines such as economics, game theory, accounting, finance and statistics. The concepts and techniques covered here will enable lawyers to analyze legal problems, and communicate with clients, with a richer vocabulary and a broader range of tools.” *Academics*, WAKE FOREST U. SCH. L., <http://academics.law.wfu.edu/courses/> (last visited Oct. 28, 2012).

231. See CARNEGIE REPORT, *supra* note 2, at 4.

232. See Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 616–22 (2007) (citations omitted).

233. *Id.* at 664. See generally LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS* (2006) (representing the general assertion that we live in a “regulatory and administrative state”).

234. Edward Rubin, *Curricular Stress*, 60 J. LEGAL EDUC. 110, 113 (2010) (“First-year students should take a required course on legislation, regulation, and the structure of the administrative state.”); see also Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679–80 (1999) (discussing the importance of the legislative process in legal analysis and lack of legislative educational opportunities in law schools); Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 169 (2008) (recommending a mandatory “[l]egislation course” in the first-year curriculum).

36. *There should be a mandatory law school course, or module, on globalization of the legal system.*

Recent decades have seen an increasing globalization of the law.<sup>235</sup> The law school curriculum should respond with a mandatory course on international law and the effect of globalization on the legal system and the practice of law.<sup>236</sup>

37. *There should be a mandatory law school course on remedies.*

Every competent civil litigator knows that the first question to ask when a client is contemplating a lawsuit is whether there is a realistic remedy for an alleged violation of the client's rights. *Ubi jus, ibi remedium*<sup>237</sup> is often a hollow legal maxim in the modern legal system. Qualified immunity, sovereign immunity, the running of the statute of limitations, lack of an attorney's fee-shifting statute, a prospective defendant's bankruptcy, and many other remedial hurdles often stand in the way of an otherwise viable lawsuit. Law students who have taken only the standard common law courses (torts, contracts, and property) and upper-level litigation courses (e.g., commercial law) are typically exposed to little, if any, remedial law.<sup>238</sup> For that reason, law schools should institute a mandatory upper-level course on remedies in order to teach law school students to truly "think like a lawyer."

38. *There should be a mandatory law school course, or module, on factual investigation and development.*

Likely because most law professors have little experience as practitioners,<sup>239</sup> law schools often fail to appreciate that factual investigation and development is just as or more important of a professional tool for a practicing attorney as legal research. Competent practitioners must possess skills such as effective witness interviewing, document review (including electronic discovery), and Internet and computer database investigation (like searching for witnesses or assets). Such skills are not amenable to being taught in a traditional law school lecture course; they are effectively taught in an experiential course.

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235. Fine, *supra* note 10, at 734.

236. *See id.* at 736.

237. "Where there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1876 (9th ed. 2009).

238. *See* Russell L. Weaver & David A. Partlett, *Remedies as a "Capstone" Course*, 27 REV. LITIG. 269, 270–71 (2008) (discussing the "haphazard way" in which students are exposed to remedies in first-year and upper-level courses).

239. *See infra* Thesis 61.

39. *Courses, or modules, on the practical side of running a law practice (as a business) should be common in law schools' curricula.*

Three-fourths of all law school graduates go into private practice, and two-thirds of those end up working as solo practitioners or in small firms (firms with five or less attorneys), compared to only 14% who go to work for big firms (those firms with more than 100 attorneys).<sup>240</sup> For that reason, courses on the practical side of running a law firm as a business should be made available and encouraged at law schools, and perhaps even mandated at schools from which a majority of graduates ultimately become solo practitioners or members of small law firms.<sup>241</sup> Currently, only a small fraction of law schools offer such a course.<sup>242</sup>

40. *Law schools should offer courses, or modules, on the "business of law," particularly business development and professional networking.*

Perhaps one of the greatest practical gaps in legal education today is the lack of any training on the business of law—that is, business development and networking.<sup>243</sup> Any private practitioner will tell you that success in the practice

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240. Hornsby, *supra* note 216, at 435–36 (citing CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 28–29 (2004)); *see also* Michael Kelly, *A Gaping Hole in American Legal Education*, 70 MD. L. REV. 440, 441 & n.8 (2011) (citing Michael J. Kelly, *Lives of Lawyers Revisited: Transformation and Resilience in the Organizations of Practice* 357 (2007) (noting that, as of 2000, nearly half of all private attorneys were solo practitioners; further noting a “substantial spike in the number of solo practitioners in the 1990s”).

241. *See* Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201, 201 (2008) (citing NSU CAREER DEVELOPMENT OFFICE, CLASS OF 2006 EMPLOYMENT REPORT 6, 7 (2006); NSU EMPLOYMENT SURVEY AS REPORTED TO NATIONAL ASSOCIATION OF LAW PLACEMENT (2002–2006)) (describing such a course at the Shepard Broad Law Center, Nova Southeastern University, being implemented); *see also* Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465, 479 (2011) (contending that law schools should offer practical courses about the “[f]undamentals of [l]aw [p]ractice”); Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207, 1222 (2010) (citing CARNEGIE REPORT, *supra* note 2, at 87–98; CONFERENCE OF CHIEF JUSTICES, IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES’ NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 26 (2001), [http://ccj.ncsc.dni.us/impl\\_plan.pdf](http://ccj.ncsc.dni.us/impl_plan.pdf)) (contending that law schools should offer practical courses about the “fundamentals of law practice”).

242. *See* Curtis, *supra* note 241, at 206 (noting that, as of 2007, only 61 of 195 ABA-accredited law schools offered such a course).

243. *See* Dilloff, *supra* note 218, at 356–57 (“Making [r]ain [i]s the [n]ame of the [g]ame[.] Client development, while always important, has now clearly become job number one. . . . [L]aw schools should include business and marketing courses in their curricula.”); Van Zandt, *supra* note 10, at 615 (contending that law schools should teach students about professional “networking”).

of law depends heavily on this skill—of which the vast majority of law school professors seem oblivious.

41. *Every law school should offer at least one meaningful management or leadership course, or module, in their upper-level curriculum.*

In my two decades of practice, I have witnessed a pervasive lack of leadership and management skills among senior attorneys in both the private and public sectors. This is not surprising because the typical law school curriculum does not teach anything about leadership and management principles.<sup>244</sup> Educating law students in such principles is essential because increasingly in today's world, lawyers are "project managers."<sup>245</sup> Law schools should learn from business schools and offer one or more courses, or modules, on leadership/management and organizational science.<sup>246</sup>

42. *Virtually all law school courses should be professional responsibility courses.*

Law students cannot effectively absorb professional responsibility into their professional identities by taking a single three credit-hour course, particularly during the third year of law school, by which time many students have already "checked out." Rather than attempt to distill principles of legal ethics into a single course, professional responsibility should be incorporated into virtually all law school courses.<sup>247</sup> To do so will require extensive coordination by and between a law school's administration and faculty. A short module on professional responsibility issues at the outset of law school<sup>248</sup> would lay a good

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244. See Silvia Hodges, *Law Schools Obligated to Provide Business and Management Education; Firms Obligated to Listen*, PARTNER'S REPORT: A MONTHLY BRIEF FOR LAW FIRM OWNERS (Inst. of Office Mgmt. & Admin., New York, N.Y.), Dec. 2009, at 8–9; Deborah L. Rhode, *Lawyers as Leaders*, 2010 MICH. ST. L. REV. 413, 413 (2010).

245. See Van Zandt, *supra* note 10, at 614 ("Basic project management skills and leadership are [an essential] competency [of an attorney]. When a lawyer, particularly in a firm, begins, he or she must be able to take on an assignment, evaluate resources and alternatives, work with other staff or other lawyers, and complete that assignment effectively. This ultimately leads to leadership positions later. Essentially, leadership encompasses a broader set of project management abilities."); see also William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 381–88 (2011) (describing an attorney's role as a project manager in industry).

246. See Kelly, *supra* note 240, at 447–48 (contending that law schools should teach organizational dynamics).

247. Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 675–76 (2000); Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 PROF. LAW. 1, 17–18 (2010).

248. See *supra* Thesis 23.

foundation for students' more in-depth learning about professional responsibility in the context of subsequent courses.

*43. Virtually all doctrinal courses in law schools should be legal writing courses.*

Rather than base students' grades solely on an end-of-semester exam, students' grades in doctrinal courses should also be based upon some written product requiring independent research, such as a short term paper, a legal memorandum, or a mock pleading or judicial opinion addressing a hypothetically disputed legal issue. Such written works need not be lengthy or complex, but they should be a regular component of a student's grade in the vast majority of courses, particularly after the first year. Students' facility in writing—which has become increasingly endangered in this era of ubiquitous cell phone texting—will increase if they are required to write on a frequent basis. Written assignments in most courses will require more work from professors and, realistically, will only be viable with smaller class sizes.<sup>249</sup> Bringing about a change from a single in-class exam in the vast majority of doctrinal classes by adding an out-of-class writing requirement will necessitate a change in ABA accreditation Standard 302(a)(3), which currently requires only “one rigorous writing experience in the first year and . . . one additional rigorous writing experience after the first year.”<sup>250</sup> Schools will not likely make such a change on their own.

*44. Virtually all doctrinal courses in law schools should be experiential or skills courses.*

Law schools should abolish the dichotomy between doctrinal courses and experiential courses, or at least blur the artificial bright line that currently exists between them.<sup>251</sup> Other than in the first-year modules discussed in Thesis 23, law students should not primarily sit and take notes while listening to a professor talk. Such passive learning—even when supplemented by the Socratic method, which involves some professor-student interchanges—should be limited in doctrinal courses. Instead, students should engage in at least some experiential learning in all courses. Each week, at least a significant portion of the students

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249. See *infra* Thesis 46.

250. ABA STANDARDS, *supra* note 22, Standard 302(a)(3), at 19.

251. See Rubin, *supra* note 232, at 662–64 (“[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.”).

in the class should participate in some type of activity that teaches them the relevant legal principles using simulation exercises.<sup>252</sup> In order to have such active learning opportunities, students must be taught in relatively small classes (twenty students or less), which will likely require more work from professors.<sup>253</sup>

45. *Academic freedom should not be used as a justification to give law professors carte blanche to teach courses in the manner that they see fit.*

In terms of curricular and pedagogical matters, law school administrators generally provide very wide latitude to members of the faculty.<sup>254</sup> Professors usually may choose their own course materials and teach the course and assess students in whatever manner that they see fit.<sup>255</sup> Some professors are excellent teachers, use appropriate course materials, and cover a particular course in adequate breadth and depth. Others, however, engage in ineffective teaching methods, assign reading materials that are only tangentially or theoretically related to the subject matter, and spend an inordinate amount of time covering a small portion of the course materials that interest them, at the expense of the bulk of the course. Academic freedom—as it is understood in relation to the First Amendment, where it finds its primary rationale<sup>256</sup>—is meant chiefly to protect a professor’s scholarship and oral statements outside the classroom, but does not extend in the same degree to the manner in which professors teach in the classroom (in terms of curriculum and pedagogy).<sup>257</sup> Particularly in a

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252. For example, in my Criminal Litigation course—which covers much of the substantive law normally covered in Criminal Procedure I and II courses (i.e., constitutional criminal procedure)—students engage in simulation exercises each week in which they role-play prosecutors, defense lawyers, and trial judges regarding each stage of a criminal prosecution, from the preliminary hearing to post-trial motions. See BRENT E. NEWTON, CRIMINAL LITIGATION & LEGAL ISSUES IN CRIMINAL PROCEDURE: READINGS & HYPOTHETICAL EXERCISES (3d ed. 2009). Students are given weekly feedback and their grades in the course are based on fourteen weeks of assessments.

253. See *infra* Theses 46, 69.

254. See ABA STANDARDS, *supra* note 22, Statement on Academic Freedom & Tenure, app. 1 at 161–62 (stating generally that, with certain limited exceptions, law professors “are entitled to full freedom in research and in the publication of the results” and that they “are entitled to freedom in the classroom in discussing their subject”).

255. See *id.*

256. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Private law schools are not generally bound by the First Amendment, yet the ABA accreditation authority, which governs both private and public law schools, injects a quasi-governmental element by its regulation of private law schools. Thus, in terms of analyzing academic freedom of private law schools and their professors, it is helpful to look at case law discussing First Amendment freedom for public universities and their professors.

257. Cf. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (“[The] caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University’s dictates.”); *Bishop v. Aronov*, 926 F.2d 1066, 1075–77 (11th Cir.

professional school whose primary mission should be to produce fiduciaries responsible for the life, liberty, and property of their clients, professors should have more limited discretion when it comes to imparting the necessary knowledge, skills, and professional values to students.<sup>258</sup> While law schools should afford professors reasonable discretion with respect to both course materials and teaching and assessment methods, and should also give the traditional academic freedom protections for what professors publish,<sup>259</sup> professors should nevertheless be required to adhere to some degree of uniformity in terms of what (and how) they teach. Otherwise, many students—and thus their future clients—will be unfairly short-changed by the instruction they receive from professors.

46. *The typical law school course has an excessive student-teacher ratio, particularly in first-year courses.*

While particularly true for first-year courses, typical law school class sizes are too large to allow for meaningful student participation. Without this critical student engagement, many students lose focus. Where laptops are permitted in class,<sup>260</sup> many students spend their time on Facebook, Twitter, or other social networking sites, play computer games, or text their friends using cell phones.<sup>261</sup> Smaller class sizes allow for more meaningful pedagogy and student

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1991) (When a professor and a university “disagree about a matter of content in the courses he teaches[, then t]he University must have the final say in such a dispute.”).

258. See Friedland, *supra* note 130, at 126; see also Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 111 (2008) (“Academic freedom cannot prevent [the administration of a law school] from demanding rigorous, consistent, coordinated teaching by the faculty.”).

259. Although the protections of academic freedom should extend to professors’ legal scholarship, law schools’ expectations about the *type* of scholarship written by their professors—in terms of hiring, tenure, and promotion—should change. See *infra* Theses 64, 78–79.

260. See, e.g., Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate Over Laptops in the Classroom*, 36 OKLA. CITY U. L. REV. 185, 185–86 (2011) (“Laptops started appearing in law school classrooms about fifteen years ago, and they are most likely here to stay. Law schools at first ostensibly welcomed them, making renovations to accommodate the innovation by putting outlets at the seats in lecture halls and seminar classes. Internet access came next, along with smart classrooms. Most law students now sit in classrooms that appear friendly to technological innovation. Law professors, however, have had mixed reactions to the presence of laptops in law school classrooms. Some believe they are a beneficial innovation for students; others go further and argue that law professors should find ways to engage the laptops as part of our teaching. Others believe the opposite: that they interfere with and inhibit learning. Many balance these competing considerations when deciding how to handle the issue; some ultimately decide to ban them from their classrooms.”).

261. I recently toured a “first-tier” law school at which I was invited to speak on legal education reform. During my tour, I was shown several doctrinal classes that were being taught. Each time the professor who escorted me showed me a classroom—from the outside of the rooms through doors with large glass windows—I pointed out the substantial percentage of students (as many as half in some classes) who were on Facebook or other Internet sites unrelated to the law.



engagement.<sup>262</sup> Smaller class sizes would also require professors to teach more courses per year.<sup>263</sup>

47. *The near ubiquitous use of commercial outlines by law students in core courses demonstrates that many students are not being effectively taught the material and are not engaged in class.*

It is widely known that many law students regularly use commercial outlines for some or all of their doctrinal law school courses.<sup>264</sup> In their instruction, many professors simply track a standard casebook, upon which commercial outlines are based.<sup>265</sup> Students are less motivated to be engaged in class because they know they can simply study the outline both for class and for the final exam. I am not proposing the banishment of the commercial outline; it is merely one of many symptoms, not the cause, of the illness afflicting legal education. Rather, I am calling for major curricular and pedagogical reforms in order to cure the disease. I submit that, if law school courses were taught effectively, most students would not consider commercial outlines to be necessary.

48. *The Socratic method should not be the primary pedagogical method used in law school.*

Law school professors and deans generally use the Socratic, or “case dialogue,”<sup>266</sup> method of instruction.<sup>267</sup> This style, or method, of teaching is relatively easy for the professor, who simply follows cases in the assigned casebook. Additionally, it allows the professor to feel powerful vis-à-vis students, who tend to be intimidated by the method. This instructional approach is also relatively cheap to administer because it has traditionally been employed with large classes.<sup>268</sup> Yet the Socratic method is an ineffective pedagogical

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262. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 1992–2002, at 23 (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum\\_Survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum_Survey.authcheckdam.pdf) (noting “the significant decrease in the small section experience[] outside of a legal writing course” in the first-year curriculum at law schools, and that “the small section experience . . . [has] been largely eliminated”).

263. See *infra* Thesis 69.

264. PHILLIP C. KISSAM, THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS 33 (2003).

265. *Id.*

266. See CARNEGIE REPORT, *supra* note 2, at 50–51.

267. See Steven I. Freidland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27–28 (1996).

268. Lande & Sternlight, *supra* note 225, at 275 (“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 interaction and observation.”).

method.<sup>269</sup> It does not resemble the type of human interchange that lawyers have with other lawyers, clients, or judges in the real world.<sup>270</sup> Any meaningful reform of legal education will involve the abolition or significant modification of this nineteenth-century pedagogy.<sup>271</sup>

*49. Casebooks should not be the primary course materials used in law school courses.*

The law school casebook—a collection of mostly appellate decisions relevant to a particular subject matter—was developed in the late 1800s at Harvard Law School.<sup>272</sup> Casebooks remain the primary type of course materials used in law school,<sup>273</sup> which, as noted above, emphasize litigation-oriented courses.<sup>274</sup> The casebook method, which is used in conjunction with the Socratic method, allows for a relatively easy manner of instruction.<sup>275</sup> There are superior alternative written course materials: hornbooks—legal textbooks that distill the relevant principles and include citations to primary legal authorities but do not include lengthy excerpts of cases—and practical course materials. One effective method using hands-on practical materials is the “case study” method, which uses real or simulated case files.<sup>276</sup> This method can be used to teach not only litigation-oriented topics, but also corporate and transactional topics.<sup>277</sup>

*50. Law school courses should do more to develop and assess students’ oral communication skills.*

A typical law school course involves the average student speaking only a few times per semester, if at all. Students are primarily, or exclusively, assessed based on their grades on a single written end-of-semester exam.<sup>278</sup> Effective oral

269. See Rubin, *supra* note 232, at 610–17.

270. See *id.* at 610–11.

271. See *id.* at 610–17.

272. CARNEGIE REPORT, *supra* note 2, at 55–56.

273. Rhee, *supra* note 137, at 316.

274. See *supra* Theses 21–22.

275. Lande & Sternlight, *supra* note 225, at 274.

276. See Rhee, *supra* note 137, at 337.

277. See, e.g., Hadfield, *supra* note 156 (discussing an experiential learning experience using the “case” method with both J.D. and M.B.A. students in the corporate transactional context).

278. BEST PRACTICES, *supra* note 2, at 236 (“In the traditional law school course . . . the only evaluation of how well a student is learning, and the entire basis for the student’s grade for the course, is a three hour end-of-the-semester essay exam . . .”); Harvey Gilmore, *To Failure and Back: How Law Rescued Me from the Depths*, 10 FLA. COASTAL L. REV. 567, 579 (2009) (citing Ron M. Aizen, Note, *Four Ways to Better 1L Assignments*, 54 DUKE L.J. 765, 766 (2004)) (“In law school . . . most classes do not have midterm exams or other graded assignments during the semester.”); Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO J. INT’L & COMP. L. 295, 355 (2010) (“[M]ost U.S. law school courses fall short in educationally sound assessment techniques, by assessing performance based on a single examination administered at the end of the semester.”).

communication is an essential skill for every type of attorney, not simply for litigators.<sup>279</sup> Law school courses need to incorporate oral communication by students as an integral part of the classroom experience—whether by way of oral advocacy exercises, negotiation simulation, or other types of public speaking exercises. Students should also on a regular basis be videotaped and required to review their public speaking. In courses where I have videotaped students in their oral presentations, they have invariably benefited from the self-feedback in observing themselves. Furthermore, law schools should again follow the lead of medical schools and expand grading to include oral as well as written assessments.<sup>280</sup> This innovation in legal education, too, would require smaller student–teacher ratios in order to be viable.<sup>281</sup>

51. *The traditional end-of-semester written exam—as the primary or sole determinate of law students’ grades—is a woefully inadequate assessment tool.*

In the typical law school course, an end-of-semester written exam is still the primary or exclusive means for determining students’ grades.<sup>282</sup> There is a tremendous need for a sea change in student assessments in law schools. Much like elementary, secondary, and undergraduate education, legal education will be most effective if there are several different types of assessments throughout the semester.<sup>283</sup> There should be both formative and summative assessments.<sup>284</sup> Out-of-class writing assignments and some type of oral assessment should also be used in determining law students’ grades.<sup>285</sup>

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279. See Jim McElhaney, *More Than Just Words: This Is What It Really Means to Talk Like a Lawyer*, A.B.A. J., Jan. 2012, at 19 (“A lawyer is a professional speaker. You talk for a living. Every time you say something as a lawyer, you are making a professional presentation.”)

280. See Friedland, *supra* note 130, at 115.

281. See *supra* Thesis 46.

282. See *supra* note 278.

283. See, e.g., DIANE M. ENERSON ET AL., SCHREYER INST. FOR TEACHING EXCELLENCE, AN INTRODUCTION TO CLASSROOM ASSESSMENT TECHNIQUES 1–2 (2007), available at [http://www.schreyerinstitute.psu.edu/pdf/classroom\\_assessment\\_techniques\\_intro.pdf](http://www.schreyerinstitute.psu.edu/pdf/classroom_assessment_techniques_intro.pdf) (encouraging Penn State University faculty to utilize various assessment techniques over the course of a semester to effectively monitor student learning).

284. Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 77 (2010) (citing CARNEGIE REPORT, *supra* note 2, at 164–67); Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 WIDENER L.J. 159, 175 (2009) (citing BEST PRACTICES, *supra* note 2, at 236–39, 259–61; CARNEGIE REPORT, *supra* note 2, at 164–67).

285. See *supra* Thesis 50.

52. *In addition to assessments in each course, students' competencies should be assessed on a global basis and at discrete points in law school.*

Currently, at the vast majority of law schools, the only global assessment of students is the requirement that they maintain a certain minimum grade point average.<sup>286</sup> What is missing in terms of assessments of students is a genuine global assessment of their competencies—either annually or at the end of law school.<sup>287</sup> Other graduate and professional schools require such a global assessment,<sup>288</sup> and law schools should as well. In addition to taking some type of examination that tests all necessary competencies, law students should be required to keep portfolios of their work—term papers, videos of their performances in mock trial or moot court competitions, memos prepared during summer jobs, etc.—that are evaluated as part of a cumulative assessment before graduation.<sup>289</sup> Such a global assessment process within law schools will afford prospective employers, and the public, the opportunity to verify that law students are competent to practice as entry-level practitioners—something the current bar exam does not ensure.<sup>290</sup>

#### *D. Deficiencies in Law School Faculties*

53. *The current model for recruiting and hiring law school faculty—the Association of American Law Schools (AALS) “meat market” system and the “job talk” process—fails to focus on the correct skill set for aspiring professors.*

In the fall of each year, aspiring law professors gather at a large faculty recruitment conference sponsored by the AALS that is commonly referred to as the “meat market.”<sup>291</sup> Law schools typically interview a number of candidates

286. See Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 335 (2010) (“[F]ew have taken on the task of doing global assessments of each student to measure the student’s all around success in developing the necessary core competencies to become successful legal professionals.”).

287. *Id.* at 336 (contending that “holistic” assessments of law students’ competencies should be required in addition to their passing discrete law school courses).

288. See, e.g., CARPENTER ET AL., *supra* note 75, at 40 (discussing osteopathic medical education’s use of student portfolios in the student assessment process); Garvey & Zinkin, *supra* note 10, at 121 (discussing the University of New Hampshire’s Daniel Webster Scholar Honors Program’s use of such portfolios in the global assessment process).

289. See *supra* note 288 and accompanying text.

290. See *infra* Thesis 89.

291. See Wendel, *supra* note 116 (discussing the logistics of the hiring process); see also CORNELL L. SCH. ALUMNI TEACHING COMM. & OFFICE OF PUB. SERV., CAREERS IN LAW SCHOOL TEACHING HANDBOOK 14 (2011) [hereinafter CAREERS IN LAW SCHOOL TEACHING HANDBOOK], available at <http://www.lawschool.cornell.edu/publicservice/upload/Complete-Handbook-final.pdf> (discussing the Faculty Recruitment Conference).

and invite a portion back to their campuses for interviews and the all-important “job talk.”<sup>292</sup> At the “meat market,” and later during an on-campus interview, the name of the game for most law schools, particularly those in the first tier of the *U.S. News & World Report* rankings, is a doctrinal candidate’s “scholarly agenda.”<sup>293</sup> Although the typical interview process will include a discussion and evaluation of a candidate’s teaching interests, the critical issue that dictates hiring decisions at most schools is the subject of what law review articles the candidate has published in the past, as well as what the candidate intends to publish in the future.<sup>294</sup> The typical tenure-track candidate’s “job talk” is the equivalent of a scholarly presentation of a paper at an academic law conference.<sup>295</sup> Rather than focusing primarily on such a scholarly agenda and presentation of academic scholarship, prospective professors should be required to spend the bulk of the interview discussing their ideas about, and displaying their genuine enthusiasm for, teaching, mentoring, and assessing law students. Candidates should also be routinely required to evince their prowess, or potential prowess, as a teacher by demonstrating how they would actually teach a class.

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292. See Anne Enquist et al., *From Both Sides Now: The Job Talk’s Role in Matching Candidates with Law Schools*, 42 U. TOL. L. REV. 619, 621 (2011) (noting that “the job talk is now a key part of hiring decisions”).

293. See Wendel, *supra* note 116 (“[Y]our research agenda” is “probably the single most important piece of information the appointments committee will be seeking”). At most schools, a “scholarly agenda” is much less important for experiential professors, who constitute a small fraction of most law faculties. See, e.g., CAREERS IN LAW SCHOOL TEACHING HANDBOOK, *supra* note 291, at 8 (“[T]he clinical faculty member’s workload typically emphasizes teaching much more than scholarship, whereas for the doctrinal teacher it is just the opposite.”); *id.* at 11 (“[T]he focus of most legal-writing positions . . . is on teaching rather than scholarship, although scholarship is usually encouraged.”).

294. CAREERS IN LAW SCHOOL TEACHING HANDBOOK, *supra* note 291, at 14 (“Candidates for doctrinal teaching positions should expect these interviews to be substantive and intense. The focus is usually on the content of a paper itself, and committee members want to see whether the candidate is conversant with the literature, can anticipate and deal with counter-arguments, can explain the significance of the research to non-specialists, and has a broader, longer-term agenda that is related to the paper under discussion. There may also be some questions about areas of teaching interests and maybe even pedagogical methods (how do you feel about the Socratic method?), but candidates should be prepared for what can be described as a moot court argument on their work.”); see also *id.* at 3–4 (“Schools have come to recognize that top grades and credentials do not necessarily predict excellence in scholarship. Instead, the very best predictor of publication success in the future is publication success in the past. Nowadays it is virtually impossible to get hired anywhere without having at least one substantial article published beyond a student note.”).

295. *Id.* at 15 (“The most important stage of the interviewing process is the campus visit and job talk. For doctrinal candidates, a job talk will be a workshop-style presentation of a scholarly paper.”).

54. *Visiting Assistant Professorships (VAPs), in their current form, should be abolished.*

A recent trend in the legal academy, particularly at top-tier schools, is the VAP, also called a law school “fellowship.”<sup>296</sup> In filling these positions, law schools typically hire recent law school graduates who have perhaps clerked for a judge and worked for a short amount of time as a practitioner, or who are finishing a Ph.D. program, and are considered promising legal scholars.<sup>297</sup> The VAPs spend a year or two at the law school writing law review articles and usually teaching a course each semester.<sup>298</sup> The primary, if not sole, purpose of the VAP is to afford aspiring law professors “the time, support, and mentoring they need to develop a research agenda and publish articles.”<sup>299</sup> Such a program should be abolished or at least significantly modified. The idea of a non-tenure-track, short-term assistant professorship is not objectionable; however, the primary purpose of such a position should be for a new professor to show promise not only as a scholar but, more importantly, as an effective teacher. Although VAPs usually do some teaching, their teaching is secondary to their central focus on scholarship.<sup>300</sup> This should change. Law students should not be subsidizing such law review scholars-in-training with their tuition dollars.

55. *Most full-time law professors are preoccupied with writing law review articles, which diverts substantial time and resources from their teaching and service duties.*

Even after she is hired and given tenure, the typical full-time law professor, particularly a doctrinal as opposed to an experiential professor, remains preoccupied with academic legal scholarship. This preoccupation with scholarship often comes at the expense of teaching law students to be effective practitioners and contributing to the legal profession in other ways such as by working on pro bono cases.<sup>301</sup> Rather than hire professors who

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296. See Paul L. Caron, *Fellowships for Aspiring Law Professors (Updated)*, TAXPROF BLOG (Sept. 2, 2008), [http://taxprof.typepad.com/taxprof\\_blog/2008/09/fellowships-for.html](http://taxprof.typepad.com/taxprof_blog/2008/09/fellowships-for.html).

297. Wendel, *supra* note 116 (discussing VAPs); see also Newton, *Preaching What They Don't Practice*, *supra* note 8, at 133–34 (quoting Wendel, *supra* note 116) (discussing VAPs).

298. See *supra* note 297.

299. Wendel, *supra* note 116.

300. See Caron, *supra* note 296.

301. In theory, law professors' professional duties are three-fold: teaching, scholarship, and “service” (to the school and public—through such activities as serving on faculty committees and engaging in pro bono legal work). See ABA STANDARDS, *supra* note 22, Standard 404(a), at 32. However, in reality, scholarship is their primary focus. See CAREERS IN LAW SCHOOL TEACHING HANDBOOK, *supra* note 291, at 2 (“[S]cholarship rather than teaching is the primary focus of the[] professional lives [of doctrinal law professors]. The hiring, evaluation, promotion, and compensation of doctrinal law professors are mostly based on their records of publication. While many people are attracted to this career because they enjoy classroom teaching, it is really far more a research and writing job than a teaching job. There is constant pressure to research, develop,

disproportionately focus on academic legal scholarship, law schools need to hire the equivalent of medical school professors traditionally known as “triple threats”—professors who excel at teaching, practical skills, and scholarship.<sup>302</sup> Attorneys with strong academic track records who later succeeded in practice are precisely the ones with such broad skill sets.<sup>303</sup> Yet, currently, such persons are often shunned in the hiring process, particularly at so-called elite law schools, because they have too much practical experience.<sup>304</sup>

56. *There is no significant relationship between a typical law professor's prowess as a legal scholar and his teaching effectiveness.*

The current skill set valued in the legal academy—which relates primarily to a professor's ability to research and write academic legal scholarship—has no meaningful correlation to a professor's overall teaching effectiveness.<sup>305</sup> If

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write, edit, publish, and promote one's scholarship while at the same time stay up on class preparation, meet with students, and teach class. Professors also travel to conferences and faculty workshops at other schools to present works in progress and completed papers. Without a lot of fire in the belly to succeed as a scholar, it is hard to balance these responsibilities.”); *see also* Matasar, *supra* note 258, at 71–73 (observing that, of the three components of a law professor's professional obligations, scholarship is typically given disproportionate attention at the expense of the other two).

302. Daniel B. Hinshaw, Former Assistant Dean at Univ. of Mich. Med. Sch., Models from Other Disciplines: What Can We Learn from Them? (July 27, 2001), in 1 J. ASS'N LEGAL WRITING DIRS. 165, 181 (2002) (“One of the interesting differences between academic law and academic medicine relates to the caste system. The medical school equivalent of the legal Brahmin, the role that I aspired to when I joined a medical school faculty, is to be a ‘triple threat.’ A triple threat is a faculty member who has not only mastered the theory and science of medicine (as a successful published investigator), but has also mastered the practice of medicine (both as a highly competent clinician and teacher).”).

303. *See* Forrest B. Weinberg, *Teaching Sabbaticals for Practicing Lawyers*, 63 A.B.A. J. 643, 646 (1977) (describing a practitioner that should consider a teaching position as one that possesses “intellectual attainment, self-confidence and stage presence, ability to communicate, and experience in either teaching students or lecturing the bar”).

304. *See infra* Thesis 61.

305. 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, 619–20, 622–23 (2008) (discussing results of author's study of data from a “reasonably representative sample” of nineteen law schools, and concluding “there is either no correlation or a slight positive correlation between teaching effectiveness” and a teacher's publication counts or citation counts); 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

faculty members generally spent more time teaching and mentoring students, and less time engaging in legal scholarship, students would benefit from smaller student–teacher ratios and more interaction with their professors. Furthermore, if law schools hired professors based on a different skill set—one related to their records as successful practitioners and their prowess as teachers—students would benefit from the resulting teaching excellence.

57. *“Teaching excellence” (or failure) is a minor factor in terms of hiring, promotion, and tenure decisions at law schools.*

Despite giving lip service to “teaching excellence,” most law schools—when it comes to the important decisions concerning hiring, promotion, and tenure—care relatively little about their professors’ teaching skills (or lack thereof) and, instead, focus disproportionately on academic legal scholarship.<sup>306</sup> Because many law schools place a lower priority on teaching excellence than scholarship,<sup>307</sup> professors—particularly young professors—are sometimes assigned to teach courses for which they lack expertise due to gaps in the faculty during a particular semester. This most commonly occurs in first-year

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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.”); see also Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 154–55 (2008) (“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.”).

306. Henderson, *supra* note 188, at 65–66 (“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. Furthermore, 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 than make up for barely passable teaching.”); 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, 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 to Paul D. Carrington, in *“Of Law and the River,” and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 26 (1985).

307. See Read & Mirow, *supra* note 306, at 61–63.



foundational courses. A running joke—that, sadly, is true in some cases—is that the professor teaching Contracts has never prepared a real contract for a real client. A law school whose first priority is teaching would always have a deep enough “bench” to avoid this short-changing of students.<sup>308</sup>

58. *Law schools should foster teaching excellence systematically.*

If law schools were not so preoccupied with academic legal scholarship and devoted more time and resources to “teaching the teachers” to be more effective—using the latest research on learning—the quality of legal education would significantly improve.<sup>309</sup>

59. *Full-time law professors’ teaching skills need to be assessed in a much more meaningful manner than they currently are.*

Rather than simply have student evaluations each semester<sup>310</sup>—which often are given short shrift by faculty members and administrators—the assessment process should involve recognized experts in legal pedagogy, as well as respected members of the legal community, reviewing videotaped classes and offering assessments and feedback on a regular basis. This is particularly important for new teachers, but even senior professors should be assessed in this manner on an occasional basis.

308. See BEST PRACTICES, *supra* note 2, at 95.

309. Judith Welch Wegner, *Reframing Legal Education's “Wicked Problems”*, 61 RUTGERS L. REV. 867, 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.”); see also Corinne Cooper, *Letter to a Young Law Student*, 35 TULSA L.J. 275, 278 (2000) (“We got here mostly by being good law students, not because we have any background in higher education theory. . . . [M]ost elementary school teachers have a stronger background in educational theory than do law professors.”); *id.* at 278 n.13 (“I cannot tell you the number of times that I have seen faculties at different law schools make decisions about pedagogy in the absence of, and even in spite of, research on the relevant issue.”); 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 (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.”); *id.* at 61 (citing Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 373 (1990)) (“In part, this is due to the fact that scholarship, rather than teaching, has paramount importance at most schools.”).

310. For a comprehensive discussion of student evaluations of law professors, see Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 SW. L. REV. 1 (2008).

60. *There is a self-perpetuating elitism among many law schools, particularly those in the upper echelons of the U.S. News & World Report rankings.*

At law schools ranked in the first tier of the *U.S. News & World Report* rankings, and increasingly at schools in the lower tiers, the typical tenure-track law professor graduated from one of the law schools at the very top of the *U.S. News & World Report* rankings.<sup>311</sup> The list of hires for the 2010–2011 academic year shows that the vast majority of new tenure-track professors, even at schools in the low tiers, possess law degrees, Ph.D.'s, or both from "elite" schools.<sup>312</sup> It simply cannot be that the top graduates from the 180 or so "lesser" law schools would not be as capable law professors as graduates from "elite" law schools.<sup>313</sup>

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311. See Brian Leiter, *Brian Leiter's Best Law Schools for the "Best" Jobs in Law Teaching*, BRIAN LEITER'S L. SCH. RANKINGS (May 25, 2006), [http://www.leiterrankings.com/jobs/2006\\_job\\_teaching.shtml](http://www.leiterrankings.com/jobs/2006_job_teaching.shtml) (indicating that vast majority of tenure-track professors hired by top-50 law schools in the *U.S. News & World Report* rankings have J.D.'s from Yale, Harvard, Stanford, Chicago, Columbia, NYU, Berkeley, Michigan, Virginia, Cornell, Duke, Georgetown, Northwestern, UCLA, Minnesota, Penn, and Texas); Wendel, *supra* note 116. In outlining the "classic resume of a teaching candidate," Professor Wendel noted:

A substantial percentage of plausible teaching candidates comes from only 4 schools—Harvard, Yale, Stanford, and Chicago—with a few more from Columbia, Michigan, and Virginia, which traditionally have a strong presence in academia. There are a number of prominent national law schools from which you may have a J.D. and not be ruled out entirely for law teaching, provided you finished near the top of your class and have the rest of your credentials in order. These schools include USC, Vanderbilt, Emory, Notre Dame, Minnesota, Iowa, George Washington, and Washington and Lee. It will be harder from these schools, but it's do-able. Getting a teaching position with a J.D. from a school significantly farther down the food chain 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.

*Id.*; see also Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocratic 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 faculty of American law schools remains dominated by graduates of a few law schools. . . . An American 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."); 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, 612 (2003) (noting that most law professors "graduated from a top-12 law school (often Yale or Harvard) or at least a top-25 school").

312. See Lawrence B. Solum, *Entry Level Hiring Survey 2010*, LEGAL THEORY BLOG (Apr. 12, 2010), <http://lsolum.typepad.com/legaltheory/2010/04/entry-level-hiring-survey-2010.html#more>. The large percentage of new professors possessing Ph.D.'s is also notable. *Id.*; see also *infra* Thesis 65.

313. By comparison, among the sixty-eight new members elected to the prestigious American Law Institute in October of 2012 were many practicing attorneys or judges who received their J.D.'s from law schools not ranked in the upper echelons of the *U.S. News & World Report* rankings (such as St. Mary's School of Law, University of Buffalo Law School, Memphis State University School of Law, and Chicago-Kent College of Law). See Press Release, Am. Law Inst., The American Law

Rather, it strongly appears that law schools' hiring practices are purposely elitist, that is, based on a candidate's academic pedigree as much as on her actual merit. Such elitism appears related to the pernicious influence of the *U.S. News & World Report* rankings, with which most law schools are obsessed.<sup>314</sup> Abandoning such elitism and opening up hiring to qualified graduates from lower-ranked schools would very likely increase the diversity and life experiences among law school faculties—something the typical law faculty claims to champion—and would also serve to benefit students.

61. *The vast majority of full-time faculty members at law schools should have a significant and successful record of practical legal experience before being hired as a full-time law professor.*

Except for experiential professors (clinicians and legal research and writing professors), who constitute a small minority of the typical law school's faculty,<sup>315</sup> the typical full-time law professor's prior record as a practitioner (long or short, distinguished or undistinguished) was virtually irrelevant in the decision to hire her. Indeed, at many law schools, particularly those in the first tier of the *U.S. News & World Report* rankings, anything beyond a few years of practical experience often *hurts* an aspiring professor's chances of being hired.<sup>316</sup> My own empirical study of full-time, entry-level law professors (excluding experiential professors) hired between 2000 and 2009 revealed that the average

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Institute Elects 68 New Members (Oct. 11, 2012), *available at* [http://www.ali.org/index.cfm?fuseaction=news.prelease\\_10112012](http://www.ali.org/index.cfm?fuseaction=news.prelease_10112012) (announcing election of new members); *Newly Elected Members*, AM. L. INST., <http://www.ali.org/index.cfm?fuseaction=membership.elected912> (last visited Oct. 23, 2012) (providing biographical sketches of new members).

314. See Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias* 7–9 (Univ. of Tenn. Coll. of Law Legal Studies Research Paper Series, Paper No. 176, 2012), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2007934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007934) (citations omitted).

315. According to a 2008–2009 AALS report listing law faculty by subject area, there were only 1,275 faculty engaged in clinical teaching. *Gender & Race by Subject Area, 2008–2009 AALS Statistical Report on Law Faculty*, ASS'N AM. L. SCHS., <http://www.aals.org/statistics/2009dlt/subjects.pdf> (last visited Oct. 28, 2012). As noted in *supra* note 46, there were between 10,000 and 12,000 law professors in the United States during that same period.

316. 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.”); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?*, 45 S. TEX. L. REV. 753, 762 (2004) (“Neither practice skills nor ‘real world’ experience matter. Indeed, apart from judicial clerking, they may even be seen as detrimental.”); Wendel, *supra* note 116 (“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.”); *see also* Frank H. Wu, *How to Become a Law Professor*, PRAC. LAW., Sept. 2000, at 15, 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.”).

professor possesses only three years of practical experience; at the top-ten schools, the typical new professor possesses only one year of practical experience.<sup>317</sup> The bias against practical experience that these statistics demonstrate needs to change before meaningful reform of legal education can occur. A law school faculty on which professors with little or no real-world experience predominate cannot teach law students to become competent, ethical practitioners. Imagine a medical school faculty dominated by professors with minimal experience in treating real patients. The idea of the average medical school professor having only three years of experience in treating actual patients—and the related notion of “elite” medical schools generally refusing to hire as professors doctors who have *too much* experience treating patients—is simply preposterous. So how can we allow the equivalent to occur in the context of legal education? I propose that the ABA accreditation Standards be amended to require that at least two-thirds of a law faculty have a minimum of five years of practical experience.<sup>318</sup> Such a standard should go into effect at some point in the distant future—say, in ten years—in order to afford law schools time to acquire such a faculty without displacing current faculty members, particularly those with tenure. Yet, such a standard would have an immediate effect on hiring because schools would feel compelled to start the process of modifying their faculties now, lest they lose accreditation in the future.

*62. With rare exception, every full-time member of a law faculty should possess an active law license.*

It is common knowledge that, at many law schools, several members of the full-time faculty do not possess law licenses. Many others hold inactive law licenses or are licensed in states other than the ones in which their law schools are located, thus generally prohibiting them from practicing law there. It is common knowledge that some professors even wear their lack of a license as a badge of honor. Perhaps with the exception of interdisciplinary scholars who specialize in areas such as law and economics or legal history (who should represent a small minority of a law faculty), every law professor should possess an active law license in the state in which they are employed as a law professor. Law school should be a professional school whose primary mission is to produce competent, ethical members of the profession. An active law license is required to be a practicing member of the profession. As a general rule, it also should be required in order to be a member of a law school's faculty.

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317. Newton, *Preaching What They Don't Practice*, *supra* note 8, at 129–30.

318. By “practical experience,” I simply mean prior, full-time legal employment that require the professor to possess a law license (other than a legal teaching job, save perhaps for a law school clinic that provides legal services).

63. *A typical full-time law professor should be expected to practice law on a regular, albeit part-time, basis in addition to engaging in teaching and scholarship.*

Much like the typical medical school professor who engages in the practice of medicine on a regular basis, the typical law professor should engage in the actual practice of law on a part-time basis in addition to her academic duties. Such practice ordinarily should be pro bono, although professors should also be permitted, as they currently are, to engage in for-profit law practice, so long as their academic duties take precedence. Regular experience as a practitioner will enhance a law professor's ability to teach. Practice sabbaticals should be encouraged.<sup>319</sup>

64. *At many law schools, it is detrimental to a professor's chances of being hired, promoted, and granted tenure to have published practical legal scholarship.*

It is not only a professor's practical experience that is irrelevant, or even detrimental, to one's chances of getting hired or promoted as a law professor at many law schools.<sup>320</sup> A professor's record of publishing practical—as opposed to academic or theoretical—scholarship also generally hurts her chances of being hired, promoted, and granted tenure.<sup>321</sup> A dramatic shift in priorities is necessary here, too. Law professors who produce high quality practical scholarship for the bench, bar, and policymakers are precisely the type who should populate the legal academy.

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319. See 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, 643 (2004) (“[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.”).

320. See *supra* Thesis 61.

321. Wendel, *supra* note 116 (“[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 316, 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.”).

65. *Law schools are hiring entirely too many law professors with Ph.D.'s.*

In recent years, many, if not most, law schools increasingly have hired professors with Ph.D.'s in addition to, or even in lieu of, a law degree.<sup>322</sup> These professors typically have their Ph.D.'s in economics, history, political science, or some other discipline in the humanities.<sup>323</sup> Because these professors spent several years obtaining a Ph.D., they typically have little, if any, practical experience in the legal field.<sup>324</sup> Most are, understandably, highly theoretical in their perspective of the legal system. My own study of entry-level hires between 2000 and 2009 showed that nearly one-quarter of all new non-experiential law professors had Ph.D.'s; that proportion was over one-third of new hires at top-ten law schools.<sup>325</sup> A review of the list of law school hires in the 2010–2011 academic year reveals that the trend has continued unabated, and appears to have extended to schools in all four tiers of the *U.S. News & World Report* rankings.<sup>326</sup> Law schools are meant to be professional schools, not graduate

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322. Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 854 (2009) (“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 [non-elite] 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.”); Rubin, *supra* note 305, 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.”); Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1909 (2002) (“Increasingly, law professors see themselves more as colleagues of sociologists, economists, and philosophers than of judges and lawyers.”); see also Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession”*, 69 WASH. L. REV. 561, 562 (1994) (“[T]he problem began in the late ’60s 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. . . . 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.” (first and second alteration in original) (quoting an unnamed law school dean)); Wendel, *supra* note 116 (“[T]he new conventional wisdom: 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”).

323. See Edwards, *supra* note 322, at 562.

324. See Newton, *Preaching What They Don’t Practice*, *supra* note 8, at 136 (noting that professors with extensive post-secondary education are typically deficient “in preparing students to actually practice law,” presumably because they lack practical experience themselves).

325. See *id.* at 131.

326. See Solum, *supra* note 312 (noting newly hired professors with Ph.D.’s).

schools.<sup>327</sup> Such Ph.D. law professors, while they may have valuable contributions to make to the legal profession in terms of their ideas and research,<sup>328</sup> primarily belong in other parts of the university, such as political science and economics departments. They are not the appropriate ones to be teaching law students to become competent practitioners. At most, a law school should include on its faculty only a small number of such Ph.D.'s who hold joint appointments in law and another discipline from another department in the university. Such professors should only teach upper-level law courses relevant to their areas of experience—for example, law and economics; legal history; or quantitative methods for lawyers. Arguably, with all of the J.S.D. programs that exist today, there should be no need for hiring any Ph.D.'s for law school faculties.<sup>329</sup>

66. *A substantial number of full-time law professors are indifferent, or even disdainful, towards practitioners, judges, and the practice of law.*

Many full-time law professors are indifferent, or even disdainful, towards the practice of law and the practitioners and judges who participate in it.<sup>330</sup>

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327. *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 73–74 (2004) (“Law schools are professional schools, not graduate schools. We grant JDs, not PhDs.”).

328. See, e.g., 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) (discussing how interdisciplinary legal scholarship in the areas of “antitrust and originalism in constitutional law provide anchors where courts were previously adrift”); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1925–26 (1993) (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).

329. Recent hiring trends by law schools may make one seriously question the value of a J.S.D. today. See *Careers in Law Teaching Program, Frequently Asked Questions*, COLUM. L. SCH. [http://www.law.columbia.edu/careers/law\\_teaching/faq](http://www.law.columbia.edu/careers/law_teaching/faq) (last visited Sept. 23, 2012) (responding to a question regarding the value of an advanced degree in law or another discipline as it relates to careers in law teaching: “Ph.D.’s in other disciplines—notably, Economics, but also Anthropology, English, History, Philosophy, Political Science, Psychology, etc.—can be very attractive to a faculty seeking to enhance its interdisciplinarity. In recent years, elite American law schools have hired holders of Ph.D.’s much more frequently than holders of J.S.D.’s.”).

330. Cohen, *supra* note 319, at 632 (“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.”); Edwards, *supra* note 2, 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.”); Schuwerk, *supra* note 316, at 767 (“Many law professors do not like the practice of law, and consistently denigrate it to their students.”); see also Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2175–76 (1993) (noting that many law professors began to lose their identity with judges, including federal judges, during the 1980s and early 1990s, when younger judges were increasingly appointed

Many members of the bench and bar are aware of this fact and feel reciprocal disdain for the legal academy.<sup>331</sup> The disconnect between the legal academy and legal profession will continue until practitioners and judges are better integrated into the law school community, and law schools hire more professors with extensive practical backgrounds.<sup>332</sup>

*67. Ideological biases often cause law schools to hire and promote some faculty members who are undeserving of their positions from the standpoint of merit.*

Much like their counterparts in other departments within universities (particularly, it seems, in the humanities and economics departments), the ideological biases of many law school faculties have often resulted in the deliberate inclusion of particular faculty members for ideological reasons and the deliberate exclusion of other prospective professors for ideological reasons—in large part without regard to these professors’ merits as teachers or scholars.<sup>333</sup> Such biases can be right-wing or left-wing in nature, depending on the law school. Law schools should not be think tanks. Ideologically based hiring decisions are improper in the context of a professional school whose primary mission should be to teach the law as objectively as possible. Of course, no law school should fail to teach students the realities of judges’ and policymakers’ ideological biases in creating the law, and should also foster students’ discussions of the merits of different ideological schools of thought about the law, but schools’ hiring of faculty members should be divorced from their ideologies as much as is realistically possible.

*68. The current system of tenure provides too much protection for some faculty members.*

Although the system of tenure for law professors should not be abolished, there is a need for some meaningful post-tenure review of professors in order to

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whose ideologies differed from most law professors, who more closely identified with federal judges from the Warren Court era); Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2011 (1993) (quoting Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 569 (1992)) (“[M]any legal academics no longer ‘depend on maintaining unity of discourse with practitioners’”).

331. *E.g.*, Edwards *supra* note 2, at 35 (noting that judges and legal practitioners “have little use for much of the legal scholarship produced . . . by members of the legal academy”).

332. *See supra* Thesis 61.

333. *See* Peter H. Schuck & Brian Leiter, *Do Law Schools Need Ideological Diversity?*, LEGAL AFFS.: MAG. INTERSECTION L. & LIFE (Jan. 23, 2006, 9:19 AM), [http://legallaaffairs.org/web/exclusive/debateclub\\_diversity0106.msp](http://legallaaffairs.org/web/exclusive/debateclub_diversity0106.msp) (debating the ideological diversity issue among law school faculty members).



assure that they remain adequate contributors to the law school.<sup>334</sup> Traditional academic tenure for professors in other parts of universities is primarily based on the premise—closely related to academic freedom—that professors should not fear being punished for advocating particular ideas in their teaching or scholarship, so long as they do not interfere with the particular university's greater educational mission.<sup>335</sup> Although that rationale exists, to a certain degree, in the professional school context as well, professors at a professional school are obliged to teach their school's students the necessary knowledge, value, and skills to be competent and ethical practitioners upon graduation. Professional school professors should be protected in their expression of controversial ideas reflected in their legal scholarship. Yet teaching, rather than legal scholarship, should be the primary focus of a law professor.<sup>336</sup> For that reason, professors at a law school (or any professional school for that matter) have less of a need for the protections of tenure than professors in other parts of the university.<sup>337</sup>

69. *Full-time law professors should teach more than three or four courses per year or should at least devote substantial additional time working directly with law students.*

Unlike professors in other parts of the university, the typical law professor's teaching load is light—three or four courses per year on average.<sup>338</sup> The rationale for such a low teaching load is that law professors need time to pursue

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334. See, e.g., Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL'Y REV. 387, 387–88 (1998) (advocating for post-tenure evaluations in light of the fact that tenured faculty members may become unproductive for various reasons).

335. *Stanton v. Tulane Univ.*, 777 So. 2d 1242, 1251 (La. Ct. App. 2001) (quoting *Schwarz v. Adm'rs of the Tulane Educ. Fund*, 699 So. 2d 895, 898 (La. Ct. App. 1997)); *N.D. State Univ. v. United States*, 84 F. Supp. 2d 1043, 1050 (D. N.D. 1999).

336. See *infra* Thesis 69.

337. Cf. *supra* Thesis 45 (discussing similar problems with academic freedom in the legal academy).

338. CAREERS IN LAW SCHOOL TEACHING HANDBOOK, *supra* note 291, at 3 (“Many schools now have a 2-1 [fall-spring] teaching load . . . and one of those courses is often a seminar, which may require fewer classroom and preparation hours. Freeing up time for research and writing shows the law schools’ strong expectations that each faculty member will write and publish outstanding scholarship that will make an impact on the field.”); Mengler, *supra* note 86, 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.”); *Almost Everything You Need to Know About Law Teaching*, COLUM. L. SCH., [http://www.law.columbia.edu/careers/law\\_teaching/Everything](http://www.law.columbia.edu/careers/law_teaching/Everything) (last visited Sept. 23, 2012) (“The teaching load is usually three to four courses, depending on the school, and typically involves a balance of ‘service’ courses (for example, first-year required courses) and upper-level courses related to the faculty member’s scholarly interests.”).

legal scholarship.<sup>339</sup> That amount of courses per year is too low. The typical full-time professor should teach at least six courses per regular academic year. Alternatively, professors should devote substantially more time to working directly with students, in addition to their current teaching loads. For instance, a professor could teach four classes and run her school's student moot court or mock trial program.

Law professors have ample time to work on legal scholarship, as they only teach or grade papers eight or nine months out of the year (the typical fall semester runs from late August to early December, and the typical spring semester runs from mid-January to early May). Professors also occasionally take sabbaticals. Teaching and mentoring students should come first. Students should be the primary beneficiaries of law schools, not law professors.

*70. Many law professors are paid too much based on their current contributions to legal education and the legal profession.*

In 2011, the average salary for a full-time law professor—including new untenured professors, as well as experiential professors, who are usually paid much less than doctrinal professors—was \$108,760 annually.<sup>340</sup> Further, this salary is typically in return for nine months of work or less, including only teaching three to four classes per year.<sup>341</sup> That average amount was higher than any other educational occupation, including primary, secondary, or post-secondary teachers (including medical school professors).<sup>342</sup> Many law professors, particularly tenured doctrinal professors at highly ranked schools, earn multiples of the average salary.<sup>343</sup> Such bloated salaries are even paid at some taxpayer-funded state law schools, like the University of Texas<sup>344</sup> and the

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339. Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 617 & n.93 (2010).

340. Press Release, Bureau of Labor Statistics, Occupational Employment and Wages—May 2011, tbl.1 (Mar. 27, 2012), available at <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

341. See *supra* Thesis 69.

342. Bureau of Labor Statistics, *supra* note 340, at tbl.1.; see also Schwarzschild, *supra* 54, at 6 (“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.”).

343. For a good discussion of law faculty and dean compensation, see *Faculty Compensation*, FAC. LOUNGE (Aug. 17, 2012), <http://www.thefacultylounge.org/faculty-compensation>; see also TAMANAHA, *supra* note 2, at 46–53 (citations omitted) (providing a general overview of law professors' salaries).

344. See Austin Compensation: University of Texas Faculty Salaries, School of Law Strategic Faculty Salary Increase Recommendations, FAC. LOUNGE (Dec. 10, 2011), <http://blurbawg.typepad.com/extracted%20ut%20faculty%20salaries.pdf> (showing University of Texas law professors' salaries).

University of Michigan,<sup>345</sup> where many full-time tenured professors earn between \$200,000 and \$300,000 annually—several earning a higher salary than the Chief Justice of the Supreme Court of the United States.<sup>346</sup>

The typical law school significantly values scholarship over teaching—which likely explains why adjunct law professors, who are hired solely to teach, are typically paid only between \$3,000 and \$5,000 per three-credit-hour, semester-long course.<sup>347</sup> Using that metric of value for law school instruction, it is reasonable to conclude that only a tiny fraction of a typical full-time doctrinal professor's annual salary is allocated to teaching duties.<sup>348</sup> Thus, the bulk of a law professors' salary is for writing law review articles rather than compensating for teaching and "service" duties.<sup>349</sup> Considering that a significant amount of law professors' legal scholarship is irrelevant to the bench and bar, as well as to law students,<sup>350</sup> professors' average salaries are entirely too high in view of the minimal contributions that they currently make. I certainly have no objection to paying the average full-time law professor commensurate to what the average attorney makes in nine months of work,<sup>351</sup> so long as they earn it by meaningfully contributing to both students' learning—by teaching much more than three to four courses per year—and to the legal profession—by publishing practical scholarship and engaging in service such as pro bono legal representation. Yet those requirements are not being met by the typical full-time doctrinal law professor. Rather, he is being paid an inordinate amount of money for writing law review articles that often serve no purpose other than gaining tenure or a promotion.

*71. Interactions between law professors and students outside of the classroom are inadequate.*

According to a 2010 survey of law students by the Law School Survey of Student Engagement (LSSSE), the average law student considers law professors generally to be "only moderately available, helpful, and sympathetic" outside of

345. See Salary Supplement, MICH. DAILY, <http://data.michigandaily.com/tmrsal?dept=law&&Year%5B%5D=2011> (last visited Sept. 23, 2012) (reporting University of Michigan law professors' salaries).

346. The Chief Justice currently earns \$223,500 per year. *Salaries of Federal Judges, Associate Justices, and Chief Justices Since 1968*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf> (last visited Oct. 15, 2012).

347. See *infra* Thesis 74.

348. Even assuming four courses per year at \$5,000 per course, only \$20,000 of a typical law professor's annual salary is allocated to teaching.

349. See *supra* Thesis 55.

350. See *infra* Theses 78, 85.

351. In 2011, the average attorney made \$130,490 per year. See Bureau of Labor Statistics, *supra* note 340, at tbl.1. This figure is approximately 25% more than the average law professor makes working only nine months per year. If law professors teach (or write law review articles as part of their employment) in the summer semester, they should be paid extra for that additional work.

class, and slightly over one-quarter of law students had never discussed issues from class with any professor outside of the classroom.<sup>352</sup> Law professors should, first and foremost, serve law students. They should not only spend a substantial amount of time in the classroom but should also make themselves available to students outside of the classroom for one-on-one and small group interactions. The culture of law school should be such that all students regularly and extensively interact with all, or at least most, of their professors outside of the classroom, and in meaningful mentoring relationships. Establishing that culture would require a sea change at most law schools and would require professors to spend considerably less time on scholarship and more time devoted to students.<sup>353</sup>

72. *At a majority of law schools, the faculty members who teach the most important courses to prepare students to practice law—experiential professors—are relegated to second- or third-class status among the faculty.*

The law professors who teach students the most important courses in terms of preparing them to be competent practitioners—clinicians and legal research and writing professors—are generally paid less, denied the right to earn tenure, and given little, if any, faculty voting rights.<sup>354</sup> An entry-level experiential

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352. See LAW SCHOOL SURVEY OF STUDENT EXPERIENCE, STUDENT ENGAGEMENT IN LAW SCHOOL: IN CLASS AND BEYOND 7 (2010), [http://lsse.iub.edu/pdf/2010/2010\\_LSSSE\\_Annual\\_Survey\\_Results.pdf](http://lsse.iub.edu/pdf/2010/2010_LSSSE_Annual_Survey_Results.pdf).

353. See Sturm & Guinier, *supra* note 5, at 535 (“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 . . . 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 rewards for excellent teaching, particularly for working closely with students outside of class, efforts that will not even show up in course evaluations.”); 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.”). But see 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, 384 (2009) (noting that the solution to law student distress is unlikely to come from a major restructuring of the relationship between students and professors).

354. See SECTION ON CLINICAL LEGAL EDUC.’S TASK FORCE ON THE STATUS OF CLINICIANS & THE LEGAL ACAD., ASS’N OF AM. LAW SCHS., REPORT AND RECOMMENDATIONS ON THE STATUS OF CLINICAL FACULTY IN THE LEGAL ACADEMY 16–17 (Mar. 29, 2010), *available at*

professorship may also be a dead-end in terms of advancement to a more prestigious, better paying doctrinal position.<sup>355</sup> Until these experiential professors are made, and treated as, equal members of the faculty, law schools will fail to prepare students to become competent practitioners. For such equality to occur throughout the legal academy, ABA accreditation Standard 405(c) and (d) must be amended to require parity among traditional doctrinal faculty and experiential faculty.<sup>356</sup>

73. *Legal research and writing professors, who occupy the lowest status on most law school faculties, are overwhelmingly female, which suggests widespread gender bias in the academy.*

Over 70% of legal research and writing professors are female,<sup>357</sup> while less than 40% of law professors as a whole are female.<sup>358</sup> This statistic suggests widespread gender bias in the academy.

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<http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/AALS%20June%202010%20Task%20Force%20Report%20on%20Status%20of%20Clinical%20Faculty%20in%20the%20Legal%20Academy.pdf> (only 40% of clinical faculty members at American law schools are on the tenure-track); SANTACROCE & KUEHN, *supra* note 207, at 31 (reporting that only 30.7% of clinicians 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); 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 (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.”); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRS. 12, 14–15 (2002). Compare ASS’N OF LEGAL WRITING DIRS., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 2012, at vii, <http://www.lwionline.org/uploads/FileUpload/2012Survey.pdf> (noting the average salary for legal research and writing faculty in the 2012 survey was \$75,288), with Society of American Law Teachers, 2011–2012 SALT Salary Survey, 2012 SALT EQUALIZER 1, 1–4 (2012) (noting the average salaries for assistant professors and pre-tenure associate professors is significantly higher, ranging from \$76,130 to \$141,282).

355. See, e.g., *Careers in Law Teaching Program*, *supra* note 329 (“Teaching legal writing and research, in and of itself, has little to commend it as an entre to law school teaching unless that is the subject you wish to teach . . .”).

356. See Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 89–90 (2011) (citing SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Interpretation 405-8 (2009–2010)) (contending that, even with the protections of accreditation Standard 405, clinical faculty generally occupy a separate and unequal status in American law schools).

357. ASS’N OF LEGAL WRITING DIRS., *supra* note 354, at iv (72.8% of legal writing and research faculty members are female).

358. *Gender & Age, 2008–2009 AALS Statistical Report on Law Faculty*, ASS’N AM. L. SCHS., <http://www.aals.org/statistics/2009dl/gender.html> (last visited Oct. 28, 2012) (noting that, in the 2008–2009 academic year, 37.3% of all law faculty were female).

74. *At most law schools, adjunct faculty members, who often are some of a school's most effective teachers, are paid a pittance.*

The typical adjunct law professor is paid between \$3,000 and \$5,000 per three-credit-hour course.<sup>359</sup> Many adjunct professors teach the same courses as those taught by full-time tenured or tenure-track faculty members.<sup>360</sup> Law students often consider adjunct professors, who generally have extensive practical experience, to be some of the most effective teachers at a law school.<sup>361</sup> The relative pittance paid to adjunct professors is a reflection of the low value that most law schools place on adjunct faculty members and, more generally, on teaching.<sup>362</sup> Yet most law schools today could not function as they currently do without adjunct professors.<sup>363</sup> In particular, full-time law professors' ability to teach only three to four courses per year, while spending the bulk of their time engaging in legal scholarship<sup>364</sup> and earning inflated salaries,<sup>365</sup> certainly would not be possible without the contributions of low-cost adjuncts. In view of the essential role that adjuncts play in legal education, they should be paid substantially more.

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359. 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 surveyed schools paid [adjuncts] between \$1,501 and \$3,000 [per course]; 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.”); see also Thies, *supra* note 339, at 619 (“[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.”). In the last year (2009) that I taught at the University of Houston Law Center, I was paid \$4,100 for a three credit hour course. In the 2011–2012 academic year, Washington College of Law (American University) paid me \$5,400 for a three credit hour course, and Georgetown University Law Center paid me \$1,500 for a two credit hour course.

360. Among the courses I have taught as an adjunct professor are Remedies, Federal Jurisdiction, Criminal Procedure I, and Criminal Procedure II—courses regularly taught by full-time, tenured faculty members.

361. See, e.g., David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 385 (2001) (“In my own experience, students—particularly those at more theoretically-oriented schools—crave teaching by [adjuncts] who actually know how to practice law.”).

362. See Read & Mirow, *supra* note 306, 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.’”); Shapiro, *supra* note 305, at 835 (“It is widely recognized that teaching is accorded a far lower priority than scholarship in the reward system for American university professors.”).

363. See Hricik, *supra* note 361, at 384 (“Adjunct professors are hired . . . to teach courses where insight into the real world is needed and unavailable from full-time faculty, who often lack real-world experience.”).

364. See *supra* Theses 55, 59.

365. See *supra* Thesis 70.

75. *Adjunct law professors are held in low regard by many full-time faculty members at law schools.*

Despite the essential contributions adjunct professors make to their respective law schools, many full-time law professors have little respect for adjuncts, whom they deem inferior members of the academy. Some full-time professors appear to have outright disdain for adjuncts.<sup>366</sup>

76. *Adjunct faculty members often are not adequately integrated into the law school community.*

The typical adjunct faculty member comes to a law school at night, teaches her course, and leaves the campus. Rarely, if ever, do law schools invite adjunct faculty members to participate meaningfully in the schools' affairs, and rarely are adjuncts seen as a pool of potential full-time members of a law school's faculty.<sup>367</sup> Based on the current pay structure for adjuncts,<sup>368</sup> it is understandable why adjuncts generally teach at night and spend little time at law schools outside of their courses; they could not afford to do otherwise.<sup>369</sup> Yet it is not solely economics that explains their peripheral existence; generally they are not made to feel that they are valuable parts of the law school community.<sup>370</sup> In addition to paying adjuncts more, law schools should invite them to occasional faculty meetings and otherwise encourage meaningful participation in faculty affairs. Adjunct professors with distinguished records as judges or practitioners, who also excel as teachers, should be actively recruited to become full-time members of the faculty.

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366. Wendel, *supra* note 116 (“[A]djuncts are treated like nobodies by the regular law faculty.”); see also Hricik, *supra* note 361, at 418–19 (quoting Karen L. Tokarz, *A Manual for Law Schools on Adjunct Faculty*, 76 WASH. U. L.Q. 293, at 296–97 (1998)) (“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.”).

367. *Careers in Law Teaching Program*, *supra* note 329 (“In general, adjunct teaching is not a good way to break into the legal academy, although it can help you learn whether teaching will be a source of gratification for you. Few faculties monitor their adjunct teachers closely, or regard them as a source of future full-time colleagues; adjunct teaching at another school will be of minor interest to a faculty you are applying to, save possibly as a source of teaching evaluations.”).

368. See *supra* Thesis 74.

369. Cf. Hricik, *supra* note 361, at 385 (“Adjuncts have a[] burden not borne by full-time, non-practicing faculty: adjuncts have two jobs.”).

370. See *id.* at 418 (quoting Tokarz, *supra* note 366, at 296–97 (1998)) (“[A]djunct professors [] ‘exist on the periphery of most law school operations’ and [] are ‘ignored as part of the intellectual and social life of the school.’”).

77. *An alternative law school model, which would significantly reduce tuition amounts and increase the effectiveness of legal education, would delegate the vast majority of teaching duties (including first-year classes) to adjunct professors and other part-time, non-tenured professors, and would maintain only a small number of full-time faculty members.*

Even if adjunct professors' wages were tripled from their current rate, law schools' costs would be cut dramatically under this model, and students' tuition could be reduced significantly.<sup>371</sup> No legal scholarship would be expected of adjunct professors and part-time professors—only teaching competence. This model would work only in areas with a large number of practicing attorneys and would require the ABA to amend their current accreditation Standards.<sup>372</sup>

*E. Problems with Legal Scholarship and Law Reviews*

78. *Most legal scholarship today has little, if any, usefulness (other than perhaps to the authors).*

A study using the Lexis-Nexis database found that 43% of law review articles have never been cited—not even once—by courts or by authors of other articles published in the database, which comprises the vast majority of all law reviews.<sup>373</sup> Lower courts cite law review articles in only a tiny fraction of their cases.<sup>374</sup> The Supreme Court, which cites law review articles more than any other court, has cited them with decreasing frequency in recent decades, despite

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371. Cf. Barnhizer, *supra* note 2, at 306–07 (suggesting alternative options to the traditional law school model which include using shorter term contractual faculty and more adjunct faculty as a means of cutting costs). Standard 402 would need to be amended for such an alternative model to exist as an ABA accredited institution. See ABA STANDARDS, *supra* note 22, Interpretation 402-1, at 30 (noting that part-time and adjunct law professors, considered collectively, may teach no more than 20% of the total amount of full-time students' credit hours during each academic year).

372. See *supra* Thesis 9.

373. Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 335–36 (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 [most] law review articles.").

374. See, e.g., David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359–62 (2011) (finding that, from 1950–2008, the federal courts of appeals cited law review articles in 7.6% of their published decisions, a percentage, the authors note, that increased from 1950 to 1990, when the percentage of cases citing law review scholarship "leveled off"); see also Newton, *Law Review Scholarship*, *supra* note 8, at 407 n.29 (noting that Schwartz and Petherbridge's conclusion that federal appellate courts' "use" of law review articles increased during the second half of the twentieth century is flawed because they failed to control for the dramatic shift from published to unpublished opinions from the 1970s to the 1990s; before the mid-1970s, virtually all opinions were published, while in recent years, nearly nine out of ten opinions are unpublished, thus dramatically decreasing the pool of potential opinions in which law review articles normally would be cited).



the massive growth in law review scholarship and the increase in the length of the Court's opinions during that same time period.<sup>375</sup> Law professors, the main authors of law review scholarship today, primarily produce legal scholarship in order to be hired, promoted, or granted tenure, or to receive other professional benefits—not as a service to law students or to the bench, bar, or legal policymakers.<sup>376</sup>

79. *Law review scholarship produced by the professoriate, particularly at the “elite” law schools, increasingly is theoretical or abstract and largely irrelevant to anyone except fellow legal academics.*

Increasingly since the 1970s, the highly-ranked law reviews tend to publish scholarly articles written *by* law professors and *for* law professors, rather than for members of the bench and bar.<sup>377</sup> Practical scholarship—relevant to the bench, bar, and legal policymakers—is openly discouraged in the legal academy.<sup>378</sup> Consequently, criticism of legal scholarship has been particularly strident in recent years.<sup>379</sup>

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375. See Newton, *Law Review Scholarship*, *supra* note 8, at 404 (noting that, during the first decade of the 21st century, Justices cited law review scholarship in a little over one-third of all opinions—including majority, concurring, and dissenting opinions—compared to one-half or more of all opinions in the 1970s).

376. See *supra* Theses 55–57; *infra* Thesis 79.

377. See, e.g., 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, 772 (2005) (quoting Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 4 (1998)) [hereinafter Posner, *Against Constitutional Theory*] (describing how law professors write about topics that interest only themselves); see also Edwards, *supra* note 2, 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.” (emphasis in original)); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–33 (1995) [hereinafter Posner, *The Future*] (“[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 . . .”).

378. 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.”).

379. See, e.g., Hricik & Salzmann, *supra* note 377, at 763 (“[M]any law review articles do not engage any aspect of the profession”); Kenneth Lasson, *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.”); Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the*

80. *There are far too many law reviews today.*

There are over 650 student-edited law reviews and journals today.<sup>380</sup> Those law reviews publish approximately 150,000 to 190,000 pages per year.<sup>381</sup> There is no need for such an excessive number of law reviews. The costs associated with them, their minimal contributions to law schools' educational mission, the lack of social utility resulting from the bulk of articles that they publish, and the diversion of professors' time from teaching to scholarship are all reasons for dramatically reducing the number of law reviews and journals.

81. *Professors' articles are evaluated—for purposes of hiring, promotion, and tenure—based on the “rank” of the law review in which the articles are published as much as on the quality of the scholarship.*

When it comes to evaluating a professor's legal scholarship, many law schools, particularly those ranked in the upper echelons of the *U.S. News & World Report* rankings, look to the “ranking” of the law review that published the article as much as the quality of the article itself.<sup>382</sup> Such a measure of quality smacks of the same elitism affecting law school hiring today.<sup>383</sup>

*Art*), 97 GEO. L.J. 803, 804 (2009) (“[A]merican legal scholarship today is dead—totally dead . . .”); *The Paper Waste: Legal Academic Writing*, CONSTITUTIONAL DAILY (May 31, 2011, 10:27 AM), [http://www.constitutionaldaily.com/index.php?option=com\\_content&view=article&id=645](http://www.constitutionaldaily.com/index.php?option=com_content&view=article&id=645) (“The state of legal academic writing is pathetic. The articles stretch the meaning of the word ‘irrelevant,’ while simultaneously having a tremendous negative impact on the lives of a great many people [i.e., law students].”).

380. As of 2012, there were 661 student-edited law reviews published in the United States. See *Law Journals: Submissions and Ranking*, WASH. & LEE U. SCH. OF L., <http://lawlib.wlu.edu/lj/index.aspx> (last visited Sept. 9, 2012). There were another 338 peer-edited or refereed law reviews published in the United States. See *id.*

381. Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 567–68 (2007) (citing Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681, 684 (1997)).

382. 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, 230 (2009) (“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 quality.”); 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, 179 & n.11 (2007) (observing that, for “[new professors], . . . success in the legal academy may depend on what, where, and how often they publish in the appropriate law journal” and specifically noting that some “promotion and tenure committees” likely have written or unwritten “policies” requiring publication in higher ranked law journals); Nora V. Demleitner, *Colliding or Coalescing: Leading a Faculty and an Administration in the Academic Enterprise*, 42 U. TOL. L. REV. 605, 608 (2011) (“[C]alibrating the ‘success’ of scholarship is difficult [with respect to assessing prospective faculty members], and seems to focus largely on the ranking and name prestige of the law review in which the author publishes.”); Lasson,

82. *Law review articles published by law professors amount to an improper cross-subsidy from students to professors.*

The typical law review article published by a full-time law professor costs at least \$25,000, and in some cases, as much as \$100,000.<sup>384</sup> That amount of money represents a portion of a professor's annual salary, a very large percentage of which is funded by student tuition.<sup>385</sup> As noted above, the typical law professor spends a substantial portion of his time devoted to legal scholarship rather than teaching or mentoring students.<sup>386</sup> Thus, a significant portion of law school tuition is, in effect, a cross-subsidy from students to law professors to enable the latter to write law review articles<sup>387</sup> that provide virtually no benefit to the law students.<sup>388</sup> Law school tuition, which results in high student loans,<sup>389</sup> should go towards a quality professional education, not an involuntary subsidy of increasingly irrelevant legal scholarship. This enormous

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*supra* note 379, at 948–49 (“Besides the life-force craving of promotion and tenure, for many a law professor image is easily as important as substance. . . . To be published, even cited, in an Ivy League law review is considered to be a feather in one’s professional cap.”). *See generally* David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 U. MEM. L. REV. 121, 123–24, 131 (2010) (citing SOC. SCI. RES. NETWORK, <http://www.ssrn.com> (last visited Sept. 24, 2012) (observing that “[t]he quest for the proverbial ‘good placement’ has come to dominate faculty discussions of scholarship”).

383. *See supra* Thesis 60.

384. *See* Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT’L L.J., Apr. 20, 2011, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=120249088822&Legal\\_scholarship\\_carries\\_a\\_high\\_price\\_tag](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=120249088822&Legal_scholarship_carries_a_high_price_tag) (reporting an estimate Hofstra University School of Law professor Richard Neumann made at the Future Ed conference in 2011).

385. A small percentage of law professors have endowed chaired professorships. Their salary does not come from students’ tuition dollars. At some public law schools, budgetary shortfalls may require taxpayers’ dollars to make up for the shortfalls (meaning taxpayers fund legal scholarship to some extent).

386. *See supra* Thesis 55.

387. Rubin, *supra* note 305, at 139 (“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 bête 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.”); Smith, *supra* note 117, at 205–06 (“[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.”); *see also* Rubin, *supra* note 305, at 144 (“Most law schools, including public law schools these days, are supported primarily by student tuition.”); *id.* at 141 (“There can be equally little doubt that a significant proportion of these ever-increasing tuition payments support faculty research.”).

388. *See supra* Theses 78, 79.

389. *See supra* Thesis 6.

misallocation of approximately *a quarter of a billion dollars* of tuition annually,<sup>390</sup> benefitting the law professoriate at the expense of law students, is a breach of the fiduciary duty that law professors owe to students.<sup>391</sup> If law schools persist in emulating academic departments in research universities—as opposed to primarily serving as professional schools—thereby coveting academic research and scholarship, then they should require their professors to fund a substantial portion of their own research, as other departments do.<sup>392</sup> Law student tuition levels should decrease accordingly.

*83. Student-edited law reviews, which predominate, are an unfair and inefficient way of selecting the best scholarship.*

The most irrational aspect of the system of American law reviews, which is utterly contrary to the scholarly rigor of the traditional “research university” model that many twenty-first century law professors purport to embrace,<sup>393</sup> is the fact that neophyte student editors both manage and edit the typical law review.<sup>394</sup>

390. The figure assumes that 10,000 full-time law professors each receive \$25,000 annually in cross-subsidy from law students’ tuition money for legal scholarship. Others have estimated an even higher number. See, e.g., Segal, *supra* note 52 (“Given that about half of a law school’s budget is spent on faculty salary and benefits, and that tenure-track faculty members consume about 80 percent of the faculty budget—and that such professors spend about 40 percent of their time producing scholarship—roughly one-sixth of that \$3.6 billion subsidized faculty scholarship. That’s more than \$575 million.”). Although it is certainly true that not all of the 10,000-plus American law professors write a law review article every year, many law professors write multiple articles in a year. Whatever the case, the typical law professor’s salary *assumes* that she will be devoting a substantial time to legal scholarship, so \$25,000 is a fair minimum estimate of the “costs” of legal scholarship per professor (whether or not every professor ends up publishing an article per year).

391. Dean Richard A. Matasar and Professor Robert Schuwerk have each correctly stated that law professors should act as “fiduciaries” of their students. Matasar, *supra* note 258; Schuwerk, *supra* note 316.

392. See, e.g., Richard Jensen et al., *University-Industry Spillovers, Government Funding, and Industrial Consulting* 10 (Nat’l Bureau of Econ. Research, Working Paper No. w15732, 2011) (citing Philippe Aghion et al., *Academic Freedom, Private-Sector Focus, and the Process of Innovation* 8 (Harvard Inst. of Econ. Research, Discussion Paper No. 11542, 2005) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=775064](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775064)), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550601) (discussing how many other academics fund their own research).

393. See Posner, *supra* note 322, 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.”); Waxman, *supra* note 322, at 1909 (“Increasingly, law professors see themselves more as colleagues of sociologists, economists, and philosophers than of judges and lawyers.”).

394. Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for “Empirical Legal Studies,”* 71 LAW & CONTEMP. PROBS. 17, 26–27 (2008) (“[C]ritique is aimed at law reviews and the unique conventions of law-review publishing, in which student editors select articles . . . and edit them without the benefit of formal training or faculty review.”); Richard A. Posner, *Against the Law Reviews*, LEGAL AFF., Nov./Dec. 2004, at 57, 57, available at [http://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp) (“[Law

Through the article selection process, student editors, particularly at prestigious law reviews, can make or break a professor's obtaining tenure or a promotion.<sup>395</sup> Law professors and distinguished members of the bench and bar—not law students—should serve as the primary editors of law reviews.

*84. The manner in which articles are submitted to law reviews in the modern era is anathema to merit-based selection.*

The current manner of mass electronic submission—whereby a law professor submits her article via “ExpressO”<sup>396</sup> to dozens, if not hundreds, of student-edited law reviews and journals at one time, after which the process of “trading up” typically begins—is anathema to the merit-based, peer-reviewed selection process used in other academic disciplines.<sup>397</sup>

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review] staffs are large, but the members, being students, are inexperienced both in law and in editing.”); Posner, *The Future*, *supra* note 377, 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.”); 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.”); *see also* Brophy, *supra* note 382, at 231 (“It really is extraordinary that students pick articles in areas in which they have little expertise.”).

395. Cameron Stracher, *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.”).

396. *See* EXPRESSO, <http://law.bepress.com/expresso/> (last visited Sept. 24, 2012).

397. Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 978 (2007) (discussing the “trading up” strategy in the electronic submission process); 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 & n.7–9 (2009) (describing the electronic submission process); *see also* Christensen & Oseid, *supra* note 382, at 188–93 (citation omitted) (“Overall, the results show that law review editors, particularly those at higher ranked schools, are heavily influenced by author credentials,” including the law school “where an author graduated from” and the “ranking of other schools where an author has published.”); Luigi Russi & Federico Longobardi, *A Tiny Heart Beating: Student-Edited Legal Periodicals in Good Ol’ Europe*, 10 GERMAN 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.”).

85. *The law review experience for most student staff members is an inefficient pedagogical exercise.*

Modern law review scholarship serves little, if any, meaningful pedagogical purpose with respect to training law students to become competent lawyers.<sup>398</sup> Furthermore, there is only a marginal benefit conferred upon those members of the student body selected to be on law reviews.<sup>399</sup> They learn the minutiae of *The Bluebook*,<sup>400</sup> gain some experience in line-editing, and are incidentally exposed to some substantive law, but surely such knowledge and skills could be learned in a much more efficient manner. The student editor's mode of learning on law review—spending hours making sure that certain quotations appear on particular pages of a case or article—is not only inefficient, but also defies well-established norms of higher education, as no meaningful assessment or feedback accompanies the editing and usually no meaningful supervision by a faculty member occurs.<sup>401</sup> Students also could spend more time on their courses if they were not spending significant amounts of time checking citations and chasing down hard-to-find sources cited by an article's author.

86. *The ABA accreditation authority should remove the scholarly productivity requirement.*

Currently, the ABA accreditation Standards require full-time law professors to engage in “research and scholarship,” in addition to teaching students.<sup>402</sup> Removal of this Standard would “open[] the door for new law schools that possess [little or] no concern for publication but concentrate entirely on the educational process.”<sup>403</sup> This would result in a “paradigm shift in the nature of

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398. Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 886 (2009) (“[S]cholarship directed at the audience of law students . . . is no longer highly valued in the academy.”); Rubin, *supra* note 305, at 161–62 (“[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.”).

399. See Posner, *The Future*, *supra* note 377, at 1132 (“[Student-editors] do not have enough time on the job to gain much experience . . .”).

400. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

401. See Posner, *The Future*, *supra* note 377, at 1136 (Student-editors of law reviews, who are “preoccupied with citation forms and other rule-bound approaches to editing, abet the worst tendencies of legal and academic writing.”).

402. ABA STANDARDS, *supra* note 22, Standard 404(a)(1)–(2), at 32.

403. Barnhizer, *supra* note 2, at 292–93 (citing Smith, *supra* note 119, at 205–06); see also Smith, *supra* note 117, 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

American legal education.”<sup>404</sup> While “elite” (and many non-elite) law schools would continue to require their faculties to focus on scholarship as well as teaching,<sup>405</sup> many other schools would likely focus on teaching excellence. The reduction in the quantity of legal scholarship that would result from the removal of the scholarly productivity requirement would hardly be noticed, given that 43% of law review articles are never cited.<sup>406</sup>

*F. Flaws in the Bar Exam, the Licensure Process, and the Process of Transition from Law School to the Job Market*

87. *If law schools adequately prepared students to enter the legal profession, there would be no need for virtually all graduates to take commercial bar exam preparation courses in order to become licensed.*

Rhetorically, I ask: How can it be that, after three years of law school and spending between \$100,000 and \$200,000,<sup>407</sup> the average American law student still feels compelled to take an expensive commercial bar review exam course<sup>408</sup> in order to pass the bar exam?<sup>409</sup>

88. *There is a growing disconnect between law schools’ curricula and the bar exam.*

Given the increasing amount of student choice in what courses to take in the second and third years of law school, and that law schools are offering more esoteric courses in recent years, many students fail to take what were formerly

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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.”).

404. Barnhizer, *supra* note 2, at 293.

405. *See id.*

406. *See supra* Thesis 78.

407. *See* Tamanaha, *supra* note 34 (noting that the average debt of law school graduates exceeds \$100,000); *see also* Career Educ. Ctr., *How Much Does Law School Cost, and How Can I Pay for It?*, GEO. U., <http://careerweb.georgetown.edu/7269.html> (last visited Sept. 25, 2012) (“Law school education costs vary, but total costs, including tuition, books, food, housing, and transportation, can easily exceed \$150,000.”).

408. *See, e.g., Bar Review Course Information*, BARBRI, <http://www.barbri.com/courseInfo/barReviewCourse/pricing.html> (last visited Sept. 25, 2012) (showing that, for example, in South Carolina, tuition for a bar review course costs \$2,850).

409. *See* Lauren Solberg, Note, *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.”).

standard courses in law school that were—and still are—tested on most states’ bar exams.<sup>410</sup>

89. *The bar exam should meaningfully assess all of the basic competencies required to be a typical entry-level practitioner.*

In addition to the three competencies that are the focus of the current American legal education—knowledge of legal doctrine, legal analytical ability, and legal writing skills—a typical entry-level attorney should have basic competencies in many areas.<sup>411</sup> These additional competencies include oral communication skills, client-relation skills, and several practical skills related to litigation, transactional or corporate law, negotiation, and alternative dispute resolution.<sup>412</sup> The bar examination currently used by almost all U.S. jurisdictions<sup>413</sup> primarily tests one’s knowledge of legal doctrine and legal analytical skills in multiple-choice and essay exams; legal writing and other practical skills are also tested in a nominal manner in some states.<sup>414</sup> The bar

410. See generally Catherine L. Carpenter, *Recent Trends in Law School Curricula: Findings from the 2010 ABA Curriculum Survey*, 81 B. EXAMINER 6, 9–11 (2012) (quoting ABA STANDARD, *supra* note 22, at Standard 302(a)) (presenting results of a survey of law schools’ curricula).

411. See MACCRATE REPORT, *supra* note 2, at 135, 138–39.

412. See *supra* Thesis 19.

413. Although individual U.S. jurisdictions in theory could administer bar examinations (or require other types of licensure requirements) suited to their own assessments of what competencies are required for entry-level attorneys, the reality is that virtually all of them have a bar examination based in large part on the “multistate” examination model created by the National Conference of Bar Examiners. See Weston, *supra* note 89, at 413–14 (citing *MBE Jurisdictions*, NAT’L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mbe/mbe-jurisdictions/> (last visited Sept. 25, 2012); *The Multistate Bar Examination (MBE)*, NAT’L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mbe/> (last visited Sept. 25, 2012); *The Multistate Essay Examination (MEE)*, NAT’L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mee/> (last visited Sept. 25, 2012)).

414. The bar exams currently in place in all fifty states and the District of Columbia are very similar in nature:

The most common testing configuration consists of a two-day bar examination, one day of which is devoted to the Multistate Bar Examination (MBE), a standardized 200-item test covering six areas (Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts). The second day of testing is typically comprised of locally crafted essays from a broader range of subject matters; however, in a growing number of states, two nationally developed tests, the Multistate Essay Examination (MEE) and the Multistate Performance Test (MPT), may be used to round out the test.

In addition, almost all jurisdictions require that the applicant present an acceptable score on the Multistate Professional Responsibility Examination (MPRE), which is separately administered three times each year.

Bar Admissions Basic Overview, AM. BAR ASS’N, [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html) (last visited Oct. 19, 2012).

The written MPT exam “consists of two 90-minute skills questions covering legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication.” National Conference of Bar Examiners: MBE, MEE, MPRE, MPT Multistate Tests, AM. BAR ASS’N, [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/bartests.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/bartests.html) (last visited Sept. 25, 2012).



examination does not meaningfully test the many other competencies an entry-level attorney needs in order to succeed.<sup>415</sup> There have been several proposals to reform the bar exam to better assess and evaluate the competencies needed in the practice of law,<sup>416</sup> yet none appear to have gained momentum among the powers-that-be.<sup>417</sup>

90. *Serious consideration should be given to graduated licensing.*

Rather than test the aforementioned competencies<sup>418</sup> at one time, both the ABA and state licensure authorities should consider whether law students should be tested at different junctures in their legal education. Such a graduated licensing examination process would resemble the current licensing system in the medical realm.<sup>419</sup> It could even require a final round of testing once a graduate has practiced law for one or two years under the supervision of an experienced attorney.<sup>420</sup>

91. *Law schools should offer more meaningful post-graduate career services.*

The conventional wisdom among law students is that most schools' career services are little better than worthless.<sup>421</sup> Considering the amount of tuition that

Although almost all U.S. jurisdictions that license attorneys use the MBE and MPRE, less than half also use the MEE and MPT. See Weston, *supra* note 89, at 413–14 (citing *MBE Jurisdictions*, NAT'L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mbe/mbe-jurisdictions/> (last visited Sept. 25, 2012); *The Multistate Bar Examination (MBE)*, NAT'L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mbe/> (last visited Sept. 25, 2012); *The Multistate Essay Examination (MEE)*, NAT'L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mee/> (last visited Sept. 25, 2012); *The Multistate Performance Test (MPT)*, NAT'L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mppt/> (last visited Sept. 25, 2012); *The Multistate Professional Responsibility Examination (MPRE)*, NAT'L CONF. B. EXAMINERS, <http://ncbex.org/multistate-tests/mpre/> (last visited Sept. 25, 2012)).

415. See BEST PRACTICES, *supra* note 2, at 12.

416. *Id.* at 12 n.21.

417. See generally Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1204–19 (1995) (citations omitted) (exploring justifications for keeping the bar exam in its current form).

418. See *supra* Thesis 89.

419. See Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340, 342–48 (2003) (citations omitted) (discussing the medical licensure process).

420. See *id.* at 362–63.

421. See, e.g., Menachem Wecker, *Students Must Take More Active Role in Job Hunt, Law Schools Say*, U.S. NEWS & WORLD REP. (Nov. 30, 2011), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2011/11/30/students-must-take-more-active-role-in-job-hunt-law-schools-say>; Kashmir Hill, *Emory Law Student Lament: "We Don't Need Donuts, We Need Jobs,"* ABOVE THE LAW (July 16, 2010, 11:00 AM), <http://abovethelaw.com/2010/07/emory-law-student-lament-we-don%E2%80%99t-need-donuts-we-need-jobs/>.

law students pay for a professional degree<sup>422</sup> and the career prospects that should come with it, other than the professors themselves, law schools' career services departments should be one of the more, if not the most, important parts of a law school. Career services departments should be the equivalent of a well-networked, aggressive head-hunting service for graduates. In view of the decline of "Big Law" firms as employers for recent graduates (even at "elite" schools), career services departments should focus on placing graduates with small and mid-sized firms.<sup>423</sup>

92. *A substantial number of law schools should establish post-graduate clinics for low- and middle-income clients, which would allow recent graduates to hone their legal skills and transition into the job market.*<sup>424</sup>

A substantial number of law schools should create independent but affiliated nonprofit legal clinics for low- and middle-income clients. Schools' partnerships with such clinics, run by experienced attorneys but staffed largely by recent graduates, would serve two primary purposes. First, they would enable students who are otherwise unable to find entry-level employment to continue their legal education while gaining practical experience, much in the same way medical school students do in medical residencies, internships, and fellowships at teaching hospitals.<sup>425</sup> Recent graduates would be paid a "living wage" but would

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422. See Career Educ. Ctr., *supra* note 407.

423. Ward B. Coe III, *Profound "Nonchanges" in Small and Midsized Firms*, 70 MD. L. REV. 364, 372 (2011).

424. See Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1, 2–3 (2011) (setting forth a somewhat different version of this proposal in a thoughtful manner). Matthew Spitzer, former dean of University of Southern California's Gould School of Law, has made a similar proposal:

[T]aking the demand for skill seriously leads down a path to law schools having a law firm (just as medical schools have hospitals) where students start to learn how to practice under lawyer-professors, who both provide training and who charge clients for their services. We would need to work hard to make the position of lawyer-professor prestigious, so that we could attract the best and the brightest. Law school might become 4 years instead of 3. And there will be negotiations between the lawyer-professors and the Deans of law schools about how to split fees. Deans of law schools will need new sets of skills, akin to managing partner at a large law firm.

Matthew Spitzer, Comment to Northwestern Nostradamus?, Word on the Streeterville (Dec. 27, 2011), <http://deansblog.law.northwestern.edu/2011/12/27/northwestern-nostradamus/>. The dean at Arizona State University School of Law recently announced plans to start such a post-graduate "legal residency" program. See Martha Neil, *Law Dean at Arizona State Unveils Plan to Create Law Grad 'Residency' Program at Nonprofit Law Firm*, A.B.A. J. (June 5, 2012, 12:52 PM), [http://www.abajournal.com/news/article/Law\\_Dean\\_at\\_Arizona\\_State\\_Unveils\\_Plan\\_to\\_Create\\_Law\\_Grad\\_Residency/](http://www.abajournal.com/news/article/Law_Dean_at_Arizona_State_Unveils_Plan_to_Create_Law_Grad_Residency/) (citing Karen Sloan, *Think of It as a Residency for Lawyers*, N.Y. L.J. (June 5, 2012), [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202557309020&Think\\_of\\_It\\_as\\_a\\_Residency\\_for\\_Lawyers](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202557309020&Think_of_It_as_a_Residency_for_Lawyers)).

425. See *Requirements for Becoming a Physician*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/education-careers/becoming-physician.page> (last visited Sept. 26, 2012).

be expected not to work in the post-graduate clinic beyond a limited time period (perhaps two or three years). Some young attorneys would go from their clinical experiences into solo practices, and others would join firms or government agencies. The second benefit of these post-graduate clinics is that large numbers of low- and middle-income Americans would have access to affordable legal services, something they currently lack but desperately need.<sup>426</sup> These clinics would differ from the type of law school clinics currently in existence.<sup>427</sup> These post-graduate clinics would not be staffed by law students, but rather by recent law school graduates who would be required to obtain law licenses. They also would have some degree of institutional independence from the affiliated law school, so as to avoid conflicts of interest and potential malpractice liability for the law school itself.<sup>428</sup> Such post-graduate clinics could differ in subject matter expertise. Most clinics would likely be general civil law clinics, typically handling commercial litigation, estate planning and probate matters, and contract drafting. Other clinics would specialize in criminal law and work in connection with local prosecutors' and public defenders' offices, although their involvement could perhaps be limited to misdemeanor and juvenile defense matters. Some clinics could be highly specialized, however, focusing for instance on environmental or health care law. Because these clinics would take in revenue—albeit in a reduced amount based on a sliding scale—they would not be as costly as the type of law school clinics currently in existence.<sup>429</sup> Most clinics would likely exist in affiliation with public law schools, so as to allow for public subsidies as well as some type of immunity for malpractice. These post-graduate clinics would also be best suited for major metropolitan areas, where clients would be plentiful.<sup>430</sup>

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426. See George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 775 (2001).

427. See, e.g., Office of Clinical & Pro Bono Servs., *Clinics*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/clinics/index.html> (last modified Oct. 4, 2012) (describing the clinic structure at Harvard Law School).

428. See Anderson et al., *supra* note 209, at 473.

429. See Wizner & Curtis, *supra* note 209, at 682.

430. An alternative post-graduate program would allow recent graduates who intend to establish solo practices to have free or reduced office space at a law school, where they would be mentored by clinical professors and law school alumni. See Rachel M. Zahorsky, *Law School Launches Program to House New Solo Lawyers*, A.B.A. J. (Oct. 25, 2012, 9:05 AM), [http://www.abajournal.com/news/article/law\\_school\\_launches\\_program\\_to\\_house\\_new\\_solo\\_lawyers](http://www.abajournal.com/news/article/law_school_launches_program_to_house_new_solo_lawyers) (describing such a program at Chicago-Kent College of Law).

93. *Every law school's web site should feature a clearly written and detailed mission statement regarding all major aspects of legal education, as well as a strategic plan for achieving the goals set forth in its mission statement.*

One of the reasons that the American system of legal education has failed to effect significant systemic changes, despite giving lip service to the various calls for reform over the past two decades,<sup>431</sup> is that law schools are not held accountable for implementing such changes. The ABA has not held the schools accountable because it has been dominated by members of the academy.<sup>432</sup> Until the ABA accreditation authority makes fundamental changes in its accreditation Standards, law schools should seek to hold themselves accountable. One way to do so—and permit prospective students to choose intelligently among law schools—is to publish a detailed mission statement with clear goals for implementing a twenty-first century model of legal education.<sup>433</sup> Such a mission statement should address not only curricular and pedagogical matters, but also faculty composition and scholarship; as I have written elsewhere, all of these matters are inextricably intertwined.<sup>434</sup> Along with such a mission statement, schools should publish a detailed strategic plan that sets forth short- and long-term goals, as well as specific methods for achieving them.<sup>435</sup>

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431. See Robert J. Derocher, *What's Going on in Legal Education? And What Should Bars Do About It?*, B. LEADER, Spring 2012, at 6, 7–8.

432. See *supra* Thesis 7.

433. Although accreditation Standard 202 theoretically requires a law school to engage in “self study” and prepare a “mission statement,” most law schools have failed to take this requirement seriously. See Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 J. LEGAL EDUC. 240, 241–42 (2000) (citing SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS., Standard 202(a)(1) (1999)). See also Jerome Organ, *Missing Missions: Further Reflections on Institutional Pluralism (or Its Absence)*, 60 J. LEGAL EDUC. 157, 159 (2010) (“[I]n gathering the various mission statements, I discovered something that I found somewhat surprising—a significant number of law schools appear not to have a mission statement.”). The ABA accreditation authority itself has not taken the mission statement requirement seriously. See CARPENTER ET AL., *supra* note 75, at 22–24 (stressing the importance of an “institutional mission” statement in the accreditation process for other professional schools and noting the absence of a law school’s mission statement “as a prominent factor in the [current law school] accreditation process”).

434. See Newton, *Preaching What They Don't Practice*, *supra* note 8, at 113.

435. See Univ. of Denver, *Strategic Plans*, EDUCATING TOMORROW'S LAW., <http://educatingtomorrowlawyers.du.edu/resources/strategic-plan/> (last visited Sept. 26, 2012) (providing examples of law schools’ “strategic plans” that have sought to modernize legal education).

94. “Big Law” should expand its hiring to include more top graduates from lower-tiered law schools and not fixate on graduates of “elite” law schools.

Although entry-level “Big Law” jobs have declined as a result of structural changes in the legal market following the recent recession,<sup>436</sup> large firms still remain a significant employer.<sup>437</sup> Traditionally, large firms have generally hired graduates from the highest ranked law schools<sup>438</sup>—the very schools that employ the most impractical professors and that provide more academic than practical training of their graduates.<sup>439</sup> In order to help end the dominance of such “elite” schools in the legal academy’s hierarchy and to promote the reform of legal education, big firms should make an affirmative effort to hire the top graduates of lower ranked law schools. Based on my experience over the years as a manager of attorneys who graduated from law schools in all four *U.S. News & World Report* tiers, as a litigator who faced many adversaries who graduated from lower ranked schools, and as a law professor who has taught at three different law schools—only one of which is considered “elite”—I strongly believe that the rank of school from which a lawyer graduated is by no means a predictor of her success as a practitioner. Countless excellent lawyers graduated from schools in the lower tiers.<sup>440</sup> Indeed, such schools often provide a better practical legal education than the “elite” schools.<sup>441</sup> Big firms should respond accordingly. As Stanford Law School Dean Larry Kramer commented:

[I]f law firms and their clients seriously want change, they can bring it about easily enough. Like anyone seeking to modify behavior, they need merely employ the available sticks and carrots. What would a stick look like? Firms could announce that because law schools A, B, and C are not properly preparing graduates for practice, they will no longer hire from those schools. Do that for a couple of years and watch how fast the schools change. Or carrots: Firms could declare that, because law schools X, Y, and Z have taken steps to improve legal education, they will give preference to their students in hiring. Better still, they will provide financial support to encourage further

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436. See Henderson & Zahorsky, *supra* note 13, at 40.

437. See Hornsby, *supra* note 216, at 435–36 (citing CARSON, *supra* note 240, at 29) (showing that 14% of attorneys practice in big firms).

438. See Brian Leiter, *The Top 15 Schools from Which the Most “Prestigious” Law Firms Hire New Lawyers 2008*, BRIAN LEITER’S L. SCH. RANKINGS (Oct. 13, 2008), [http://www.leiter.rankings.com/jobs/2008job\\_biglaw.shtml](http://www.leiter.rankings.com/jobs/2008job_biglaw.shtml).

439. See *supra* Thesis 60.

440. See *supra* Thesis 60.

441. See Theresa M. Beiner, *A View from the Third Tier: One Professor’s Preliminary Thoughts About Teaching Law Students*, ARK. J. SOC. CHANGE & PUB. SERV. (Aug. 16, 2012), <http://ualr.edu/socialchange/2012/08/16/a-view-from-the-third-tier-one-professors-preliminary-thoughts-about-teaching-law-students/>.

programmatic changes. Combine the carrots with the sticks and, again, watch how quickly law schools change.<sup>442</sup>

95. *Supreme Court Justices and federal circuit judges should expand their hiring of top graduates from the “non-elite” law schools.*

Although only three dozen young attorneys are selected as law clerks for the Justices each year—out of the roughly 45,000 law students who graduate annually from American law schools<sup>443</sup>—the significance of these clerkships extends well beyond their impact on the lives of the less than one-tenth of one percent of law schools graduates. Law schools proudly boast of their schools’ graduates being selected as Supreme Court law clerks,<sup>444</sup> and a law school’s track record of placing graduates as Supreme Court law clerks surely adds to the school’s reputation as a “great” law school.<sup>445</sup> In recent decades, the Justices have overwhelmingly chosen law clerks who graduated from the law schools that rank at the very highest point of the *U.S. News & World Report* rankings.<sup>446</sup> Although clerks from schools in the upper echelons of the rankings are, surely, extremely bright and effective law clerks, there are—just as surely—equally bright graduates from many of the “non-elite” schools who proved themselves in the legal academy and later when clerking for lower court judges. The Justices’ consistent pattern of not hiring law clerks who graduated from lower ranked law schools suggests the same elitism that is evident in law school faculty hiring today.<sup>447</sup> Like increasing numbers of the law professoriate, especially at the most highly ranked law schools, the Justices themselves graduated from “elite”

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442. Kramer, *supra* note 12.

443. *Enrollment & Degrees Awarded*, AM. BAR ASS’N, [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf) (last visited Oct. 15, 2012).

444. See, e.g., *LSU Law Graduate Selected For United States Supreme Court Clerkship*, LSU L. CENTER (July 25, 2011), <http://www1.law.lsu.edu/news/2011/07/25/lsu-law-graduate-selected-for-united-states-supreme-court-clerkship/> (proudly announcing the selection of the first graduate of LSU School of Law ever to clerk for a Supreme Court Justice).

445. See Brian Leiter, *Supreme Court Clerkship Placement, 2000 Through 2010 Terms*, BRIAN LEITER’S L. SCH. RANKINGS (Dec. 1, 2010), [http://www.leiterrankings.com/new/2010\\_SC\\_ClerkshipPlacement.shtml](http://www.leiterrankings.com/new/2010_SC_ClerkshipPlacement.shtml) (ranking schools based on Supreme Court clerkships).

446. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 23–31 (2006) (citations omitted) (historical table showing the law schools from which Supreme Court law clerks graduated; graduates from the law schools at Harvard, Yale, University of Chicago, New York University, Stanford, and the Universities of Michigan and Virginia accounted for approximately 80% of the Justices’ law clerks in the modern era); see also *Harvard Leads Among Supreme Court Law Clerks*, BLT: BLOG LEGALTIMES (Aug. 18, 2010), <http://legaltimes.typepad.com/blt/2010/08/harvard-leads-among-supreme-court-law-clerks.html> (noting that graduates from law schools at Harvard, Yale, Duke, and Virginia accounted for twenty-five law clerks selected for the 2010–2011 term).

447. See *supra* Thesis 60.

law schools.<sup>448</sup> Lower ranked law schools should encourage their top graduates who succeed in their lower court clerkships to apply to be Supreme Court clerks, and the Justices should give meaningful consideration to, and ultimately hire, a substantial number of them who prove qualified. Likewise, federal circuit judges, many of whom also generally tend to be elitist in their clerkship hiring,<sup>449</sup> should make affirmative efforts to hire the best and brightest law graduates from lower ranked law schools. Such efforts would, in turn, expand the pool of potential Supreme Court clerks who did not graduate from “elite” schools.

### III. CONCLUSION

Virtually every major decision a law school makes should reflect a genuine fiduciary commitment to their students—with the ultimate goal of producing graduates who will be competent and ethical entry-level attorneys; that is, graduates who are practice-ready.<sup>450</sup> Law schools should hire faculty members, design curricula and pedagogies, and admit and assess students<sup>451</sup> with the primary goal of producing attorneys who can “hit the ground running” upon graduation. Law professors (and the schools that hire them) should make legal scholarship secondary to their teaching duties, and their scholarship should be relevant to the bench, bar, and legal policymakers.<sup>452</sup> Law schools also need to charge a fair amount for tuition in view of the quality of the legal education they provide to their students and should only expect students to carry an amount of debt that is reasonable in relation to their job prospects.<sup>453</sup> Finally, state licensing authorities should require law school graduates to demonstrate the broad range of competencies needed to be an effective entry-level practitioner before licenses are issued.<sup>454</sup>

With these aspirations for the legal academy and legal profession in mind, I contend that many structural changes in the current system of legal education are necessary—beginning with the manner in which schools admit law students,<sup>455</sup> continuing with the manner they teach and assess students during law school,<sup>456</sup> and concluding with the manner in which law school graduates are admitted to

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448. See *Biographies of the Justices*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> (last visited Sept. 26, 2012).

449. See Bob Morse, *Which Law School Grads Get the Most Judicial Clerkships?*, U.S. NEWS & WORLD REP. (Apr. 28, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/04/28/which-law-school-grads-get-the-most-judicial-clerkships>.

450. See Garvey & Zinkin, *supra* note 10, at 129.

451. See *supra* Part II.C–D.

452. See *supra* Theses 55, 78.

453. See *supra* Thesis 15.

454. See *supra* Thesis 89.

455. See *supra* Part II.A.

456. See *supra* Part II.C.

the bar.<sup>457</sup> Some proposed reforms look to effective practices in American medical and business schools as models.<sup>458</sup> For most of the reforms to occur, law schools must, in addition to modernizing their curricula and pedagogies, undertake paradigmatic shifts in several areas<sup>459</sup>: the composition of their faculties,<sup>460</sup> their approach to legal scholarship,<sup>461</sup> and their relationship with members of the bench and bar.<sup>462</sup> The ABA's Section on Legal Education and Admissions to the Bar must pave the way in order for these structural changes to occur.<sup>463</sup> In particular, the ABA Standards governing law school accreditation must be amended substantially with respect to faculty composition, faculty governance, faculty duties concerning scholarship, and law school curricular requirements.<sup>464</sup> Without such changes, no meaningful systemic reform will ever occur, and the many problems that currently plague legal education will continue. The ball is in the ABA's court, but ultimately, law schools must effect change themselves—with or without the ABA's help, to the degree that they are able—for the good of law students, the legal profession, and the public. We can, and should, turn the current crisis in legal education into an opportunity for meaningful change.

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457. *See supra* Part II.F.

458. *See supra* Theses 1, 2, 10, 27, 28, 30, 61, 90.

459. *See supra* Part II.C.

460. *See supra* Part II.D.

461. *See supra* Part II.E.

462. *See supra* Thesis 66.

463. *See supra* Part II.B.

464. *See supra* Theses 8–11, 61, 72, 77, 86.



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