

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

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We are at a critical juncture in the history of American legal education. Recent years have seen significant growth in the number of law schools, faculty members, and law students. Currently 200 accredited law schools exist in the United States with more than 10,000 full-time faculty² and over 140,000 matriculating law students seeking J.D. degrees³ – the vast majority of whom will join the more than one million practicing attorneys in the United States.⁴ These numbers on the surface suggest the legal profession is thriving and that law schools are doing their jobs well. And the recent appointment of Elena Kagan, a former law professor and dean, first as Solicitor General of the United States and subsequently as an associate justice of the Supreme Court of the United States might cause a casual observer to believe that the legal academy and the legal profession are working closely in step. But, as I discuss below, that is certainly not the case.⁵ The academy – both in terms of its preparation of law students to enter

² According to the American Association of Law Schools' (AALS) data, in the 2007-08 academic year, there were 10,647 full-time law professors (including deans and law librarians) employed by AALS member institutions in the United States. *See* AALS, *Statistical Report on Law Faculty, 2007-08*, at 18. Of those full-time faculty, 588 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.* These numbers do not include part-time professors or adjunct professors. *See id.* at p. i (table of contents).

³ During the 2007-08 academic year, there were 142,922 J.D. candidates enrolled in 200 ABA accredited law schools. During the year that I graduated from law school, 1992, there were 176 accredited law schools and 129,580 law students. *See* <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>.

⁴ According to data from the American Bar Association, at the end of 2009, there were 1,180,386 “active” licensed attorneys in the United States. *See* http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf (last visited May 5, 2010).

⁵ Justice Kagan’s exceptional case will be discussed at *infra* note 79.

the profession and the type of scholarship being produced by the professoriate – has lost its practical moorings.

As discussed in Part I below, in response to decades of complaints that American law schools have failed to prepare students to practice law, several prominent and respected authorities on legal education, including the Carnegie Foundation for the Advancement of Teaching, recently have proposed significant curricular and pedagogical changes in order to bring American legal education into the twenty-first century⁶ – indeed, some would say simply into the twentieth century.⁷ The proposed reforms primarily call for more real-world and “skills” training and more effective teaching practices.

In this essay, I will not attempt to add substantially to such well-reasoned and

⁶ See William M. Sullivan *et al.*, EDUCATING LAWYERS: PREPARATION FOR THE PREPARATION OF LAW 88 (Carnegie Foundation for the Advancement of Teaching 2007) (hereafter the “*Carnegie Report*”); see also Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909-10 (Spring 2008) (noting the recent “thorough critiques of legal education,” which are also discussed at *infra* notes 12-32 and accompanying text); Elena Kagan, *A Curriculum Without Borders*, HARV. L. BULLETIN (Winter 2008) (discussing recent efforts to reform Harvard Law School’s curriculum and stating that: “Our goal was to keep what continues to work – principally our techniques of making people ‘think like lawyers’ – but also to recognize and impart the new skills and areas of knowledge needed today to perform most effectively as lawyers and in the other positions of leadership our graduates hold. Our goal, in short, was to transform our curriculum – and indeed legal education itself – to fit the 21st century.”).

⁷ Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (Mar. 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.”).

constructive criticisms, with which I fully concur. Rather, as set forth in Parts II and III below, my thesis is that it will not be possible to implement such proposed curricular and pedagogical reforms if law schools continue their trend of primarily hiring and promoting tenure-track⁸ faculty members whose primary mission is to produce theoretical, increasingly interdisciplinary scholarship for law reviews rather than prepare students to practice law. Such “impractical scholars,”⁹ because they have little or no experience in the legal profession and further because they have been hired primarily to write law review articles rather than primarily to teach, lack the skill set necessary to teach students how to become competent, ethical practitioners. Indeed, law school faculties – excluding clinicians, legal research and writing (“LRW”) faculty, and adjunct professors – increasingly resemble graduate school faculties at major research universities, whose primary mission is to produce academic scholarship and whose secondary educational mission is to produce more academic professors. Especially at law schools in the upper echelons of the *U.S. News & World Report* rankings, the core of the faculties seem indifferent or even hostile to the concept of law school as a professional school with the primary mission of producing competent practitioners. Attempts by law schools to compensate for the decreasing number of tenure-track professors with practical backgrounds or inclinations by allocating practical teaching to a discrete, small pool of clinicians and LRW instructors and also by outsourcing such teaching to adjunct professors have not achieved and will not achieve a healthy balance within modern law

⁸ For simplicity’s sake, I use the term “tenure-track” broadly to mean both those professors who are on the track to obtain tenure but who have not yet attained it as well as those professors who have obtained tenure.

⁹ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (Oct. 1992).

faculties. Rather, such practical components of the faculty possess a separate-and-unequal status in the vast majority of American law schools. The gulf between the main faculty and these second- and third-class members of the legal academy in terms of practical experience and inclination is widening at the very time when it needs to be shrinking.

The recent economic recession, which did not spare the legal profession,¹⁰ has made the complaints about American law schools' failure to prepare law students to enter the legal profession even more compelling; law firms no longer can afford to hire entry-level attorneys who lack the basic skills required to practice law effectively.¹¹ In the coming years, hoards of ill-

¹⁰ See, e.g., Brian Tamanaha, "Wake Up, Fellow Law Professors, to the Casualties of Our Enterprise," June 12, 2010 ("Many [recent] graduates can't get jobs. Many graduates end up as temp attorneys working for \$15 to \$20 dollars an hour on two week gigs, with no benefits. The luckier graduates land jobs in government or small firms for maybe \$45,000, with limited prospects for improvement. A handful of lottery winners score big firm jobs. And for the opportunity to enter a saturated legal market with long odds against them, the tens of thousands newly minted lawyers who graduate each year from non-elite schools will have paid around \$150,000 in tuition and living expenses, and given up three years of income. Many leave law school with well over \$100,000 in non-dischargeable debt, obligated to pay \$1,000 a month for thirty years.") (blog entry, available at <http://balkin.blogspot.com/2010/06/wake-up-fellow-law-professors-to.html>); Douglas S. Malan, *Law School Grads Urged to Consider Alternative Paths*, CONNECTICUT LAW TRIBUNE (May 24, 2010) ("Two years after the beginning of a significant shakeup in the legal industry, there's no guarantee that new grads will start their careers in law firms that historically scooped up talent a year or more before anyone passed the bar exam. These days, graduates should be prepared to find alternative opportunities in the law, or even take a nonlegal job to pay the bills and get experience through pro bono work, say career development directors at several law schools in the region.").

¹¹ See Steven C. Bennett, *When Will Law School Change?*, __ NEB. L. REV. __, __-__ (forthcoming in late 2010, available at <http://dotank.nyls.edu/futureed/Bennett%20When%20Will%20Law%20School%20Change.pdf>); see also Judith Welch Wegner, *Response: More Complicated Than We Think*, 50 J. LEGAL EDUC. 623, 623-27, 632 (May 2010) (noting that "major corporate clients that no longer wish to pay for or rely upon uniformed novice advice" and that law firms "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").

prepared law school graduates with huge debts will be realizing little or no return on their massive law school investments. In Part IV below, I propose significant changes in both faculty composition and law reviews aimed at enabling law schools to achieve the worthy goals of reformists such as the Carnegie Foundation.

I.

TWENTY-FIRST CENTURY REFORMISTS

Toward to the end of the last century, the ABA's MacCrate Report, which proposed substantial reforms in American legal education, recognized that "practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation."¹² In 2007, two other influential reports about American legal education found that the situation had not improved in the ensuing fifteen years: "Law schools are not producing enough graduates who . . . are adequately competent[] and [who] practice in a professional manner."¹³ "At present . . . a law degree requires no experience beyond honing legal analysis in the classroom and taking [written] tests. In most schools, this leaves direct preparation for practice entirely up to student initiative. Too often, the complex business of learning to practice is largely deferred until after entry into licensed professional status."¹⁴ Such "practical"

¹² ABA Section on Legal Education & Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 5 (1992) (commonly called the "*MacCrate Report*" after its primary author, Robert MacCrate).

¹³ See *Carnegie Report*, *supra* note 6; see also Roy Stuckey *et al.*, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 24 (Clinical Legal Education Association 2007) (hereafter "*Best Practices*").

¹⁴ *Carnegie Report*, at 88.

competencies that the vast majority of American law schools undervalue or ignore include basic litigation skills such as oral advocacy and the questioning of witnesses, factual investigation, negotiation, and counseling.¹⁵ These skills, of course, are the very ones that a typical practicing lawyer uses on a daily basis.¹⁶ And it is not only such “skills” that are not being taught; more fundamentally, law schools are failing to afford students “systematic training in effective techniques for learning law from the experience of practicing law.”¹⁷

As a result of this enduring belief that American law schools consistently have failed to prepare students to practice law, respected authorities, including the Carnegie Foundation and the Clinical Legal Education Association, have renewed the call for significant reforms in legal

¹⁵ See *MacCrate Report*, at 138-140.

¹⁶ Despite the trend in recent decades towards fewer civil and criminal trials, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (Nov. 2004), it appears that a substantial percentage of American lawyers today, perhaps even a majority, still engage in litigation-related activity as a portion of their law practices. See Sung Hu Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 98 & n.160 (Winter 2010). Much of that activity involves the preparation and filing of pleadings (*e.g.*, complaints and summary judgment motions) and the settlement of lawsuits. See Galanter, *supra*, at 485, 515, 521-22. Even among those attorneys who never set foot into a courtroom, many seek to avoid litigation by counseling clients about their options and by adequately drafting contracts, wills, and other legal instruments. Many others regularly practice before administrative agencies and other quasi-judicial entities or represent clients in various modes of alternative dispute resolution. *Id.* at 530. To effectively represent clients in such activities, attorneys must possess the same basic skill set required to succeed in litigation (*e.g.*, competency in factual investigation, effective written and oral advocacy, and the ability to effectively negotiate).

¹⁷ Anthony G. Amsterdam, *Clinical Legal Education – A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 613 (1984). Experiential education, if properly done, is not simply focused on “skills” training. Rather, it teaches law students how *to learn* through application of legal and ethical principles in real-world situations. See, *e.g.*, Robert Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 215 (1981) (“Increased interest in clinical education has tended, however, to focus increased attention on the importance of learning how to learn and the importance of developing and nurturing good habits of learning.”).

education.¹⁸ Similar proposals, such as those set forth in the *MacCrate Report* in 1992, have been made before¹⁹ although not with the same level of specificity in terms of proposed changes to better prepare students to become competent practitioners.

The *Carnegie Report* and *Best Practices*, the leading critiques of twenty-first century American legal education, contend that law schools focus too much on teaching substantive legal

¹⁸ See, e.g., *Carnegie Report*, *supra*; *Best Practices*, *supra*; see also Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867 (Summer 2009) (citing several critiques and proposed reforms of legal education); John O. Sonsteng *et al.*, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007) (same); Jason Dolin, *Opportunity Lost: How Law School Disappoints Students, the Public, and the Legal Profession*, 44 CAL. WEST. L. REV. 219, 230-31 (Fall 2007) (same).

¹⁹ As Dean Chemerinsky has observed:

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

Edwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 37-38 (Fall 2009).

The 1992 McCrate Report, *see supra* note 12, was the most significant of the prior calls for reform, yet it – like the other proposals, including the most recent ones – “failed to deal directly with the growing imbalance between practical and impractical scholarship and teaching in legal education. The Report seems not to comprehend that there are many academics in legal education who would reject or ignore its goals because they do not really view legal education as a form of professional training.” Harry T. Edwards, *Another Post-Script to The Growing Disjunction Between Legal Education and the Legal Profession*, 69 WASH. L. REV. 561, 570 (July 1994).

doctrine using the “case-dialogue method”²⁰ and not enough on developing practical competencies through simulations, clinics, and other types of experiential education.²¹ *The Carnegie Report* notes that, although in recent years law schools have offered more courses “with the purpose of preparing students to practice,” such courses are almost always optional rather than mandatory and, as a result, most students fail to take advantage of them.²² Furthermore, such “practical” courses usually are “taught by faculty other than those teaching the so-called substantive or doctrinal courses of the curriculum.”²³ The report also makes an indisputable, common-sense observation: law professors are students’ primary role models.²⁴ “On any law school campus, the faculty is influential in conveying what the profession stands for and what qualities are important for a member of that profession.”²⁵ The *Carnegie Report* urges

²⁰ *Carnegie Report*, at 76.

²¹ *Id.* at 24 (“With some important exceptions, the underdeveloped area of legal pedagogy is clinical training, which typically is not a required part of the curriculum and is taught by instructors who themselves are not part of the regular faculty.”); *see also id.* at 165 (“[L]aw schools’ heavy emphasis on academic training, in contrast to the education in settings of practice . . . , heightens the likelihood of a disparity between learning to be a law student and learning to be a lawyer.”); *see also Best Practices*, at 121-52. A recent ABA committee that has proposed reforms in the accreditation standards has agreed with this assessment: “Focusing predominantly on . . . the cognitive or intellectual [development of law students] exacerbates the gap between what practitioners and the academy value. It deprives the students of forming the skills necessary to take abstract principles which they learned in law school and apply them in real life . . . contexts.” Catherine L. Carpenter *et al.*, American Bar Association Section of Legal Education and Admissions to the Bar, *Report of the Outcome Measures Committee* 8, 61 (July 27, 2008) (unpublished report).

²² *Carnegie Report*, at 87; *see also infra* notes 144-47 and accompanying text.

²³ *Carnegie Report*, at 87-88.

²⁴ *Id.* at 157.

²⁵ *Id.* at 156.

law faculties to do a better job of serving as positive role models for aspiring practitioners.²⁶

In addition to recommending more “practical” education, the authors of *Best Practices* propose several specific pedagogical reforms for law schools, including (1) lower student-teacher ratios; (2) more effective teaching methods (including more “active learning” opportunities) and better training of professors to be effective teachers; and (3) more meaningful feedback to, and assessments of, students than the traditional single end-of-semester examination.²⁷ The central theme of these proposals is that “law schools should become more student-centered and should recognize and reward good teaching more than most do today.”²⁸

As an initial step toward reform, which antedated both the *Carnegie Report* and *Best Practices*, the ABA’s Section on Legal Education and Admissions to the Bar in 2005 revised accreditation Standard 302 so as to require law schools to offer students “substantial instruction” in the “professional skills generally regarded as necessary for effective and responsible participation in the legal profession,” including “live-client or other real-life practical experiences.”²⁹ Yet, as noted, students are not *required* to take such experiential courses.

²⁶ See *id.* at 156-57; see also David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 384-85 (Spring 2001) (“In academe, law teaching often involves skills and attitudes on the part of the teacher that may be poor role models for the student to emulate as he or she moves into the practice of law.”).

²⁷ *Best Practices*, at 3-7.

²⁸ *Id.* at 4.

²⁹ American Bar Association, 2009-2010 Standards and Rules for Procedure for Approval of American Law Schools, Chapter 3, Program of Legal Education, Standard 302, Curriculum (available at <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>) (hereafter “ABA Standards”); see also Katz, *supra* note 6, at 909 (discussing the 2005

Schools merely must offer them. As of mid-2010, the ABA is considering taking further steps to promote law students' learning of the practical skills needed to achieve competency as entry-level practitioners.³⁰ Although certain law schools have begun to implement some reform measures in addition to the bare minimum required to satisfy the revised Standard 302,³¹ most

amendment of Standard 302).

³⁰ In mid-2010, the Standards Review Committee of the Section of Legal Education and Admissions to the Bar, circulated a draft of proposed amendments to the accreditation standards governing law schools' curricula and pedagogy. Those proposals – which, if adopted, would constitute a “quantum shift in the structuring of the law school accreditation process” – focus on an *outcome*-oriented assessment process (*i.e.*, measuring what students have learned in terms of knowledge, skills, and professional values) rather than on a process, as currently exists, that primarily measures *inputs* (*e.g.*, the number of volumes in the law library). *See* Carpenter *et al.*, *supra* note 21, at 61. The proposed revision to Standard 302(b) states in pertinent part that:

(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:

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

The full draft is available at

<http://www.abanet.org/.../Drafts%20for%20Consideration/Student%20Learning%20Outcomes%20May%205%202010%20draft.doc-2010-05-07> (May 5, 2010).

³¹ Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L. J. 717, 743-46 (July 2009) (discussing some U.S. law schools' recent curricular changes aimed at improving “lawyering skills” among law students); Wegner, *supra* note 18, at 945-47, 953-54 (same); *see also* Elena Kagan, *A Curriculum Without Borders*, HARV. L. BULLETIN (Winter 2008) (discussing recent efforts to reform Harvard Law School's curriculum and stating that: “Our goal was to keep what continues to work – principally our techniques of making people ‘think like lawyers’ – but also to recognize and impart the new skills and areas of knowledge needed today to perform most effectively as lawyers and in the other positions of leadership our graduates hold.”). As I discuss

law schools have not made significant efforts at reform.³² If the ABA modifies its accreditation standards to require that law schools actually demonstrate *results* in better preparing students to practice law, the remaining law schools will be forced to attempt to implement reforms such as those proposed by the *Carnegie Report* and *Best Practices*.

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

II.

THE ASCENDANCY OF IMPRACTICAL SCHOLARSHIP AND IMPRACTICAL SCHOLARS

A. Impractical Law Review Scholarship

below in Part IV, *infra*, while a positive development, such curricular improvements alone will not achieve meaningful reform without a fundamental shift in law faculties from impractical to practical professors.

³² See, e.g., *Best Practices*, at 5 (“[M]ost law schools are [still] not committed to preparing students for practice.”).

“I haven’t opened up a law review in years. No one speaks of them. No one relies on them.”
Chief Second Circuit Judge Dennis G. Jacobs³³

Law professors, as a class, express themselves as scholars in law review articles much more so than in scholarly books and typically are evaluated for promotion and tenure based solely on such articles.³⁴ In that way, they differ from other types of professors, especially those in the humanities, who consider books the highest form of scholarship and the measure by which they typically judge their peers.³⁵

There are nearly 1,000 law reviews in the United States, the vast majority of which are traditional student-edited journals.³⁶ Those law reviews publish approximately 150,000 to

³³ Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8. “In a cheerfully dismissive presentation, Judge Jacobs and six of his colleagues on the United States Court of Appeals for the Second Circuit said in a lecture hall jammed with law professors at the Benjamin N. Cardozo School of Law . . . that their scholarship no longer had any impact on the courts.” *Id.*

³⁴ Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENVER L. REV. 661, 661 (1998) (“Law reviews are the primary outlet for legal scholars . . .”); *see also* Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N. U. L. REV. 563, 566 (2007) (“The traditional rule is for three scholarly articles in law reviews of sufficient quality [to qualify for tenure].”); *see also* Alan Watson, *THE SHAME OF AMERICAN LEGAL EDUCATION* 91 (2d ed. 2005) (stating that publishing four law review articles is generally required for promotion to full professor and tenure).

³⁵ *See, e.g.*, Joyce Seltzer, *Honest History*, 90 J. AMER. HISTORY 1347, __ (March 2004) (“Tenure and promotion decisions depend on publications and, in most history departments, that means books rather than articles.”).

³⁶ According to Washington and Lee Law School’s Associate Law Librarian John Doyle, who maintains a website devoted to ranking law reviews, as of mid-2010, there were 640 student-edited law reviews published in the United States. *See* Washington and Lee Law School’s “Law Journals: Submission and Rankings” website (<http://lawlib.wlu.edu/lj/index.aspx>; last visited May 8, 2010). There are another 333 peer-edited or refereed law reviews published in the United States. *See id.*; *see also* John Doyle, *The Law Reviews: Do Their Paths of Glory Lead But to the Grave?*, 10 J. APP. PRAC. & PROCESS 179 (2009).

190,000 pages per year.³⁷ Yet the majority of those pages – I submit the vast majority – provide little if any social utility (other than to their authors) and represent a colossal amount of wasted resources and opportunity costs.³⁸ Although somewhat hyperbolic, Chief Judge Jacobs’s remarks reveal that, unlike in the past,³⁹ when more of a “symbiosis” between the professoriate and the profession existed,⁴⁰ relatively few members of the bench and bar or legal policy-makers today rely on law review scholarship in meeting the demands of their jobs. In addition, significantly fewer members of the bench and bar are writing law review articles than in the past.⁴¹ Even in

³⁷ Day, *supra* note 34, at 567-68.

³⁸ See Frank H. Wu, *How to Become a Law Professor*, 46 No. 6 PRACTICAL LAWYER 15 (Sept. 2000) (“A law review article takes about a year of work, even for a dedicated scholar who is being encouraged in the endeavor.”).

³⁹ See, e.g., William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 227 (1965) (“I have a special affection for law reviews, . . . and I have drawn heavily from them for ideas and guidance as practitioner, as teacher, and as judge.”); Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962) (arguing that law reviews are very useful to judges in developing the law); Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941) (“It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical.”); Benjami N. Cardozo, *Introduction to Selected Readings on the Law of Contracts from American and English Legal Periodicals* vii (Association of American Law Sch. ed. 1931) (noting utility of law reviews to courts). There were critics of law reviews during that earlier era – most notably Fred Rodell, see *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936), and *Goodbye to Law Reviews--Revisited*, 48 VA. L. REV. 279 (1962) – but they were few and far between compared to the modern era.

⁴⁰ Louis H. Pollak, *The Disjunction Between Judge Edwards and Professor Priest*, 91 MICH. L. REV. 2113, 2113 (Aug. 1993).

⁴¹ See Michael J. Saks *et al.*, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 365 (1996) (noting the difference between the ratios of judge and practitioner articles to professor articles in 1960 and 1985; in 1960, the ratio of judge and practitioner articles to those law professor articles was 1:1, but by 1985 the ratio was 1:2.24). I am not aware of an updated version of this study, but the ratio surely has grown even more since

the rarified intellectual atmosphere of the Supreme Court, law review scholarship has fallen from grace. As noted by former Solicitor General Seth Waxman, “at the Supreme Court, academic citations are viewed as largely irrelevant – only a true naif would blunder to mention one at oral argument.”⁴²

The practical irrelevance of law reviews became noticeable toward the end of the last century.⁴³ Many of the intellectual giants in the legal profession who have shown mastery as both as judges or practitioners *and* legal scholars and who span the ideological spectrum have commented critically on law reviews’ decreasing utility to the bench and bar.⁴⁴ Even one of

1985.

⁴² Seth Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1909 (June 2002).

⁴³ Louis J. Sirico, *The Citing of Law Reviews by the Supreme Court, 1971-1999*, 75 INDIANA L. REV. 1009, 1010 (Summer 2000) (“We find a continuing decline in number of times the [Supreme] Court cited legal periodicals and a noticeable decrease in citations to the top tier of law journals.”); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (Winter 1989) (“This survey reveals a 47.35% decline in the use of legal scholarship by courts over the past two decades, the most notable decline occurring in the past ten years.”); *see also* Gerald F. Uelman, *The Wit, Wisdom & Worthlessness of Law Reviews*, CAL. LAWYER (June 2010) (“I did my own count recently of the California Supreme Court opinions published during the past five years that relied on law reviews as authority: There were just six. This despite – or perhaps because of – the fact that law reviews have tripled in number since the 1970s.”); Thomas L. Fowler, *Law Reviews and Their Relevance to Modern Legal Problems*, 24 CAMPBELL L. REV. 47 (Fall 2001) (study of citations to articles appearing in North-Carolina based law reviews by the North Carolina Supreme Court, which showed a dramatic reduction in annual citations from the 1960s to 2000 – from a high of 26 citations in 1965 to 2 citations in 2000); Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 118 (Winter 2004) (“If one excludes the small group of four fairly heavily cited articles from the calculation, then the overall average citation frequency for this large set of contract law articles published predominantly in very top-tier law reviews is only 0.7 cites per article.”).

⁴⁴ *See, e.g.*, Judge Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L. J. 845, 850-51 (Spring 2009) (“[A]ll around us, there is more, vastly more,

modern law reviews' defenders, Erwin Chemerinsky, who stands among those giants,⁴⁵ does not dispute the growing irrelevance of law reviews to the legal profession⁴⁶ but contends that such

of nothing happening than ever before [in law reviews]. . . . [O]ne encounters an increasing tendency, especially at the elite law schools, for law professors to write exclusively for other law professors.”); *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008) (criticizing modern legal scholarship as being decreasingly relevant to the legal profession); Waxman, *supra* note 42, at 1906 (same observation by former Solicitor General of the United States); Judge Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, *supra* note 9, at 36 (“Because too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers.”). During a recent oral argument in *McDonald v. City of Chicago*, ___ S. Ct. ___, 2010 WL 2555188 (June 28, 2010), Justice Scalia joined the chorus of critics, albeit with humorous flair, in questioning one of the attorneys about whether he was “bucking for a place on some law school faculty” by making a legal argument that found no support in 150 years’ worth of legal precedent but that would make him a “darling of the professoriate.” *See* Michael C. Dorf, *Justice Scalia Suggests that the Legal Academy is Out of Touch: Is He Right?*, <http://writ.news.findlaw.com/dorf/20100308.html> (Mar. 8, 2010) (quoting from the oral argument transcript and also observing that “even Justices who were sympathetic to his cause were vexed by his tactics during the argument, deeming them better suited to a law school faculty workshop than to the Court”); *see also McDonald*, 2010 WL 25555, at *35 (Thomas, J., concurring in part and concurring in the judgment) (the only member of the Court to have accepted the argument).

⁴⁵ *See* Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881 (April 2009). Dean Chemerinsky, one of the nation’s foremost constitutional law scholars, regularly has been involved in litigation, including repeatedly arguing before the Supreme Court. *See, e.g.*, *Scheilder v. Nat’l Organization for Women*, 547 U.S. 9 (2006); *Tory v. Cochran*, 544 U.S. 734 (2005).

⁴⁶ *See* Chemerinsky, *Why Write?*, *supra* note 45, at 885 (“Over the twenty-nine years that I have been a law professor there has been a shift. Faculty scholarship has become far more interdisciplinary and more abstract, and interdisciplinary scholarship is more highly valued than traditional doctrinal scholarship, especially at elite institutions. Edwards wrote his critique over fifteen years ago [*see* Edwards, *supra* note 9], and I think that the trends that he identified have increased since then. The reality is that legal scholarship, especially from elite faculty and in elite law reviews, is even more disconnected from the issues that judges and lawyers face.”); *see also id.* at 886 (“The legal academy – especially the elites – have increasingly come to value scholarship directed primarily or exclusively at law professors (and maybe those in other disciplines). Correspondingly, the legal academy places little value on books or articles written for students, for lawyers, for judges, for the general public.”).

scholarship nonetheless serves important purposes within the legal academy.⁴⁷

It is not only the legal profession which finds law reviews increasingly useless. Members of the legal academy, who write the vast majority of the articles, decreasingly use (or even read) a large percentage of law review articles published each year, and many are critical of the poor quality of the interdisciplinary works that some of their fellow professors are producing.⁴⁸ A

⁴⁷ Dean Chemerinsky gives several reasons why, in his opinion, the current type of legal scholarship that predominates in the law reviews is appropriate: (1) “[A]s legal academics, we write to add significant, original ideas to the analysis and understanding of the law; as people, we write to understand ourselves and the world in which we live. Ideally, scholarly writing offers insights that are useful to others, but at the very least, it helps the author understand an area better and clarify his or her thoughts. Frequently, that greater knowledge and understanding helps in teaching as well,” *id.* at 882-83; (2) “There is potentially great value in writings that advance legal understanding and knowledge, even if the immediate audience is only professors of law or other disciplines. Works of legal history or legal philosophy, for example, may not have practical utility for judges, but they contribute to the academy’s understanding about the legal system. Knowledge and understanding is desirable, even if it is only part of a scholarly dialogue that informs other academics,” *id.* at 889; and (3) “Writing, even in the often stilted tones of law review articles, is an act of self-definition. What we choose to write about, the voice we employ, the points we choose to make, all are important expressions of self.” *id.* at 893-94. Below, I will discuss why these reasons – which focus primarily on benefitting the professoriate rather than law students and the legal profession – do not justify the current state of legal scholarship.

⁴⁸ Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for “Empirical Legal Studies,”* 71 J. L. & CONTEMP. PROB. 17, 27-28 (Spring 2008) (“[F]rom a scholarly perspective [the student-edited law review system] has been roundly criticized by law professors and social scientists alike. . . . Such criticism has only intensified as law reviews have begun publishing more specialized interdisciplinary and empirical work.”); *see also* Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L. J. 803, 804 (March 2009) (“American legal scholarship today is dead – totally dead”); Friedman, *supra* note 34, at 661 (“ . . . I share [other academic fields’ professors’] astonishment [at law reviews]; and I think [the law review system] is every bit as crazy, in some ways, as they think it is.”); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (Feb. 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.”).

recent empirical study of all of the law review articles contained in the Lexis-Nexis database found that 43 percent of them have never been cited *even once* in other law review articles or reported cases.⁴⁹ It seems, in the words of one critic, many law professors “are not even talking to each other but to the mirror.”⁵⁰ In addition to its growing irrelevance, much of the legal scholarship being published today uses a different vocabulary from that used by members of the bench and bar, causing critics to characterize legal scholarship as increasingly pedantic.⁵¹

During recent decades, particularly at the highly-ranked law schools,⁵² the content of the

⁴⁹ Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007); *see also* Ezra Rosser, *On Becoming “Professor”: A Semi-Serious Look in the Mirror*, 36 FLA. ST. U. L. REV. 215, 223 (Winter 2009) (“Judges, law clerks, practitioners, policymakers, students, other faculty, and even family members do not read or care about law review articles.”). Additional empirical research on law review articles’ influence, or lack thereof, is in the offing. *See* Olufunmilayo Arewa, *The Production, Consumption and Content of Legal Scholarship: A Longitudinal Analysis*, at 1 (unpublished paper, available at <http://www.utexas.edu/law/academics/centers/clbe/assets/LegalScholarshipProject.pdf>) (“Our goal is to construct a large-scale relational database of legal scholarship from 1928 to the present that will allow examination of the production, consumption, content, and evolution of legal scholarship generally and interdisciplinary scholarship in particular.”).

⁵⁰ Andrew P. Morriss, *The Market for Legal Education and Freedom of Association*, 14 WILLIAM & MARY BILL OF RTS J. 415, 473 (Dec. 2005).

⁵¹ *See, e.g.*, Second Circuit Judge Roger J. Miner, *A Significant Symposium*, 54 N.Y. L. SCH. L. REV. 15, 18 (2009/2010) (“[I]f I saw the word ‘normative’ in one more law review article, I would scream.”). Perhaps an even better example is the scholarly-sounding word “hermeneutic,” which a great number of legal academics strive to include in their articles. As of June 23, 2010, a search of this term in Westlaw’s “jlr” directory (which includes many law reviews and journals) yielded 3,559 articles, while a search of the term in the “all cases” (state and federal cases) directory on Westlaw yielded only 175 cases. Similarly, the terms “epistemological” or “epistemology” appear in 8,050 articles in the “jlr” directory but only appear in only 246 cases in the “all cases” directory.

⁵² Richard Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321 (March 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

law review articles has changed from largely being primarily practical or “doctrinal” – that is, discussing cases, statutes, or administrative regulations using traditional tools of legal analysis – to being mostly abstract or theoretical⁵³ and often interdisciplinary.⁵⁴ In a 2007 study, the editors

are the principal audience.”); Stephen M. Feldman, *The Transformation of an Academic Discipline*, 54 J. LEGAL EDUC. 471, 496 n.92 (Dec. 2004) (noting that at “non-elite schools,” interdisciplinary scholarship “has gained less of a foothold”).

⁵³ David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 767 (2005) (“Some scholars estimate that while at one time there were five practical articles for every theoretical one, today the ratio is one to one.”); Michael J. Saks *et al.*, *supra* note 41, at 370 (authors’ empirical study of law review articles published in 1985, which concluded that the ratio between “practical” and “theoretical” articles was nearly 1:1, compared to the nearly 5:1 ratio in 1960). The ascendancy of theoretical legal scholarship in the twenty-first century was predicted – and championed – in the 1980s by Professor George L. Priest. *See Social Science Theory and Legal Education: The Law School as the University*, 33 J. LEGAL EDUC. 437, 440 (1983) (predicting that “[t]he [American] law school will be comprised of a set of miniature graduate departments in the various disciplines. . . . [A] wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without.”); *see also* George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681 (1988-89).

⁵⁴ *See, e.g.*, Edwards, *The Disjunction Between Legal Education and the Legal Profession*, *supra* note 9, 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.”); *id.* at 42-43 (“There has been a clear decline in the volume of ‘practical’ scholarship published by law professors. ‘Practical’ legal scholarship, in the broadest sense, has several defining features. It is prescriptive: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform. It is also doctrinal: it attends to the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker.”); Richard Posner, *The Future of Student Edited Law Reviews*, 47 STAN. L. REV. 1131, 1132-33 (Summer 1995) (“[There] was a time when legal scholarship was understood to be doctrinal scholarship, and the more technical and intricate the doctrine, the better. . . . Doctrinal scholarship as a fraction of all legal scholarship underwent a dramatic decline to make room for a host of new forms of legal scholarship – interdisciplinary, theoretical, nondoctrinal[.]”); Chemerinsky, *Why Write?*, *supra* note 45, at 885 (“In the past two decades, elite law schools have emphasized theoretical, interdisciplinary scholarship. . . . [S]imply

of Cardozo Law Review examined articles published in five of the most highly-ranked law reviews (Harvard, Columbia, Yale, University of California at Berkeley, and New York University) in both 1960 and 2000. The editors classified the articles as “practical,” “theoretical,” or mixed practical/theoretical. Their study found that, in 1960, the five law reviews published a total of 48 practical articles, 36 “mixed” articles, and 21 theoretical articles. By 2000, the journals published six practical articles, 45 “mixed” articles, and 68 theoretical articles.⁵⁵

In Justice Breyer’s words, “there is evidence that law review articles have left terra firma to soar into outer space.”⁵⁶ Judge Posner, whose renown as a prolific legal scholar, federal appellate judge, and public intellectual is unrivaled,⁵⁷ has spoken in even harsher terms: “In

perusing the table of contents of law reviews – from elite and non-elite institutions – it is obvious that there are a significant number of abstract articles being published that are unlikely to be useful to judges or lawyers.”); *see also* Hricik & Salzmann, *supra* note 53, at 768-69 (“Too much of legal scholarship is becoming ‘law professor scholarship,’ a discourse among theorists with little practical application. . . . Some law reviews are becoming nothing more than battlegrounds for theoretical camps where the members fight over their ideas with passionate publications that have no intent of engaging the profession or legal decision-makers. The demise of the law review article as a player in doctrinal development is clear.”).

⁵⁵ Carissa Alden *et al.*, *Trends in Federal Judicial Citations and Law Review Articles*, Appendix D (Mar. 8, 2007) (unpublished manuscript, available at http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf). According to the authors, the “practical” categorization encompassed “articles addressing narrowly doctrinal questions of law or concrete solutions to relevant legal problems,” while “theoretical” articles “relate[s] to an abstract legal issue or focuses on the intersection of law and other disciplines.” A “mixed” article “may have practical application, but approaches the legal issue through a more conceptual lens.” *Id.* at 1-2.

⁵⁶ Breyer, *supra* note 44, at 33.

⁵⁷ Justice Elena Kagan has referred to Judge Posner as “the most important legal thinker of our time.” *Richard Posner, The Judge*, 120 HARV. L. REV. 1121, 1121 (2007). She also was careful to note that “Richard Posner . . . is not only a theorist. He is also a practitioner.” *Id.*

recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution.”⁵⁸

The distinction between “practical” and “theoretical” is, to some degree, illusory, which has led some critics of modern legal scholarship to suggest a different dichotomy.⁵⁹ Although the concept of “theoretical” is somewhat like obscenity was in Justice Stewart’s eyes,⁶⁰ Professor Lawrence M. Friedman best captured the notion when he stated: “When legal scholars use the word ‘theory,’ they seem to mean (most of the time) something they consider deep, original, and completely untested” – in contrast to most other academic fields, in which “a theory has to be

From 1981 to 2009, Judge Posner authored six articles critical of modern legal scholarship. *See supra* notes 44, 52 & 54 and *infra* notes 62 & 65 (two articles). The fact that the most important legal thinker of our time has done so should be enough by itself to cause serious concern among the professoriate.

⁵⁸ Judge Richard Posner, *Legal Scholarship Today*, *supra* note 52, at 1314.

⁵⁹ For example, Professors David Hricik and Victoria S. Salzmann reject the practical/theoretical distinction and, instead, employ the phrase “engaged” (in contrast to unengaged) scholarship to refer to “scholarship [that] addresses problems related to the law, legal system, or legal profession that affect a significant portion of society or the legal community. It identifies current legal issues, offers possible solutions to legal problems, or meaningfully informs decision-makers on the issues before them.” Hricik & Salzmann, *supra* note 53, at 764; *see also* James Boyd White, *Law Teachers’ Writing*, 91 MICH. L. REV. 1970, 1970 (Aug. 1993) (“[F]or me the relevant line is not between the ‘theoretical’ and ‘practical,’ . . . but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not.”). Mark Tushnet has set forth a three-part taxonomy of legal scholarship: (1) “traditional legal advocacy” (using traditional tools of legal analysis); (2) “advocacy augmented with concepts drawn from nonlegal fields of thought”; and (3) “the study of law as a phenomenon.” Mark Tushnet, *LEGAL SCHOLARSHIP AND EDUCATION: COLLECTED ESSAYS IN LAW* 98 (2008). The second and third species that he identifies comprise the bulk of what others consider “theoretical” legal scholarship.

⁶⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“ . . . I know it when I see it.”).

testable; it is a hypothesis, a prediction, and therefore subject to proof.”⁶¹ That said, unquestionably some legal scholarship is legitimately theoretical (*i.e.*, it competently employs analytical tools from the social sciences to test theories about relevant legal issues) and occasionally may serve “practical” needs of the bench and bar.⁶² Yet doctrinal legal scholarship that addresses case law, statutes, or administrative regulations using traditional legal analysis in the context of actual legal problems is more likely to be useful to judges, practitioners, and policy-makers than scholarship that eschews such a practical approach. After all, such legal analysis is the bulk of the daily grind of the bench and bar. Furthermore, theoretical scholarship – indeed, *any* legal scholarship – is more likely to be relevant and useful if its author has a real-world understanding of the context in which the law applies.

Judge Posner, a proponent of theoretical legal scholarship so long as it is competently produced and edited and also balanced in the law reviews with practical scholarship,⁶³ contends that the current system of law reviews is built to fail with respect to most theoretical scholarship. He points to the fact that the vast majority of the reviews still rely on law students to select and

⁶¹ Friedman, *supra* note 34, at 668.

⁶² See Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision-Making*, 33 HARV. J.L. & PUB. POL’Y 217, 237 (Winter 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 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).

⁶³ See Posner, *The Deprofessionalization of Legal Scholarship*, *supra* note 62, at 1925-26.

edit articles for publication⁶⁴ and argues that such neophyte editors are ill-equipped to perform these tasks when it comes to interdisciplinary scholarship (as opposed to traditional doctrinal scholarship, which involves analysis of case law and statutes – something at which a good law student becomes reasonably proficient by her second year of law school).⁶⁵ Judge Posner has proposed faculty-run, peer-reviewed law reviews for interdisciplinary articles.⁶⁶

⁶⁴ Critics also have contended that the selection process for student editors – which is based primarily on first-year grades – is seriously flawed. *See, e.g.*, Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N. U. L. REV. 563, 570 (2007) (“The method of selection for membership on the law review has been criticized as arbitrary and unfair. Law reviews may not choose the most talented writers, editors, or researchers on the basis of grades or the writing competition. The management and people skills required to publish law reviews are not part of the selection matrix. A number of critics believe the automatic elevation to the law review on the basis of grades is capricious and unfair, resulting in a tainted honor.”).

⁶⁵ *See* Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Makes Articles About the Wrong Topics Worse*, LEGAL AFFAIRS (available on Westlaw at 2004-Dec. Legaff 57, 57) (Nov./Dec. 2004); Richard A. Posner, *The Present Day Situation in Legal Scholarship*, 90 YALE L. REV. 1113, 1132 (1981) (“It should be obvious that in the performance of these tasks the reviews labor under grave handicaps. The gravest is that their staffs are composed primarily of young and inexperienced persons working part-time: inexperienced not only as students of the law but also as editors, writers, supervisors, and managers.”); Posner, *The Deprofessionalization of Legal Scholarship*, *supra* note 62, at 1927 (“I am not starry-eyed about the new interdisciplinary legal scholarship. Much of it is bad, in part because a form of scholarship that is so difficult for most law students to understand places severe strain on the system for publishing legal scholarship, a system dominated by student-edited law reviews, and impedes the gatekeeper function that scholarly journals are supposed to perform.”); *see also* Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. L. REV. 229, 231 (Winter 2009) (“It really is extraordinary that students pick articles in areas in which they have little expertise.”)

⁶⁶ *See* Posner, *The Present Day Situation in Legal Scholarship*, *supra* note 65, at 1123-24 (“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

Exacerbating this problem is that, because of the voluminous number of submissions to law reviews in the electronic era⁶⁷ and, in particular, the increasing amount of interdisciplinary articles being submitted, student editors tend to rely on the prestige of the law school at which an author is employed or the law school from which she graduated as proxies for an article's quality.⁶⁸ Furthermore, most law school faculties (including deans) are greatly concerned about – some would say obsessed with – their school's place in the annual *U.S. News & World Report* rankings,⁶⁹ and it is commonly believed that a significant factor in that overall ranking is the

process characteristic of academic fields other than law.”).

⁶⁷ John Zimmer & Jason P. Luther, *Peer Review as an Aid to Article Selection in Student-Edited Journals*, 60 S.C. L. REV. 959, 963 & n.7 (2009) (describing the electronic submission process).

⁶⁸ Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALBANY L. REV. 565, 584 (2008) (discussing the authors' survey of student-editors and concluding that “editors use author credentials extensively to determine which articles to publish.”); *see also* 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 (2009) (“‘Good’ [as a quality of scholarship] will often have less to do with the content of the work and more with its placement in a highly ranked law review. Placing law review articles has become an art and the system is stacked against certain topics and faculty at lower ranked law schools.”); Luigi Russi & Federico Longobardi, *A Tiny Bearing Heart: Student-Edited Law Reviews in Good Ol' Europe*, 10 GERMAN L. J. 1127, 1137 (July 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.”); Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Section Process: An Empirical Study of Those with All the Power – Student Editors*, 59 S.C. L. REV. 179, 188-93 (Autumn 2007) (“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.”); *see also* Rachel J. Anderson, *From Imperial Scholar to Imperial Student: Minimizing Bias in Article Evaluation by Law Reviews*, 20 HASTINGS WOMEN'S L. J. 197 (Summer 2009) (discussing how biases of law student editors can affect the article selection process).

⁶⁹ Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The*

prestige of a school's law review.⁷⁰ Whether true or not, the perception that the reputation of a school's law review is an important contributor to a law school's overall ranking puts institutional pressure on student-editors to select articles based on the reputation of the author or the author's law school affiliations rather than on the article's merits and also select the type of article that is held in high regard by most law professors, *i.e.*, an impractical, usually theoretical

Pernicious Effects of Rankings, 81 IND. L. REV. 309, 326 (Winter 2006) (“[T]he *U.S. News* ranking has become the ‘800-pound gorilla’ of legal education affecting just about everything we do.”); Paul Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1510 (May 2004) (same); Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching* (unpublished, unpaginated manuscript, available at <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm>) (“We all hate to admit it, but the *U.S. News* rankings have become an entrenched part of life . . .”). The *U.S. News* ranking system has been subject to manipulation by some law schools that have attempted to increase their ranking. Steven R. Smith, *Gresham’s Law in Legal Education*, 17 J. CONT. LEGAL ISSUES 171, 183-84 (2008) (“[S]everal law schools [have] engaged in questionable practices to make themselves look better. Northwestern and Indiana University law schools, for example, briefly hired some of their own graduates for short internships to make its employment statistics look better and the University of Illinois incorrectly attributed the difference between the Lexis educational rate and commercial rate as a law school expenditure and a contribution to the law school. Deans sometimes say in private that they feel they must fudge figures or engage in other inappropriate academic behavior because other law schools are doing so and will get ahead of them. It is a sad commentary that the ABA 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.”).

⁷⁰ Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings*, 78 U. COLO. L. REV. 35, 36 (Winter 2007) (“[E]specially for the . . . top fifty schools [as ranked by *U.S. News & World Report*], there is a high correlation (.88) between citations to the schools’ main law reviews, as measured by citations in other journals, and the *U.S. News* peer reputation rank.”); *id.* at 48 (“Given the close connections between law review rank and law school peer assessment scores, schools should be mindful that their law reviews contribute to the legal community’s perception of their institution and that their schools are likely to be judged on the basis of their reviews.”); *but cf.* Ronen Perry, *Correlation Versus Causality: Further Thoughts on the Law Review/Law School Liason*, 39 CONN. L. REV. 77, 83-84 (Nov. 2006) (“[I]t seems that law review citations make no notable impact on law school reputation. Apparently, the correlation between these two variables is not the result of a common response to an unobserved variable. So the only logical conclusion is that law school reputation is usually the cause whereas law review success is the effect.”).

work. To make matters even worse, the current ubiquitous practice of law professors’ “trading up” to a more highly-ranked review on an expedited basis after a “lesser” review has made an offer of publication⁷¹ flies in the face of the rigor of the professionally-edited journal common in other disciplines.⁷² This non-rigorous – some would say arbitrary – selection method can seriously affect the careers of some legal academics, particularly at the more highly ranked law schools.⁷³

⁷¹ See 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).

⁷² See Posner, *Against the Law Reviews*, *supra* note 65, at 57 (discussing the differences between social science journals and student-edited law reviews in the article selection process and noting that a typical social science journal will not permit simultaneous submission of the same article to multiple journals); Posner, *The Present Day Situation in Legal Scholarship*, *supra* note 65, at 1124 (discussing the peer-view and referee processes used by most social science journals and contrasting the process used by the vast majority of student-edited law reviews). A handful of student-edited law reviews recently have begun to experiment with peer-review in the selection process. See, e.g., 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, 961 (2009) (noting that South Carolina Law Review recently “institut[ed] . . . a rigorous peer review system, displaying most hallmarks of peer review publishing in academia, including double-blind review by external experts”). The student-editors “ask[ed] subject matter experts to evaluate manuscripts for scholarly merit. . . . Editors then use[d] the completed evaluations to help decide which manuscripts are most worthy of publication. . . . Thus, freed from the unreasonable aspects of their traditional ‘gatekeeping’ function, student editors can instead focus on judgments better suited to their level of experience, namely, vetting for writing quality and proofreading for grammatical, typographical, factual, and citation errors.” *Id.* at 961.

⁷³ Cameron Stratcher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y.L. SCH. L. REV. 349, 351 (2007-08) (“It is certainly difficult to imagine medical students selecting articles for publication in the prestigious New England Journal of Medicine, and then editing those articles, making or breaking careers along the way. Yet law students make these decisions every day at the Harvard Law Review, the Yale Law Journal, and nearly every other law review in the country.”). Alan Watson, a long-time law professor at the Universities of Pennsylvania and Georgia, contends that the law review selection process also occasionally suffers from faculty members’ putting pressure on student-editors to accept or reject particular professors’ submissions. See Watson, *supra* note 34, at 90. Watson claims that “[t]his is a subject much

Finally, and perhaps most significantly, little modern law review scholarship serves any meaningful pedagogical purpose with respect to training law students to become competent lawyers.⁷⁴ Furthermore, there is only a marginal benefit conferred upon those members of the student body selected to be on law reviews. True, they learn the minutiae of the *Blue Book*, gain some experience in line-editing, and incidentally are exposed to some substantive law (about which they are not tested), but surely such knowledge and skills could be learned in a much more efficient manner.⁷⁵ Although some may contend that law professors gain more substantive expertise as teachers when they research and write law review articles, practical experience (*e.g.*, actually litigating cases rather than just reading about them) is surely a superior way of gaining such expertise.

B. Impractical Scholars

“ . . . [T]he vocation of the legal scholar has shifted from that of priest to theologian.”⁷⁶

discussed in private by professors but not in public.” *Id.*

⁷⁴ See Chemerinsky, *Why Write?*, *supra* note 45, at 886-87 (“ . . . [S]cholarship directed at the audience of law students . . . is no longer highly valued in the academy.”); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 161-62 (2008) (“[S]cholarship and teaching have increasingly diverged. . . . The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.”).

⁷⁵ Those who contend that student editors gain important knowledge by cite-checking and reading the sources cited by the authors, *see, e.g.*, Joshua Baker, *Relics or Relevant? The Value of the Modern Law Review*, 111 W. VA. L. REV. 919, 930-31 & nn.83-89 (Spring 2009), fail to appreciate that this mode of learning not only is inefficient (*e.g.*, spending hours making sure that certain quotations appear on particular pages of a case or article) but also defies well-established norms of higher education (*i.e.*, no meaningful assessment or feedback accompanies the editing and usually no meaningful supervision by a faculty member occurs).

⁷⁶ Kathleen M. Sullivan, *Forward: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1217 (May 2002).

It is no coincidence that, at the very time that law reviews began publishing a larger percentage of theoretical, increasingly interdisciplinary articles, the composition of modern law school faculties began reflecting the same shift away from the practical.⁷⁷ This trend began around 1970 and picked up steam in the past two decades; it primarily has affected legal scholarship but has influenced law schools' curricula as well.⁷⁸ Not only are there fewer tenure-

⁷⁷ See, e.g., Posner, *The State of Legal Scholarship Today*, *supra* note 44, at 853-54 ("With the rise of interdisciplinary legal studies, . . . the old system of faculty recruitment faltered. Eventually it was largely replaced, especially at elite law schools (but at many nonelite ones as well), by a system more like that found in the standard academic fields. Now many new legal academics begin their teaching career after obtaining a Ph.D. in economics, or history, or some other field related to law, or after a two-year teaching and research fellowship at a leading law school, and invariably they have done some substantial academic legal writing, preferably published, before being hired for a tenure-track position."); Waxman, *supra* note 42, at 1909 ("Increasingly, though, in recent years many of the country's elite law schools . . . law professors see themselves more as colleagues of sociologists, economists, and philosophers than of judges and lawyers.");

⁷⁸ Richard Posner, *Legal Scholarship Today*, *supra* note 52, at 1316 ("What was new was the number and density of the external approaches that began to take hold in the legal academy around 1970 and the number and seriousness of their practitioners. I shall call the new approaches 'interdisciplinary' in contrast to the 'doctrinal' scholarship that until then had the field of academic law pretty much to itself."); *id.* at 1317 ("[I]nterdisciplinary scholarship looms very large. . . . Already there are signs that it is changing the internal perspective of the academic legal profession by infiltrating doctrinal scholarship and changing the professoriat's understanding of what constitutes good doctrinal scholarship and good teaching of core law courses"); Harry T. Edwards, *Another Post-Script to 'The Growing Disjunction Between Legal Education and the Legal Profession*, 69 WASH. L. REV. 561, 562 (July 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.") (quoting an unnamed law school dean).

track law professors today with significant practical experience gained before (or after⁷⁹) entering the tenure-track faculty – an issue that I will further discuss immediately below – there also is outright disdain for practitioners and judges among a significant number of full-time faculty members.⁸⁰ This disdain is reflected in the message conveyed to students,⁸¹ which affects the

⁷⁹ A rare modern exception of a legal academic who has “jumped several times between the academic and professional spheres” is Justice Kagan, a former tenured law professor and dean of Harvard Law School. *See At the HLS Helm*, JOHN HARVARD’S JOURNAL 66 (July/August 2003). Among her professional endeavors (in addition to serving as a law clerk for a D.C. Circuit judge and a Supreme Court Justice) included being a law firm associate, special counsel to the Senate Judiciary Committee, associate White House counsel, deputy assistant to the President (in the Executive Office of the President), and Solicitor General of the United States. In total, she spent approximately a decade practicing law and approximately 15 years as a legal academic. *See* Questionnaire for Nominee for the Supreme Court (for the United States Senate Committee on the Judiciary) (available at <http://www.washingtonpost.com/wp-srv/politics/documents/ElenaKagan-PublicQuestionnaire.pdf>).

⁸⁰ Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOYOLA L. REV. 623, 634 (Fall 2004) (“One of the most unfortunate collateral effects of the tendency for law professors to identify first and foremost as scholars and academicians and to distance themselves from practicing lawyers is the apparent disdain many professors feel and perhaps even express towards practice and practitioners.”); *see also* Lee C. Bollinger, *The Mind in the Major American School*, 91 MICH. L. REV. 2167, 2175-76 (Aug. 1993) (noting that many law professors began to lose their identity with judges, including federal judges, during the 1980s and early 1990s, when Presidents Reagan and Bush increasingly appointed younger judges 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 (Aug. 1993) (same).

⁸¹ Robert P. Schuwerk, *The Law Professor as a Fiduciary: What Duties Do We Owe Our Students?*, 45 S. TEX. L. REV. 753, 767 (Fall 2004) (“Many law professors do not like the practice of law, and consistently denigrate it to their students.”); Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, *supra* note 9, at 36 (“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.”).

student-editors who select law review articles for publication.⁸²

The typical twenty-first century law professor has the self-identity of a “university professor” – one of the humanities – rather than as a practitioner-teacher.⁸³ This identity has slowly developed over time since the beginning of law schools as components of universities in the late 1800s and culminated with the influx of impractical scholars during recent decades; law professors increasingly have felt the need to prove themselves as legitimate academicians in the university lest they be perceived as mere teachers at a trade school.⁸⁴

The typical twenty-first century law professor indeed resembles a university professor more than a teacher-practitioner at a professional school. Several empirical studies of the prior practical experience of tenure-track law professors hired during the past three decades or so consistently have shown that the typical professor practiced law for only a relatively short time before becoming a full-time member of the legal academy. Studies using data of the American Association of Law Schools (“AALS”) from the mid-1970s and late 1980s showed that, although the vast majority of law professors had some practical experience before being hired as full-time

⁸² See Christensen & Oseid, *supra* note 68, at 193 (noting the results of a survey of law review editors: “None of the . . . respondents [from the 15 highest-ranked law reviews] considered an author’s practice experience in making publication decisions, and only a slim majority of the other top-ranked segments answered ‘yes’ to this question. In contrast, this factor had more influence on editors among the 3d Tier and 4th Tier school segments.”).

⁸³ See Stephen M. Feldman, *The Transformation of an Academic Discipline*, 54 J. LEGAL EDUC. 471, 473 (Dec. 2004) (“But if we are not lawyers, what are we? The most likely answer . . . appears to be that we are university professors.”); see also Paul D. Reingold, *Harry Edwards’ Nostalgia*, 91 MICH. L. REV. 1998, 2004 (Aug. 1993) (“[T]he *teaching* of the practice of law was at least as marginalized and denigrated as the practice of law itself.”) (emphasis in original).

⁸⁴ Feldman, *supra* note 83, at 484-85.

faculty members, the average number of years of such experience was only approximately five.⁸⁵

The study of professors hired in the late 1980s noted that “[p]rofessors at the nation’s highest-ranked schools are even less likely to have practice experience than their peers at lower-ranked schools.”⁸⁶ A more recent study of AALS data concerning new full-time tenure-track law professors (which excluded the vast majority of clinicians and LRW professors) hired between 1996 through 2000 showed the same trend:

For those with [prior] legal practice experience [86.6% of all new hires], the average number of years’ experience was 3.7. . . . There is a negative relationship between the number of years in practice and the [ranking] of the hiring law school [with “top 25” law school new hires’ having only 1.4 years of prior practical experience].⁸⁷

⁸⁵ See Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J. L. REFORM 191, 194 & n.16, 217 & n.71 (Fall 1991) (study using AALS data from the late 1980s showed 80% of full-time professors, excluding clinical “instructors” and all LRW instructors but including a small number of clinical “professors,” had prior experience in law practice; those professors had an average of 5.4 years of practical experience); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AMER. BAR FOUND. RES. J. 501, 511 (1980) (study using AALS data from 1975-76 academic year showed that 67.2% of full-time tenure-track faculty had prior practical experience; median number of years of such experience was five years).

⁸⁶ Borthwick & Schau, *supra* note 85, at 219. This study reported data on the “top 7” schools, which showed an average of 4.3 years of prior practical experience for the 63.0% of professors with some amount of prior experience; the faculty at the remaining 168 law schools showed somewhat greater amounts of prior practical experience – approximately 80% of those professors had practiced law before becoming legal educators and their average number of years of experience was five and one-half years. See *id.* at 219 (table 20).

⁸⁷ Richard E. Redding, “Where Did You Go to Law School?”: *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600-01 (table 3), 612 (Dec. 2003). The rankings referred to in the study are from *U.S. News & World Report*’s annual rankings of law schools. See *id.* at 598 n.16. A smaller-scale study using a random selection of AALS data from the 2003-04 academic year found that non-experiential full-time faculty members had similarly meager amounts of prior practical experience before becoming law professors. See Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 329, 337 (2005) (breaking down the average prior experience by law firm

My own study of the average amount of prior practical experience of entry-level tenure-track law professors hired between 2000 and 2009 – using a sample of data from forty law schools in all four “tiers” of the *U.S. News & World Report* (“*USNWR*”) rankings in 2010⁸⁸ –

experience, public interest law experience, and governmental law experience). A 2009 “informal empirical study” of the new faculty members of representative highly-ranked schools by Dean Thomas M. Mengler revealed similar results. *See Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L. REV. 337, 340 n.18 (Winter 2009) (“I undertook an informal empirical study . . . by looking at the recent appointments at five of the top law schools in the country: California-Berkeley (Boalt), Columbia, Michigan, Northwestern, and Virginia. I looked at the faculty profile website for each of these five law schools to evaluate the legal practice experience of Assistant and Associate Professors who taught anything other than clinical courses. The number of faculty at those ranks who either (1) lacked any legal professional experience or (2) lacked any attorney experience other than a year or two clerking for a judge are as follows: Boalt: 6 of 12; Columbia: 4 of 6; Michigan: 2 of 7; Northwestern: 5 of 9; and Virginia: 4 of 8.”).

⁸⁸ I chose the first 10 schools in tier one and also ten schools beginning at number 50 in the rankings (what is commonly called “tier two,” although *USNWR* does not so label schools ranked from 50-99). Because *USNWR* does not numerically rank schools in tiers three and four (other than by simply including them in the lower two tiers), I selected the first 10 schools in each of those two tiers by alphabetical order. In the event that I was unable to obtain sufficient data about each law full-time law professor on a particular school’s faculty, I moved down the *USNWR* rankings (numerically for tiers one and two and alphabetically for tiers three and four) to the next school appearing in the same tier. I looked at the resumes of the full-time professors at each of the schools hired since 2000 (which appear either on the schools’ websites or in the AALS’s *2009-10 Directory of Law Teachers*). I excluded visiting professors and lateral hires and also only considered professors who had never previously been hired as a full-time professor (other than as a “fellow” or for a similar short-term, non-tenure track position). My definition of “practical experience” is the following: with one exception, any type of professional experience (other than that associated with law teaching) requiring a law license. That exception is the time that a recent law graduate spent working as an associate at a law firm or in a comparable position at another type of legal employer awaiting the results of the bar examination. Copies of all of the biographical information used in my study as well as the calculations of the average years of practical experience for each of the law faculties examined are available for inspection at the South Carolina Law Review.

It should be noted that the vast majority of professors’ biographical information listed their prior practical experience based only on periods of years and did not include the months of the year in which their employment began and ended (*e.g.*, “Associate, ABC Law Firm, 2000-02” rather than “August 2000-June 2002”). In such cases, I assumed that they worked 12 months for each year listed except for the terminal year (*e.g.*, “2000-02” equaled 24 total months). This

revealed a similar profile. Excluding those professors with “skills,” “clinical,” “legal writing,” or other practical appellation in their titles, the data showed that the typical tenure-track professor had only three years of practical legal experience before being hired as a full-time faculty member.⁸⁹ The amount of prior practical experience differed significantly by tier. For instance, for the schools in tier one, the median was 1 year and the mean was 1.92 years; 46.8% of the entry-level tenure-track professors hired by these schools since 2000 had *no* prior practical experience. Conversely, for the schools in tier four, the median was 6 years and the mean was 7.58 years; 85.8% of those professors had some amount of prior practical experience.

The data concerning the meager amount of practical experience of typical tenure-track law professors hired during the past thirty years are consistent with Professor Alan Watson’s assertion that most of them entered the academy because they had a “strong distaste for the practice of law.”⁹⁰ For those professors with only a few years of practical experience – typically gained while working as an associate at a big law firm⁹¹ – such limited experience usually would not have permitted much significant professional development:

assumption is based on the fact that most law graduates begin working for a law firm or other legal employer in July or August of the year, and most new faculty members likewise begin their teaching jobs in July or August.

⁸⁹ Three years is the median. The mean (average) was 4.57 years. The median more accurately reflects the typical professor because a small number of professors with extensive prior experience (*e.g.*, 15-30 years) results in the mean being significantly higher than the median.

⁹⁰ Watson, *supra* note 34, at 29.

⁹¹ Professor Redding’s study showed that, of those newly hired professors who had prior practical experience, approximately half worked for law firms. *See* Redding, *supra* note 87, at 601 (table 3).

[A]ssuming their brief careers were at large law firms, these individuals faced very few practical issues themselves. During their first three or four years at large firms, many lawyers do not see the inside of a courtroom, seldom have client contact, and often perform document review and other similar tasks. A professor with limited experience at a large law firm will not have tried many, if any, cases, argued many, if any, appeals, or negotiated many, if any, deals. Most of the time, she will have conducted research, drafted memos or briefs, reviewed documents, or revised agreements.⁹²

Particularly notable in the shift from practical to theoretical is the large percentage of tenure-track faculty in recent years who have Ph.D.'s in addition to (or, occasionally, instead of) a law degree. In the late 1980s, five percent of full-time law professors had Ph.D.s.⁹³ By the end of the twentieth century, 10.4 percent of new tenure-track hires had Ph.D's (13.4% at "top 25 schools").⁹⁴ Just a decade later, by 2010, that percentage had grown significantly, particularly at the highly ranked schools. My own study of a representative sample of entry-level tenure-track professors hired between 2000-09 (excluding clinicians, LRW professors, and other "practical" faculty) revealed that 18.9 percent possessed Ph.D.'s in addition to or in lieu of a law degree. Professors with Ph.D.'s constituted 35.5 percent of such tenure-track faculty members hired since 2000 by the first ten schools in tier one of the *USNWR* rankings.⁹⁵

⁹² Hricik & Salzmann, *supra* note 53, at 767.

⁹³ Borthwick & Schau, *supra* note 85, at 213.

⁹⁴ Redding, *supra* note 87, at 600 (table 1) & n.14.

⁹⁵ According to another commentator, the percentage of Ph.D.s being hired by law schools during recent years in particular has continued to increase. *See* Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 160 (2008) ("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."); *see also* Wendel, *supra* note 69 (noting "the 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.").

Regardless whether they possess a Ph.D., a vastly disproportionate number of new law professors graduated from so-called “elite” law schools, which not coincidentally employ the largest percentage of impractical faculty.⁹⁶ “Law professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1L’s, and preferably ones taken at elite ‘national’ law schools.”⁹⁷ Some critics contend this homogeneity in law school faculties has resulted in an ethos of perceived intellectual superiority and classism⁹⁸ and has made full-time professors, at

⁹⁶ See Redding, *supra* note 87, at 600 (table 1) (noting 66.2% of all new hires, including clinicians, graduated from a “top 12” law school and 86.2% graduated from a “top 25” law school; only 1.9% graduated from a “tier 3” or “tier 4” school); *see also* Wendel, *supra* note 69 (“Getting a [tenure-track] teaching position with a J.D. from a school significantly farther down the [rankings than the top dozen or so schools] would be akin to walking on water, unless you are [first] in your class, have a graduate degree in law or some other discipline, and have a record of good publications.”); Lucinda Jesson, *So You Want to Be a Law Professor*, 59 J. LEGAL EDUC. 450, 450, 452 (Feb. 2010) (noting that, even though she had practiced law twenty-three years, including as a law firm partner and a deputy state attorney general, before being hired as a full-time law professor, hiring committees at law schools “cared where I earned my J.D. . . . and whether I was on . . . law review”).

⁹⁷ Schuwerk, *supra* note 81, at 762.

⁹⁸ Ezra Rosser, *supra* note 49, at 220, 222 (“Privilege is infused in every conversation [among the professoriate] and is an understood shared reference, yet is never acknowledged.”); *id.* at 224 (“Law professors engage in self-study to determine who others acknowledge to be smart or to see which journals publish more prominent authors. Blogs on professor gossip such as lateral moves are checked regularly so that everyone can keep track of who seems the smartest.”); 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.”); Wegner, *supra* note 18, at 971-72 (“On another level, a hesitancy to embrace ‘practice’ in the law school context may reflect discomfort with those of other socio-economic classes or professional

least those with tenure, jealous of their privileged positions.⁹⁹ Other critics contend that many law professors are so absorbed in their scholarly pursuits that they are largely unconcerned with

profiles, with the term a proxy for divisions of a deeper sort. Modern practice-oriented legal education is often associated with the rise of clinical education in the 1960s and 1970s, during a time when foundations and the federal government funded efforts to reduce poverty and the legal establishment allowed legal aid societies and law schools to take on clients without the means to pay. Those who entered the academy as clinical faculty in that era brought with them a commitment to service and a pragmatic hope to educate young lawyers while providing needed services to the poor. Differences in academic credentials, professional experiences, values and priorities thus marked the beginning of practice-oriented instruction in recent memory, and preconceptions dating from that era may influence the ability of many to look beyond resulting chasms to this day.”); *A Conversation with Judge Harry Edwards*, 16 WASH. U. J. L. & POL’Y 61, 73 (2004) (“I also believe that there are still too many legal scholars who tend to discuss material from non-law disciplines without situating it in a meaningful legal context. I think that some of this is attributable to a misguided sense of intellectual superiority.”).

⁹⁹ See Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law School*, 81 IND. L.J. 359, 366 (2006) (“There’s no question that life for a tenured professor at a research university has to be one of the all-time best deals in the world: as long as the university can afford to keep running . . . the freedom that the professor has is unparalleled. No boss can dictate to the professor what her field of research should be; most of the time, the professor teaches in areas that complement her research interests; and the service components of the job are often interesting Even another of the all-time great jobs . . . federal judge . . . pales in comparison. The lifetime tenure is the same, but the cases before the judge somewhat dictate the issues that the judge gets to consider”); Philip P. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 159 (June 2000) (“The receipt of tenure bestows on the recipient benefits and riches that few in society can ever realize. Although the dean can make life difficult for a faculty member who does not adhere to the institutional agenda, the available sanctions are nothing compared to the ability to terminate employment.”); see also 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, 62 (2009) (“Law school teachers have relatively light teaching loads, at least compared to what goes on in other disciplines.”); Thomas M. Mengler, *Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L. REV. 337, 344 (Winter 2009) (“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.”).

students' needs – academic¹⁰⁰ or otherwise.¹⁰¹

In addition to the threshold requirement of possessing a law degree from an “elite” law school, publication of impractical law review scholarship *after* graduating has become a prerequisite for *getting hired in the first place*.¹⁰² Legal scholarship has become the “coin of the

¹⁰⁰ See, e.g., Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519, 535 (March 2007) (“With the exception of students aspiring to become legal academics, many professors do not communicate with students about the relationship of their academic work to their professional aspirations and goals. Nor, as we pointed out above, are faculty generally rewarded for playing this integrative, mentoring role in students’ lives. Instead, law schools assign the role of professional mentoring and advising primarily to administrators, particularly deans of student services, placement, and public interest.”); *id.* at 538 (“[T]he reward structure for tenure-track faculty discourages them from taking the time to provide the ongoing, prompt, qualitative and individualized feedback that enables students to learn from their errors and to advance intrinsic learning goals. Professors receive limited rewards for excellent teaching, particularly for working closely with students outside of class, efforts that will not even show up in course evaluations.”).

¹⁰¹ See, e.g., Schuwerk, *supra* note 81, at 764-66 (“Most law professors are not familiar with the ever-increasing literature documenting the extreme levels of mental illness and substance abuse that develop among law students while in law school Many of those who are familiar with this body of work either do not believe that it is true or else attribute it to [other] causes”); 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 (March/June 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.”); see also 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 (Summer 2009).

¹⁰² A *Conversation with Judge Harry Edwards*, *supra* note 98, at 73-74 (“[A] significant problem that I have noted in recent years is the prevalence of hiring policies heavily favoring candidates who have published major articles prior to beginning the application process. This necessarily favors persons who have earned PhDs and excludes bright young lawyers with significant practice experience. This exacerbates the distressing disconnection between legal education and legal practice. I do not understand why law schools would consciously adopt

realm” in the hiring of entry-level faculty.¹⁰³ To facilitate the hiring of new professors who already have post-graduate scholarly publications, several law schools have created post-graduate “fellowship” programs, commonly called “visiting assistant professorship” (or “VAP”) programs, in which aspiring professors are hired for a year and given the chance to write law review articles while teaching a class or two.¹⁰⁴ According to Professor Brad Wendel, a member of Cornell Law School’s hiring committee, “time spent in a VAP [is becoming] an essential step or credential in the hiring process, at least in top school hiring. Unfortunately that’s had the effect of making it incredibly competitive to get into a VAP program, and that means the original purpose of these programs has been undermined. . . . Now it’s important to have gotten some writing done before even applying [for a VAP] position.”¹⁰⁵ Professor Wendel also has described the importance of a prospective law professor’s interest in producing legal scholarship to law school hiring committees:

If there is one thing that [law] schools are looking for, it is someone with fire in

hiring policies that effectively preclude brilliant practitioners from entering the teaching market. Law schools are professional schools, not graduate schools. We grant JDs, not PhDs. Upon graduation, our students are qualified to seek licenses not available to persons who do not have a legal education.”); *see also* Wendel, *supra* note 69 (“[T]eaching candidates must have at least one post-law school publication (*i.e.*, not a student note) published in an academic law review, not a publication intended primarily for practitioners. At one time this was considered icing on the cake. Now, at the better schools, it’s becoming a de facto requirement for serious consideration. . . . In general, . . . one or two solid law review articles is a requirement to get an interview at the AALS ‘meat market’. . . . [I]t is a prerequisite almost everywhere.”).

¹⁰³ Wu, *supra* note 38.

¹⁰⁴ A lengthy list of law schools with such programs (as of 2007) is available at http://taxprof.typepad.com/taxprof_blog/2007/12/teaching-fellow.html.

¹⁰⁵ Wendel, *supra* note 69.

his or her belly to produce scholarship about some intellectually significant issue. This matters because at any school with aspirations to be more than a bar-preparation service for in-state practitioners . . . , the name of the game is scholarship. Teaching is of secondary importance only. In fact, I sometimes tell students not to think of their goal as getting a “teaching” job at all. It’s really a writing job. You will be hired, evaluated, given tenure, promoted, and recognized in the profession based almost entirely on the quality of your scholarship.¹⁰⁶

It is not simply publishing but publishing in an “elite” law review that matters. Much like the manner in which student-editors view an author’s law school affiliation as a proxy for quality, hiring and promotion committees often view the rank of a law review in which an article was published as a proxy for the article’s quality.¹⁰⁷

Significant practical experience generally is *detrimental* to a non-clinical tenure-track candidate’s chances of getting hired and eventually being promoted and receiving tenure.¹⁰⁸ The

¹⁰⁶ *Id.*

¹⁰⁷ Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. L. REV. 229 (Winter 2009) (“The legal academy’s obsession with law reviews continues. It may even be growing. . . . Much of the obsession rests on an assumption that there are better reviews and that it is desirable to publish in a better review than a worse one. For purposes of career promotion, there is likely truth to this. For purposes of job placement and pay increases, it is not unreasonable to assume that articles placed in more prominent journals are more useful, as a general matter, than articles placed in less prominent journals. In fact, some schools are reputed to pay bonuses for articles placed in highly regarded journals. This is because evaluators use journal placement as a proxy for article quality.”).

¹⁰⁸ Schuwerk, *supra* note 81, at 762 (“Neither practice skills nor ‘real world’ experience matter. Indeed, apart from judicial clerking, they may even be seen as detrimental.”); Wendel, *supra* note 69 (“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.”); Gregory W. Bowman, *The Comparative Advantages of Junior Faculty: Implications for Teaching and the Future American Law Schools*, 2008 BYU EDUC. & L. J. 191, 204 n.108 (2008) (“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.”); Wu, *supra* note 38 (“With rare exceptions, former judges, elected officials, and partners at the prestige law firms

same is true of a record of publishing “practical” scholarship.¹⁰⁹

Several empirical studies have shown that, once tenure is awarded to a professor, her rate of law review publication (and scholarly publication generally) on average declines.¹¹⁰ However, many tenured professors continue to publish impractical law review articles in highly-ranked reviews because such publications yield benefits even after tenure.¹¹¹

Despite the extensive post-secondary education possessed by most law professors hired

likely will start as assistant professors at almost the bottom of the pay scale.”).

¹⁰⁹ Wendel, *supra* note 69 (“[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 38 (“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.”).

¹¹⁰ Jeffrey L. Harrison, *Post-Tenure Scholarship and Its Implications*, 17 U. FLA. J. LAW & PUBLIC POL’Y 139, 141 (April 2006) (in analyzing a sample of one hundred professors from U.S. law schools, the author “found that nearly seventy percent of those surveyed wrote less per year in their post-tenure period than in their pre-tenure period”); James R. P. Ogloff *et al.*, *More Than “Learning to Think Like a Lawyer:” The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 147-48 (2000) (examining different statistical studies that reached the same conclusion); *see also* Ira P. Robbins, *Exploring the Concepts of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL’Y REV. 387, 387 (1998) (advocating for post-tenure evaluations in light of the fact that tenured faculty members may become unproductive for various reasons).

¹¹¹ Rubin, *supra* note 74, at 141-42 (“[V]irtually all the material rewards that tenured faculty members receive, other than basic job security, depend on their research production. The quality of their research, as measured largely by the attention that it attracts from other academics, determines their salary raises, their summer grants, their supplementary expense funding, and their access to funds for organizing conferences or speaker series that are of interest to them. It also determines whether they receive competing offers from other law schools, which not only provide the psychic reward of recognition, but also generally include a salary increase, and even if not accepted, can be used to extract further salary increases from their home institution. In some cases, these competing offers can also alter the balance between teaching and research in a direct way, because a highly valued faculty member can use competing offers to bargain for a reduced teaching load.”).

during the last decade, the quality of teaching by such faculty members, as a class, is deficient, particularly in preparing students to actually practice law (*i.e.*, what should be the primary mission of a professional school for future attorneys). This is disturbing considering the importance of educating students who, after graduation, will be responsible for their clients' lives, liberties, and property. Although there undoubtedly are some excellent legal educators who have little or no practical experience, significant deficits in teaching by most full-time professors should not be surprising for two related reasons. First, as noted, most law professors today are impractical scholars with little if any interest in (and, in some cases, disdain for) the actual practice of law. They thus lack the knowledge and interest in the practice of law required to effectively teach students to become competent practitioners. Even for those tenure-track professors who had several years or more of prior practical experience before joining the legal academy, their ability to teach students how to practice law will be impaired over time if they focus on impractical scholarship at the expense of practical works. Second, as also discussed previously, tenure-track faculty today are hired and promoted almost exclusively based on their record of publishing impractical scholarship.¹¹² It is human nature that, when an employee is almost exclusively rewarded for performing a certain task, she will focus on that task to the detriment of other tasks that do not accrue similar benefits.¹¹³

¹¹² See Read & Mirow, *supra* note 7, at 59 n.13 (“Sadly, at most institutions – even those espousing ‘excellence in teaching’ as a goal – scholarship is now king. Teaching takes a distant second place. No one in the past twenty years has heard of a promotion or a lateral move based solely on ‘excellence in teaching.’”). Many law professors appear to share Professor Owen Fiss’s opinion: “Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover.” *“Of Law and River,” and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 26 (1985) (letter from Owen M. Fiss to Paul D. Carrington).

¹¹³ Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law*

Although the professoriate gives lip service to “excellence” in teaching,¹¹⁴ law schools actually devote little effort to developing effective pedagogies.¹¹⁵ Furthermore, in non-clinical courses, which constitute the vast majority of law schools’ curricula, most professors still primarily rely on the “case-dialogue” method (*i.e.*, the Socratic method instituted by Langdell and Ames in the late 1800s or some ersatz version of it).¹¹⁶ Such a pedagogical method, which

School?, 53 J. LEGAL EDUC. 48, 65-66 (March 2003) (“Law schools generally fail to meet expectations about teaching. They neither offer incentives for good teaching nor even define it. The only consistent feedback on their teaching that law teachers receive comes from end-of-term student evaluations. 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.”); *see also* Sturm & Guinier, *supra* note 100, at 538 (“[P]rofessors measure their worth in publications, and it is widely recognized that this incentive structure places serious constraints on any innovation that will require faculty to devote time and energy to teaching at the expense of scholarship.”).

¹¹⁴ Cohen, *supra* note 80, at 626 (quoting a statement from the AALS, in which it stated that “[l]aw professors should aspire to excellence in teaching”).

¹¹⁵ Wegner, *supra* note 18, at 874 (“The professoriate . . . has very little training in educational effectiveness or assessment principles.”); *id.* at 885 (“Most legal educators are ignorant about the profound developments in the ‘learning sciences’ (psychology, cognitive and neurological studies, physiology, and more) that have occurred since they attended law school.”); *see also* James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 51-52, 61-62 (2006) (“Researchers working in the fields of education and social psychology, among others, have long recognized the vital influence of . . . socio-emotional effects in the classroom context. The emerging consensus holds that these considerations may play the greatest role in determining whether, and how much, our students learn. . . . More specifically, things such as teacher expectations, support, encouragement, and warmth toward students can have a profound effect on their success in school. Law school teachers, however, have been slow to appreciate the power and importance of these considerations. . . . In part, this is due to the fact that scholarship, rather than teaching, has paramount importance at most schools.”).

¹¹⁶ *See* Donald G. Marshall, *Socratic Education and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1 (Nov. 2005) (“Popular myth has it that Socratic method is pervasive in American law schools. But nothing could be further from the truth. The fact is that

typically involves a large class size and a single examination at the end of the semester, is inexpensive to implement and requires relatively little effort of law professors compared to the pedagogy in other areas of professional education, particularly when a typical law professor teaches only three or four courses per year.¹¹⁷

This low-cost teaching method has enabled law schools to allocate significant resources to producing impractical scholarship by faculty members. Although it is common for law professors to assert that their scholarship enhances their teaching prowess,¹¹⁸ a 2008 study of the teaching effectiveness of full-time law professors (as evidenced in student evaluations) showed

teaching and learning by genuine dialog has all but disappeared from the second and third years of law school, and is fast disappearing from the first. . . . Professors are substituting other pedagogical forms: One – the lecture – transmits facts and principles, but not the essentials of legal education, which require teacher-student and student-student interaction. A second – the pro-forma dialog – is a disguised lecture, structured around a series of questions which the teacher asks and then answers himself. A third – the avuncular dialog – is one conducted by a kindly professor who, in his desire to be loved, avoids making any significant demands upon his students.”).

¹¹⁷ See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR and the Future of Dispute System Design*, 25 OHIO ST. J. ON DISP. RESOL. 247, 275 (2010) (“The current doctrinal courses are relatively inexpensive, as most such courses can be taught in a large lecture format. One professor can teach one hundred students or more at one time, using a combination of lecture and Socratic discussion. By contrast, skills and clinical courses are much more labor-intensive and require much smaller student-faculty ratios to provide closer interaction and observation.”); Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J. LAW & EDUC. 705, 708-09 (Oct. 2009); see also Edward Rubin, *What’s Wrong with Langdell’s Method and What to Do About It*, 60 VAND. L. REV. 609 (March 2007); see also Mengler, *supra* note 99, at 344 (noting a typical law professor today teaches only three or four courses per year).

¹¹⁸ See, e.g., Dennis R. Honabach, *Responding to “Educating Lawyers”: An Heretical Essay in Support of Abolishing Teaching Evaluations*, 39 U. TOLEDO L. REV. 311, 319 (Winter 2008) (“So strong has the culture of scholarship become in legal education that one can rarely attend a discussion on scholarship these days without hearing someone espouse the belief that scholarship is essential for good teaching.”).

that there is no significant correlation between professors' record of publishing and their teaching effectiveness.¹¹⁹ Although student evaluations should not be the sole measure of teaching effectiveness and further such studies are warranted,¹²⁰ the results of this study are consistent with anecdotal accounts of experienced legal educators.¹²¹

¹¹⁹ Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL L. STUDIES 619 (Sept. 2008) (discussing results of author's study of data from 20 public law schools, including schools from all four "tiers" in the *U.S. News & World Report* law school rankings, and concluding "there is either no correlation or a slight positive correlation between teaching evaluations and publication counts or citation counts"); *see also* Deborah Jones Merritt, *Research and Teaching on Law Faculties*, 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, 840 (1998) ("It is hard to escape the judgment that while, generally, praise of teaching is a nearly universal feature of tributes to law faculty, for the most highly cited scholars, it is often completely absent from their tributes, and this despite the fact that such scholars typically are accorded much longer tributes than is the norm. Good teaching, indeed teaching period, was not part of the story of many of their lives. . . . [I]n a reward system based, in law schools as in universities as a whole, on published scholarship credentials, emphasis on teaching inevitably perishes, and those who succeed admirably in the scholarship game may nonetheless have some kind of problem with the task of teaching law students.").

¹²⁰ *See* Peter A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281, 305 (1981) ("[W]e can safely say that student ratings are a valid index of instructional effectiveness. Students do a pretty good job of distinguishing among teachers on the basis of how much they have learned. Thus, the present study lends support to the use of ratings as one component in the evaluation of teaching effectiveness."); *see also* Caron & Gely, *supra* note 69, at 1528 & n.262 ("We note . . . that the [empirical] literature [about legal education] is surprisingly bereft of work assessing [law] teaching. . . . A serious inquiry into the teaching component of faculty performance could raise interesting questions about the relationship of teaching and scholarship as well as the value of individual faculty members to their institutions.").

¹²¹ *See, e.g.*, Rubin, *supra* note 74, at 154 ("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,

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

III.

CURRENT LAW FACULTIES' INABILITY TO ACHIEVE MEANINGFUL CURRICULAR AND PEDAGOGICAL REFORMS

"Remember, it's not really a teaching job[,] . . . it's a writing job."¹²²

examples abound of master or even legendary teachers who never carried out research, but devoted their considerable talents and energies to their classroom performance. Thus, while there is almost certainly a connection between knowledge and teaching ability, the connection between research and teaching ability is attenuated at best, and the great likelihood is that these two skills vary almost independently of one another."'). The nearly universal practice of recent law school graduates' taking commercial bar exam preparation courses also suggests that law schools are not providing students with even the basic substantive knowledge necessary to pass the bar exam. *See* Lauren Solberg, *Reforming the Legal Ethics Curriculum: A Comment on Edward Rubin's "What's Wrong with Langdell's Method and What to Do About It,"* 62 VAND. L. REV. 12, 22 (2009) ("Bar preparation courses exist, and are successful, because students do not expect law school to prepare them fully for the bar exam.").

¹²² Wendel, *supra* note 69.

“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 participates.”¹²³

Modern law faculties’ preoccupation with publishing impractical law review articles – and their pattern of hiring impractical scholars better suited to write such articles rather than to teach students the full array of skills, knowledge, and values that they will need to become competent, ethical practitioners – will frustrate the implementation of the recent curricular and pedagogical reforms discussed in Part I above. Law school administrations and faculties apparently believe that these reforms can be accomplished through the use of “practical” faculty, namely, clinicians, legal research and writing (“LRW”) professors, and adjunct faculty members. Much like traditional Indian society, the Brahmins (*i.e.*, the tenure-track faculty) wish to use the lower castes of the legal academy to do the “dirty work.”¹²⁴ Barring some significant changes in the low status and number of such relatively small segments of the faculty, however, it is highly unlikely they will be able to carry the water for the impractical scholars, who constitute the bulk of most law schools’ faculties today. Even those relatively few law schools that have made significant strides in reforming their curricula to include more practical courses will not be able to accomplish the reforms called for by the *Carnegie Report* and *Best Practices* if they continue to primarily hire impractical scholars.

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

Dean Chemerinsky has rightly proclaimed that “[t]here is no better way to prepare

¹²³ Chemerinsky, *Why Not Clinical Education?*, *supra* note 19, at 37.

¹²⁴ Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12, 14-16 (July 2001).

students to be lawyers than for them to participate in clinical education.”¹²⁵ Clinical education involves more than mere “skills” training; it “give[s] students systematic training in effective techniques for learning law from the experience of practicing law,” which is vastly superior to learning from reading appellate cases and then listening to a professor lecture or employing the case-dialogue method in a large classroom.¹²⁶ A 2009 survey of recent law graduates confirms that “those law school experiences that involve the use of and training in skills that practicing lawyers use in their work are experiences that new lawyers rate as most helpful for making the transition to practice.”¹²⁷

Since the 1970s, law schools grudgingly have realized that clinics are necessary to afford students with the experiential education that traditional tenure-track faculty members have failed to provide.¹²⁸ When “main” faculty members lack the experience and knowledge to teach students about law practice, clinical faculty members are assigned that task. Ironically, the creation of – and delegation of “practical” teaching to – clinicians have provided the impractical

¹²⁵ Chemerinsky, *Why Not Clinical Education?*, *supra* note 19, at 35.

¹²⁶ Amsterdam, *supra* note 17, at 612-13.

¹²⁷ Rebecca Sandefur & Jeffrey Selbin, 16 CLINICAL L. REV. 57, 87 (Fall 2009); *see also id.* at 85-86 (noting that 62% of new attorneys surveyed rated clinical courses as being “helpful” or “extremely helpful” as part of their preparation for becoming a practitioner, while only 48% rated upper-level doctrinal classes in that manner and only 37% rated first-year courses in that manner).

¹²⁸ Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy*, 59 J. LEGAL EDUC. 97, 98 (Summer 2008); *see also* Paul D. Reingold, *Harry Edwards’ Nostalgia*, 91 MICH. L. REV. 1998, 2003 (Aug. 1993) (“The coincidence of the timing of these two events – (1) the shift toward theory that has all but eliminated the hiring of new professors with substantial backgrounds or interests in practice (while the elders with those backgrounds or that interest vanish by attrition or nonreplacement); and (2) the ascension of clinics, and the consequent admission to the faculty of a small number of practicing lawyers – seems too great to ignore.”).

professors with “one more excuse to do what they wanted to do all along”: theoretical scholarship.¹²⁹

Both the relatively small numbers of clinical professors – 1,400 full-time clinicians out of over 10,000 full-time law professors,¹³⁰ a percentage smaller than the percentage of Ph.D.s being hired as tenure-track faculty members at the highly-ranked law schools during the past decade¹³¹ – and their second-class status in most law schools will prevent them from shouldering the burden that the main faculty seeks to delegate to them. Only 40 percent of full-time clinical law faculty members are either tenured or on a tenure-track (either a regular tenure-track or a special “clinical” species of tenure-track).¹³² The remainder either are hired under presumptively renewable contracts or are post-graduate “fellows.”¹³³ In a 2008 survey of clinical faculty members, only 30.7 percent reported having full voting rights in matters of faculty governance, while 33.4 percent reported having limited voting rights (but not on matters of hiring, promotion, and grants of tenure); the remainder reported having no voting rights.¹³⁴

¹²⁹ Reingold, *supra* note 128, at 2004.

¹³⁰ Kuehn & Joy, *supra* note 128, at 98 & n.5; *see also supra* note 2 and accompanying text.

¹³¹ My study of the full-time law faculty members hired since 2000 by the first ten schools in tier one of the *U.S. News & World Report* rankings, *see supra* notes 88-89 and accompanying text, revealed a total of 23 clinical professors versus a total of 44 regular tenure-track professors with Ph.D.’s.

¹³² Bryan Adamson *et al.*, AALS Section on Clinical Legal Education, Task Force on the Status of Clinicians in the Legal Academy, *Report and Recommendations of the Status of Clinical Faculty in the Legal Academy* 16-17 (Mar. 29, 2010).

¹³³ *See id.*

¹³⁴ David A. Santacrose *et al.*, Center for the Study of Applied Legal Education, *Report of*

Such a second-class status is permitted under the ABA's accreditation rules, which do not require tenure or equal voting rights for clinical faculty in matters of faculty governance and, instead, only require something "reasonably similar" to tenure as job security (which, according to the ABA, includes presumptively renewable contracts).¹³⁵ Even this second-class status has been considered too generous by some members of the traditional professoriate, including the American Law Deans Association.¹³⁶

In the words of a 2010 AALS task force on clinical faculty, despite some progress since the 1970s when clinics first began at most law schools, "equality between clinical and non-clinical faculty remains elusive."¹³⁷ "At many law schools there [still] is a rigid divide between the clinical faculty and the academic tenure track faculty,"¹³⁸ and there generally exists a "marginalization of both clinical courses and faculty teaching those courses in legal education."¹³⁹ Traditionally, and continuing at many law schools today, clinical programs are

the 2007-2008 Survey, at 31.

¹³⁵ See ABA Standard 405(c).

¹³⁶ *Calling in the Big Guns*, Inside Higher Ed (blog), Mar. 2, 2009 (available at <http://www.insidehighered.com/news/2009/03/02/lawprof>) (discussing opposition of American Law Deans Association to ABA accreditation Standard 405(c) requiring law schools to offer clinical faculty "a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members" even if such security only involves a "limited number of fixed, short-term appointments in a clinical program").

¹³⁷ Adamson *et al*, *supra* note 132, at v.

¹³⁸ Chemerinsky, *Why Not Clinical Education?*, *supra* note 19, at 40.

¹³⁹ Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 231 (Summer 2008); *see also* Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (April 2009) ("The theory/practice dichotomy in law

“relegated to law school basements”¹⁴⁰ – literally and figuratively.

The AALS task force on clinical faculty contended that “each status model other than [regular] tenure communicates to students that the role clinical faculty have . . . can never be as valuable as that provided by non-clinical faculty”¹⁴¹ – which sends a clear message to law students that their professional role models should not be clinicians and, instead, should be impractical scholars who dominate most law faculties.¹⁴² The task force’s report also advocated affording clinicians full voting rights regarding matters of faculty governance, which is particularly important in view of the recent proposals for reforms of law schools’ pedagogies and curricula that have recommended both the incorporation of the teaching of practical skills in doctrinal courses and more experiential courses – a current void that clinicians are best equipped to fill.¹⁴³

school teaching, scholarship, and mission relegates clinical-lawyer instruction to the periphery of legal education and consigns clinical faculty to a subordinate caste status differentiated by inferior compensation, limited governance, and segregated space.”); Schuwerk, *supra* note 81, at 767 (“[M]any law professors denigrate the value and talent of ‘legal research and writing,’ ‘lawyering skills,’ and ‘clinical’ professors, both at their own institutions and elsewhere.”); Chemerinsky, *Why Not Clinical Education?*, *supra* note 19, at 38-39 (“The emphasis on interdisciplinary study, which I applaud, means more law professors with a Ph.D. as well as a law degree, but with no practice experience. . . . An ever smaller number of law faculty are actively involved in briefing and arguing cases or handling transactions. This, I fear, translates into less of an appreciation for clinical education”); Watson, *supra* note 34, at 139 (“[C]linical teachers, even if they have tenure, are regarded by professors as separate from the main enterprise.”).

¹⁴⁰ Daphne Eviatar, *Clinical Anxiety*, LEGAL AFFAIRS (Nov./Dec. 2002) (available at http://www.legalaffairs.org/issues/November-December-2002/review_eviatar_novdec2002.msp).

¹⁴¹ Adamson *et al.*, *supra* note 132, at 33.

¹⁴² *See supra* notes 24-25 and accompanying text.

¹⁴³ Adamson *et al.*, *supra* note 132, at 25.

The second-class status of clinicians and clinical courses is further evident in the fact that most law schools do not make such courses an integral part of the curriculum. According to the 2008 survey of clinicians at seventy U.S. law schools, 50 percent of law schools reported that, in a given semester, less than 10 percent of their students were enrolled in a clinical course. In contrast, only three percent of law schools reported that more than 50 percent of their students were enrolled in a clinical course in a given semester.¹⁴⁴ Even more remarkable is the survey's finding that only *two percent* of law schools *required* students to enroll in at least one clinical course as a graduation requirement.¹⁴⁵ It is reliably estimated that only one-third of all law students today are receiving any structured clinical education and that only approximately half of all law students are receiving clinical education *or* some other type of experiential "live client" education (*e.g.*, interning for a public defender office).¹⁴⁶ The ABA so far has not required, for purposes of accreditation, mandatory student enrollment in at least one clinical course before a student graduates.¹⁴⁷ As Dean Chemerinsky has commented, "It is frightening to imagine medical schools training doctors who had never seen patients before their graduation. Yet,

¹⁴⁴ David A. Santacrose *et al.*, *supra* note 134, at 7.

¹⁴⁵ *Id.* at 10.

¹⁴⁶ Rebecca Sandefur & Jeffrey Selbin, *The Clinical Effect*, 15 CLINICAL L. REV. 57, 78 (Fall 2009) (based on various empirical studies and studies, estimating that "approximately one-third of contemporary law students are participating in clinics, and perhaps fifty percent or more are participating in some kind of live client (not simulated) experiential education").

¹⁴⁷ *See* Chemerinsky, *Why Not Clinical Education*, *supra* note 19, at 40-41 (recommending that the ABA standards make clinical enrollment a mandatory requirement for graduation).

although most law schools have clinics, only a minority of students participates.”¹⁴⁸

At most of the law schools where clinicians are awarded tenure and afforded equal voting rights in matters of faculty governance, clinical faculty are expected to “publish or perish,” just like the traditional academic faculty.¹⁴⁹ Some clinicians have attempted to meet this requirement by publishing practical legal scholarship, yet such “efforts have received a less enthusiastic, and often chilly, response from conventional colleagues.”¹⁵⁰

Even more so than clinical faculty, LRW professors have struggled to gain acceptance in the legal academy.¹⁵¹ Notwithstanding the important skills that they teach to law students and also the ABA’s *requirement* of substantial instruction in legal research and writing for a law school’s accreditation, the ABA accreditation standards provide for an even “less secure form of

¹⁴⁸ *Id.* at 37.

¹⁴⁹ Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 542 (December 2002) (“With some exceptions, senior faculty and administrators expect tenure-track clinicians and activists to publish according to traditional legal academic criteria, namely heavily footnoted law review articles in ‘respectable’ law journals. The more elite the journal, the more likely that nonclinical colleagues will be impressed. Many clinicians have accepted this reality and have demonstrated a wide range of success in meeting these long-standing promotion criteria.”).

¹⁵⁰ *Id.*

¹⁵¹ Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Professors at Hiring Time*, 46 U. LOUISVILLE L. REV. 383 (Spring 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.”); *see also* Watson, *supra* note 34, at 72 (“Although I have taught as a tenured law professor in the United States for more than 25 years, . . . I have had no social dealings with [LWR] instructors and know of no law professors – with one limited exception – who have had. I have never heard of their role discussed by faculty colleagues. . . . [But I have] the perception that students learned more about law from the [LWR] program than they did from all of their other first-year classes.”).

employment [for LRW faculty] than that afforded [to] clinical faculty.”¹⁵² Such LRW faculty also are typically paid much less than traditional faculty¹⁵³ and, in a vastly disproportionate manner, comprise female professors (particularly in relation to the percentage of female faculty members on the “main” faculty).¹⁵⁴

At the bottom of the order of law faculty are adjunct professors, who generally “are treated like nobodies by the regular law faculty.”¹⁵⁵ ABA accreditation standards restrict the number of courses adjunct professors may teach and also generally limit them to teaching elective courses – leaving the most important courses, the first-year mandatory classes, to be

¹⁵² Melissa H. Weresh, *Form and Substance: Standard for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE UNIV. L. REV. 281, 283 (discussing ABA Standard 405(d), which requires only the minimum level of job security for LRW faculty required to “attract and retain” such faculty and “safeguard academic freedom”) (Winter 2007); *see also id.* at 294 & n.64 (noting ABA’s requirement in Standard 302(a) that law students receive “substantial instruction” on “legal research” and “writing in legal context”).

¹⁵³ Ann C. McGinley, *Reproducing Gender on Law Faculties*, 2009 B.Y.U. L. REV. 99, 101 n.4 (2009) (noting results of survey by Association of Legal Writing Directors/Legal Writing Institute of LRW faculty; average salary of all respondents during 2007-08 academic year was \$66,302; also noting results of Society of American Law Teachers survey from same academic year, which showed average salary for assistant professors on the regular tenure-track was in the range of \$80,000-\$95,000).

¹⁵⁴ *Id.* (noting results of survey by Association of Legal Writing Directors/Legal Writing Institute of LRW faculty; showing that 75% of respondents were female during 2007-08 academic year).

¹⁵⁵ Wendel, *supra* note 69 (“adjuncts are treated like nobodies by the regular law faculty”); *see also* Hricik, *supra* note 26, at 418 (“A more fundamental issue is the apparent disdain some full-time academicians have toward adjuncts and the subjects they teach and the effect this has on the education process. Some have observed that tenured faculty do not associate much, if at all, with adjunct professors who ‘exist on the periphery of most law school operations’ and who are ‘ignored as part of the intellectual and social life of the school.’ I have felt this anti-adjunct attitude first hand and have heard it is prevalent in some of the best law schools.”).

taught by full-time faculty members.¹⁵⁶ Adjunct professors generally are paid a pittance – per course taught – compared to the salary of full-time faculty members (from a per-course standpoint).¹⁵⁷ Of course, unlike full-time faculty, adjuncts are not expected to publish and thus are not compensated for scholarly pursuits (or for other tasks performed by full-time faculty, such as serving on committees). Because full-time professors spend the overwhelming majority of their time in relation to either teaching or writing, the question arises whether the small amount paid per course to adjuncts reflects law schools’ low valuation of the adjuncts’ worth¹⁵⁸ or, instead, reflects the low valuation put on teaching generally (whether by an adjunct or a full-time professor) – or both.

Although “[t]here has been very little systematic study or collection of data on the effects

¹⁵⁶ David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L. REV. 815, 816-17 (July 2009) (“While law school accreditation rules of the American Bar Association (ABA) encourage including ‘practicing lawyers and judges as teaching resources to enrich the educational program,’ they also require that ‘full-time faculty shall teach the major portion of the law school’s curriculum, including substantially all of the first one-third of each student’s coursework.’”) (quoting ABA accreditation standards).

¹⁵⁷ See David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 U. DAYTON L. REV. 285, 289 (Winter/Spring 2008) (noting results of author’s survey of law schools: “[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.”).

¹⁵⁸ See Daniel Theis, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 619 (May 2010) (“[A] law school could hire twenty-five adjuncts [assuming they are paid \$5,000 per course taught] for every full professor earning a salary and benefits of \$125,000 per year.”)

of adjunct teaching in law schools,”¹⁵⁹ it is commonly said by students that adjunct professors on average are more effective law teachers than full-time tenure-track law faculty members.¹⁶⁰ Because usually they are active practitioners, adjuncts are “well-suited to help schools integrate the practical and theoretical aspects of legal education.”¹⁶¹ According to my student evaluations over the course of a decade at the University of Houston Law Center (during which I taught over two dozen courses), which provided not only my own numerical evaluations but also the average numeric evaluations for both all tenure-track and all adjunct faculty members for each semester, adjuncts as a group received higher ratings than full-time faculty as a group two-thirds of the time.¹⁶² Although, as noted above,¹⁶³ evaluations by students are only one measure of teaching effectiveness and the dataset mentioned here involved only a single law school, the results suggest that further research into the teaching effectiveness of part-time adjuncts compared to full-time professional legal educators – using data from a broad range of law schools – is warranted.

¹⁵⁹ Siegel, *supra* note 156, at 817.

¹⁶⁰ *See, e.g.*, Hricik, *supra* note 26, at 385 (“In my own experience, students – particularly those at more theoretically-oriented schools – crave teaching by those who actually know how to practice law.”).

¹⁶¹ Theis, *supra* note 158, at 619.

¹⁶² Copies of those evaluations are on file with the South Carolina Law Review. The University of Houston Law Center’s evaluation used a scale of 1 through 5, with 1 being the highest score and 5 being the lowest score. With respect to the question, “Overall, the instructor was . . .” – with options of “outstanding” (1) through “unsatisfactory” (5) – adjuncts received an average score of 1.7285 and tenure-track faculty received an average score of 1.8614 for the semesters in which I taught (from the 2000-01 academic year through the 2008-09 academic year).

¹⁶³ *See supra* note 120 and accompanying text.

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

Although it is possible to incorporate the teaching of some practical skills into doctrinal courses (particularly those with small student-teacher ratios),¹⁶⁴ effective teaching of real-world skills – and, as important, providing students “systematic training in effective techniques for learning law from the experience of practicing law” – requires experiential education.¹⁶⁵ Realizing the importance of experiential education, the *Carnegie Report* recommends that “[b]oth doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the other, complementary area.”¹⁶⁶ This recommendation begs the question of whether a typical non-clinical tenure-track law professor today could effectively teach both doctrinal and experiential courses.¹⁶⁷ The answer to that question, of course, depends on whether such a professor possesses the skill set to teach an experiential course. Because practical skills are an essential component of that skill set and further because such skills are honed by significant practical experience, it is highly unlikely that most tenure-

¹⁶⁴ See, e.g., Roger Dennis, *Building a New Law School: A Story from the Trenches*, 61 RUTGERS L. REV. 1079, 1084 (Summer 2009) (dean of Drexel University School of Law noting that, “[m]any 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”).

¹⁶⁵ Amsterdam, *supra* note 17, at 612-13.

¹⁶⁶ *Carnegie Report*, *supra* note 6, at 7.

¹⁶⁷ I am unaware of any study of the effectiveness of traditional law faculty members who teach “practical” courses, such as clinics. This is likely so because so few have taught such courses. The *Carnegie Report*’s recommendation also begs the converse question of whether clinical faculty could effectively teach doctrinal courses. Traditionally, few law schools have permitted their clinical faculty to do so on a regular basis. Yet the fact that law schools regularly have employed adjuncts to teach doctrinal courses suggests that clinicians could do so well as well.

track professors – particularly the new breed of interdisciplinary theoreticians – could effectively teach such a course.

This assertion is perhaps best supported by posing a series of questions about a typical tenure-track, non-clinical law professor hired during recent decades: Could such a professor whose primary scholarly interest is criminal law and procedure effectively prosecute or represent a criminal defendant at a felony trial? Could such a professor who writes law review articles about the First Amendment effectively represent a client in a civil rights litigation? Could such a professor whose expertise is securities regulation effectively represent a client or the government in an S.E.C. enforcement action? Imagine such professors being first-chair counsel in a complex civil or criminal litigation who must interview potential witnesses, take depositions and engage in electronic discovery, file and respond to summary judgment motions, conduct *voir dire*, present the testimony of an expert witness, cross-examine (and impeach) hostile witnesses, and make closing arguments to a jury.¹⁶⁸ There are some full-time non-clinical law professors capable of competently representing clients in real cases,¹⁶⁹ but they are the exception, not the rule, particularly among professors hired in recent years at highly-ranked law schools.

¹⁶⁸ The examples that I have given obviously all are litigation scenarios. I did so because the majority classes in law school are litigation-oriented and are taught using casebooks. Similar examples could be imagined in corporate, transactional, or administrative law contexts. My examples also only concern using practical skills and knowledge and do not implicate the *business* of law practice (*e.g.*, developing and maintaining clients) – something else few full-time law professors are competent to teach law students.

¹⁶⁹ Most professors who engage in real-world litigation appear to do so at the appellate level (*e.g.*, filing *amicus curiae* briefs). The skill set of a typical tenure-track professor is more suited for appellate advocacy (which involves more written advocacy than oral advocacy and also does not require factual development) than representation of a client at the trial court level.

How can we expect law students to become competent practitioners if the core of full-time law faculties, notwithstanding their scholarly prowess, do not themselves possess even the basic skills required to practice the type of law about which they teach and write? How can we expect law students to become competent and ethical practitioners when the faculty members best suited to teach them the necessary practical skills and ethical lessons from real-world cases – clinicians, LRW professors, and adjuncts – are marginalized and even openly held in disdain by some members of the “main” faculty? What message is being communicated to law students by their primary faculty role models?

IV.

PROPOSED CHANGES IN FACULTY COMPOSITION AND THE LAW REVIEWS

Because presently “law schools are run primarily for the benefit of law professors [and] not for the benefit of law students”¹⁷⁰ – enabling a privileged existence devoted to research and writing based on a professor’s chosen agenda with relatively minor teaching and other obligations compared to professors in other academic disciplines – major change from within the professoriate will be difficult to achieve.¹⁷¹ Nevertheless, some basic proposals for reform follow inexorably from the above recounting of the fundamental problems in the legal academy.

¹⁷⁰ Schuwerk, *supra* note 81, at 761.

¹⁷¹ See Rapoport, *supra* note 99, at 366 (contending that significant reforms in legal education will be difficult to achieve); *see also* Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training Lawyers*, 94 CORNELL L. REV. 479, 482 (January 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.”); Sturm & Guinier, *supra* note 100, at 519 (“[H]istory is littered with failed reform efforts of this type. . . . Law schools are extremely conservative institutions that are quite resistant to fundamental change.”).

The first proposal is for law schools to create two types of tenure-track professorships – “research” professors and “teaching” professors – with equal opportunities in the tenure-track system (although evaluated differently for tenure),¹⁷² equitable voting rights in faculty governance, and equivalent salaries.¹⁷³ Unlike the current system, which routinely assigns the bulk of teaching responsibilities to faculty members who have been hired to be impractical scholars, the proposed system would permit a certain segment of the faculty, at most one-third, to focus on what they do best: theoretical, interdisciplinary research and scholarship. Such research professors, only a small minority with both a Ph.D. and a law degree,¹⁷⁴ would carry lesser teaching loads than teaching professors and, in addition, only would teach courses in their areas

¹⁷² Because of their differing areas of expertise, each type of law professor would be chiefly responsible for evaluating its own type for hiring, promotion, and tenure. *See* Posner, *The Present Day Situation in Legal Scholarship*, *supra* note 65, at 1122 (“The difficulty that doctrinal analysts face in evaluating the work of social scientists comes not only from a lack of understanding of the theories and empirical tools of the social scientist but also from a difference in outlook or culture. . . . The doctrinal analyst and the social scientist differ in the emphasis they place on scholarship relative to teaching.”).

¹⁷³ *Cf.* Harry T. Edwards, *Another Post-Script to ‘The Growing Disjunction Between Legal Education and the Legal Profession*, 69 WASH. L. REV. 561, 571 (July 1994) (“[T]he entire legal academic community must work collectively to find a middle ground where a greater number of practical scholars flourish alongside their theory-oriented counterparts in an environment of mutual respect; both should contribute to an education for students that better prepares them for practice, and both should share the fundamental belief that scholarship that seeks to inform and guide practitioners, legislators, other policymakers, and judges is a valuable, indeed necessary, component of any law school’s mission.”)

¹⁷⁴ Although some research professors should appropriately have a Ph.D. (such as those who specialize in quantitative analysis or economics), too many Ph.D.’s on a law faculty (particularly those without a law degree) detracts from the mission of law school as a professional school. Furthermore, a J.S.D. degree, rather than a Ph.D., should be the norm for research professors. Professors with Ph.D.’s whose scholarly interest is law ordinarily should join political science or history departments and at most possess a joint appointment at their university’s law school.

of expertise (*e.g.*, statistics and econometrics for lawyers).¹⁷⁵ However, as I discuss immediately below in connection with my proposed reforms of law reviews, such scholarship would be subject to peer-review before being published and would be expected to have meaningful relevance to the legal system. Such research professors would not teach doctrinal courses (first-year or upper-level) such as contracts, criminal law, civil procedure, and evidence.

Conversely, teaching professors, who would constitute at least two-thirds of the faculty, would be expected to teach a disproportionately larger load of classes,¹⁷⁶ including all doctrinal, clinical, and LRW courses (except for those courses taught by adjunct faculty). The demarcation between clinical, LRW, and doctrinal courses and their corresponding faculty also would be erased.¹⁷⁷ A typical teaching professor would be able to competently teach any of the three types

¹⁷⁵ See Posner, *The Present Day Situation in Legal Scholarship*, *supra* note 65, at 1123 n.30 (“Because the demand by law students for instruction in the social sciences is limited, the law school may be quite willing to offer the social scientist a reduced teaching load. The social scientist also escapes the burden of supervising Ph.D. dissertations, though, as I have suggested, this involves a loss as well as a gain. If, however, the social scientist appointed to a law faculty comes to share the law professors’ preoccupation with teaching, his scholarly career may be seriously compromised.”); *see also* at 1128-30 (although Posner in 1981 encouraged “[t]he appointment of more economists, of philosophers, and perhaps of other nonlegal scholars such as anthropologists, sociologists, and statisticians, to full-time positions on law school faculties,” he also believed that “doctrinal” lawyers should remain the primary faculty; doing so would “enhance the research function of the law school without impairing its primary mission of professional training”).

¹⁷⁶ *Cf.* Thomas M. Mengler, *Maybe We Should Fly Instead: Three More Train Wrecks*, 6 U. ST. THOMAS L. REV. 337, 344-45 (Winter 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. . . .”).

¹⁷⁷ See Rubin, *supra* note 117, at 663, 665 (“[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

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

For all professors (including adjuncts), law schools would actively promote teaching excellence (including training teachers in the latest advances in the science of adult learning) and would make teaching competence an integral part of the assessment of a faculty member for promotion and tenure, particularly for teaching professors. Consistent with the recommendations of the *Carnegie Report* and *Best Practices*, the case-dialogue method would occupy a much smaller role in legal pedagogy,¹⁷⁸ and clinical and other experiential education – “active

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.”).

¹⁷⁸ See *Carnegie Report*, *supra* note 6, at 76; *Best Practices*, *supra* note 13, at 77-174.

learning”¹⁷⁹ – would assume a much larger portion of the educational experience of law students, somewhat like the medical school model.¹⁸⁰ Many members of the “main faculty” would thus actively work on real cases (whether in clinics or in *pro bono* cases), thereby providing students with an appropriate role model as a teacher-practitioner.¹⁸¹ Because the bulk of the faculty would be hired primarily to teach and secondarily to publish, class sizes would be smaller and feedback to and assessments of students¹⁸² would dramatically improve from the current situation.¹⁸³ Finally, adjunct faculty would assume a more significant status in the legal academy. Selective hiring of adjuncts and efforts to integrate them into the faculty – beginning with more pay and greater expectations from them (*i.e.*, that they would participate in the law school community

¹⁷⁹ Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999).

¹⁸⁰ See Waxman, *supra* note 42, at 1909-10 (“[T]he lack of balance [between practical and theoretical professors on law school faculties] has too often intensified the increasing separation of the academy from the rest of the legal world. That doesn’t have to be the case. Take medical schools, for example. Many, if not most, of members of medical school faculties also are practicing physicians. . . . There is certainly room for law schools to move in that direction.”); see also Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J. LAW & EDUC. 705, 708 (Oct. 2009).

¹⁸¹ See Cohen, *supra* note 80, at 643 (“[A]t a minimum, law professors should be encouraged, if not required, to stay connected to the world of practice. Law professors could spend a sabbatical in practice, engage in some outside work while teaching, or simply observe, study, or communicate regularly with those who are actively engaged in the practice of law. If seen as a form of class preparation or as an inspiration for scholarship, such time will be well-spent and should enrich both teaching and scholarship.”).

¹⁸² See *Best Practices*, *supra* note 13, at 3, 175-97.

¹⁸³ As Dean Chemerinsky has recognized, if law professors spent less time producing legal scholarship, “[m]ore time and attention could be paid to students and to instructional materials. . . . In fact, if law professors wrote much less, teaching loads could increase, faculties could decrease in size, and tuition could decrease substantially.” Chemerinsky, *Why Write?*, *supra* note 45, at 881.

more than simply showing up to teach a night class) – would become the norm. Highly regarded, experienced practitioners and judges would become typical adjuncts (as they currently are at many of the highly-ranked schools). From this group of adjuncts, the best would be recruited to become senior teaching professors subject to a shorter tenure-track than younger practical faculty.

The second proposed reform concerns law reviews. Just as I have proposed a bifurcated faculty with an emphasis on the practical component, I likewise propose a bifurcated system of law reviews along the same lines. The traditional species of law review, the student-edited journal, would publish student works and articles by the teaching professors – along with articles written by members of the bench and bar (who would be brought back into legal academy in greater numbers) – and would focus on practical topics, such as case law and statutory analysis. Case law analysis would shift its current focus (in the doctrinal articles) from decisions of the Supreme Court of the United States and tap the deep well of federal circuit courts and state appellate courts that to date has been largely ignored.¹⁸⁴ More attention also would be paid to the state and federal legislative process, which has been given inadequate treatment in the law reviews.¹⁸⁵ Students would continue to serve as law review editors, yet they would work much

¹⁸⁴ See Posner, *Against the Law Reviews*, *supra* note 65, at 58 (“[T]he profession, including the judiciary, would benefit from a reorientation of academic attention to lower-court decisions. Not that the Supreme Court isn’t the most important court in the United States. But the 80 or so decisions that it renders every year get disproportionate attention compared to the many thousands of decisions rendered by other appellate courts that are much less frequently written about, especially since justices of the Supreme Court are the judges who are least likely to be influenced by critical academic reflection on their work.”) ; *id.* (contending that too many student-written articles focus on “hot” topics such as constitutional law and neglect “equally important commercial subjects that cry out for doctrinal analysis”).

¹⁸⁵ See Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L. REV.

more closely under faculty supervision than currently is the case.¹⁸⁶

The other species of law review would be peer-reviewed and faculty-edited (by research professors) and would publish theoretical and interdisciplinary articles – although works with relevance to the legal system,¹⁸⁷ such as empirical studies of factual assumptions underlying laws and legal policies using rigorous econometric and statistical tools.¹⁸⁸ Because teaching would assume a larger role in a majority of faculty members’ daily existence, the amount of law review articles, and presumably the number of law reviews, likely would decrease over time from their current bloated number.

These proposals, if implemented, would fully comport with ABA accreditation standards, both the current ones and the proposed revisions discussed above.¹⁸⁹ In particular, law faculties

679, 679 (Summer 1999) (“Notwithstanding the importance of the legislative process to complete, sophisticated legal analysis, the legal academy focuses very little of its attention on Congress and the state legislatures.”).

¹⁸⁶ Posner, *Against the Law Reviews*, *supra* note 65, at 58 (“Ideally, one would like to see the law schools ‘take back’ their law reviews, assigning editorial responsibilities to members of the faculty. Students would still work and write for the reviews, but they would do so under faculty supervision.”).

¹⁸⁷ Richard Posner, *Legal Scholarship Today*, *supra* note 52, at 1317 (“I also argue that [interdisciplinary legal scholarship’s] future . . . depends on the ability of the [authors] of this scholarship to influence practice, rather than merely to circulate their ideas within the sealed network of a purely academic discourse.”); *id.* at 1326 (“My conclusion is that interdisciplinary legal scholarship is problematic unless subjected to the test of relevance, of practical impact.”).

¹⁸⁸ *See* Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473 (Fall 2009); Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on a Market for “Empirical Legal Studies,”* 71 J. L. & CONTEMP. PROBLEMS 17 (Spring 2008); *see also* Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311 (Sept. 2003); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875 (2002).

¹⁸⁹ *See supra* notes 29 & 30.

would be required to: (1) effectively teach substantive law, practical skills, professional values, as well as relevant topics in the social sciences (such as economics, statistics, accounting and finance, and psychology);¹⁹⁰ and (2) produce a reasonable amount of legal scholarship that benefits not only the professor writing it but the legal profession as well.¹⁹¹ If implemented, these reforms would not turn law schools into lowly “trade schools” and would not result in an “anti-intellectual” triumph, as some law professors have claimed.¹⁹² Rather, they would become

¹⁹⁰ See ABA Standard 302; see also Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. CIV. RTS. & CIV. LIB. 595, 597-98 (Summer 2008) (“The most important change in legal education since I was a law student thirty years ago is the recognition that law is inherently interdisciplinary and must be shaped by understanding fields such as economics, philosophy, and psychology. Law schools still do too little to bring these disciplines into their classes in a systematic way.”); Mara Merlino *et al.*, *Science in the Law School Curriculum: A Snapshot of the Legal Education Landscape*, 58 J. LEGAL EDUC. 190 (June 2008) (contending that the Supreme Court’s expert witness jurisprudence, *see, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), has made the teaching of the hard and soft sciences more relevant in law schools); Elena Kagan, *A Curriculum Without Borders*, HARV. L. BULLETIN (Winter 2008) (“[E]ffective legal education] requires a combination of analytical skills, hands-on experience and interdisciplinary tools, as well as an understanding of the full range of legal institutions and sources of law, both domestic and international. . . . Integral to this approach are greatly expanded opportunities for clinical and interdisciplinary work in the second and third years. Students benefit from seeing how legal problems look – and how they can be solved – in real-world settings. So, too, do they learn from seeing how law connects to a range of other subject matters, including business and economics, government and politics, and technology and medicine.”).

¹⁹¹ ABA Standard 402; see also Stephen R. Smith, *Gresham’s Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 207 (2008) (“The argument for an ABA . . . research requirement [for accreditation] rests on several assumptions. First, the assumption is made that research will serve the public interest by being the source of ‘pure’ research in law. The second assumption is that it is appropriate for entrants to the legal profession to bear the burden of that expense in the cost of their legal education. Third, the assumption is that the benefit to the public is less than the increase in costs to students. The argument against an ABA research requirement is that one or more of these assumptions fails. If, for example, law school research efforts serve the public interest only very marginally at great cost to students, then there would not be a good argument for licensing-related accreditation requiring research.”).

¹⁹² See, e.g., Leonard J. Long, *Resisting Anti-Intellectualism and Promoting Legal*

bona fide professional schools that would regain the respect of the legal profession.¹⁹³

Although my proposals are compatible with current ABA accreditation standards, they stand no realistic chance of succeeding under the current standards. As noted, the current ABA standards permit law schools to relegate clinical and LRW faculty to a separate and unusual status.¹⁹⁴ That second-class status would need to be abolished before such practical faculty would be able to become equal players in law faculties. Although the accreditation standards recently were improved to require the teaching of practical skills in addition to substantive law, they still have not gone far enough to *require* clinical and other experiential courses.¹⁹⁵ Until such changes in the accreditation standards force law schools to retool their curricula and graduation requirements so as to mandate a substantial number of such experiential courses for all students, law schools will continue primarily hire impractical scholars whose mission is to produce impractical scholarship.

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

Literacy, 34 S. ILL. U. L. J. 1, 5 (Fall 2009) (“For the anti-intellectual traditionalists in legal education, the dominant purpose of law schools, and the nearly exclusive aim of legal education, is training law students to become practicing lawyers. This purpose falls within the realm of anti-intellectualism because it demonstrates hostility towards intellectual pursuits in legal education when such pursuits are not directly, and obviously, relevant and transferable to the task of lawyering. It is hostile to merely forego the encouragement of intellectual pursuits and intellectual cultures because these are not deemed relevant to law practice.”).

¹⁹³ Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. REV. 1421, 1423 (June 2006) (“Law schools are professional schools, not graduate schools. We grant JD’s, not Ph.D.’s.”).

¹⁹⁴ See *supra* note 135 and accompanying text.

¹⁹⁵ See *supra* note 152 and accompanying text.

Carnegie Report. “The calling of legal educators is a high one: to prepare future professionals with enough understanding, skill, and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens’ loyalty; that is, to uphold the vital virtues of freedom with equity and extend those values into situations yet unknown but continuous with the best aspirations of our past.”¹⁹⁶

We also owe it to law students. The enormous amount of tuition paid by law students per year has dramatically outpaced inflation in recent years¹⁹⁷ and has resulted in huge average educational debts by law graduates.¹⁹⁸ As a result of the recent global economic downturn, there has “been a very substantial decrease in employment of lawyers,” and law firms (and their clients) have responded by demanding greater skills from entry-level attorneys.¹⁹⁹ Furthermore, because fewer firms are hiring new attorneys than in the past – at the very same time that law schools are producing more graduates than ever – many neophyte attorneys will be forced to hang out their shingles and attempt to make it as solo practitioners. For their own financial well-being

¹⁹⁶ *Carnegie Report*, *supra* note 6, at 202.

¹⁹⁷ Dolin, *supra* note 18, at 230-31 (“From 1985 to 2005, public law schools’ annual tuition and fees have increased from a median of \$1792 to a median of \$13,107, while private law schools’ annual tuition and fees have increased from a median of \$7385 to a median of \$30,670. According to the ABA: ‘Since the early 1970’s, there has been a steep and persistent rise in the costs of legal education and in the tuition law schools charge students. From 1992 to 2002, the cost of living in the United States has risen 28%, while the cost of tuition for public law schools has risen 134% for residents and 100% for non-residents, while private law school tuition has increased 76%.’”)

¹⁹⁸ Indiana University Center for Postsecondary Research, 2009 *Law School Survey of Student Engagement* (available at www.Issse.iub.edu) (noting that, in 2009, 29% of law students will graduate with law school student loans in excess of \$120,000; another 40% will graduate with loans between \$60,000 and \$120,000).

¹⁹⁹ Bennett, *supra* note 11, at ____.

as well as for the good of the public, such attorneys obviously need to be proficient in practical skills.

A significant amount of the tuition paid by law students currently serves as a cross-subsidy that allows professors to spend most of their time researching and writing impractical law review articles rather than effectively teaching students the knowledge, skills, and professional values they will need to be competent (and employable) lawyers.²⁰⁰ This state of affairs is unacceptable. A healthy balance must be reached between law schools' dual roles as learning institutions and producers of legal scholarship. The latter's current dominance – which has spawned a generation of mostly impractical law faculties – must cease before the pedagogical

²⁰⁰ Smith, *supra* note 191, 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.”); *see also id.* at 206 (“The tuition that is used to cover legal research is, for most students, the equivalent of an involuntary fee that they must pay in order to obtain a law degree and law instruction. It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are generally borrowing the money to do this and they are the least able of all those in the profession to pay for it.”); Rubin, *supra* note 74, at 144 (“Most law schools, including public law schools these days, are supported primarily by student tuition.”); *see also id.* 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 bete noir of economists, the cross-subsidy, seems to be operating in force – students are paying for something that does not benefit them, and they are being compelled to do so by means of an intra-institutional transfer that they cannot control.”); *id.* at 141 (“There can be equally little doubt that a significant proportion of these ever-increasing tuition payments support faculty research.”). More so than other parts of the university system, law schools generally are revenue generators. Nicholas S. Zeppos, *2007 Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325, 325 (March 2007) (“[T]he fact that law schools are largely tuition-supported means that they do not need to receive funding from central university sources. In fact, they can be regarded as a source of funds for other university programs – . . . they are cash cows.”). Dean Chemerinsky has recognized that “tuition could decrease substantially” if law faculties reallocated resources from scholarship to teaching. Chemerinsky, *Why Write?*, *supra* note 110, at 881.

and curricular reforms such as those proposed in the *Carnegie Report* can be realized. The professoriate must practice before it preaches.

The changes that I propose will not likely occur without support from several stakeholders in the legal profession and legal academy who have the power to influence law school deans and faculties (as well as the ABA's accreditation authority).²⁰¹ Judges (particularly those who hire law clerks), law firms and other employers of law school graduates, and law students all must demand change. Judges and law firms should make it clear to law schools that students need to graduate with better practical skills – which means that law school faculties need to stop hiring a disproportionate number of impractical scholars and refocus their efforts on practical courses and teaching excellence. In hiring law clerks and entry-level lawyers, judges and firms should stop reflexively looking to highly-ranked law schools and, instead, make hiring decisions based on whether law schools have prepared students to be competent practitioners. Law students also need to demand changes in the composition of law faculties. They should insist that their tuition dollars be substantially reallocated from subsidizing impractical scholarship to the creation of more practical courses and the hiring of more practical professors with skill sets better suited than current tenure-track faculties' to prepare students to practice law in a proficient and ethical manner. Prospective students should eschew law schools that fail to take seriously the paramount educational mission of preparing students to be competent practitioners.

²⁰¹ As another critic of modern legal education astutely has observed, “It should come as no surprise that the ABA committees that set law school standards are dominated by those who have succeeded and are comfortable in the current system: law school deans and professors.” Dolin, *supra* note 18, at 235-36.

As a final note, I realize that all of what I have proposed here is much easier said than done, particularly when it seems that all of the stakeholders are buying into the *U.S. News & World Report* rankings (which empowers the most impractical law schools). I also recognize that, even if law schools were amenable to such change, it would take many years to implement my proposals because turn-over in law faculties (most of whom possess tenure)²⁰² usually occurs through the slow process of attrition. Yet, as is true with respect to any fundamental reform, change begins with articulating the problems that exist and proposing specific reforms to remedy those problems.

²⁰² Unlike some other critics of legal education, *see, e.g.*, Louis B. Schwartz, *With Gun and Camera Through Darkest CLS Land*, 36 STAN. L. REV. 413, 413 (1984) (discussing Duncan Kennedy's proposal), I do not propose that tenure in law schools be abolished. *See also* Paul Boudreaux, *Emma's Legal Education: 2025*, 59 J. LEGAL EDUC. 454 (Feb. 2010) (posing the question of whether tenure for law professors may be abolished in the future based on current economic and technological trends). Tenure "is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society." American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments* (available <http://www.aup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf>) (last visited June 21, 2010). That said, I do agree that some type of limited post-tenure review would be appropriate. *See* Robbins, *supra* note 110, at 388 (suggesting serious consideration of post-tenure review as a means to prevent post-tenure decline in faculty productivity).