Catholic University Law Review

Volume 64
Issue 2 *Winter 2015*

Article 7

4-21-2015

The Legal Academy Under Erasure

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Cover Page Footnote

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THE LEGAL ACADEMY UNDER ERASURE

Richard E. Redding[+]

I. TENURED LAW PROFESSORS: THE PRIVILEGED CLASS ENJOYING ITS PRIVILEGES....364
II. ACADEMY OR TRADE SCHOOL: EDUCATING OR JUST TRAINING LAWYERS?....370
III. NO PLACE FOR NOSTALGIA IN LEGAL EDUCATION....377
A. An (Un)Realistic Turn for Legal Education....379
B. Teaching Knowledge and Skills Together....388
IV. THE MEDICAL SCHOOL MODEL: THE RIGHT PRESCRIPTION FOR LEGAL EDUCATION?....393
V. MARGINALIZING SCHOLARSHIP....399
A. Engaged Scholars Are Better Teachers....401
B. Legal Scholarship Contributes to the Public Good....403
VI. TOO MANY LAW SCHOOLS, TOO MANY LAWYERS....411
VII. CONCLUSION....416

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We hear much about the "crisis" in legal education:[1] high tuition costs, steep declines in law school enrollment,[2] and graduates who are unprepared for practice and unable to find jobs. Although the legal profession experienced the

1. JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 1 (2013) (arguing that the legal profession faces a crisis "every decade or so"); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS x (2012). *See* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 222 (2012) ("The status quo in American legal education has become unsustainable."); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 462 (2013) (indicating that the structural shift in the legal profession requires a transformative reassessment of the traditional law school curriculum); Kyle P. McEntee et al., *The Crisis in Legal Education: Dabbling in Disaster Planning*, 46 U. MICH. J.L. REFORM 225, 226–27 (2012) (discussing the huge nationwide drop in applications to law schools, the inability of graduates to get jobs, lawsuits against law schools for fraudulent advertising and student recruitment practices, and stories in leading newspapers and media outlets questioning the value of a legal education); Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10 (discussing the poor employment prospects of law school graduates and the serious need for pragmatic changes in legal education); Katherine Mangan, *Educators Make the Case for Going to Law School*, CHRON. HIGHER EDUC. (Jan. 3, 2014), http://chronicle.com/article/Educators-Make-the-Case-for/143791 (reporting discussions on the crisis at the 2014 meeting of the Association of American Law Schools, where it was "acknowledged that times were tough" for law schools, with total enrollment at its lowest level since 1975, when there were thirty-nine fewer ABA accredited law schools than today).

2. Between 2010 and 2013, law school applications saw a thirty-eight percent decline with numbers down to pre-1983 levels. Karen Sloan, *Avoiding Law School in Droves: The Number of Applicants Has Slumped by 20 Percent*, NAT'L L.J., Jan. 28, 2013, at 1. In 2014, only twenty-one of the 201 ABA-accredited schools placed seventy-five percent or more of their graduates in jobs requiring a law degree. *See* Inst. for the Advancement of the Am. Legal Sys., *Law Jobs: By the Numbers*, EDUCATING TOMORROW'S LAW., http://educatingtomorrowslawyers.du.edu/law-jobs/calculator (last visited Mar. 7, 2015) (providing data on each school's placement statistics). Between 1985 and 2011, the median tuition increased from $3,746 to $19,788 at public schools and from $15,438 to $39,496 at private schools. *See* Campos, *supra* note 1, at 180–81 (citing ABA data). The average law school debt of 2012 graduates exceeded $140,000 at twenty law schools, though at many of these schools, less than half of the graduating class secured jobs requiring a J.D. degree. *See* Brian Tamanaha, *The Law Graduate Debt Disaster Goes Critical*, BALKINIZATION (Mar. 12, 2013, 10:30 PM), http://balkin.blogspot.com/2013/03/the-law-graduate-debt-disaster-goes.html [hereinafter Tamanaha, *Disaster*]. The average amount borrowed by law graduates is now $124,950, up seventy-eight percent from 2002, while the average starting salary has fallen to $78,653, down sixteen percent from 2009. *See id.* Yet, even with these new economic realities, law school may still be a good investment for many. *See* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 1, 1, 65 tbl.10 (HLS Program on the Legal Profession Research, Paper No. 2013-6, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585 (reporting results of an economic study finding that "given current tuition levels, the median and even 25th percentile annual earnings premiums justify enrollment. . . . We estimate the mean pre-tax lifetime value of a law degree [is] approximately [one million dollars].").

prequel to this problem during the 1990s,[3] the current predicament is more severe and symptomatic of a restructuring in the legal services market.[4]

Many blame law professors for the crisis. Professor Brian Tamanaha, author of *Failing Law Schools*,[5] asserts that tenured law professors, who seek to serve their professional and economic interests at the expense of their students' best interest, have captured law schools and the American Bar Association's (ABA) accrediting process.[6] Such critiques of legal education created a firestorm,[7] though not only in the legal academy. Multiple articles published in

3. *See, e.g.*, Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 709 (1996) (noting that many critics complain that law schools fail to teach the skills students will need in law practice).

4. *See* TAMANAHA, *supra* note 1, at 168–71; Campos, *supra* note 1, at 213; Henderson, *supra* note 1, at 462, 479–89. *But see* D. Benjamin Barros, *Reconsidering the Conventional Wisdom on the Legal Job Market*, 1–2 (Widener Law Sch. Legal Studies Research Paper Series, Paper No. 13-60, 2013), *available at* http://ssrn.com/abstract=2258806 (arguing that the current downturn may not be so different from the downturn in the 1990s).

5. *The National Jurist* magazine recently named Professor Tamanaha one of the twenty-four most influential legal educators. Many say that his reform proposals, which much of the public appears to endorse, will "have an enormous impact . . . on legal education." TAMANAHA, *supra* note 1, at back cover (quoting Professor William Henderson, Indiana Univ. Law School). *See also Symposium, Can Law Schools Prepare Students to be Practice Ready?*, 17 CHAPMAN L. REV. 153, 164 (2013) [herineafter CHAPMAN L. REV. SYMP.] (noting that Professor R. Michael Cassidy believes that *Failing Law Schools* has "been instrumental in encouraging a lot of the debates we've been having right now" about legal education).

6. TAMANAHA, *supra* note 1, at 44–45.

7. For example, Professor Paul Campos created a blog titled *Inside the Law School Scam*; the inaugural post stated that he could "no longer ignore that, for a very large proportion of my students, law school has become something very much like a scam. . . . [A]t the level of actual moral responsibility, [it] is that *law professors are scamming their students*." Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663, 672–73 (2012). In response, Professor Brian Leiter argued that Professor Campos

> is the failed academic who has done almost no scholarly work in the last decade, teaches the same courses and seminars year in and year out, and spends his time trying to attract public attention . . . . [H]e is indeed scamming his students and his state, and his initial posts were tantamount to a confession that he's not doing his job.

Id. at 673–74. *See also* Anders Walker, *Tamanaha's Response*, FACULTY FLOW: A BLOG FOR ASSOCIATE DEANS (Aug. 20, 2012), http://www.slu.edu/colleges/law/slulaw/faculty.flow (posting that "Tamanaha has written an incendiary book that WILL be read by university presidents, trustees, and others eager to cut costs, strip faculty resources, and stick it to law professors").

the *New York Times*,[8] *Wall Street Journal*,[9] *Los Angeles Times*,[10] *National Law Journal*,[11] and *Forbes*[12] generated vigorous public debate about the value and efficacy of legal education, which in turn spurred the establishment of the *Law School Transparency Project*.[13] Even President Barack Obama weighed in on the crisis.[14] The ABA, in response to the "intense and unprecedented criticism in national media, blogs, Congress, the courts, and elsewhere" directed at law schools,[15] formed an emergency task force to address the problem.[16] As Professor James E. Moliterno observes, "for all the reasons why it's a bad time for legal education, it's a great time to be a legal education reformer."[17]

The brief against law professors stems from their demands for increased faculty sizes and salaries, and their focus on scholarly work, which critics claim is mostly irrelevant to practitioners and students and only diverts professors from their teaching responsibilities.[18] Law faculties instituted allegedly self-serving

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8. Caplan, *supra* note 1.

9. Ashby Jones & Jennifer Smith, *In Rare Step, Law Schools Shrink Faculty*, WALL ST. J., July 16, 2013, at B1; Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012, 10:18 AM), http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html; *Kaplan Bar Review Survey: 63% of Law School Graduates from the Class of 2013 Believe That Law School Education Can Be Condensed to Two Years*, BUSINESS WIRE (Sept. 10, 2013, 8:35 AM), http://www.businesswire.com/news/home/20130910005628/en/Kaplan-Bar-Review-Survey-63-Law-School#.VPs8OsYd18c [hereinafter *Kaplan Bar Review Survey*].

10. Jason Song, *Faced with Job Complaints, Loyola Law School Accepting Fewer Students*, L.A. TIMES, Aug. 19, 2013, at A1, *available at* http://articles.latimes.com/2013/aug/19/local/la-me-loyola-law-20130819.

11. Sloan, *supra* note 2.

12. J. Maureen Henderson, *Why Attending Law School Is the Worst Career Decision You'll Ever Make*, FORBES, June 26, 2012, http://www.forbes.com/sites/jmaureenhenderson/2012/06/26/why-attending-law-school-is-the-worst-career-decision-youll-ever-make/.

13. *See LST Details*, L. SCH. TRANSPARENCY, http://www.lawschooltransparency.com/blog/about (last visited Mar. 7, 2015) ("Law School Transparency is a nonprofit legal education policy organization dedicated to improving consumer information and to reforming the traditional law school model."). *See also* TASK FORCE ON THE FUTURE OF LEGAL EDUC. 16 (Am. Bar Assoc., Working Paper Aug. 1, 2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf [hereinafter ABA TASK FORCE RPT.] (stating that the ABA now requires greater transparency from law schools).

14. Peter Lattman, *Obama Says Law School Should Be 2, Not 3, Years*, N.Y. TIMES, Aug. 24, 2013, at B3 (quoting President Barack Obama's remarks at a town-hall meeting held at Binghamton University).

15. *See* ABA TASK FORCE RPT., *supra* note 13, at 6–7.

16. *Id.* at 1.

17. CHAPMAN L. REV. SYMP., *supra* note 5, at 158.

18. TAMANAHA, *supra* note 1, at 42, 54–55 (noting that decreased teaching loads and increased focus on scholarship, which in turn increases tuition costs, may reduce law professors' commitment to teaching practice-relevant skills to their students); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV.

practices, such as hiring scholars instead of professionals who can provide practical lawyering skills training to students.[19]

Proposals to address the crisis appear to enjoy wide support,[20] and, as seen in the recommendations of the ABA's Task Force on the Future of Legal Education,[21] may be poised to change dramatically the landscape of legal education. Yet, such reforms will harm law students and the legal profession, placing the legal academy "under erasure,"[22] as Jacques Derrida would say, by: (1) reorienting legal education from an academically-grounded education toward vocational training; (2) eliminating one year from the traditional three-year program for the J.D. degree; (3) allowing graduates of non-ABA accredited law schools to sit for the bar examination, rendering accreditation a toothless mechanism for ensuring academic quality; and (4) gutting law faculty scholarship.

The truth is that legal education is broken because it fails to prepare students for the demands of modern law practice, an industry more complex and interdisciplinary than ever before. A two-year law degree focusing on practice skills, as many are now proposing, takes us back nearly a century in time when law schools were little more than vocational schools.[23] Eliminating a full year of legal education will not better equip law students to be practicing lawyers, especially considering that today's three-year program of legal education produces graduates insufficiently prepared to practice law. Rather, to make the value of legal education worth its cost, the industry must rethink the purpose of law schools.

I write from the vantage point of someone who has been a law student and graduate student, a law and psychology professor at four different universities, and a law school associate dean and current senior university administrator. This

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105, 107–08 (2010). *See also* ABA TASK FORCE RPT., *supra* note 13, at 6–16 (summarizing current criticisms of legal education and noting that the faculty culture at law schools creates expectations of job security and a focus on scholarship that may be adverse to the market interests of law schools).

19. *See* TAMANAHA, *supra* note 1, at 55–61; Newton, *supra* note 18, at 140–56.

20. *See, e.g.*, *Law Grads Give Schools High Marks, But Want Change*, NAT'L JURIST (Sept. 17, 2013), http://www.nationaljurist.com/content/law-grads-give-schools-high-marks-want-change (reporting results of a survey of graduates of the class of 2013: eighty-seven percent thought that legal education needed substantial reforms to better prepare students for practice, and sixty-three percent thought that law school could be shortened to two years).

21. *See* ABA TASK FORCE RPT., *supra* note 13, at 28–32 (providing possible recommendations for legal education reform).

22. *See* Gayatri Chakraorty Spivak, *Preface* to JACQUES DERRIDA, OF GRAMMATOLOGY xiv (Gayatri Chakraorty Spivak trans., Johns Hopkins Univ. Press, 1st Am. ed. 1976) (1974) (explaining the deconstructive technique of placing a written term "under erasure"—crossing out a word or phrase yet allowing it to remain in the text, denoting that the phrase does not adequately signify the concept it represents).

23. *See* David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 67 (1999) (stating that "for more than a century law schools have battled to keep their distance from vocational schools and maintain their rightful place in the university").

Article draws upon this experience to fashion a proposal for reforming legal education, based on a comparative evaluation of the current model of legal education with the models for medical and graduate education.

Part I of this Article addresses the contention that tenured law professors have become too powerful in shaping legal education. Part II identifies a long-standing debate as to whether legal education should focus more on academic work or on practical skills training. Part III argues that legal education must not be reshaped into a less academic two-year program of vocational study. Instead, the three-year program should be fashioned into a much more robust curriculum that teaches applications of other disciplines (e.g., accounting, economics, psychology) to law in addition to the traditional core subjects. Such an integrated, interdisciplinary curriculum would expose law students to a reasonable range of specialty areas and integrate practical skills training (e.g., client counseling, advocacy, legal drafting) throughout the curriculum. Part IV considers adapting the medical school model to legal education in accomplishing the goal of producing better-rounded and practice-ready lawyers. Such a curriculum would provide a comprehensive foundation in basic legal subjects interlaced with other legally relevant disciplines and would culminate in a series of clinical rotations where basic doctrinal and interdisciplinary knowledge are applied in practice. Part V argues against the claim that if law schools decreased their support for faculty scholarship it would reduce costs and incentivize law professors to be better teachers of practical skills. Contrary to popular claims, engaged scholars are better teachers, and legal scholarship contributes meaningfully and substantially (though often in ways not readily apparent) to law practice and law reform efforts. Finally, Part VI addresses the employment problem facing many law students upon graduation, suggesting that we need fewer, but better law schools.

I. TENURED LAW PROFESSORS: THE PRIVILEGED CLASS ENJOYING ITS PRIVILEGES

In *The Philadelphia Story*, the protagonist reflecting on high society during the Great Depression proclaims, "the prettiest sight in this fine pretty world is the privileged class enjoying its privileges."[24] Are law professors the "privileged class enjoying its privileges," while students cover the cost of their salaries by footing soaring tuition bills?[25] Do law students view their professors as "parasitic leeches who have amazingly cushy jobs, who hypocritically pontificated about practicing law while having no real or current experience, who cannot get the students jobs, and who do not work more than a couple hours

24. THE PHILADELPHIA STORY (Metro-Goldwyn-Mayer 1940).

25. *See* Barnhizer, *supra* note 7, at 676 (noting the incredible "degree of bitterness and loathing held against [law professors] and [the] profession by this emerging culture of disenfranchised law graduates and impoverished students").

a day"?[26] The high price law school graduates pay for their legal education coupled with poor job prospects, only exacerbate this vexed sentiment. High faculty salaries, a major expenditure of law schools, are believed to be a key cause of high tuition costs,[27] as well as the desire for higher *U.S. News* rankings, which produces an ever-increasing emphasis on legal scholarship to bolster the school's academic reputation among its peers.[28] As a result, professors reduce their teaching loads and devote more time to scholarly production, forcing law schools to compensate by increasing the number of professors.[29] Law schools also compete for the "star" professors, who demand even higher compensation and lighter teaching loads.[30]

Many reformers propose that law schools shrink the size of the full-time faculty, increase teaching loads, and rely more on adjunct and part-time faculty.[31] But faulty assumptions underlie such proposals, which will harm the overall quality of students' legal education.[32] It is not the case, for example, that law professors devote less time to teaching than their university counterparts, as

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26. *Id.* at 687. In addition:

> [T]he matriculating law student [is portrayed as being] tricked into going to law school by a coterie of greedy deans and financial-cocaine dealing lenders; preyed upon by an uncaring, hypocritical, lazy, and disconnected faculty; and then when they have been bled dry, they are thrown out into the world to face a lifetime of debt slavery, hopelessness, and despair.

Id. at 667; *see id.* at 681 (describing posts to the various "law school scam" blog sites, including one site that was visited over 400,000 times).

27. *See In re* Culver, slip op. at 11–12 (Mont. filed Feb. 7, 2002) (Trieweiler, J., dissenting) (noting that some non-ABA accredited law schools, such as the Massachusetts School of Law, are able to offer lower tuition rates by having a small full-time faculty and many adjunct professors teaching in their specialty area, and "by focusing on its faculties' classroom ability rather than providing extensive time off for research on which the ABA places extensive emphasis but which most often contributes nothing to the improvement of society or our profession"); TAMANAHA, *supra* note 1, at 52 (stating that lighter professor course loads requires schools to hire more professors); *see also* Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 79–80 (2012) (arguing that "[l]aw school tuition is too high and is wrongly allocated primarily to benefit law professors at the expense of law students. . . . [T]he typical tenured professor receives a handsome salary in return for contributing relatively little to students' legal educations"); Jennifer Smith, *Law-School Professors Face Less Job Security*, WALL ST. J. (Aug. 11, 2013, 7:18 PM), http://online.wsj.com/article/SB10001424127887323446404579006793207527958.html (quoting Kent Syverud, Dean of Washington University School of Law, arguing that "[l]aw professors and law deans are paid too much. . . . The whole problem of [tuition] costs probably would go away if our salaries were halved.").

28. TAMANAHA, *supra* note 1, at 62.

29. *Id.* at 126.

30. *Id.*

31. *See id.* at 40–45; Campos, *supra* note 1, at 216–17; Mangan, *supra* note 1, at 3 (reporting that some law schools have been reducing faculty size by offering early retirement packages and not filling vacancies); Newton, *supra* note 27, at 125.

32. *See infra* Part V.A.

some critics suggest.[33] Unlike professors in graduate schools, law professors generally do not have graduate teaching assistants who do much of the exam grading, meeting with students, and class lecturing.[34] As compared to professors in other fields, students and administrators expect more from law professors vis-à-vis teaching because they teach in a professional school.[35] As Professor Wallace Loh observed, "[m]ost social scientists, in contrast, view teaching as ancillary to their research commitment. If they were as preoccupied about teaching as their law school colleagues, their scholarly productivity would be compromised."[36]

Some critics also blame faculty governance, which vests the faculty with most of the decision-making authority for faculty hiring and curricular decisions, for the problems in legal education.[37] Professor Tamanaha sees faculty governance and the ABA (the law professors' "trade union") as vehicles the "privileged class" use to protect its privileges: high salaries, low teaching loads, special preferences for tenure-track faculty, and a focus on legal scholarship and pet legal theories rather than teaching students practical skills.[38] As the ABA's Task Force on the Future of Legal Education reports, "[f]aculty are blamed for

33. *Cf.* Newton, *supra* note 27, at 118–19 (explaining that "a typical law professor teaches only three or four courses per year").

34. J.M. Balkin, *Interdiscplinarity As Colonization*, 53 WASH. & LEE L. REV. 949, 966 (1996); Richard S. Markovits, *Taking Legal Argument Seriously: An Introduction*, 74 CHI.-KENT L. REV. 317, 348 (1999); *cf.* Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems in Using Teaching Assistants: Hard Lessons Learned from Peer Teaching Theory and Experience*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 269, 274 (2007).

35. *See* Paula A. Monopoli, *Teaching Lawyers to Be More Than Zealous Advocates*, 2001 WIS. L. REV. 1159, 1170 (2001) ("Law schools are professional schools. . . . It is . . . essential that they be given incentives to make their classroom presentations more effective.").

36. WALLACE D. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT 737 (Russell Sage Foundation 1984). Having sat through many faculty and committee meetings in law schools and psychology departments at five different universities, I can attest to the amount of time devoted to discussing teaching and curricular concerns in law schools as compared to psychology departments, where research and grant-getting are the most frequently discussed topics. Indeed, law professors seem to be the only ones in the academy concerned with the question of whether being a scholar improves one's teaching effectiveness, since all but two of the studies and articles on this issue were written by law professors. *See* Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL LEGAL STUD. 619, 619 (2008); James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI.-KENT L. REV. 823, 823 (1998); Michael P. O'Connor, *Perish the Thought of Publication?: Scholarship's Critical Role in Effective Teaching*, 3 PHX. L. REV. 417, 418 (2010); Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 369 (1990); Fred R. Shapiro, *They Published, Not Perished, But Were They Good Teachers?*, 73 CHI.-KENT L. REV. 835, 840 (1998).

37. *See, e.g.*, TAMANAHA, *supra* note 1, at 8, 32; ABA TASK FORCE RPT., *supra* note 13, at 14 (discussing faculty culture and governance structures as potential obstacles to reforming legal education).

38. TAMANAHA, *supra* note 1, at 16–19.

supposedly self-seeking behavior and the pursuit of questionable goals for the law school,"[39] and "the prevailing structure for faculty role in a law school, reflect[s] the model of a law school as primarily an academic enterprise . . . . This entrenched culture and structure has led, inter alia, to declining classroom teaching loads and a high level of focus on publishing and research."[40]

To illustrate how faculty governance corrupts the ability of law schools to best serve their students, Professor Tamanaha recounts in *Failing Law Schools* his interim deanship at St. John's University Law School.[41] Remarkably, Professor Tamanaha was appointed to the deanship as an untenured professor, after brazenly complaining to the University's president that the faculty voted for the previous dean's removal partly because he had pressured them to be good teachers and scholars. He recalled that "[m]any faculty members were hardly present in the building, coming in only to teach, leaving immediately thereafter . . . . A number were in semiretirement, though not officially."[42] Professor Tamanaha uses his short-lived deanship to illustrate what he believes to be the problem with law schools and why it is so difficult to reform them.[43] He notes that "[l]aw schools are run [*by professors*,] *for* law professors" who do not devote the attention they should to teaching and serving the best interests of students.[44] Standard 206 of the ABA Standards and Rules of Procedure for Approval of Law Schools require that law faculties have "*substantial* involvement in the selection of a dean" and are to "advise, consult, and make recommendations to the appointing authority in the selection of a dean."[45] Thus, according to Professor Tamanaha, law schools are run to advance the privileges of the tenured faculty, over whom deans have limited supervisory power:[46]

> No one tells law professors what to do. Law professors are superior to the students and served by the staff. . . . For a law school to function at a high level requires that individual professors be self-motivated, responsible, conscientious, and oriented to the common good even

39. ABA TASK FORCE RPT., *supra* note 13, at 7.

40. *Id.* at 26–27.

41. TAMANAHA, *supra* note 1, at 1–8.

42. *Id.* at 2. Professors who are effectively in semiretirement with respect to their scholarly and service contributions, a relatively common phenomenon, are derided as "retired-in-place (RIP)." Nancy B. Rapoport, *Not Quite "Them," Not Quite "Us": Why It's Difficult for Former Deans to Go Home Again*, 38 U. TOL. L. REV. 581, 591 (2007). Some decide to take RIP status soon after receiving tenure. *Id.*

43. TAMANAHA, *supra* note 1, at 8.

44. *Id.*

45. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 206(d) (2011) [hereinafter *Interpretation 206-1*] (emphasis added). Standard 206 states: "[e]xcept in circumstances demonstrating good cause, a dean should not be appointed or reappointed to a new term over the stated objection of a substantial majority of the faculty." *Id.*

46. TAMANAHA, *supra* note 1, at 5–6 ("Deans wield small sticks for prodding—twigs, really—and consequently must resort to passing out goodies to get more out of people.").

> when that requires a sacrifice of their own self-interest. . . . Alas, we are fallible and self-oriented like everyone else.[47]

I value faculty governace more than Professor Tamanaha might, but it does produce unintended consequences. Faculty incentives may not always align with the interests of the institution or students, just as any employees not subject to managerial oversight may come to regard their interests as not entirely consistent with the interests of their employer or the customers. Curricular decisions may be based on what and how particular faculty members want to teach rather than the curricula and pedagogy students need, faculty hiring decisions may be based on faculty turf battles rather than candidates' teaching and scholarly ability, and faculties may resist rigorous review processes that hold them accountable for quality teaching and scholarship.

Since deans and law school administrators usually are not active teachers and scholars,[48] they usually have fewer conflicts of interest between what is best for students and their own scholarly and teaching interests, and have incentives to be more demanding of the faculty than the faculty is of itself. Faculty governance diminishes the accountability of faculty members because when the faculty corporately makes a decision that later turns out to be bad, no individual is held accountable, and thus there is no way to effectively monitor and improve faculty performance.[49] By contrast, when deans are granted greater authority they become the focus of accountability, both from the faculty—who can effectively vote a dean out under ABA standards[50]—as well as from the university administration. Importantly, deans should not be bureaucrats but leaders, and part of leading is shaping the institution according to the dean's vision. A dean cannot do this when many key decisions rest largely with the faculty, rather than also with the dean.

In addition, deans have a better sense of the relationship between the law school's mission and the larger university's strategic goals and usually a more objective, arms' length perspective on faculty disputes given their outsider's perspective, since most deans were hired from other institutions.[51] Moreover, by virtue of their position as a university administrator, law school deans are tuned into national norms and trends not only in the legal academy but also in

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47. *Id.* at 8.

48. In 2008, the number of law professors increased to 17,080, with 1,059 being deans, librarians, and other full-time administrators. Jack Crittenden, *Why Is Tuition Up? Look At All the Profs*, NAT'L JURIST, Mar. 2010, at 40, *available at* http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0310/#/40.

49. *See* TAMANAHA, *supra* note 1, at 36.

50. *See Interpretation 206-1*, *supra* note 45, at 14.

51. Colleen A. Khoury, *Ruminations on A Deanship*, 34 U. TOL. L. REV. 105, 107 (2002).

higher education generally, making them more broadly informed decision-makers than are most faculty members about law school policies and priorities.[52]

To be sure, under no circumstances should the democratic process of faculty governance be jettisoned in favor of autocratic or quasi-autocratic deans,[53] but law schools may want to reconsider the allocation of decision-making authority between law school faculties and deans. If the faculty does not approve of how the dean is steering the law school, then the faculty should not be reluctant to vote for the dean's removal.[54]

But critics like Professor Tamanaha go further and argue that the ABA should loosen or eliminate its control over legal education, which would make law professors and law schools more accountable to students and the profession.[55] According to Professor Tamanaha, the ABA "ha[s] been subverted by legal educators to ratchet up their salaries and reduce their teaching loads," and above all, to define a good legal education as requiring a three-year program of study in an academically-oriented institution (staffed mostly by full-time faculty) that supports faculty scholarship, thus shutting out more affordable law schools devoted to teaching rather than research.[56] To break the ABA's monopoly over an accreditation process that promotes the interests of professors, these critics urge states to disregard ABA policies that allow "the ones being regulated . . . [to] writ[e] the rules,"[57] and admit graduates of non-ABA law schools to practice.[58]

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52. *See id.* at 107 (stating "a dean does see the institution from a unique perspective—a sort of helicopter view from which one can see all the parts and how they work together and relate").

53. *Cf.* Newton, *supra* note 27, at 73. Newton suggests:

> [I]n order for systemic reform to occur, the model of governance will need to change to one analogous to the "corporate" model—a powerful executive who, while not omnipotent, does not require the consensus of . . . faculty members with respect to significant administrative matters such as hiring decisions, curriculum reform, and the like. Such corporate governance *is the norm at American medical schools*.

Id. (emphasis added).

54. *See Interpretation 206-1*, *supra* note 45.

55. *See In re* Culver, slip op. at 9 (Mont., filed Feb. 2, 2002) (Trieweiler, J., dissenting); TAMANAHA, *supra* note 1, at 16–17; Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Exposé on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 74–76 (2003).

56. TAMANAHA, *supra* note 1, at 18.

57. *Id.* at 36.

58. *Id.* Professor Tamanaha cites with approval a dissenting opinion from the Montana Supreme Court in its denial of bar admission to a graduate of a school not accredited by the ABA, but accredited by the Western Association of Schools and Colleges:

> [T]he monopoly of this private trade association to set standards for law schools increases the cost of legal education, burdens new members of the profession with debt that limits their options for professional and public service, hampers innovations in the area of legal education, discriminates against "working faculty" with practical professional experiences to share with their students, and discriminates against non-conventional students and minorities who do not meet the arbitrary admissions standards imposed.

The accrediting authority of the ABA can be traced back to the turn of the twentieth century,[59] a time when lawyers were held in low esteem, the result of too many low-quality law schools staffed mostly by non-academic practitioners that were producing too many lawyers.[60] In 1921, the ABA began to promulgate standards required for law school accreditation, and graduation from an ABA-accredited institution was an eligibility condition most state bars adopted for admission to the bar.[61] Yet, in 2013, lawyers continue to be held in low esteem, and there are still too many law schools and too many lawyers. What is the proposed solution? Allowing law schools to once again offer two-year vocational degree programs and graduates of non-ABA approved law schools to practice law.

As discussed below, this Article vigorously disagrees with the notion that legal education should be put under erasure by reshaping the three-year law school curriculum into a two-year vocational program.

II. ACADEMY OR TRADE SCHOOL: EDUCATING OR JUST TRAINING LAWYERS?

> *[T]he critique of legal education has a long pedigree, traversing the twentieth century and enduring through the present day. . . . [T]he nature of the critique has been remarkably consistent, focusing on the poor connection between traditional legal education and legal practice.*[62]
>
> —Professor A. Benjamin Spencer

> *"The customer is always right" may have worked for Marshall Field, but it is a prescription for disaster in legal education.*[63]
>
> —Professor Brian Leiter

A common complaint about legal education is that law schools have become divorced from the practical needs of students and the profession. Such

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Id. at 176 (quoting *In re* Culver, slip op. at 9 (Mont. Filed Feb. 2, 2002) (Trieweiler. J., dissenting)).

59. Staver & Staver, *supra* note 55, at 10–11.

60. *Id.* at 21–22.

61. Gerard J. Clark, *Monopoly Power in Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession*, 45 SUFFOLK U. L. REV. 1009, 1014 (2012); Staver & Staver, *supra* note 55, at 10–11.

62. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2015 (2012).

63. Brian Leiter, *A Different Take on the ABA Task Force Draft Report on the Future of Legal Education*, BRIAN LEITER'S L. SCH. REP. (Sept. 27, 2013), http://leiterlawschool.typepad.com/leiter/2013/09/a-different-take-on-the-aba-task-force-draft-report-on-the-future-of-legal-education.html.

arguments are not new.[64] Almost twenty-five years ago, former ABA President Talbot D'Alemberte observed that he "[could not] find many people who are that happy with legal education. . . . The profession is not benefiting, the students are not benefiting. In whose interest are we running legal education?"[65] Indeed, legal education has been debated almost since the founding of the Republic, and the contours of that debate are not much different today. In the 1800s and early 1900s, people questioned whether formal legal training was necessary for bar admission, and whether legal education should be practical or academic in nature.[66]

This persistent criticism that legal education is insufficiently practical has greater potency in the current economic environment, with critics arguing that the current academic model of legal education cannot continue.[67] The bar has renewed the criticisms made by AALS President Thomas Morgan over two decades ago, when there also was the concern "that young lawyers coming into their firms require too much training" and that firms were unwilling "to undertake the burden of sharing 'nuts and bolts' insights about law practice."[68] Once again, law firms are unwilling to train new attorneys,[69] apparently feeling little responsibility for doing so, either to the profession or young lawyers.[70]

This Article discusses proposals that would effectively put the legal academy under erasure by making it vocationally, rather than academically, oriented, an anti-intellectual approach condemned by the President of the AALS almost forty years ago.[71] There was a time when law schools thought it their mission to provide a liberal arts education in the law to broaden students' horizons, cultivate critical thinking, and prepare lawyers to contribute to American

64. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 119–23, 162 (1983); John Nivala, *From Bauhaus to Courthouse: An Essay on Educating for Practice of the Craft*, 19 N.M. L. REV. 237, 259 (1989); Sternlight, *supra* note 3, at 723-28 (discussing persistent criticisms that law schools fail to teach practical skills).

65. Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, 76 A.B.A. J. 52, 52 (1990).

66. Thomas D. Morgan, *A Defense of Legal Education in the 1990's*, 48 WASH. & LEE L. REV. 1, 2–4 (1991).

67. *See* TAMANAHA, *supra* note 1, at 160, 181–82; Henderson, *supra* note 1, at 462 (stating that "[t]he demand for our core product—traditionally educated law school graduates—is collapsing").

68. Morgan, *supra* note 66, at 11.

69. *See* Henderson, *supra* note 1, at 462 (noting the unwillingness of clients to be billed for the work of "lawyers in training").

70. This trend is not limited to the legal job market. Employers in many fields are refusing to provide the kind of on-the-job training and apprenticeships they once did, insisting that universities now provide such vocational job-skills training. Employers are doing so to maximize profits by shifting their training costs to universities. *See* PETER CAPPELLI, WHY GOOD PEOPLE CAN'T GET JOBS 71–75 (2014).

71. Francis A. Allen, *The Prospects of University Law Training*, 63 A.B.A. J. 346, 346 (1977).

democracy.[72] But today it is the market that rules,[73] and "nuts-and-bolts" vocational training for law practice is what both students and employers appear to want.[74] According to a recent Time/Carnegie Corporation survey, forty percent of Americans think the goal of higher education should be to train

72. *See* Sternlight, *supra* note 3, at 720–21 (discussing early legal education). Indeed, the early law schools were established with the mission of educating future political leaders through a liberal arts curriculum. *Id.* (citing treatises on history of legal education).

73. *See* SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION 181–206 (2004) (discussing how universities are under considerable pressure to generate revenue and respond to market forces, with many configuring their programs and curricula in ways that will maximize their appeal to prospective students, employers, and donors). Universities are adopting business models and becoming entrepreneurial, even in non-professional disciplines. For example, classics departments may offer trips to Greece or Rome for alumni or the general public. *Id.* at 27. Fine arts colleges are shifting resources away from fields not having economic payoffs, like studio art, to those having greater market demand, like graphic arts. *Id.*; *see also* Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 131, 150–51 (2015). Flanagan notes that

> [o]ne of the more troubling aspects of the customer orientation of students is an increased focus on the extrinsic outcomes of a college degree . . . . The consumer orientation, and corresponding extrinsic motivations, "radically alters" the fundamental nature of education. Students no longer see themselves as partners in a relationship designed to further growth; consumer orientation frames the relationship between student and teacher as customer and service provider, with the customer expecting satisfaction. Students who view education as an economic transaction become preoccupied with their GPA, sacrificing "deeper, critical analytical learning" in pursuit of a credential they can exchange on the market.

Id. (footnotes omitted). Although some argue that viewing education as a business model is "entirely reasonable" to ensure that colleges "prove their worth" to their student-customers, this proposition overlooks the risk that colleges acting solely as service providers "los[e] their value as places where young people enter as adventurous adolescents and from which they emerge as intellectually curious adults." Andrew Delbanco, *Illiberal Arts: What's the Point of College? Two Books Consider the Question from Different Perspective*, N.Y. TIMES, June 23, 2013, at BR22 (reviewing JEFFREY J. SELINGO, COLLEGE (UN)BOUND: THE FUTURE OF HIGHER EDUCATION AND WHAT IT MEANS FOR STUDENTS (2013)). For a discussion of the many negative effects on teaching and higher education of the business and student-as-consumer models of higher education, see Joel Thomas Tierno, *How Many Ways Must We Say It?*, ACADEME 11 (Nov.–Dec. 2014) and Miguel-Martinez-Saenz & Steven Schoonover, Jr., *Resisting the "Student-As-Consumer" Metaphor*, ACADEME 15 (Nov.–Dec. 2014).

74. *See* ABA TASK FORCE RPT., *supra* note 13, at 8 (discussing "the rise of consumer outlook"). According to Jeffrey J. Selingo, education has turned into a business where students are the customers purchasing a service, which creates "a major power shift in the classroom from professors to the students." SELINGO, *supra* note 73, at 20. As a result, students "regard their professors as service providers, just like a cashier at the supermarket or a waiter in a restaurant." *Id.* Course evaluations, for example, "look eerily similar to customer satisfaction surveys from department stores." *Id.* This shift incentivizes professors to grade leniently so as to curry favor with students in their course evaluations, and to entertain, rather than teach, students in order to satisfy the student-customer. *See id.* at 21; *see generally* Richard E. Redding, *Students' Evaluations of Teaching Fuel Grade Inflation*, 53 AM. PSYCHOLOGIST 1227 (1988) (arguing, based on the empirical evidence, that course evaluations cause professors to inflate grades).

students in specific job skills and eighty three percent believe that curriculums are too divorced from career training goals.[75] Only twelve percent think the goal should be to develop critical thinking skills, only eleven percent to help students develop life values, and only six percent to become better-informed citizens.[76]

It is no wonder, then, that studies find today's university students to be "academically adrift," [77] with dumbed-down curricula and limited student engagement with learning. In a survey of students entering four-year colleges in 2012, eighty-eight percent said that a chief reason they pursued higher education was to get a better job, seventy-nine percent said it was to get training for a particular career, and seventy-five percent said they wanted to make more money.[78] But seventy-three percent also said they wanted to get a good general education, eighty-three percent wanted to learn more about what interested them, and fifty-one percent strived to become more cultured. [79] Nonetheless, policymakers and universities have responded to what they perceive as the market demand for a laser-like focus on job skills, as seen in recent mandates from the U.S. Department of Education that schools adopt "learning objectives and assessment schemes that gauge whether students are learning the skills required for particular jobs."[80] As a result, many law schools, including elite schools, have been rethinking their curricula to focus more on practical lawyering skills.[81]

Yet, as Professor Dan Solove of George Washington University Law School, in defense of traditional, three-year law programs, explains:

> [s]ome assume that the goal of a legal education should be to teach people practical skills so that when they leave law school, they can

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75. *See* Josh Sanburn, *Higher-Education Poll*, TIME (Oct. 18, 2012), http://nation.time.com/2012/10/18/higher-education-poll/?pcd=teaser.

76. *See id.*

77. *See* RICHARD ARUM & JOSIPA ROSKA, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES 3–5 (2011) (discussing the disconnect between today's students and the traditional model of education).

78. Press Release, U.S. Dep't of Educ., Education Department Releases College Scorecard to Help Students Choose Best College for Them (Feb. 13, 2013), http://www.ed.gov/news/press-releases/education-department-releases-college-scorecard-help-students-choose-best-colleg; *A Profile of Freshmen at 4-Year Colleges, Fall 2012*, CHRON. HIGHER EDUC., Aug. 19, 2013, http://chronicle.com/article/A-Profile-of-Freshman-at/140387.

79. *Id.*

80. *See* Press Release, *supra* note 78. The College Scorecard, a website launched by the United State Department of Education, provides statistics concerning a school's "cost, graduation rate, loan default rate, average amount borrowed, and employment." *Id. But see* Ann Schoebelen, *The Jury Is Out on the New College Scorecard*, CHRON. HIGHER EDUC., Feb. 25, 2013, *available at* http://chronicle.com/article/The-Jury-Is-Out-on-the-New/137531/ (detailing experts' criticisms of the new scorecard).

81. *See, e.g.*, Anne Cassidy, *Strategic Planning: Rethinking the Future of Legal Education*, GEO. L. MAG., Spring–Summer 2013, at 31–32 (discussing Georgetown Law Center's Strategic planning council meeting to improve the school's practicum experience).

> start practicing law like a pro. I don't agree. [] We are training people who will be in profound positions of power—future lawyers, judges, politicians, policymakers and so on. It is important for all of society that these individuals be given a legal education that consists of more than just taking a few key classes and rushing off into the practice of law. *Law school is, for many, one of the few times that they reflect more broadly on the law, on justice, on how the law ought to be, on what works and doesn't work well in the legal system. It is a chance to learn about the history of law, the philosophy of law, law and literature, law and sociology, law and economics, and more.* I believe that *these things make students be better lawyers—wiser, more creative, more well-rounded.* When we train lawyers, we're training people who will be shaping our society, and I think it is imperative that their legal education be a robust extension of a liberal arts education, not simply a trade school education.[82]

A law school is not only responsible for teaching practical skills so that employers do not have to bear the cost of training new associates. Law schools share the collective responsibility to produce lawyers capable of contributing meaningfully to public discourse, society's civil institutions, policymaking, and the democratic process. This is especially true given the influence lawyers have in society today.[83] Professor Tamanaha quotes Professor Solove with disapproval, however, emphasizing that lower-ranked law schools are not training society's leaders.[84] Yet, since the founding of the Republic, lawyers have dominated state legislatures (seventeen percent of legislators are lawyers) and the U.S. Congress (fifty-four percent of Senators and thirty-six percent of Representatives are lawyers, most of whom graduated from law schools not ranked in the top fifty), and lawyers play significant policymaking roles in government agencies and many private organizations.[85] And, of course, judges are lawyers, many whom did not graduate from top law schools.[86]

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82. TAMANAHA, *supra* note 1, at 26–27 (alteration in original) (emphasis added) (quoting Prof. Dan Solove, George Washington University). Similarly, employers would probably prefer their employees to have taken courses in technical writing or digital media rather than courses in Shakespeare or nineteenth-century British poetry. Do we want our college graduates trained only in the former and uneducated in the latter?

83. *See id.*

84. *See id.*

85. Catherine Rampell, *First Thing We Do, Let's Elect All the Lawyers*, N.Y. TIMES (Feb. 23, 2012, 1:37 PM), http://economix.blogs.nytimes.com/2012/02/23/first-thing-we-do-lets-elect-all-the-lawyers/.

86. *See, e.g.*, *Mission Statement*, GOV'T & PUB. SECTOR LAWYERS DIV., AM. BAR ASS'N, http://www.americanbar.org/groups/government_public/about_us.html (last visited Nov. 15, 2015) (discussing the mission of public sector attorneys).

One can imagine the critics' response: a liberal arts education is inappropriate in professional school,[87] or a liberal arts education is fine for students at elite schools, but everyone else only needs the most immediate, practical, and efficient education possible. But, medicine, economics, psychology, and education are also professions, yet these academic disciplines provide substantial theoretical and interdisciplinary training to their students.[88] They recognize that "there is nothing so practical than as a good theory,"[89] since it provides the descriptive and analytical framework for the deductive problem solving, creative-thinking, and problem-solving flexibility necessary to confront new problems across a range of practice contexts.[90] A legal education centered primarily on practical skills leaves students incapable of returning to the foundational jurisprudential understandings needed when grappling with novel legal problems and cases. Elitist and profoundly dismissive of students at non-elite schools, Professor Tamanaha's approach implies that these students will not achieve the sorts of careers requiring them to fashion novel and creative approaches to legal problems. It also establishes a caste system among the bar, with two types of lawyers having two different legal educations—one academic and one vocational—an outcome not favorable for clients and the legal profession.[91] Incorporating liberal arts education into legal education makes students *at any law school* better lawyers—"wiser, more creative, more well-rounded"[92] critical thinkers about the law best prepared to serve the clients and causes they represent. Such an education incubates the development of critical thinking, sound judgment, and an appreciation for intellectual and cultural

87. Dana M. Levitz, *So, You Think You Want to Be a Judge*, 38 U. BALT. L. REV. 57, 71–72 (2008).

88. TAMANAHA, *supra* note 1, at 27.

89. *See, e.g.*, KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 168–69 (Dorwin Cartwright ed., 1952); Jennifer S. Bard, *Teaching Health Law*, 36 J.L. MED. & ETHICS 841, 843 (2008) (comparing medical education to legal education).

90. For a discussion of the methodological value of teaching legal theory, see Jonathan Crowe, *Reasoning From the Ground Up: Some Strategies for Teaching Theory to Law Students*, 21 LEGAL EDUC. R. 49, 55–62 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382356.

91. *See, e.g.*, Bard, *supra* note 89, at 841, 843. Consider medical education. Although medical schools vary in selectivity and the extent to which their faculties are research- versus practice-oriented, all graduates of American medical schools receive essentially the same education and mostly the same core courses and range of clinical experiences. *See id.* Narrowly and technically trained physicians will suffice in instances where a patient presents routine problems. However, a broadly trained physician, advanced in her specialty and capable of thinking critically and creatively about medical problems, is required when a patient presents multifaceted or unusual problems. Pity the client with a complex or unusual legal problem whose lawyer is trained only as a legal technician in one or two discrete areas of the law.

92. TAMANAHA, *supra* note 1, at 26 (quoting Prof. Dan Solove).

diversity.[93] By grappling with foundational issues and theory in a variety of relevant core disciplines, students develop the critical-thinking skills necessary to apply insights from the humanities and social sciences to legal problems, something clients very much need if they are to receive the most effective representation.

Even if the overriding goal is to better train students for practice, it is vocationally myopic to narrow the academic experience. I applaud teaching the skills needed for law practice. Students need more of that, provided it is appropriately integrated with relevant theoretical, doctrinal, and interdisciplinary knowledge. In the long-run, lawyers who can think creatively about the law will distinguish themselves as great lawyers, able to fashion creative approaches to solving legal problems, novel legal arguments, and deal structurings. Lawyers commit a disservice to their clients and the courts when they are unable to draw upon relevant legal theory or insights from other disciplines in providing policy rationales to support their proferred legal doctrine or interpretation.[94] As Professor Nancy L. Schultz observes, effective lawyers not only know the skills of the trade, such as how to write a motion, draft particular contract clauses, take a deposition, or avoid conflicts of interest, but also must be able to "*critically analyze the utility, effectiveness, and social implications of legal doctrine and procedure; integrate nonlegal approaches into the legal problem-solving process; and synthesize and build original legal theories, frameworks, and systems*."[95]

Developing such a knowledge foundation and skill set requires not only technical skills training, but also a liberal arts education in the law that "mak[es] students work and think in ways and at levels of engagement and intensity that are characteristic of graduate students elsewhere in the academy. . . [so] that doctrine, theory, skills, and interdisciplinary perspectives on law all constituted it in integral and equally-important ways."[96] Should we return to a time when law school focused on "nuts-and-bolts" practice skills in a two-year curriculum, or will legal education move forward to provide students with the robust

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93. *See* James A. Arieti, *Liberal Arts and the Human Soul*, RECORD (Hampden-Sydney C., Hampden-Sydney, Va.), June 2011, *available at* http://www.hsc.edu/The-Record/2011-June/Liberal-Arts-and-the-Human-Soul.html (arguing that a traditional liberal arts education in the humanities, sciences, and social sciences uniquely develops the "psychic goods"—virtues such as "courage, justice, moderation, wisdom . . . and a respect for the dignity of all one's fellow human beings and for the world of nature").

94. *See* Arnold H. Loewy, *Why I Authored a Criminal Law Casebook*, 10 OHIO ST. J. CRIM. L. 661, 662 (2013) (providing an example where defense counsel, when asked by the court, was unable to offer a policy rationale to support the legal standard for proximate cause that counsel had argued for on behalf of his client).

95. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 60 (1992) (emphasis added).

96. Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 537 (2002).

academic experience needed to successfully navigate the complexities of law practice in the twenty-first century?

III. NO PLACE FOR NOSTALGIA IN LEGAL EDUCATION

> *I believe that law schools would probably be wise to think about being two years instead of three years.*[97]
>
> —President Barack Obama

> *[T]he law-school-in-two-years proposal rests on the premise that law school is, or ought to be, a trade school. . . . It is not that. It is a school preparing men and women not for a trade but for a profession—the profession of law.*[98]
>
> —U.S. Supreme Court Justice Antonin Scalia

Ever since the ABA and AALS successfully established the three-year model of legal education in the early 1900s,[99] it has been argued that two years of law school is sufficient,[100] an argument renewed by today's reformers.[101] In proposing a two-year law degree emphasizing practice skills,[102] reformers are nostalgic for American legal education circa one hundred years ago when law schools were vocational schools. Some go even further,[103] suggesting that legal

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97. *See* Lattman, *supra* note 14, at B3 (quoting President Barack Obama's statement at a town-hall meeting at Binghamton University in New York).

98. *See* John Schwartz, *Evaluating That Third—Boring—Year*, N.Y. TIMES 25 (Education Life, Aug. 3, 2014) (quoting Justice Antonin Scalia's commencement address at William and Mary Law School).

99. Campos, *supra* note 1, at 219–20.

100. *See, e.g.*, *The Carrington Report*, *reprinted in* HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTORS IN LEGAL EDUCATION app. A, at 138–39 (1972) (noting that law professors have questioned the efficacy of the third year).

101. *See* TAMANAHA, *supra* note 1, at 20–27 (including a discussion of the history of the third year of law school); Campos, *supra* note 1, at 220 (stating that "[a]t a recent national conference on legal reform, no one among a group of more than one hundred legal academics was willing to defend the proposition that the third year of law school represented a justifiable investment"); Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 599–600 (2012); Debra Cassens Weiss, *Two-Year Law School Was a Good Idea In 1970, and It's a Good Idea Now, Prof Tells ABA Task Force*, A.B.A. J. (Feb. 10, 2013, 1:36 AM), http://www.abajournal.com/news/article/two-year_law_school_was_a_good_idea_in_1970_and_its_a_good_idea_now/ (citing the testimony of law professors before the ABA Task Force).

102. *See* ABA TASK FORCE RPT., *supra* note 13, at 31 (suggesting that the ABA consider reducing the amount of instruction time required for a J.D. degree and "[s]eriously [c]onsider [p]roposals to [r]educe the [a]mount of [l]aw [s]tudy [r]equired").

103. TAMANAHA, *supra* note 1, at 23–24.

training can be delivered entirely at the undergraduate level followed by a professional apprenticeship, which was the predominant educational model in the United States over a century ago.[104] But this model was abandoned when it became obvious that an apprenticeship alone provided insufficient training because it did not teach the thinking and analytical skills necessary for solving complex legal problems.[105] Even a recent Stanford Law School graduate questioned the need for a legal education to practice law, and claims that three years of law school churns out "over-educated" lawyers.[106]

There is clearly the sense among many, particularly law students, practitioners,[107] and even some law professors,[108] that two years of legal education is sufficient to prepare new generations of lawyers for the complexities of law practice in the twenty-first century. Yet, as Professor Thomas Morgan observes, even during three years of law school "there is not nearly enough time in law school to prepare a new lawyer to meet all the challenges that he or she will face in a practice."[109]

Indeed, the current program of legal education produces under-trained, not over-educated, lawyers. Doctrinal education alone need not be three years long, but law schools should provide a more robust academic experience that teaches the essential doctrine of first year courses, exposes students to a reasonable range of specialty areas, and teaches the applications of other disciplines relevant to law (e.g., accounting, economics, psychology, and quantitative methods, but also some philosophy of law, comparative jurisprudence, and law and the humanities). Further, schools should integrate skills training throughout the curriculum. Achieving these pedagogical goals requires a minimum of three years of law school. In all likelihood, it requires four years of study, as is the case in medical education today.

To be sure, any proposal for a four-year J.D. curriculum is a non-starter in a time when tuition costs are already exorbitant and reformists are pushing hard in the direction of a two-year curriculum.[110] Yet, confronting the ideal informs our consideration of what should *not* be done. Law schools are currently failing

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104. *See* Campos, *supra* note 1, at 220–21.

105. *See* STEVENS, *supra* note 64, at 3.

106. Vijay Sekhon, *The Over-Education of American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States*, 14 GEO. MASON L. REV. 769, 769–70 (2007). Mr. Sekhon postulates that "[a]ttorneys probably do not need to know the basic legal doctrines in all of the subjects taught in law school in order to be effective advocates. . . . [I]t is difficult to argue that the benefits of three years of law school justify its significant economic cost." *Id.* at 780–81 (internal citation omitted).

107. *See Kaplan Bar Review Survey*, *supra* note 9 (reporting that sixty-three percent of recent graduates think that law school can be shortened to two years).

108. *See* Campos, *supra* note 1, 219–20; Weiss, *supra* note 101.

109. Morgan, *supra* note 66, at 13.

110. *See* Weiss, *supra* note 101.

to provide the theoretical and interdisciplinary training, integrated with the necessary practice skills that students require to be competent attorneys in today's very complex practice environment. At a minimum, then, law schools should not be entertaining the erasure of what little theoretical and interdisciplinary training there is in legal education today by reducing law school to just a two-year program of study, putting the J.D. degree on par with Master's degrees.

A. An (Un)Realistic Turn for Legal Education

> *The need for an understanding of other disciplines—history, psychology, sociology, and economics—becomes plain after even the most cursory examination of the range of problems lawyers and judges face.*[111]
>
> —Professor Nancy L. Schultz

> *American legal education does not do enough to teach how law works in the context of the social, political, and economic world that is inhabited by lawyers' clients. Teaching the law without its context . . . is like teaching the Fourteenth Amendment without the Civil War.*[112]
>
> —Faculty Members of the Massachusetts School of Law

Arguing that law had become so "entangled" with political and social questions, Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit described a system of law that was no longer an "autonomous discipline," but rather an interdisciplinary one, drawing on insights from the sciences, social sciences, and humanities.[113] Nearly thirty years later,

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111. Schultz, *supra* note 95, at 65 (internal citation omitted). *See also* Brannon P. Denning, *The Yale Law School Divisional Studies Program, 1954–1964: An Experiment in Legal Education*, 52 J. LEGAL EDUC. 365, 369 (2002) (quoting REPORT ON THE COMMITTEE ON CURRICULUM AND PERSONNEL, YALE LAW SCHOOL (May 6, 1946) (concluding that it is "self-evident that law is one of the social sciences, and that the law will be most fruitful and critical when skills and perspectives of history, economics, statistics, psychology, political science, sociology, and psychiatry are fully and effectively used").

112. Andrej Thomas Starkis et al., *Meeting the MacCrate Objectives (Affordably): Massachusetts School of Law*, 48 J. LEGAL EDUC. 229, 240–41 (1998) (discussing Massachusetts School of Law's development of a series of "law in context" courses).

113. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 768–73 (1987). Posner highlights the contributions of economics, philosophy, and public choice theory to legal theory and policy, and states:

> [the] confidence in the ability of lawyers on their own to put right the major problems of the legal system has collapsed. . . . [D]ue partly to the rise of other disciplines to positions where they can rival the law's claim to privileged insight into its subject matter. . . . [such

this same lack of autonomy is more apparent and more pronounced in everyday law practice.[114] Because the law includes concepts from other disciplines that provide ways to critically analyze legal problems and policies in their social context,[115] lawyers ignore other disciplines at their peril. As was recognized by the early twentieth-century legal realists,[116] the law "is truly interdisciplinary in the sense of being without discipline. . . . [T]he causes that come before the lawyer, the pathology, madness, and injuries that get litigated can call upon any number of skills of apprehension and determination."[117]

When lawyers confront a legal question, they must investigate and develop relevant facts. The social and business sciences often enlighten those facts and their legally relevant social context.[118] Law itself is an empty vessel—"a profession of *process*"[119]—a system for ordering, regulating, and mediating human affairs that must rely on other disciplines for the knowledge upon which legal doctrine and practices are shaped.[120] As Professor Peter H. Schuck bemoans, the "single greatest failing" of legal education is that "we do not teach our students how to handle facts—how to find, interpret, prove, and rebut them."[121] Once law students master the basics of legal reasoning, which can be

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> as] the continuing rise in the prestige and authority of scientific and other exact modes of inquiry.

Id.

114. Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1, UC IRVINE L. REV. 1, 17–18 (2011) (describing the UC Irvine Law School's interdisciplinary first-year Legal Profession course that teaches students about, inter alia, "the economics of the profession, the psychology of being a lawyer, and the legal profession from a law and society perspective").

115. *See* Denning, *supra* note 111, at 367, 369–70.

116. Deborah M. Hussey Freeland, *Speaking Science to Law*, 25 GEO. INT'L ENVTL. L. REV. 289, 317 (2013) (citing Oliver Wendell Homes, *The Path of the Law*, *in* AMERICAN LEGAL REALISM 15 (William W. Fisher III, Morton J. Horwitz, & Thomas Reed, eds.) (1993)).

117. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986), *in* JOHN MONAHAN & LAUREN WALKER, SOCIAL SCIENCE IN LAW: CASE AND MATERIALS 328 (8th ed. 2014) (discussing the early legal realist movement); *see also* Peter Goodrich, *Intellection and Indiscipline*, 36 J.L. & SOC'Y 460, 468 (2009) (arguing that "courts should treat social science research relevant to creating a rule of law as a source of authority rather than as a source of facts").

118. Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L. J. 1, 2–3 (1998).

119. *See id.* at 30.

120. *See* Richard E. Redding, *Reconstructing Science Through Law*, 23 S. ILL. U. L.J. 585, 585 (1999); *see also* John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 L. & HUM. BEHAV. 72, 74–80 (2011) (noting that since the 1985 publication of the first edition of their casebook, *Social Science in Law*, "American courts' reliance on social science research was often confused and always contested," but "[i]n the past several years, it has become more difficult to find a Supreme Court constitutional decision implicating an empirical question in which at least one side did *not* cite to social science research").

121. Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 325 (1989).

accomplished in the first half of law school, it becomes more important for students to learn about the factual and policy context in which they will be working than it is to learn more rules of process.[122] Along with an insufficient appreciation for the psychology and sociology of working with clients, the main problem with legal education is a lack of attention to the substantive problems the law seeks to resolve and regulate.

It may be argued that college, not law school, is the appropriate forum to expose students to other disciplines. Unfortunately, few lawyers have an undergraduate background in legally relevant disciplines, and few undergraduate courses address the legal applications of those disciplines.[123] Even if legally relevant undergraduate courses were offered and taken, it is unlikely that such courses would offer content at the level of sophistication necessary for lawyer training. Moreover, undergraduate programs today leave many graduates without a sufficiently well-rounded liberal arts education in the essential and generalizable critical thinking, communication, and creative skills. We should not further narrow and vocationalize their college education by focusing it on legally-relevant courses and issues, rather than allowing pre-law students to instead pursue a broad liberal arts education.[124]

Still, some feel that interdisciplinary education in law school is a luxury.[125] Professor Anthony D'Amato insists that there is barely enough time in three years of law school to teach what students must know about legal doctrine, and that, because attorneys "can simply hire the appropriate [expert]" for any case, "many advocates of interdisciplinary collaboration between a lawyer and a social scientist do not seem to sufficiently appreciate the fact that the usefulness of the social scientist begins after the lawyer has read, sorted, and categorized

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122. *See, e.g.*, CHAPMAN L. REV. SYMP., *supra* note 5, at 156–57. Susan Meyers, Associate General Counsel at Hyundai Capital American, said:

> I thought I was very well prepared with my Harvard law degree to start practice. One of my first assignments was to review a package of loan documents for a bank client . . . . I started reading the document and realized that I didn't know what the borrower's business was, I had no idea what the assets described involved, I didn't know what a financial condition was, or what EBITDA ratios were . . . . [I]t is important to learn and be knowledgeable about your client's business and the industry, almost more so than knowing the law.

Id.

123. *See* DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 53–54 (1999); Richard E. Redding & Daniel C. Murrie, *Judicial Decision Making About Forensic Mental Health Evidence*, *in* FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES 683, 685 (Alan M. Goldstein ed., 2007) (reviewing evidence that most lawyers have little or no training in science and few understand basic statistical concepts).

124. For the same reasons, we should not shorten students' college education by offering "3 + 3 programs" that allow students to complete college and law school in just six years by shaving off one year of college, as some schools are now doing. *See* Mangan, *supra* note 1.

125. Anthony D'Amato, *The Interdisciplinary Turn in Legal Education* 4–5 (Bepress Legal Repository, Working Paper No. 1901, Dec. 2006), http://law.bepress.com/expresso/eps/1901.

the cases."[126] On the contrary, practicing lawyers regularly research the law in an area in which they are unfamiliar. But without at least some knowledge of other legally relevant disciplines, lawyers may fail to recognize when those disciplines might be useful in resolving the client's legal problem, and when they ought to retain an expert. Ample social psychological research has shown that people often fail to recognize their own incompetencies and knowledge deficiencies.[127] Although interdisciplinary courses cannot survey every potential circumstance under which another discipline might become useful in a legal case, these courses can provide students with an introductory foundation and representative sampling of practical applications to the law, raising students' awareness of its legal applications.[128]

The usefulness to lawyers of psychological research on factors affecting the accuracy of eyewitness testimony serves to illustrate the value of interdisciplinary training.[129] Especially in criminal cases, juries tend to give eyewitness testimony great weight, which often can make or break the case.[130] Yet, a compelling body of psychological research shows that eyewitnesses frequently misperceive or misremember what they witnessed; many jurors, and even judges, do not understand the potential variables that affect the accuracy of eyewitnesses' perceptions and memories.[131] Accordingly, uninformed jurors are not in a position to accurately assess the reliability of eyewitness testimony.[132] Unless exposed to the relevant research on eyewitness reliability in a law school course or elsewhere, attorneys may fail to investigate the particulars of their case for the presence or absence of these eyewitness reliability factors, and may fail to consider that they should consult an expert on eyewitness testimony and possibly call him or her as an expert witness at trial.

The social and business sciences, namely accounting, economics, quantitative methods, and psychology, are useful to practicing attorneys for developing case facts, understanding the extralegal context of cases, and counseling clients.

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126. *Id.* at 12.

127. *See generally* David Dunning et al., *Why People Fail to Recognize Their Own Incompetence*, 12 CURRENT DIRECTIONS PSYCHOL. SCI. 83, 83–85 (2003), *available at* http://jstor.org/stable/20182845 (discussing their findings); Ethan Zell & Zlatan Krizan, *Do People Have Insight into Their Abilites? A Metasynthesis*, 9 PSYCHOL. SCI. 111, 111–13 (2014), *available at* http://pps.sagepub.com/content/9/2/111.

128. *See* JOHN MONAHAN & LAUREN WALKER, SOCIAL SCIENCE IN LAW: CASE AND MATERIALS 328 (8th ed. 2014) (entitled "Social Science Used to Make Law") (describing the applications of social science to determine case facts, make new law, provide relevant context for juries and legal decision-makers, and to plan the litigation of a case).

129. *See* Kate A. Houston et al., *Expert Testimony on Eye Witness Evidence: In Search of Common Sense*, 31 BEHAV. SCI. & L. 637, 638, 649–50 (2013).

130. *See* Neil Brewer & Gary L. Wells, *Eyewitness Identification*, 20 CURRENT DIRECTONS PSYCHOL. SCI. 24, 24–25 (2011), *available at* http://cdp.sagepub.com/content/20/1/24.

131. *See* Houston et al., *supra* note 129, at 637–39, 648.

132. *See supra* notes 127–31 and accompanying text.

Accounting is the language of business.[133] Without a proper foundation in accounting, an attorney practicing in any business field may be excluded from many meaningful conversations, limited in his or her understanding of relevant financial documents, and branded as hopelessly unsophisticated. Additionally, accounting teaches fundamental ethical principles about when safeguards are required. Many ethical issues are solved "on the natural" if the attorney understands basic accounting rules.[134] Economics is the study of efficiencies, trade-offs, moral hazards, and incentives, which is what much of the law concerns itself with—selecting those legal policies and doctrines that best achieve market efficiencies and incentivize desired behavior.[135] Consequently, "economic thinking dominates contract, commercial, bankruptcy, antitrust, corporate, and securities law and related fields . . . [and] is also influential . . . in tort, criminal, and property law and civil procedure."[136] Economics is at the heart of cost-benefit analysis, which is essential to the administration of environmental law, for example.

Psychology, the study of human behavior, has many insights to offer law and legal practitioners: guidance in litigating a cases, such as jury selection, crafting jury instructions, and jury persuasion; counseling clients, such as therapeutic jurisprudence; determining case facts, such as consumer surveys of trademark confusion or risk assessments of defendants' future dangerousness; or providing relevant context to assist the finders of fact, such as research on the reliability of eyewitness testimony or the reliability of psychiatric diagnosis.[137] For example, basic principles of forensic psychology may guide a criminal defense attorney or prosecutor in dealing with mentally-ill defendants, competency concerns, and

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133. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 569 (2007).

134. Joan T.A. Gabel et al., *Evolving Regulation of Corporate Governance and the Implications for D&O Liability: The United States and Australia*, 11 SAN DIEGO INT'L L.J. 365, 388–89 (2010) (noting the rise in governmental supervision and regulation of the auditing profession).

135. *See* HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS 4–5 (2d ed. 2006) (noting that "individuals, businesses, and other economic actors . . . [generally] seek to maximize their 'self-interest.' . . . The rational maximizer responds to changes in incentives in a predictable manner."); *see, e.g.*, David A. Weisbach, *in The Future of Law and Economics: Essays by Ten Law School Scholars*, REC. ONLINE (U. Chi., Chi., Ill.), Fall 2011, http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-future (discussing the use of economics in the resolution of climate change-related issues).

136. *See, e.g.*, Eric A. Posner, *in The Future of Law and Economics: Essays by Ten Law School Scholars*, REC. ONLINE (U. Chi., Chi., Ill.), Fall 2011, http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-future.

137. For a thorough discussion of the role the social sciences play in the legal process, see MONAHAN & WALKER, *supra* note 128, at v–vi. *See generally* Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107 (1998) (outlining "a 'common sense psychology' approach to psycholegal research and advocacy").

mental health evidence at sentencing hearings; these issues will arise more frequently in practice than many of the doctrines taught in criminal law courses, such as necessity, duress, and impossibility.[138] Furthermore, psychological research has a long history of use in legal reform, including the school desegregation cases, death penalty jurisprudence, and affirmative action law.[139]

Legal practitioners must also be conversant in the quantitative and scientific methods of the business and social sciences, whether as litigators understanding scientific evidence[140] or as business attorneys understanding basic accounting principles.[141] Accordingly, law students should be required to take one quantitatively-oriented course, such as accounting, law and economics, or statistics for lawyers.[142] George Mason University School of Law, for example, offered a required course in "analytical methods for law" that surveyed the legally relevant basics of decision analysis, theory, statistics, accounting, finance, microeconomics, law and economics, and economic and financial issues relating to contracts.[143]

The humanities may also contribute to legal education. The Carnegie Foundation Report on Legal Education emphasized the need for law students to understand their professional identity and purpose as lawyers:

> (1) what are the core values of the legal profession?; (2) what does it mean, morally and ethically, to be a lawyer?; (3) how should lawyers shoulder the mantles of power and authority in their professional

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138. *See* Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 52–53 (2006) [hereinafter Redding, *The Brain-Disordered Defendant*]; Richard E. Redding, *Why It Is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How to Do It)*, 14 WASH. U. J.L. & POL'Y 407, 407–08 [hereinafter Redding, *Mental Health Issues in Criminal Law*] (2004).

139. *See* Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 603 (2003) (citing Cass R. Sunstein et al., Punitive Damages: How Juries Decide (2002); William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 (2001)); MONAHAN & WALKER, *supra* note 128, at ch. 4 (entitled "Social Science Used to Make Law").

140. Federal trial judges must assess the reliability of proffered scientific evidence. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993); *see also* Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 12–13 (3d ed. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sciman3DOI.pdf/$file/sciman3DOI.pdf (discussing the implications of *Daubert*). Lawyers must be prepared to litigate these issues, which requires that they have a basic understanding of scientific methods and statistics. Thus, the second chapter of Monahan and Walker's casebook, SOCIAL SCIENCE IN LAW, *supra* note 128, at 33, is a social science methodology "primer" for law students.

141. *See* Newton, *supra* note 27, at 94–95 (emphasizing that corporate lawyers "must speak 'the language of business' in order to provide their clients effective assistance").

142. *See id.*

143. Francesco Parisi, *Multidisciplinary Perspectives in Legal Education*, 6 U. ST. THOMAS L.J. 347, 350–51 (2009). *See also* Howell E. Jackson, *Analytical Methods for Lawyers*, 53 J. LEG. EDUC. 321, 322–24 (2003) (describing the "Analytical Methods for Lawyers" course and casebook offered at Harvard Law School).

> lives?; and (4) what does it mean to "flourish" as a lawyer and how, if at all, is that different than flourishing as a person?[144]

Enlightenment on these matters will not be found in either the Model Rules of Professional Responsibility or in legal ethics opinions. The humanities, including law and literature, provide an ideal vehicle for students to engage such questions, as does law and religion, particularly in religiously-affiliated law schools.[145] Courses based in the humanities equip students to confront the value choices and ethical dilemmas they will face in practice, because "[l]iterary accounts of lawyers' work—and more general literature that deals with themes such as truth, virtue, and justice—helps readers to understand not only the responsibilities of lawyers but also the social exigencies to which lawyers must respond."[146]

A recent study published in *Science* found that reading fiction improves a person's ability to understand the perspectives, emotions, and needs of others.[147] For example, the lessons of Dickens' *Bleak House*,[148] Dostoevsky's *Crime and Punishment*,[149] Lee's *To Kill a Mockingbird*,[150] Kafka's *The Trial*,[151] Grisham's *A Time to Kill*,[152] and Hawthorne's *The Scarlet Letter*,[153] provide valuable extralegal perspectives on the power of legal norms and the legal system (and the souls caught up in it), often conveying deeper truths about the legal system than the law does itself, thereby "offer[ing] a very direct preparation for the challenges of [practicing law]."[154] Literature can also be used as a pedagogical device. For example, Professor Martin H. Pritkin uses Arthur Miller's play, *The*

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144. R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1525 (2012); *see also* Jacob Soll, *The Economic Logic of the Humanities*, CHRON. HIGHER EDUC. (Feb. 24, 2014), http://search.proquest.com/docview/1501850218?accountid=9940 (describing how the great economists and political philosophers "placed the liberal arts at the center of economic thought" because policy issues must "be analyzed through the lens of philosophy, psychology, and history").

145. Cassidy, *supra* note 144, at 1525 n.59 (stating that the professionalism retreat offered to students at Boston College Law School "is loosely based on St. Ignatius's Spiritual Exercises").

146. Mark Sanders, *Law and Literature: Resources for Illinois Attorneys and Law Students*, 87 ILL. B.J. 109, 109 (1999).

147. *See* David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCIENCE 377, 377–79 (2013).

148. CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1985) (1853).

149. FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Constance Garnett trans., Random House 1956) (1866).

150. HARPER LEE, TO KILL A MOCKINGBIRD (Grand Cent. Publ'g 1960).

151. FRANZ KAFKA, THE TRIAL (Tribeca Books 2011) (1925).

152. JOHN GRISHAM, A TIME TO KILL (Doubleday 1989).

153. NATHANIEL HAWTHORNE, THE SCARLET LETTER (Dover Publ'n 1994) (1850).

154. Arieti, *supra* note 93; *see also* RICHARD A. POSNER, LAW AND LITERATURE 21–22, 389 (3d ed. 2009) (arguing literature can provide lawyers with unique insights on jurisprudential questions).

Crucible, to teach students how to think strategically about evidentiary issues at trial.[155]

> [I]t is crucial that we not abandon the humanistic foundations of education in favor of narrow, technical forms of teaching intended to give quick, utilitarian results. Those results are no substitute for the practices, sometimes painstaking, of inquiry and critique that enhance students' ability to appreciate and understand the world around them—and to respond innovatively to it. A reflexive, pragmatic liberal education is our best hope of preparing students to shape change and not just be victims of it.[156]

By studying how other disciplines approach sociological problems, lawyers are better prepared to question whether the best solution is a legal one,[157] whether the best alternative is the legal doctrine or remedy presently on the books, and whether the social and behavioral assumptions underlying legal doctrines and procedures comport with empirical reality or merely reflect untested common-sense assumptions. Jurisprudence, critical theory, and the social sciences provide insights into how the law functions, how the law is perceived to function, how the law is failing to function, or how the law ought to function in society. As Professor Pierre Schlag cautions, such "disruptive questions" are harder to come by when legal education is confined to the "internal perspective" of the law.[158]

Since the days of legal realism, it has been recognized that empirical questions are at the heart of law, which is replete with doctrines and practices that fail to reflect social reality.[159] A narrow focus upon understanding established doctrine from the insider perspective of the legal system itself reifies lawyers as "appliers of law rather than as creators of law" who are little more than "apologist[s] and technician[s] for established institutions and things as they are," and "confines legal education to the '*what is*' and neglects the promise of 'what *might* be.'"[160] Instead, law schools should equip lawyers to "relentlessly question the validity of what they think they know, accept received truths with skepticism, and

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155. Martin H. Pritikin, *Can Law and Literature Be Practical?* The Crucible *and the Federal Rules of Evidence*, 115 W. VA. L. REV. 687, 703 (2012) (discussing the evidentiary lessons that the interrogation scenes in *The Crucible* can provide to law students).

156. Michael S. Roth, *The False Promise of "Practical" Education*, CHRON. HIGHER EDUC., May 19, 2014.

157. *See generally* PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 5–6 (1998) (arguing that we tend to cast all social problems in legal terms requiring a legal solution).

158. *See* Pierre Schlag, *Anti-Intellectualism*, 16 CARDOZO L. REV. 1111, 1112 (1995).

159. *See* Redding, *The Brain-Disordered Defendant*, *supra* note 138, at 108–10 (discussing how the behavioral assumptions underlying much of law are inconsistent with social science research findings).

160. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 254–55, 262 (1978).

wonder with every [legal problem] what improved understanding or novel [solution] is just around the corner."[161]

Thus, "course[s] in legal history, sociology, institutions, hermeneutics, theory and sociology . . . give[] . . . students places to stand outside the habituation of and by doctrine or law."[162] Only then may students "gain the purchase necessary to fashion it, from the beginning, in other images"[163] to advance the interests of their clients and to act as legal policymakers or reform advocates. Courses in jurisprudence and comparative law provide students with useful alternative approaches to various legal doctrines and procedures and instill a critical mindset whereby students question law's foundational assumptions and practices, the necessary starting point for change.[164] Unlike law students, students in other disciplines, such as sociology, psychology, film studies, history, and English, graduate with a grounding in the competing foundational schools of thought associated with their discipline. These disciplines find such a grounding fundamental, a prerequisite for creative problem solving, yet few law students receive such an education. How many lawyers can talk meaningfully about competing schools of jurisprudence, different approaches to providing procedural justice, or about the meaning of "justice" itself?[165]

A word of caution is required, however. If interdisciplinary courses are to be successful as a requirement for law school graduation, professors teaching such courses must be mindful that students will be asking the "so what" question. Students will wonder what this has to do with law practice, or even more pragmatically, with passing the bar. Thus, professors should teach these courses in an applied context, clearly illustrating how the other disciplines are useful in solving legal problems. Even then, some students will feel that learning more legal doctrine, in lieu of the interdisciplinary exposure, is of greater value and interest to them,[166] particularly because many law students are somewhat phobic of quantitative disciplines such as accounting, statistics, or economics.[167]

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161. MOLLY COOKE, DAVID M. IRBY & BRIDGET C. O'BRIEN, EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY 30 (2010) (applying this approach to medical students).

162. Pether, *supra* note 96, at 538.

163. *Id.*

164. *Id.* at 513; *see also* Cramton, *supra* note 160, at 249 (recognizing a need for attorneys to distinguish between desired results and reality).

165. *See, e.g.*, Goodrich, *supra* note 117, at 468.

166. *See* Redding, *Mental Health Issues in Criminal Law*, *supra* note 138, at 421, 425 (reporting results of a survey of students in a first-year criminal law course). The survey found that while many students reacted positively to practice-relevant insights from the social sciences, a substantial minority of students reacted negatively because they felt such issues were irrelevant as these topics are not tested on the bar examination, and they found legal doctrine to be more important. *Id.* at 422–26.

167. *See* Leonard J. Long, *Basic Economics for Aspiring Lawyers: A Review of Richard A. Ippolito, Economics for Lawyers*, 28 QUINNIPIAC L. REV. 219, 219 (2009) (noting that prospective

Nonetheless, if taught properly, most students will react positively to the interdisciplinary insights bearing on legal problems and everyday lawyering.[168]

B. Teaching Knowledge and Skills Together

> *Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same.*[169]
>
> —Dean William L. Prosser

> *[We should] offer[] in legal education a complexity that matches the complexity of the legal world in which our students will function after they graduate. . . . [The notion of] "skills" versus "substance"—ought to be banished from our thinking.*[170]
>
> —Professor Nancy L. Schultz

The 2007 Carnegie Foundation Report,[171] the 1992 ABA Report on Legal Education (MacCrate Report),[172] and even the early 1914 and 1921 Carnegie

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law students can meet the criteria for admission "having no aptitude for science or mathematics, and having had no exposure to accounting, psychology, political science, statistics, literature, philosophy, or other useful subjects including economics"); Robert J. Rhee, *Specialization in Law and Business: A Proposal for A JD/"MBL" Curriculum*, 17 CHAP. L. REV. 37, 45–46 (2013) (stating that most incoming law students "do not come to law school with a basic knowledge of business").

168. In teaching my first-year criminal law course, I frequently discussed psychological concepts relevant to understanding criminal behavior, defenses to crimes, and the effective representation of criminal defendants. Comments from students illustrated that they understand the benefit:

> [Psychology] is such an important issue in terms of defenses, witnesses, and determining what punishment will or will not be effective. I think it is crucial to proper representation. . . . The study of law should not be limited to learning the trade of lawyering [as] the ability to understand and apply the social policies behind the law aid in serving our clients. I will work in the U.S. Attorney's Office this summer and the materials regarding mental disorder and mental illness will be food for thought.

Redding, *Mental Health Issues in Criminal Law*, *supra* note 138, at 424–25. A student also commented that "[i]t gave [her] a much broader perspective on our criminal justice system, and what is wrong with it." *Id.*

169. William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257, 257 (1948–49) (quoting a Native American saying as a metaphor for American legal pedagogy in 1948).

170. Schultz, *supra* note 95, at 57.

171. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22 (2007) [hereinafter CARNEGIE REPORT].

172. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, TASK FORCE

Foundation studies[173] all lambasted law schools for failing to teach legal practice skills. The MacCrate Report identified ten skills[174] and four professional values[175] that every law graduate should have.[176] Still, law schools generally do a poor job of teaching these skills and professional values. Responding to the renewed call for such training, many schools now require students to take an upper-level transactional or litigation skills course, applied capstone course, or a clinic or externship.[177] State bars are also mandating skills training in law school. For example, the California State Bar, attempting "to foster the development of professional competency skills," now proposes that candidates for bar admission complete at least fifteen units of upper-level coursework or "participat[e] in Bar-approved externships, clerkships or apprenticeships for courts, governmental agencies, law firms or legal service providers."[178]

But requiring students to take only a few skills or clinical courses is insufficient, and only emphasizes the false dichotomy between doctrine and practical skills. Rather, skills must be integrated throughout the curriculum, along with theory and doctrine, as each is necessary to the other. Nothing is more useful than a good theory, which provides the conceptual framework for deductive and inductive problem-solving when deploying one's skills. Most errors in problem-solving occur because the person's underlying theory or "mental model" is faulty or incomplete. Moreover, the key feature differentiating the expert from the novice is that "[t]he expert's knowledge is less context-specific or situation-specific in that he/she can generalize abstract principles in order to solve problems across a range of situations."[179]

ON SCH.: NARROWING THE GAP 5, 266 (1992) [hereinafter MACCRATE REPORT] (demonstrating the failure of law schools to recognize the importance of teaching professional skills).

173. JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 68–69 (1914); ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 48–49 (1921).

174. Problem solving; legal analysis and reasoning; legal research; fact investigation; communication; counseling; negotiation; litigation and alternative dispute resolution; organization and management of legal work; and recognizing and resolving ethical dilemmas.

175. Provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional development.

176. MACCRATE REPORT, *supra* note 172, at 138–41.

177. *See Chart of Legal Education Reform* (2011) (on file with the Catholic University Law Review).

178. STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 24 (2013), *available at* http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf.

179. Richard E. Redding, *Metacognitive Instruction: Trainers Teaching Thinking Skills*, 3 PERF. IMPROV. Q. 27, 30 (1990).

Skills are the mechanism by which legal knowledge is applied and understood in context, and skills practice provides students with feedback on how their knowledge should be interrogated, synthesized, and refined.[180] Active learning best motivates and engages students, since they can see how the theory is useful, and skills application is the ultimate form of "learning by doing."[181] However, research in cognitive psychology indicates that skill development requires continual practice across a range of legal contexts and problems, particularly if the skills are to transfer to the complex cases students will handle in practice.[182] Accordingly, to be effective, skills training must be neither too little, too early (e.g., a few add-on skills components in first-year courses), nor too little, too late (e.g., a few skills courses or clinics in the last year of law school), but must be integrated into all three years of law school.

Consider legal writing skills, as taught through first-year legal writing courses and the several seminar or drafting courses law schools now require.[183] In comparing students' writing during the first year of law school with their writing at graduation, it is often the case that though they have mastered the nuts-and-bolts of legal writing, there has been little improvement in their writing style, which is something that requires continued practice and refinement.[184] To truly develop students' writing skills, law schools must incorporate writing exercises into courses throughout the curriculum,[185] and these writing exercises should

180. *Id.* at 27–28.

181. *Id.* at 31–33.

182. Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 885–86 & n.20 (1996) (citing GORDON H. BOWER & ERNEST R. HILGARD, THEORIES OF LEARNING 77–78 (5th ed. 1981)); Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169, 173 n.15 (1990) (stating that "sufficient repetitive practice opportunities is critically important to skill development"); *see* Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLINICAL L. REV. 149, 149 (2004) (concluding that "basic knowledge of substantive legal doctrine is a necessary prerequisite to learning effective legal practice"); Redding, *supra* note 179, at 30–32 (1990) (reviewing research on the transferability of skills problem); *see also* Yasmin Sokkar Harker, *"Information Is Cheap, but Meaning Is Expensive": Building Analytical Skill into Legal Research Instruction*, 105 LAW LIBR. J. 79, 95 (2013) (noting that "literature from cognitive and educational psychology offers an enormous amount of information instructors can use and apply, especially in the area of analytical skill development and learning"); *see generally* ROBERT E. HASKELL, TRANSFER OF LEARNING (2001).

183. *See, e.g.*, *Legal Writing at Duke Law*, DUKE L. SCH., https://law.duke.edu/curriculum/legalwrit (last visited Nov. 18, 2014) (providing an overview of the different types of legal writing courses).

184. Susan Hanley Kosse & David T. Butleritchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 87 (2003).

185. A word of caution about teaching skills: often when professors attempt to incorporate skills training into their courses, the pedagogical focus becomes the nuts-and-bolts mechanics (glorified paralegal training or "soft skills" only) rather than deeper problem-solving skills.

also serve to develop other practice skills. For example, a course in business associations might require students to draft corporate bylaws or a shareholder agreement based on a mock term sheet, with the students representing the parties and negotiating the terms with one another.

To teach knowledge and skills in an integrated fashion, law schools must develop a competency-based curriculum, whereby we teach the knowledge and skills required of attorneys and test for these expert-typical competencies in applied contexts. Legal doctrine and skills, when taught in a manner divorced from the larger social and factual context and case history, is not an effective pedagogy.[186] Reflecting on her time teaching at an Australian law school, Professor Penelope Pether observed that educators "actually tested what it was [they] wanted students to learn, skills and content both, and as a result courses were generally continually assessed using a range of assessment models. . . . [S]tudents wrote and otherwise applied what they were learning a lot, in many genres, everywhere in the curriculum . . . ."[187] Similarly, the California Bar proposes restructuring the bar examination to test practical competencies "that are found among the best and most successful lawyers" rather than "standardized test-taking skills and knowledge of legal doctrine."[188] We should adopt the same approach throughout legal education.

To do so effectively, we must first "identify the knowledge, skills, behaviors, and attributes of highly successful [attorneys] . . . and then work backwards," using the identified knowledge and skills as course learning objectives.[189] Two recent studies identifying the generic skills, such as listening skills, creative problem solving, and emotional intelligence, that are characteristic of successful attorneys are helpful, but only a rudimentary beginning.[190] Educational and

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Students may "become adept at workplace procedures without developing deeper conceptual understanding of the rationale for the practices they are learning." *See* COOKE, IRBY & O'BRIEN, *supra* note 161, at 223 (discussing a similar problem in medical schools).

186. *See* Spencer, *supra* note 62, at 2036–38. Professor A. Benjamin Spencer observes:

> [T]he case-dialogue method often strips disputes from their context and emphasizes formal and procedural issues over other moral or personal factors that might bear on reaching a more complete appraisal of the justice of an outcome . . . . Omitted is any consideration of the underlying record, including documents, evidence, pleadings, trial transcripts, trial court rulings, and the like, or the raw client narratives and other facts that faced the practitioner at the pre-litigation, problem-solving phase of the representation, in favor of a retrospective view that stymies the development of the "legal imagination" . . . .

Id. (citations omitted)

187. Pether, *supra* note 96, at 507.

188. STATE BAR CAL., *supra* note 178, at 13.

189. Henderson, *supra* note 1, at 496.

190. *See* Neil W. Hamilton & Verna E. Monson, *Ethical Professional (Trans)Formation: Themes From Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921, 946–51 (2012); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness:*

cognitive psychologists should be recruited to conduct sophisticated and comprehensive studies of lawyering skills to identify the knowledge, mental models, and skills of expert attorneys in various practice areas.[191]

Such studies, which have been conducted in other fields, examine how experts do their work, using a technique known as "cognitive task analysis."[192] This technique employs experimental techniques, such as cognitive interviewing, psychological scaling, performance modeling, and error analysis, to identify the underlying knowledge base, mental models (high-level conceptualizations of problems and tasks providing the framework for solving problems), planning and attention allocation skills, and decision-making and problem-solving strategies differentiating between those more skilled versus less skilled at various tasks.[193] The goal is to determine how expertise develops over time, how to expedite learning, and how to identify the developmental antecedents to such expertise, including the beginning and intermediate knowledge and skill sets prerequisite to moving to higher expertise levels. In sum,

> a cognitive task analysis [of lawyering] should include: (a) the development of measurement instruments for assessing individual abilities as well as changes in the knowledge base; (b) the identification of task components; (c) the identification of the conceptual and procedural knowledge required for similar components; (d) the identification of differences between novices and experts, as well as intermediate states of knowledge; and (e) the specification of the learning conditions which best facilitate progress from one knowledge state to the next.[194]

Curriculum designers can use the findings from a cognitive task analysis to optimally structure and sequence instruction in a way that will promote students' development of the expert-typical cognitive structures and skills; and, to provide individualized instructional feedback about discrepancies between the expert-typical knowledge structures, mental models, and problem-solving strategies and the students' own.

Broadening the Basis for Law School Admissions Decisions, 36 LAW & SOC. INQUIRY 620, 629, 630 tbl.1 (2011).

191. Joan M. Ryder & Richard E. Redding, *Integrating Cognitive Task Analysis into Instructional Systems Development*, 41 EDUC. TECH. RES. & DEV. 75, 75–76 (1993). *See, e.g.*, Seamster et al., *Cognitive Task Analysis of Expertise in Air Traffic Control*, 3 INT'L J. AVIATION PSYCHOL. 257, 257–58 (1993).

192. *See* COGNITIVE TASK ANALYSIS 3–4 (Jan Marten Schraagen, Susan F. Chipman & Valerie L. Shalin eds. 2000).

193. *See, e.g.*, Seamster et al., *supra* note 191, at 257–58; *see generally* COGNITIVE TASK ANALYSIS, *supra* note 192, at 3–6 (providing an introduction to cognitive task analysis); Redding, *supra* note 179, at 27 (discussing metacognition); Ryder & Redding, *supra* note 191, at 75 (noting a shift in job demands from requiring behavioral responses to sophisticated cognitive skills).

194. Redding, *supra* note 179, at 36–38.

IV. THE MEDICAL SCHOOL MODEL: THE RIGHT PRESCRIPTION FOR LEGAL EDUCATION?

> *One limitation is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner . . . .*[195]
>
> —Authors of the Carnegie Report

> *The arguments against changes in law school curriculum are remarkably similar to those raised against changing the medical school curriculum.*[196]
>
> —Professor Jennifer S. Bard

It is instructive to compare law schools to medical schools, because both are professional schools preparing students for practice that have been criticized for failing to do so. In the early twentieth century, "medical education in the United States was faced with many of the problems that critics feel are confronting legal education today: an over-production of practitioners . . . proliferation of professional schools, insufficient financing, and inadequately trained graduates entering the profession."[197] The 1910 Carnegie Foundation's evaluation[198] hugely impacted medical education, with medical schools adopting its recommendation that medical education be more clinically oriented.[199]

Early American legal education similarly was clinically oriented, a structure borrowed from the British apprenticeship model, with many states requiring lengthy apprenticeships for admission to the bar.[200] Eventually legal education turned away from this approach, prompted by Harvard Law Professor Christopher Langdell's introduction of the notion that law was a "science," best

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195. CARNEGIE REPORT, *supra* note 171, at 188.

196. Jennifer S. Bard, *Teaching Health Law: What We in Law Can Learn from Our Colleagues in Medicine about Teaching Students How to Practice Their Chosen Profession*, 36 J. L. MED. & ETHICS 841, 847–48 (2008).

197. Robert M. Hardaway, *Legal and Medical Education Compared: Is It Time for a Flexner Report on Legal Education?*, 59 WASH. U.L. REV. 687, 687–88 (1981).

198. A. Flexner, *Medical Education in the United States and Canada*, BULL. 4 (THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 1910).

199. Hardaway, *supra* note 197, at 697–99.

200. *Id.* at 699–700.

mastered by classroom case study,[201] and today law is about the only profession that does not require some form of apprenticeship experience before becoming licensed to practice.[202] An early twentieth-century critic of American legal education observed that while medical schools trained their students by having expert physicians model medical decision-making across hundreds of patients, law schools exposed students only to particular kinds of cases—those resulting in appellate litigation—found in casebooks.[203] The critic explained:

> The medical student is taught how to do it right in the first place. He watches the operations of eminent surgeons. He sees top-ranking physicians examine living patients. . . . [H]e does things not merely once, as a law class visits a courthouse, but literally hundreds and hundreds of times . . . . And at the same time he is being taught the theory of medicine. He learns to read x-rays, not by reading in a book about a patient dying because someone did not read an x-ray correctly, but by reading hundreds of x-rays under expert supervision."[204]

Until recently, the first year of medical school taught students[205] the basic medical sciences, such as anatomy, microbiology, and biochemistry, in large lecture classes.[206] In 1998, the American Association of Medical Colleges (AAMC) reformed medical school curricula to better link theory to practice and facilitate "discovery learning." Medical schools shifted to problem and case-based pedagogies whereby basic sciences are taught in the context of their clinical relevance (e.g., cancer cell biology and treatment rather than basic cell biology), with clinical experiences and competency-based assessments incorporated throughout the four years of medical school.[207] Today, medical students are taught the basic sciences as they inform the medical applications, and students receive considerable practice exposure via clinical rotations where the applications of basic sciences to medical practice are stressed.[208] Such an integrative pedagogical model is rare in legal education, which still focuses on doctrine at the expense of jurisprudential theory and legally-relevant insights

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201. The 1912 ABA Committee on Legal Education noted that a significant advance had been "[t]he recognition of the superiority of the law school over the office preparation or the Bar." Henry A. Rogers et al., *Report of the Committee on Legal Education and Admission to the Bar*, *in* REPORT OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 595, 602–04 (1912).

202. CHAPMAN L. REV. SYMP., *supra* note 5, at 155.

203. Hardaway, *supra* note 197, at 706.

204. *Id.* at 706–07 n.115.

205. *See* Bard, *supra* note 89, at 844 (stating that the first two years of medical school looked like the current law school model).

206. *See id.*

207. *See id.* at 844–46 (stating that "almost all medical schools . . . now incorporate some version of problem-based learning (PBL)"); *see also* COOKE, IRBY & O'BRIEN, *supra* note 161, at 80–81 (stating that "PBL is the essence of 'discovery learning'").

208. *See* Bard, *supra* note 89, at 845–46.

from other disciplines, and which often teaches clinical skills divorced from the practical applications of theory.[209]

The alarms raised by the 2010 Carnegie Foundation Report on medical education should resonate with legal education reformers, who call for similar reforms.[210] The report lambasted medical schools for failing to teach students how to think creatively about medical problems, for over-emphasizing factual knowledge, and for failing to prepare them adequately for practice.[211] The report urged schools to do a better job of linking foundational scientific knowledge to practice.[212] Similarly, the 2007 Carnegie Report on legal education urged law schools to "mediate between the claims for legal theory and the needs of practice, in order to do justice to the importance of both while responding to the demands of professional responsibility."[213] To accomplish these goals, law schools should consider adapting the medical school model to legal education, crafting a curriculum that: (1) teaches foundational doctrine in the core subjects during the first year and a half of law school, but in an applied context whereby students practice skills through case simulations and problem-solving exercises; (2) exposes students to a reasonable range of specialty areas via elective courses during the second and third years, in a fashion that integrates doctrine with skills; (3) requires students to take a certain number of courses from a menu of interdisciplinary courses focusing on practical applications to law practice, such as jurisprudence or critical theory, accounting, economics in law, psychology or criminology in law, quantitative methods for lawyers, and courses in law and the humanities; and (4) provides students with clinical experiences early in law school, while devoting much of the final year of law school to a series of clinical rotations that exposes them to different practice areas.

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209. Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 357–59 (2008). *See also* CARNEGIE REPORT, *supra* note 171, at 10 (finding that "careful analysis of intelligent practice reveals a more intricate relationship between theory and practice . . . an understanding that is still poorly appreciated in the academy as a whole").

210. *Compare* COOKE, IRBY & O'BRIEN, *supra* note 161, at 23 (finding "instances of foundational knowledge poorly linked to experience"), *and* Richard B. Gunderman, *A Prescription for What Ails Medical Education*, CHRON. HIGHER EDUC., Dec. 20, 2013, at A60 (lamenting that "[m]any medical students gain remarkably little practical, hands-on experience"), *with* Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating A Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 727–28 (1996) (noting the overwhelming criticism "on law schools' alleged failure to convey a variety of practical skills").

211. COOKE, IRBY & O'BRIEN, *supra* note 161, at 23.

212. *Id.* at 23–30; *see also* Richard B. Gunderman, *A Prescription for What Ails Medical Education*, CHRON. HIGHER EDUC. (Dec. 16, 2013), http://search.proquest.com/docview/1473861708/1A851A99E5E843AFPQ/1?accountid=147762 (citing surveys of physicians, many of whom complained that medical residents lack basic practice skills).

213. CARNEGIE REPORT, *supra* note 171, at 12.

The structure of legal education in the twentieth century essentially rendered the first year of law practice, the fourth year of law school. Today, however, law firms resist the cost of training first-year associates in basic practice skills, and demand that law schools assume much of that responsibility.[214] But most law schools do not require students to complete any clinical experience for graduation,[215] most law students do not enroll in clinics,[216] and externships, where students often receive little meaningful supervision and frequently perform largely clerical and low-level tasks, may be of questionable value.[217] By contrast, clinical rotations give students the opportunity to meaningfully experience different practice areas. These hands-on training experiences also equip students to make more informed career decisions about which practice specialties to pursue. Just as medical schools offer clinics in each of the major specialties, law schools could offer community clinics in a range of practice areas, such as the clinic courses offered at New York Law School.[218]

Yet, as Professor Jennifer S. Bard explained, "it is difficult to teach someone how to do something that you yourself do not know."[219] Professor Brent E. Newton asks us to "[i]magine a medical school faculty dominated by professors with minimal experience in treating real patients. . . . [H]ow [then] can we allow the equivalent to occur in the context of legal education?"[220] A cadre of adjunct faculty, who bring other benefits to a law school, can assist full-time faculty in managing and supervising the clinics.[221] Adjunct professors bring valuable practice expertise that many full-time faculty members, who only practiced briefly with a large firm or government agency, lack in comparison.[222] Adjunct

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214. Robert J. Condlin, *"Practice Ready Graduates": A Millennialist Fantasy*, 31 TOURO L. REV. 75, 95 (2014).

215. Spencer, *supra* note 62, at 1949.

216. *Id.* at 2018 (citing data from the National Association for Law Placement). However, the ABA is considering a proposal requiring law school students to complete at least six credit hours of clinical, externship, or simulation-based courses. *See* Karen Sloan, *Panel Near Decision on Law Students' Bar Exam Passage Rates*, NAT'L L.J. (Feb. 6, 2014), http://www.nationallawjournal.com/id=1202641943246/Panel-Near-Decision-on-Law-Schools-Bar-Exam-Passage-Rates.

217. *See* ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY xiv–xv (2012).

218. *See Clinics*, N.Y. L. SCH., http://www.nyls.edu/academics/office_of_clinical_and_experiential_learning/clinics/ (last visited Oct. 22, 2014).

219. Bard, *supra* note 89, at 844.

220. Newton, *supra* note 27, at 113.

221. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014, *Interpretation 304-3(e)*, 24–25 (2013) [hereinafter *Interpretation 304-3(e)*], http://www.americanbar.org/content/dam/abapublications/misc/legal_education/standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf.

222. *See* Walter Bumphus, *Partner with the Private Sector*, TIME (Oct. 17, 2012), http://ideas.time.com/2012/10/18/8-ideas-to-improve-higher-education/slide/partner-with-the-priv

professors can also share their practitioner's real-world insights on curricular matters and faculty scholarship.[223]

Insofar as clinical education is concerned, Arizona State University Law School, New York Law School, and Washington and Lee University School of Law perhaps come the closest to adopting something akin to the medical school model.[224] Arizona State University Law School created its own law firm staffed by clinical and adjunct faculty, law students, and newly minted graduates,[225] just as medical schools do with associated university teaching hospitals.[226] At New York Law School, students are required to complete a two-semester course, working with "trained actors with whom students practice their interviewing, fact-gathering, and counseling skills."[227] In addition, the third year of law school is entirely devoted to "three nine-week full-time clinical rotations" available through their twenty-six clinics.[228] Washington and Lee University School of Law has transformed the third year of law school into a series of skills emersion, experiential, and clinical courses.[229]

However ideal the medical education model may appear for teaching knowledge and skills together, there are significant limitations to the value of

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ate-sector/; *see also* ABA TASK FORCE RPT., *supra* note 13, at 25 (stating that law schools alone cannot equip students with all the practice competencies and that law firms and other legal organizations must help train new lawyers).

223. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, BEST PRACTICES REPORT ON THE USE OF ADJUNCT FACULTY 10, 35 (2011) [hereinafter BEST PRACTICES REPORT ON THE USE OF ADJUNCT FACULTY]. *See also* CHAPMAN L. REV. SYMP., *supra* note 5, at 167 (setting forth Professor Cassidy's comment that "[w]e need to have really experienced lawyers and judges, who are senior in their career, join faculty on a short-term basis, for example, a 'distinguished visitor from practice,' we'll call it").

224. *See, e.g.*, Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES, Mar. 8, 2013, at A14 (discussing Arizona State University Law School); *The Third Year in Detail*, WASH. & LEE. U. SCH. L., http://law.wlu.edu/thirdyear (last visited May 1, 2013).

225. *See, e.g.*, Ethan Bronner, *supra* note 224 (discussing Arizona State University Law School).

226. *See, e.g.*, Steven Dowshen, *What's a Teaching Hospital?*, KIDSHEALTH.ORG (Apr. 2013), http://kidshealth.org/PageManager.jsp?dn=KidsHealth&lic=1&ps=107&cat_id=20253&article_set=60611; *What is a Teaching Hospital?*, BARNABAS HEALTH (last visited Nov. 3, 2014), http://www.barnabashealth.org/Medical-Education/What-is-a-Teaching-Hospital-.aspx.

227. *New York Law School Named One of 20 Most Innovative Law Schools*, N.Y. LAW SCH. (Aug 8, 2012), http://www.nyls.edu/news-and-events/new-york-law-school-named-one-of-20-most-innovative-law-schools/.

228. *Why NYLS? The City is Our Classroom*, N.Y. L. SCH. 6–8, http://www.nyls.edu/admissions/wp-content/uploads/sites/144/2014/09/ADMS-Viewbook-2015-16-F-City-Classroom.pdf (last visited Nov. 3, 2014) [hereinafter NYLS BROCHURE].

229. CHAPMAN L. REV. SYMP., *supra* note 5, at 159–62 (setting forth Washington and Lee University School of Law Professor James Moliterno's description of the school's innovative third-year education program, a series of twelve experiential courses that "put the students in the role of lawyer"). *See Washington and Lee's New Third Year Reform Leading the Way in Legal Education Reform*, WASH. & LEE U. SCH. L., http://law.wlu.edu/thirdyear (last visited Nov. 3, 2014).

clinical rotations in legal education. Medical training programs are designed with the following considerations in mind: "What are the clinical experiences that a newly minted physician in this specialty should have encountered under supervision? How many instances should she have seen? What level of proficiency or sophistication should she have attained?"[230] During clinical rotations in the last two years of medical school, students are exposed to thousands of cases ranging in complexity and patient populations, often assisting the supervising physicians with a dozen or more patients daily.[231] Further, medical students rounding at teaching hospitals will be exposed to patients presenting complex and challenging medical problems because these patients are often referred to the teaching hospitals of medical schools.[232]

In contrast, law school clinics provide students with only a handful of cases, due to the time commitment required to handle most legal matters.[233] Law clinics also usually handle relatively simple cases (e.g., drafting a simple will, filing a no-fault divorce, mediating a small claims dispute, trying misdemeanor cases) involving particular kinds of legal issues (most clinics do not, for example, handle international business transactions, corporate law, real estate transactions, or felony criminal cases).[234] Although clinics will introduce students to real cases, law students are exposed to a very limited range of client populations and case types that are not representative of the diverse populations and complex cases they will encounter in practice. In terms of the number and range of clients and cases and the complexity level of these cases, the clinical training law schools are able to provide pales in comparison to the clinical training provided by medical schools. For these reasons, the kind of work students do in existing law school clinics may have little transferability to their later law practice.

Consider also the opportunity cost involved in the time taken away from teaching theory, doctrine, and interdisciplinary perspectives on the law. This is a huge cost; young lawyers will acquire lawyering skills in practice but are not likely in practice to study legal theory or critical perspectives on law and the

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230. *See* COOKE, IRBY & O'BRIEN, note 161, at 237.

231. *See id.* at 239 (discussing the heavy workload of medical school students during their internship rotations).

232. FLEXNER: 75 YEARS LATER, A CURRENT COMMENTARY ON MEDICAL EDUCATION 27 (Charles Vevier ed. 1987) ("[T]eaching hospitals tend to attract the most complex cases; the patients are sicker and have a higher rate of complications."); *see also* COOKE, IRBY & O'BRIEN, *supra* note 161, at 164 (discussing how university teaching hospitals "provide general and specialized clinical care to some of the most severely ill and injured").

233. *See* Bard, *supra* note 89, at 846; R. Sam Hoover, *A Physician Becomes An Attorney With Little Advice: A Case Study*, 19 ANNALS HEALTH L. 43, 44 (2010) (stating law school clinical programs do not compare, experience wise, to medical school programs).

234. *See, e.g.*, NYLS BROCHURE, *supra* note 228, at 6; *Fact Sheets*, ARIZ. STATE UNIV. LAW SCH., https://www.law.asu.edu/clinics/TheClinicalProgram/ClinicFactSheets.aspx (last visited Mar. 9, 2015).

legal system, making law school the only time for such an education. How many legal skills do students actually acquire, retain, and generalize after working on a few relatively simple cases in just one or two semester-long clinics? To be sure, there is a pressing need for graduates to be "practice ready."[235] But we must consider whether this is a realistic goal given the limited number and range of skills we are likely to impart to students in a few clinical or skills-based courses and via the few, usually time-consuming, skills exercises we can feasibly incorporate into traditional courses.

It may appear that the solution to these intrinsic problems in clinical legal education is to adopt the model of medical schools, which have fee-charging teaching hospitals and outpatient clinics staffed by a cadre of full-time clinical faculty.[236] Perhaps in collaboration with the private sector, law schools might operate like law firms, offering reduced-fee legal services staffed by tenure-track supervising faculty who are valued as highly as their non-clinical counterparts.[237] But this would only partially solve the range and complexity of cases problem, since full-paying clients having more complex cases or business law cases are not likely to retain the services of the school's firm unless the school can staff it with distinguished supervising practitioners, as medical schools do in their teaching hospitals (with patient insurance covering much of the cost). The problem of exposure to only a small number of cases would remain, though not if new graduates obtain their first year of practice experience in the law school firm, as a kind of legal internship similar to a medical internship. Unfortunately, given the structure of legal education and the legal services market, the viability of law-school affiliated firms is questionable; most previous attempts to establish such firms have failed.[238]

V. MARGINALIZING SCHOLARSHIP

> *The high quality and distinctiveness of American legal education are based largely on the work of career, full-time faculty who engage fully in the law school's teaching, scholarship, and service missions. Full-time faculty should be experts in their fields and continue to engage in scholarship that makes them even more accomplished. . . . The scholarship and public service of career, full-time faculty do not merely supplement their teaching role. Both scholarship and public*

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235. *But see* Robert Condlin, "*Practice Ready Graduates": A Millennialist Fantasy*, U. of Maryland Legal Studies Research Paper No. 2013-48 (Nov. 18, 2014) (challenging the notion that law schools can produce "practice-ready" graduates).

236. *See, e.g.*, John Z. Ayanian & Joel S. Weissman, *Teaching Hospitals and Quality of Care: A Review of the Literature*, 80 MILBANK Q. 569, 569–70 (2002).

237. *See* Chemerinsky, *supra* note 114, at 16 (noting that at most law schools "clinical faculty are essentially second-class citizens—or worse" and are non-tenure-track faculty).

238. *See id.* at 18 n.16, 19.

> *service underlie teaching and give it an authority that teachers who merely pass on received understanding or transmit skills cannot match.*[239]
>
> —Professor Michael A. Olivas

One of the most potent criticisms of legal education today is that law professors are preoccupied with their scholarship at the expense of teaching.[240] It has become fashionable for critics, particularly non-academics and those law professors who have not been successful scholars, to assert that "many law professors are so absorbed in their scholarly pursuits that they are largely unconcerned with students' needs," [241] and "that there is no significant correlation between professors' records of publishing and their teaching effectiveness."[242] Implicit in such arguments is the notion that the legal scholar can separate his or her academic expertise from teaching and deliver legal education in instrumentalist, reductive ways. Sure, legal scholars can put the intellectual side "under erasure," as Derrida would say,[243] but this does not mean that scholarly inquiry fails to inform what they do as teachers and practitioners.

It is wrong to suggest that law professors are scholars above all else, with law schools "set up like research universities" where scholarship is "the coin of the realm."[244] Critics often complain that professors run law schools to promote their scholarship, but this is far less true for law schools than graduate schools, where virtually everything is geared toward promoting the professors' research.[245] To be sure, scholarship has grown in importance in determining a law professor's salary and standing among his or her colleagues, but it is far

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239. Letter from Michael A. Olivas, Former President of Ass'n of Am. Law Sch., to Hulett H. Askew, Consultant on Legal Educ. Section of Legal Educ. of Admission to the Bar, Am. Bar Assoc. 3 (March 28, 2011), *available at* https://web.archive.org/web/20110409195546/http://www.aals.org/advocacy/Olivas.pdf.

240. Newton, *supra* note 18, at 132.

241. *Id.*

242. *Id.* at 107–08.

243. Spivak, *supra* note 22, at xiv.

244. *See* TAMANAHA, *supra* note 1, at 43, 45.

245. *See, e.g.*, *Graduate Assitantships*, WORCESTER ST. UNIV., http://www.worcester.edu/Graduate-Assistantships (last visited Nov. 5, 2014). For example, graduate school admissions decisions are driven by whether applicants can assist professors with their research; many professors are interested in teaching and mentoring graduate students only insofar as doing so facilitates the faculty member's research; and, some professors will try to stretch out students' time in graduate school so they have the benefit of their cheap labor and developing expertise. Michael W. Kraus, *Is Graduate School a Ponzi Scheme?*, PSYCH. TODAY (Jan. 19, 2012), http://www.psychologytoday.com/blog/under-the-influence/201201/is-graduate-school-ponzi-scheme; *see, e.g.*, Graduate Assistantship Responsibilities, WORCESTER ST. UNIV., http://www.worcester.edu/Graduate-Assistantships (last visited Nov. 4, 2014).

from being the only determinative factor.[246] Other currency, such as elite credentials or holding professional leadership positions, still carries considerable cachet.[247] For example, U.S. Supreme Court Justice Elena Kagan, prior to being appointed a justice, was a law professor at the University of Chicago and then Harvard Law School, where she later served as dean. Yet, in Justice Kagan's approximately fifteen-year long academic career, she published just six articles and one book chapter,[248] a publication record likely not even warranting tenure—and certainly not the rank of full professor—in most other colleges at those very same universities.[249] The fact that professors like Justice Kagan can achieve the pinnacle of success belies the notion that scholarship is the coin of the realm in the legal academy.

A. Engaged Scholars Are Better Teachers

It is a red herring to argue that scholarship is unrelated to teaching. To be maximally effective teachers, professors must also be engaged with their discipline as scholars. Non-scholar professors may have a wonderful classroom presence, great rapport with their students, and employ very effective and even cutting-edge pedagogical techniques.[250] But professors should question whether these effective pedagogical skills are wasted on teaching stale content that they themselves mastered only by reading the casebook and through their own usually limited, years-old practice experience.

Grappling with the sorts of questions one encounters when undertaking scholarly work is the best way to stay current in a field, while continually engaging the mind in a much more active way than simply staying atop the cases and legal literature. Non-scholar professors are unlikely to remain on the cutting

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246. Matthew T. Bodie, *Funding Legal Scholarship*, 4 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 107, 108–09 (2014). *See* O'Connor, *supra* note 36, at 422–23 (2010) (finding that "the studies comparing student evaluation scores with the number of publications or citations may be looking at one measure rather than engaging in a comparative analysis").

247. *See* Bruce D. Fisher & Paul Bowen, *The Law School Compensation System at Three Top Quartile State Law Schools: Factors Correlating with Law Professors' Salaries and Suggestions*, 19 N. ILL. U. L. REV. 671, 687–90 (1999).

248. Thomas Goldstein, *9750 Words on Elena Kagan*, SCOTUSBLOG (May 8, 2010, 1:00 A.M.), http://www.scotusblog.com/2010/05/9750-words-on-elena-kagan/.

249. *See* Christi Parsons, *U. of C. Law Faculty Didn't Back Kagan*, CHI. TRIBUNE (May 30, 2010), http://articles.chicagotribune.com/2010-05-30/news/ct-met-kagan-chicago-20100530_1_harvard-law-school-elena-kagan-faculty. In addition, casebook and treatise authoring also has cachet in law schools. But it is eschewed elsewhere in the academy as being non-scholarly (counting for little in promotion, tenure, or merit pay decisions) because these are teaching and reference materials that do not generate new knowledge, the defining characteristic of "scholarship."

250. *See* O'Connor, *supra* note 36, at 422–23 (surveying the empirical literature on the relationship between scholarship and teaching effectiveness). The few studies of the relationship between professors' scholarly productivity and teaching effectiveness have been conflicting or inconclusive, measuring teaching effectiveness through student course evaluations, which tend to focus on instructional style rather than content and rigor. *Id.*

edge of the current scholarship in their field, and will likely teach current modal practices but not necessarily the best practices. Practitioners, serving as adjunct or part-time professors, usually have neither the time nor the inclination to track and contribute to legal scholarship and innovation.[251] As a consequence, they are poorly positioned to mentor students in cutting-edge developments and in thinking about legal problems in new and innovative ways. By contrast, an engaged scholar keeps abreast of cutting-edge thought in her specialty and contributes innovative perspectives and solutions through her scholarship. When surveyed, law students say that the most effective teachers are those who are the acknowledged scholarly experts in their field.[252] Indeed, the elite universities are thought to provide a superior education largely because the top scholars in their fields serve on their faculties.

The quintessential expert is one who drives her field by creating new knowledge, not one who merely acquires expertise secondhand—by reading casebooks and treatises. We should want those teaching our students to possess the highest level of expertise possible. The ability to develop innovative ideas ("inventing") requires a higher order of insight about one's field than does understanding and applying pre-existing knowledge ("practicing").[253] The ABA accreditation standards, recognizing the correlation between scholarship and best-practices instruction, require that law school faculties engage in scholarship.[254] But Professor Tamanaha proposes the elimination of that standard,[255] while Professor Newton asserts that because law schools are professional schools, "[l]aw review articles published by law professors amount to an improper cross-subsidy from students to professors."[256] To be sure, law schools are professional schools training students for practice. But they are also academic institutions, and if law professors do not generate legal scholarship, who will?

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251. Dean Erwin Chemerinsky argues that the teaching quality of adjunct professors is generally inferior to that of full-time faculty because they are less experienced teachers and have less time to prepare for class. Erwin Chemerinsky, Opinion, *You Get What You Pay For in Legal Education*, NAT'L. L.J. (July 23, 2012), http://www.nationallawjournal.com/id=1202564055135?slreturn=20150210223643. ABA TASK FORCE RPT., *supra* note 13, at 29 (suggesting that the ABA consider permitting a greater percentage of courses to be taught by adjunct and part-time faculty).

252. *See* James B. Levy, *As Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 76–77 (2006) ("The results . . . make good common sense because it stands to reason that students are much more likely to pay attention in class when they have faith in their teacher's knowledge and expertise.")

253. *See* COMM. OF COLL. & UNIV. EXAM'RS, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS 41 (Benjamin S. Bloom ed., 1956).

254. *Interpretation 304-3(e)*, *supra* note 221, at 29.

255. *See* TAMANAHA, *supra* note 1, at 173.

256. Newton, *supra* note 27, at 128–29.

B. Legal Scholarship Contributes to the Public Good

As Judge Posner observed, "[t]he academy does not generate the knowledge that judges, lawyers, and legislators need in order to operate a modern legal system, yet there is no other institution capable of generating it."[257] The mission of universities is, and has been, the advancement of knowledge.[258] Unfortunately, in recent years universities have begun to shift from a public good regime, valuing knowledge production for its own sake, to a capitalist regime, valuing knowledge production only if economically useful to the university or its graduates in the marketplace.[259] But, law schools, allied with the academic mission of their universities, "must at times give society, not what society wants, but what it needs."[260] This Article proposes that legal education return to the public good model, a regime that implicitly considers law schools' clients to include society and the legal profession, to which law professors can uniquely contribute through legal scholarship. While teaching "spreads *existing* knowledge [to] *thirty or so* students at a time,"[261] scholarship creates *new* knowledge available to *many*, with the added benefit of potential lasting systemic impact.

Yet, marketplace reformists, warped by consumerism, propose an academic model aimed at reducing the cost of tuition that guts legal scholarship and increases faculty teaching loads. The marketplace regime's proposed curriculum for legal education represents what economists call the "tragedy of the commons," which is when a service or commodity important to society, such as basic scientific research, is not financially supported by the private market.[262] Legal scholarship may foster legal innovation and make important contributions to our understanding of the legal system, yet no one in the marketplace—neither

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257. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 468–69 (1990).

258. *See generally* JOHN HENRY NEWMAN, THE IDEA OF A UNIVERSITY, 12–13 (I.T. Ker ed., 1976).

259. SLAUGHTER & RHOADES, *supra* note 73, at 28–29; *see also* Richard Moser, *Overuse and Abuse of Adjunct Faculty Members Threaten Core Academic Values*, CHRON. HIGHER EDUC. (Jan. 13, 2014), http://chronicle.com/article/OveruseAbuse-of-Adjuncts/143951/ (stating that the recent "corporatization" and consumerism in higher education means that "[t]he search for truth, critical thinking, intellectual creativity, academic standards, scientific invention, and the ideals of citizenship have been discounted in favor of maximizing profits, vocational training, career success, applied research, and bottom-line considerations").

260. ABRAHAM FLEXNER, UNIVERSITIES: AMERICAN, ENGLISH, GERMAN 5 (Transaction Publishers 1994) (1930).

261. James Lindgren, *Fifty Ways to Promote Scholarship*, 49 J. LEGAL EDUC. 126, 126 (1999) (emphasis added); *see* Lindgren & Nagelberg, *supra* note 36, at 827–29 (reporting results of a study finding that professors whose scholarship is frequently cited in the literature are also more likely to have significantly higher teaching evaluations).

262. *See* William H. Press, *What's So Special About Science (And How Much Should We Spend on It?)*, 342 SCIENCE 817, 821 (2013), *available at* http://www.sciencemag.org/content/342/6160/817.full.pdf.

law students, law firms, nor clients—are individually willing to pay for this larger societal benefit. The 2013 ABA Task Force on the Future of Legal Education noted the "constant, never fully resolvable tension" between the view of the law school as a private good designed to serve the needs of consumers in the legal marketplace and train lawyers for practice versus the broader view of the law school as a public good with the mission to serve society[263] by producing scholarship and by training students, through a liberal arts education in the law, to be "broad-based problem solvers and societal leaders."[264] But as discussed below, *these public goods will serve the private interest as well*. As the ABA Task Force noted, "[t]he traditional emphasis on legal education as a public good has led to a focus on *quality of legal education* as an overriding goal by law schools."[265]

The case for decentering professors from scholarship stands as foreground against the longstanding debate concerning the value of legal scholarship and the appropriate role for law schools as either academic or vocational schools. In 1936, Professor Fred Rodell complained that legal scholarship was irrelevant to law practice and public policy.[266] The complaint that law professors write on esoteric topics for themselves and each other[267] is an old criticism[268] that has

263. ABA TASK FORCE RPT., *supra* note 13, at 4–5.

264. *Id.* at 12.

265. *Id.* at 24 (emphasis added).

266. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 42–43 (1936).

267. Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 415 (stating that most legal scholarship is simply "articles written *by* law professors *for* law professors, rather than for members of the bench and bar").

268. *See id.* (noting the same criticisms date back to the 1970s); *see also, e.g.*, James W. Ely, Jr., *Through a Crystal Ball: Legal Education—Its Relation to the Bench, Bar, and Community*, 21 TULSA L.J. 650, 654 (1986) (stating that law reviews are not useful to practitioners); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 321 (1985) (claiming that only academics read the law reviews, which only "decorate law school library shelves").

gained renewed potency among judges,[269] the bar,[270] and even some law professors,[271] just as it did during the 1990s when people were complaining that professors were out of touch and did not teach students real-world skills. Legal scholarship today is heavy on theory and interdisciplinarity ("law and . . ."), and critics note that most law review articles are never cited or used by practitioners.[272] Yet, the same is true in most fields, where practitioners[273] as

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269. *See* Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008) (stating that legal scholarship is increasingly irrelevant to the legal system and that "law review articles have left terra firma to soar into outer space"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (observing that most legal scholarship is useless from his view on the bench of the D.C. Circuit Court of Appeals); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989) (a New York Court of Appeals judge expressed her "disappoint[ment] not to find more in the law reviews that is of value and pertinence to our cases . . . . The concern that academics are writing for each other is indeed well founded"); Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 297, 318 (2000) (Ninth Circuit Court of Appeals judge's criticism of law review articles as irrelevant to lawyers and judges); *see also* Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, N.Y. TIMES, Oct. 21, 2013, http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html (quoting Chief Justice John Roberts at a recent judicial conference, "[p]ick up a copy of any law review . . . [and it] isn't of much help to the bar"); Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, http://www.nytimes.com/2007/03/19/us/19bar.html?_r=0 (providing the opinion of several judges).

270. *See* MACCRATE REPORT, supra note 172, at 5 (positing that "[p]ractitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns"); Newton, *supra* note 18, at 105, 114 (asserting that "law reviews publish approximately 150,000 to 190,000 pages per year. Yet the majority of those pages . . . provide little if any social utility (other than to their authors) and represent a colossal amount of wasted resources and opportunity costs").

271. *See, e.g.*, David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 768 (2005) (stating that "[t]oo much of legal scholarship is becoming 'law professor scholarship,' a discourse among theorists with little practical application").

272. *See* Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 117 (2004) (reporting results of empirical study finding that "judicial citation of contract law scholarship is apparently rather infrequent, with almost 70% of the predominately top-tier subset of contract law articles here considered never having been cited by a single court," and that "the average article considered in this study was cited approximately 50 times more frequently by other scholars in law review articles than it was in judicial opinions"); Michael McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) (finding that state and federal appeals court citations to the top law reviews have dropped significantly in the last few decades); Newton, *supra* note 267, at 416 (finding that the Supreme Court cites law review articles far less frequently than in the past, with many of the articles cited not written by full-time law professors); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1051–53 (1991) (finding a low percentage of law review citations); Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 335 Fig.12, 336 (2007) (finding that forty-three percent of law review articles are never citied).

273. *See* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1331–32 (2002) (discussing the rate of citations in the humanities and social sciences); Newton, *supra* note 18, 119–

well as policymakers[274] ignore most of the scholarship. As Deborah L. Rhode explained, however, "there is no system that can produce only good scholarship. An academic culture that eliminates the bad scholarship will not provide a seed-bed for the good."[275]

Two recent empirical studies examining citations to legal scholarship by the U.S. Supreme Court and Circuit Courts of Appeals, the most comprehensive and methodologically sound studies to date, refute the notion that courts ignore legal scholarship.[276] Analyzing all Supreme Court decisions between 1949 to 2009, Professors Lee Petherbridge and David L. Schwartz found: (a) the Court cited legal scholarship in approximately one-third of its decisions; (b) the citation rate had increased significantly over the years; and (c) citations to legal scholarship often seemed to influence the Court's decision or reasoning, with the Court most often citing scholarship in difficult or important cases.[277] Professors Petherbridge and Schwartz concluded: "we think the evidence reasonably leads to an interpretation of the Court's use of scholarship that is strongly contrary to the claim that courts and practitioners have little use for it."[278] A similar study of citations by the federal courts of appeals, analyzing 296,098 reported decisions between 1950 and 2008, found that while only thirty-seven percent of the opinions between 1950 and 1979 cited legal scholarship, sixty-three percent of the opinions between 1980 and 2008 did so, a two-fold increase.[279] Likewise, a study of 200 business law opinions issued by the Delaware courts between 1997 and 2007 found no decline in their citation to law review articles.[280] Although the Delaware courts usually did not rest their holding on the scholarly commentary, they did cite it more often in cases presenting novel or difficult issues.[281]

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22 (complaining that legal scholarship is too theoretical or interdisciplinary and citing many others with the same complaint).

274. *See, e.g.*, Beth McMurtie, *Social Scientists Seek New Ways to Influence Public Policy*, CHRON. HIGHER EDUC., Sept. 6, 2013, at A20–21 (discussing the longstanding problem that research by academic social scientists has often failed to impact policymaking).

275. Rhode, *supra* note 273, at 1331–32.

276. *See* Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 1005 (2012); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359 (2011).

277. Petherbridge & Schwartz, *supra* note 276, at 1005–08, 1012–16.

278. *Id.* at 1016.

279. Schwartz & Petherbridge, *supra* note 276, at 1359–61.

280. Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Cases*, 19 U. MIAMI BUS. L. REV. 1, 5 (2011).

281. *Id.* at 25, 30, 48–49 (finding, however, that the courts more frequently cited articles by practitioners than articles by professors).

Indeed, there are many instances where legal scholarship has significantly altered the course of legal precedent or public policy; for example, Professor Charles Reich's scholarship that changed due process law through the *Goldberg v. Kelly*[282] decision;[283] Professor Guido Calabresi's impactful work on product safety liability;[284] Professor Catharine MacKinnon's scholarship helping to establish sexual harassment law;[285] the "Chicago School's" capturing of the Supreme Court's antitrust jurisprudence;[286] Professor Paul Bator's work on federal habeas corpus jurisprudence;[287] and the influential work of Professor Franklin E. Zimring and colleagues on the counterproductive effects of "get-tough" juvenile justice policies.[288] More recently, Professor (now Senator) Elizabeth Warren's scholarship and associated advocacy on consumer financial protection[289] was chiefly responsible for the creation of the Consumer Financial Protection Bureau.[290]

When courts fail to cite relevant scholarship, it may be because scholarly commentary tends to articulate the ideal legal structure or doctrine, whereas judges are constrained by precedent. Nevertheless, an ideal often informs the possible, influencing jurists' background perspectives and conceptual frameworks for understanding legal problems.[291] The thinking and practices of lawyers, judges, and law clerks is influenced by what their professors (whose thinking was molded by scholarship in their field) taught them in law school. They also are influenced when they consult professors about cases and when they hear professors talk at legal forums and continuing legal education

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282. 397 U.S. 254 (1970).

283. *See* Ronald A. Cass & Jack M. Beermann, *Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law*, 45 ADMIN. L. REV. 1, 9–11 (1993).

284. *See generally* Guido Calabresi, "THE COST OF ACCIDENTS": A LEGAL AND ECONOMIC ANALYSIS 1–16 (1970) (discussing five proposed reforms to product safety liability and providing a thorough examination of the issues posed by the proposed reforms).

285. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

286. *See* William E. Kovacic, The Antitrust Paradox *Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1415–17 (1990) (describing the impact of the Chicago school's view of antitrust on Supreme Court decisions).

287. *See* Neal Kumar Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1193 n.20 (2012) (citing the influence of Professor Bator's work on the law of habeas corpus).

288. Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 OHIO ST. J. CRIM. L. 57, 58–59 (2013) (summarizing their empirical findings).

289. *See* Elizabeth Warren, *Unsafe At Any Rate*, 5 DEMOCRACY J. 8, 16–18 (Summer 2007), *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

290. Jackie Calmes & Sewell Chan, *Obama Chooses Warren to set up Consumer Bureau*, N.Y. TIMES, Sept. 18, 2010, at B5.

291. Katyal, *supra* note 287, at 1190–94 (describing the influence of scholarship on the Supreme Court's Affordable Care Act decision).

workshops.[292] A jurist's perspective on constitutional law may be influenced by critical theory learned in law school courses, a transactional attorney's approach to contract negotiation may be altered by exposure to the economic principles of contract law, and a lawyer's approach to counseling clients may be influenced by learning about therapeutic jurisprudence or by reading *The Trial*[293] or *Bleak House*[294] in a law and literature course. A lawyer's thinking may even be shaped by something quite esoteric, such as Professor David S. Caudill's Lacanian psychoanalysis of law, which changed my perspective on the legal system.[295]

Moreover, scholarship may have a greater impact on the development of legislation and administrative regulations than it does on judicial decision-making. To be sure, while legislators and other policymakers virtually never consult law review articles when drafting legislation,[296] their staffs, legislative task forces, and the law professors and other experts they consult may rely on scholarship and scholarly opinion in various ways. For example, I served on a Virginia task force appointed by the state legislature to study whether the Commonwealth should adopt competency to stand trial standards or permit the insanity defense in the juvenile court. At the outset, the task force consulted the relevant legal and mental health scholarship on these issues, which substantially influenced the task force's recommendations.

Professors Hricik & Salzmann observe that in law practice they often faced complex problems that could have benefited from scholarly, particularly interdisciplinary, analysis of the kind that practitioners and judges have neither the time nor expertise to conduct.[297] When practitioners view legal scholarship as irrelevant, as admittedly it often appears to be, perhaps it is not because their legal education was too academic or that legal scholarship is, in fact, irrelevant. Instead, the problem may be that law schools fail to educate students on the ways in which scholarship can inform law practice.[298] This leaves many

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292. *See* Gary A. Munneke, *Managing A Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207, 1220 (2010).

293. KAFKA, *supra* note 151.

294. DICKENS, *supra* note 148.

295. *See* DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY at xi–xv (1997).

296. *See* Cass & Beerman, *supra* note 283, at 4–7 (noting some scholarly influence on legislative decisions, but that such influence often occurs in relation to "broader issues that ha[ve] permeated the popular realm . . . as to influence voting or at least the votes of active interest groups").

297. *See* Hricik & Salzmann, *supra* note 271, at 781.

298. *See* Sternlight, *supra* note 3, at 770–71. Sternlight stated:

> Academics . . . should cease making comments that lead students to see theory and practice as conflicting with one another. Instead, academics should attempt to help students see those disciplines as symbiotically supportive. . . . Too many academics, consciously or not, encourage students to see legal practice . . . as an intellectual wasteland. . . . [A]cademics also do a disservice to their theoretical scholarship when

lawyers "not knowing what they don't know"[299] concerning the actual value of legal theory as well as the social sciences, business sciences, and humanities to what they do in practice.[300] This implies that their legal education was not academic *enough*. The problem is compounded by the fact that law professors often do not produce scholarship of the same quality as academics in other fields, because law professors are the products of the same legal education as practitioners, not having had the benefit of the scholarly training provided in research-oriented graduate degree programs.[301] Current reform proposals would erode the rather modest extent to which law schools do provide scholarly training, moving legal education back to a time when law school was trade school and law professors were practitioners, who just taught what they knew from their own limited practice experience and the casebooks they read.[302]

To be sure, however, much could be done to improve the quality and relevance of legal scholarship. It suffers considerably because virtually everything written is published somewhere sans the quality control found in the peer-reviewed journals of other disciplines because would-be law professors receive little or no scholarly training or preparation, and because most law schools have scholarship standards for tenure (typically only three or four publications in non-peer reviewed journals) below the quality and quantity standards of most other academic disciplines.[303]

> they fail to show students the relevance, and thus power, of their theories. Instead, too often students accept the professors' point that the worlds of practice and theory have little in common and then go on to embrace the world of practice and reject the world of theory.

Id.

299. Wendy L. Werner, *DIY Professional Development*, LAW PRACTICE MAGAZINE, May/June 2013, *available at* http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/career-steps.html.

300. *See* Edwards, *supra* note 118, at 2–3.

301. *See* Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321–23 (2002).

302. *See* Bruce A. Kimball, *The Principle, Politics, and Finances of Introducing Academic Merit as the Standard for Hiring for "the Teaching of Law as a Career," 1870–1900*, 31 LAW & SOC. INQUIRY 617, 618 (2006) (contrasting the "traditional hiring standard of professional experience and reputation" with the new "hiring standard of academic merit" emerging during the end of the nineteenth century).

303. Professor Larry Rosenthal provides a touchstone example of the hazards of non-peer-reviewed legal scholarship:

> William Stuntz was one of the most prolific and cited criminal procedure scholars in recent decades, but his work often contained broad empirical generalizations with questionable empirical support—the kind of work that might be questioned by the editors of a peer-reviewed criminology journal, but which law review editors were evidently eager to publish, and legal scholars were subsebsequently [sic] eager to cite. For years (really decades), the process of post-publication peer review described in this post seemed to smile on Professor Stuntz's claims—not because anyone systematically examined the evidence supporting these claims, but because they offered support for

Moreover, law professors often fail to fully consider the feasibility and practical application of their theories in the real world. For example, when the University of Pennsylvania Law School Professor Lani Guinier's controversial writings on voting rights were publically aired, President Clinton withdrew his nomination of her to the post of Assistant Attorney General for Civil Rights.[304] Professors Guinier's fate, postulates Mary Ann Glendon, may have been the result, inter alia, of her fellow academic's failure to scrutinize the real-world implications of Guinier's work. Consider also Berkeley Law School Professor John Yoo's "Torture Memo," later widely criticized for providing misguided legal advice, which provided the legal predicate for the enhanced interrogation techniques of terrorist suspects utilized by the Bush Administration.[305] Though Professor Yoo was widely considered to be a "superstar" scholar,[306] his lack of practice experience may have left him ill-equipped to recognize the limits of his innovative theories of executive power when applied in the real world.[307]

Legal scholarship must be of much higher quality and relevance. It must explicate, rather than obscure, its practical relevance to law students, practicing attorneys, and judges. Scholars should derive their theories from real-world data, explain the links between theory and application, promulgate solutions

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> others who wished to make arguments that were supported by these same claims. In other disciplines, however, empirical claims are not accepted merely because someone has already made them—they require persuasive supporting evidence. In their recent reviews of Professor Stuntz's final book largely recapitulating Stuntz's law review articles, Stephen Schulhofer and Donald Dripps have dismantled a great many of Stuntz's central empirical claims. This is the kind of thing that rigorous peer review would be more likely to catch.

Larry Rosenthal, Comments to *Et Tu, Adam? The Lazy Critiques of Law Reviews Continue*, PRAWFSBLAWG (Oct. 21, 2013 9:42 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/10/et-tu-adam-the-lazy-critiques-of-law-reviews-continues.html. Although introducing some form of peer review into law reviews would likely improve overall quality, one should not be overly sanguine about its benefits. Studies have documented bias in peer recommendations that often reflects the reviewers' theoretical and ideological bents, the unreliability of peer review, and the lack of thoroughness in peer review. In addition, the peer-review process can produce long delays between paper submission and publication, which is especially problematic for time-sensitive topics. Finally, journal reviewers and editors sometimes reject papers they find too contrary to their own views. *See generally* Jennifer Couzin-Frankel, *Secretive and Subjective, Peer Review Proves Resistant to Study*, 341 SCIENCE 1331 (2013) (discussing poor peer-reviews); Carole J. Lee et al., *Advances in Information Sciences: Bias in Peer Review*, 64 J. AM. SOC'Y FOR INFO. SCI. & TECH. 2 (2013) (describing the different biases that exist in peer review); Richard Smith, *Peer Review: A Flawed Process at the Heart of Science and Journals*, 99 J. ROYAL SOC'Y MED. 178 (2006) (describing the inefficiency, inconsistency, and bias of peer review).

304. Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16.

305. Lawrence Rosenthal, *Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law*, 80 MISS. L.J. 1563, 1563, 1566–67 (2011).

306. *Id.* at 1564.

307. *Id.* at 1619–25.

having a realistic chance of real-world application, and write in a manner accessible to non-academics.[308]

VI. TOO MANY LAW SCHOOLS, TOO MANY LAWYERS

Finally, an important step in improving students' employment prospects, while preserving the legal academy, is to reduce the over-supply of law schools. The current glut of lawyers is the result of the late twentieth century boom in law schools (we now have 204 ABA-accredited schools producing 44,000 graduates every year)[309] combined with the contraction in the legal services market.[310] The profit motive has captured today's universities,[311] which is partly why we have an overabundance of law schools and law graduates unable to secure employment.[312] Many law schools were established to brand their universities as comprehensive institutions and to act as "cash cows," because law schools charge high tuition but have lower costs than most other professional schools.[313]

I agree with critics that we need fewer law schools and smaller entering class sizes.[314] The alarming levels of student indebtedness, coupled with the inability of recent graduates to find decent jobs or even a job utilizing their law degree,

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308. Sternlight, *supra* note 3, at 768–77.

309. ABA-Approved Law Schools, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Mar. 1, 2014); ABA-Approved Law Schools by Year, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Mar. 1, 2014). Twenty-four new law schools have received ABA accreditation just since 1990. *See also* Jerome M. Organ, *Legal Education and the Legal Profession: Convergence or Divergence?*, 38 OHIO N.U. L. REV. 885, 900 n. 75 (2012).

310. Campos, *supra* note 1, at 212 (stating that "[a]s a percentage of gross domestic product, the legal services sector in America has contracted by nearly one-third since the late 1970s"). In addition to the pressures on law firms during the economic downturn, there has been a restructuring of the legal services market. Online self-service vendors like *Legal-Zoom* allow customers to draft their own simple legal documents without the services of an attorney, and major law firms are increasingly utilizing non-lawyer services to perform paralegal-type functions. *See* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 33–39 (2008) (arguing that legal services are evolving toward being standardized and prepackaged, thus requiring far fewer lawyers).

311. *See* SLAUGHTER & RHOADES, *supra* note 73, at 17–21, 25–27 (describing the influence of the corporate model on higher education).

312. *See* TAMANAHA, *supra* note 1, at 145–54 (describing unemployment statistics and how they underestimate the number of unemployed law school graduates).

313. Howard B. Eisenberg, *Mission, Marketing, and Academic Freedom in Today's Religiously Affiliated Law Schools: An Essay*, 11 REGENT U. L. REV. 1, 7–8 (1999).

314. *See* Campos, *supra* note 1, at 222 (stating that "law schools must become much less expensive and produce far fewer graduates than they do now").

place enormous stress on students.[315] While the indebtedness problem is to some extent overestimated,[316] the lack of employment opportunities is not.[317] For 2013 law school graduates, the ABA reports that only fifty-seven percent secured employment that requires admission to the bar,[318] and the Bureau of Labor Statistics "projects that [only] 47.6 percent of graduates of ABA-accredited law schools over the course of this decade will get legal jobs."[319]

Not only are law schools producing too many lawyers, but they also are producing too many bad ones, something we surely need not do given the glut of attorneys. Yet, the admissions offices at many schools increasingly serve more of a marketing than a selection function in this buyer's market. Schools must compete for students who are savvy consumers sensitive to comparative tuition costs, scholarship availability, degree requirements, and schools' job placement success.[320] To maintain the privileges of the privileged class, lower-ranked schools in particular will matriculate students who lack the ability to succeed in law school, pass the bar, land a decent job, or be effective lawyers.[321]

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315. *Inceptia Survey Reveals Financial Stress Taking Toll on College Students*, INCEPTIA (July 26, 2012), http://www.inceptia.org/about/news/jul-26-2012. A recent national survey found that loan indebtedness was the number one stress or for a large percentage of students, even more than academics. *Id.*

316. *See* Campos, *supra* note 1, at 178, 204 (reasoning that the rising cost of legal education is "not sustainable," with students incurring "[d]ebts that [n]o [h]onest [m]an [c]an [p]ay"). Assuming that the average combined undergraduate and law school debt of graduates is $130,000, if students were to opt to repay their loans over a twenty-five-year periodm that amounts to monthly payments of about $600, not much more than payments on a car loan. Though this imposes a substantial burden on graduates whose average starting salary is only $60,000–$70,000, their salaries will increase substantially over the course of their careers and likely will not be the sole source of family income. *But see id.* at 206 (estimating that the average debt of a 2016 law school graduate will be $165,000, which amounts to a monthly payment of approximately $1,100).

317. *See id.* at 202 n.99, 210–11 (reviewing employment data showing that in 2011–12, only fifty-eight percent of law graduates obtained jobs requiring a law degree and that many graduates of elite schools did not secure desirable jobs). As one discouraged graduate put it:

> I'm humiliated and demoralized. . . . I've resigned myself to the fact that I will never have a career. I won't have retirement savings. . . . I will continue to be immune to the rejection letters I receive in response to the litany of resumes and cover letters I send out daily. . . . I will be just another number in this generation of lawyers who will fall by the wayside.

Id. at 178.

318. Paul Caron, *ABA Releases "Bleak" Jobs Data for 2013 Law School Grads*, TAX PROF BLOG, (Apr. 10, 2014), http://taxprof.typepad.com/taxprof_blog/2014/04/aba-releases-.html.

319. Campos, *supra* note 1, at 213–14 (citing data from the United States Department of Labor).

320. *See generally* Jeffrey Selingo, *Colleges Must Prepare for a Buyer's Market*, CHRON. HIGHER EDUC. (Apr. 8, 2013), http://search.proquest.com/columbo.law.cua.edu/docview/1325038908/fulltext/FE7C8DEC4A014119PQ/12?accountid=147762 (discussing college students being more conscious about these factors).

321. The median LSAT score of incoming students is lower than it was several years ago at half the law schools in the country. Sloan, *supra* note 2. Some argue that the lowest-ranked schools

As Professor Daniel D. Barnhizer observed, "because we have admitted the otherwise inadmissible, and because law school finances are dependent on student tuition payments, we incur a high cost to 'nurture' those who are neither particularly good students nor likely to become good lawyers no matter how many skills courses through which we put them."[322]

Additionally, we must confront the societal cost of producing so many attorneys in terms of the unnecessary litigation and other kinds of "over-lawyering" they must generate to keep themselves employed. We now have over one million licensed attorneys in the United States, more than one for every 300 people (open the phone book and see the reams of pages devoted to lawyers, more than any other service or profession). What our society needs, instead, is more nurses, doctors, engineers, scientists, computer specialists, teachers, social workers, and the like, yet schools are producing 44,000 law school graduates every year (as compared to only 9,000 doctorates in the physical sciences, 8,000 in engineering, and 8,000 in the social sciences). We are falling behind other nations in math and science, not in legal services, though we do not have enough attorneys for underserved populations.

To address the systemic problem of too many schools producing too many lawyers, reformers propose limiting the amount of federal student loan money available to law schools (which currently receive over one billion dollars a year)[323] and tying loan money to performance measures such as affordability and learning outcomes—with an emphasis on practical skills, bar passage rates, and job placement.[324] These measures would cause some law schools to close and lead to smaller entering class sizes in others. Reducing federal aid money and tying it to educational performance is a good way to reduce the glut of lawyers and ensure educational quality.[325] Indeed, unlike the ABA, the AAMC has effectively ensured that there is not a substantial over-supply of physicians by keeping the number of medical schools to only 141[326] and by requiring very high standards for admission—higher than the standards of all but the most elite law schools.[327]

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serve the societal need of producing graduates who may be more likely to serve underserved populations, yet clients are benefitted little if served by an incompetent or marginally-competent attorney.

322. *See* Barnhizer, *supra* note 7, at 670.

323. *See* TAMANAHA, *supra* note 1, at 179–80; *see also* Newton, *supra* note 27, at 67–68 (opining that the federal loan structure should be altered to provide law schools with a financial incentive to admit a more reasonable number of students).

324. *See* Newton, *supra* note 27, at 67–71.

325. *See* TAMANAHA, *supra* note 1, at 180; Henderson, *supra* note 1, at 469–70.

326. *See Medical Schools*, ASS'N OF AM. MED. COLLS., https://www.aamc.org/about/medical schools/ (last visited Oct. 20, 2014).

327. *See, e.g.*, *MSAR: Getting Started, Medical School Admissions Requirements*, ASS'N AM. MED. CS. 7, 59 (2012); *School of Medicine M.D. Admissions, Prerequisites and Requirements*, JOHN HOPKINS MED., http://www.hopkinsmedicine.org/som/admissions/md/application_process/

Furthermore, the quality of legal education would be improved if the *U.S. News* rankings better reflected educational quality. Rankings are valuable in holding schools accountable, providing information to consumers, and acting as a sorting and signaling function for students and employers alike.[328] Law schools' obsession with their ranking drives certain priorities that trump more appropriate academic considerations.[329] These rankings place too much emphasis on factors that do not necessarily correlate with the quality, rigor, or innovativeness of instruction, such as institutional wealth, peer reputation (which is a self-fulfilling cycle; schools are rated highly by peers because of their name recognition and because they are already highly ranked), and job placement success.[330]

Not only has the profit motive captured universities and law schools, but law professors as well.[331] As Professor Tamanaha observes:

> Our pay is far better than that of other professors in the university, and we teach less than most professors. (And unlike professors generally, who undergo a rigorous tenure process, tenure for law professors—lifetime job security—is achieved with a relatively low quantity of scholarly production and in practice is seldom denied.) Our quality of life is far better than that of lawyers, and we make more money than most lawyers.[332]

The average salary for tenure-track law professors is approximately $142,000 as compared to only $95,000 for professors in other disciplines.[333] "Star" professors and those at elite law schools make much more, usually between

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prerequisites_requirements.html (last visited Mar. 9, 2015).

328. *See* Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1515–17 (2004) (reviewing MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003)).

329. *See* Kenneth Lasson, *Compelling Orthodoxy: Myth and Mystique in the Marketing of Legal Education*, 10 U.N.H. L. REV. 273, 275–78 (2012) (pointing out the problems inherent in trying to increase a school's ranking).

330. Not only do some schools manipulate their job placement statistics, but it is also difficult to equate placement statistics across schools that differ markedly in local economic conditions and the percentage of their students opting for various types of legal and non-legal jobs. *See* Paul Campos, *Served*, NEW REPUBLIC (Apr. 25, 2011), http://www.newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown.

331. TAMANAHA, *supra* note 1, at 77–78.

332. *Id.* at 52–53. A colleague once remarked that law professors were the last of the aristocracy. Hyperbole, but true when compared to professors elsewhere in the academy who are paid substantially less and who usually have fewer perks in the way of travel, research budgets, staff support and working environs and who are tenured at the associate rather than full professor rank, yet have doctoral degrees and far greater scholarly expectations placed on them for tenure and promotion.

333. *Average Median Salaries of Tenured and Tenure-Track Faculty Members at 4-Year Colleges, by Discipline and Rank, 2012–13*, CHRON. HIGHER EDUC., Apr. 23, 2013, at 7, *available at* http://chronicle.texterity.com/almanac/201314almanac?sub_id=q2mohohy0qkG#pg1.

$200,000 and $350,000.[334] Law professors rationalize their salaries based on what they could be making in practice, but as Professor Tamanaha suggests, many law professors would not necessarily have the kinds of practices, or success in practice, that would justify high salaries.[335] In any case, the market does not drive high salaries to attract lawyers to the professoriate, as the over 500 resumes submitted every year for the AALS faculty recruitment conference demonstrate.[336]

Moreover, law professors' salaries are difficult to justify when comparing their credentials and productivity with that of other professors. Most academic positions require an impressive publication record in peer-reviewed journals before being hired on the tenure-track. Further, with the median time to complete a Ph.D. program being almost eight years, doctoral degrees typically take much longer to earn than a law degree.[337] This contrasts with the requirements for being a law professor, which typically include only a three-year, non-research degree[338] and little scholarship before being hired—typically only one or two publications in non-peer-reviewed law reviews.[339] This does not mean that law professors should be paid less, however, but only that professors in other disciplines deserve to be paid more. In any event, the median

334. TAMANAHA, *supra* note 1, at 48–49; *Universities With Highest Average Pay for Full Professors, 2012–2013*, CHRON. HIGHER EDUC., Apr. 23, 2013, at 7, *available at* http://chronicle.texterity.com/almanac/201314almanac?sub_id=q2mohohy0qkG#pg1.

335. *See* TAMANAHA, *supra* note 1, at 47.

336. *See, e.g.*, Memorandum from Judith Areen, Exec. Dir. Ass'n Am. Law Schools, & Regina Burch, Assoc. Dir. Ass'n Am. Law Schools, to the Council of the ABA Section on Legal Education and Admission to the Bar (May 28, 2014).

337. *Characteristics of Recipients of Research Doctorates, 2012*, CHRON. HIGHER EDUC. (Aug. 18, 2014), http://chronicle.com/articles/characteristics-of-Recipients/14732. In an embarrassing act of self-interested hubris, the ABA Section on Legal Education and Admissions to the Bar simply proclaimed that the "Doctor of Jurisprudence degree . . . and the Doctor of Philosophy degree . . . shall be considered as equivalent degrees for educational purposes." Roederick C. White, Sr., *The Matrix Phenomenon: The Belief That the Lawyer Disciplinary System is Designed to Give Lawyers Another Chance. Revisiting Penological Theory*, 32 S.U. L. REV. 1, 4 n.8 (2004).

338. Although it usually is less demanding to earn a J.D. degree than it is to earn an M.D. or Ph.D., those hired as tenure-track law professors typically were top-performing students from top law schools. *See* 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, 599 (2003) (reporting results of empirical study finding that eighty-six percent of all newly-hired law professors graduated from a top-25 law school, one-third graduated from either Harvard or Yale, and almost one-half served on the law review while in law school). Law professors have sterling credentials, which is not a *de facto* requirement for other academics, where hiring decisions are based primarily on the candidate's scholarship and letters of recommendation.

339. *See* Brian Leiter, *Why is it So Easy to Get Tenure in Law Schools?*, LEITER REPORTS: A PHIL. BLOG (June 24, 2004, 11:53 AM) http://leiterreports.typepad.com/blog/2004/06/why_is_it_so_ea.html.

attorney salary of $114,300[340] is not, as Professor Tamanaha suggests, an appropriate benchmark for law professors' salaries[341] given their cream-of-the-crop credentials. Few lawyers have the academic preparation, scholarly creativity, or academic inclination to be a law professor.[342] Furthermore, I would suggest that the teaching, scholarship, and pro bono professional service of professors is a greater service to society than the work of many highly-paid attorneys, who advance the parochial interests of individual clients that often are not coextensive with society's best interest.[343]

VII. CONCLUSION

The real crisis in legal education is not high tuition, student debt, or the poor job market, all of which are very significant concerns. The crux of the problem is law schools' failure to prepare students for twenty-first century law practice, which is more complex and interdisciplinary than ever before—a failure that in turn leads to the under-employment of law school graduates.[344] I agree with Professor William Henderson that "[t]o justify our current price tag, a law degree needs to be a transformative educational experience that confers personal and professional benefits to students and positive external benefits to society in the form of more capable leaders and problem solvers."[345] But current proposals to reform legal education will both harm the legal profession and law students. A two-year law degree focusing on nuts-and-bolts practice skills, as many are now proposing, takes us back to a time in American legal education when law schools were little more than vocational schools.

We must retain the three-year program of study but make it more robust: teach the core subjects and applications of other disciplines relevant to everyday law practice, expose students to a reasonable range of specialty areas, and integrate skills training throughout the curriculum. To accomplish these goals, law schools should adapt the medical school model to legal education. This would entail a curriculum that provides a comprehensive foundation in basic legal

340. BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages*, May 2013, http://www.bls.gov/oes/current/oes231011.htm (last visited Mar. 10, 2015).

341. *See* TAMANAHA, *supra* note 1, at 47.

342. *See* Robin I. Mordfin, *Students to Students: Teaching the Legal Academies Process*, U. CHI. L. SCH. (2013) http://www.law.uchicago.edu/alumni/magazine/spring13/studentstoscholars (Mar. 10, 2015).

343. *See e.g.*, *Determining Whether Legal Advice to Violate the Law Is Ethical*, ARIZ. ST. L.J. (June 13, 2011), http://arizonastatelawjournal.org/determining-whether-legal-advice-to-violate-the-law-is-ethical/. The free market is quite imperfect. There is often a difference between the benefits work conveys on society and the value it commands in the market. Despite the market imperfections, economists would balk at Professor Tamanaha's inference that law professors are overpaid in part because the professors have somehow formed an anti-competitive cartel. There are over 200 accredited law schools that frequently compete against one another to offer sizeable tuition discounts to their best applicants.

344. Henderson, *supra* note 1, at 461-62.

345. *Id.* at 465.

subjects and legally relevant other disciplines, culminating in a series of clinical rotations where the basic doctrinal and interdisciplinary knowledge is applied in practice. We also must not gut support for faculty scholarship in the hopes that doing so will cut costs and encourage professors to focus on teaching practical skills. Contrary to popular claims, engaged scholars are better teachers, and legal scholarship contributes meaningfully and substantially to law practice and reform. Finally, law schools must address the employment problem and improve educational quality by producing fewer attorneys. We need fewer, *but better*, law schools.