

**SCHOLAR OR PRACTITIONER?
RETHINKING QUALIFICATIONS FOR ENTRY-LEVEL
TENURE-TRACK PROFESSORS AT
FOURTH-TIER LAW SCHOOLS**

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Imagine a law school wants to hire a new or entry-level professor on the tenure track to teach a first-year course, such as torts. It is not a prestigious school, at least according to criteria *U.S. News & World Report* (*U.S. News*) uses when making its annual ranking of law schools. The *U.S. News* ranking shows this school in the “rank not published category,” which includes those in roughly the lowest quartile of all ABA-accredited law schools, a group commonly known as the “fourth tier.”¹ Two candidates have applied for the position. Both have been out of law school for five years. One is a graduate of an “elite” law school.² He worked for three years at a major national law firm where his clients were mainly large corporations before he left practice and enrolled in a post-J.D. fellowship program. While in the program, he wrote a law review article that has been accepted for publication. He is not licensed to practice in the state where the hiring school is located and he knows little about the area. The other candidate attended a good, but not

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¹ *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Mar. 26, 2016) [hereinafter *U.S. News Ranking*]. *U.S. News* divides law schools into two groups. *Id.* The first has 150 numerically-ranked schools; the second consists of “rank not published” schools. *Id.* This Article refers to rank not published or unranked schools as the fourth tier. An alternative way of identifying the groups is referring to numerically-ranked schools as the first tier and unranked schools as the second tier. Whether one uses fourth tier or second tier, the reference is to the same schools in the lowest quartile. This Article uses the *U.S. News* ranking because it is currently the most popular ranking system. *Id.* This is not an endorsement, as the *U.S. News* approach is seriously flawed by evaluating all schools against the same criteria regardless of mission and available resources. See, e.g., Kyle McEntee, Opinion, *The U.S. News Rankings Are Horrible. Stop Paying Attention.*, ABOVE THE LAW (Mar. 10, 2016 5:26 PM), <http://abovethelaw.com/2016/03/the-u-s-news-rankings-are-horrible-stop-paying-attention>.

² By elite law school, this Article refers to one regularly in the top fifteen to twenty of the *U.S. News* ranking. See Jacob Gershman, *2016 U.S. News Law School Ranking: The Highlights*, WALL ST. J. (Mar. 10, 2015, 12:03 AM ET), <http://blogs.wsj.com/law/2015/03/10/2016-u-s-news-law-school-ranking-the-highlights>.

highly-ranked, law school. Since graduation, she has been with a local law firm specializing in medical negligence cases. She is licensed in the state and is active in state and local bar associations. Her only publication is an article for the county bar journal. She has lived in the community for most of her life and knows many lawyers and judges.

Who is likely to get the job? Recent studies show the applicant from the elite law school with promise as a legal scholar is a serious candidate, while the person with the practice background will likely not be considered.³ When it comes to hiring professors to teach core courses⁴ on the tenure track in today's law school world, there is a bias in favor of "scholars"—individuals whose main qualification is the ability to produce academic scholarship⁵—and against "practitioners"—persons with substantial law

³ BRANNON P. DENNING, MARCIA L. MCCORMICK & JEFFREY M. LIPSHAW, *Introduction to BECOMING A LAW PROFESSOR: A CANDIDATE'S GUIDE* xiii (2010).

⁴ These individuals are sometimes referred to as "doctrinal faculty or "podium professors."

Doctrinal faculty are those faculty who teach the bread-and-butter courses of the law school curriculum—torts, contracts, constitutional law, property, criminal law, and so on. "Doctrinal" simply refers to the fact that the vast majority of the classes they teach are introductory survey courses covering the court-made (or statutory, regulatory, and court-supplemented) body of law of a particular subject. Doctrinal faculty may teach small upper-level seminars that are specialized, covering a topic in greater depth than the entry-level survey course, or one that is not usually covered in doctrinal surveys at all. Doctrinal faculty are usually on a career path that will end in receiving tenure and, eventually, promotion to full professor

Id. at 3. Doctrinal professors are at the top of the law school hierarchy. "These are the coveted jobs in the law school. They usually pay the most money, hold out tenure for those who meet the minimum qualifications, and (according to legal writing professors, clinicians, and some administrators) do the least work of anyone at the law school." *Id.* at 7.

⁵ A typical scholar is a graduate of an elite law school, has an advanced degree in law or another discipline, has fellowship or visiting assistant professor experience, possesses a record of scholarly publications, or has a combination of these credentials. See Lucille A. Jewel, *Tales of a Fourth Tier Nothing. A Response to Brian Tamanaha's Failing Law Schools*, 38 J. LEGAL PROF. 125, 144 (2013).

practice experience.⁶ Although lawyer groups⁷ and judges⁸ complain that law schools are doing a poor job of teaching everyday practice skills, law faculties are hiring professors with impressive academic credentials whose main qualification is the ability to write theoretical law review articles.⁹

This bias is puzzling because the purpose of most law schools is to teach students how to practice law, not to serve as academic think-tanks.¹⁰ Teaching students is what fourth-tier schools certainly should be emphasizing. Their niche in the law school world is training lawyers who

⁶ See Daniel Solove, *Law Professor Hiring: Statistics on JD Placement*, CONCURRING OPINIONS (May 19, 2008), http://concurringopinions.com/archives/2008/05/law_professor_hiring.html.

⁷ There is a general perception of a “gap between the teaching and practice segments of the profession” A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND PROFESSION: NARROWING THE GAP 5 (1992) [hereinafter MACCRATE REPORT]. “Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice.” WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007) [hereinafter CARNEGIE STUDY]. “While law schools help students acquire some of the essential skills and knowledge for law practice, most law schools are not committed to preparing students for practice. It is generally conceded that most law school graduates are not as prepared for law practice as they could be and should be. Law schools can do much better.” ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 5 (2007) [hereinafter BEST PRACTICES REPORT]. See also John S. Elson, Address, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1135 (1997).

⁸ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) [hereinafter Edwards, *Growing Disjunction*]; Harry T. Edwards, *Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession”*, 69 WASH. L. REV. 561, 561 (1994); Katherine Mangan, *At Meeting, Federal Judge Hands Down a Sharp Opinion About Law Schools*, CHRON. HIGHER EDUC. (Jan. 8, 2012), www.chronicle.com/article/Federal-Judge-Hands-Down-a/130264.

⁹ See Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 906 (2006).

[L]egislators, judges, and lawyers complain all the time that law professors don’t write articles that matter in the real world of law. And law professors don’t care. They’re too busy articulating the background assumptions of the law, reconceptualizing the law in terms of theories borrowed from other fields, and pointing out that you can’t be a real lawyer (or at least an effective lawyer) without situating your client’s position in a theoretical context.

Id.

¹⁰ See Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 862, 864 (2006–2007).

are well qualified to serve their communities.¹¹ In the last few decades, there has been a major growth spurt in the number of law schools.¹² Of the 201 fully-accredited ABA schools in the United States,¹³ twenty-nine—over one-eighth of the total—earned full approval during this period.¹⁴ Most of these new law schools are in the fourth tier.¹⁵ Most are affiliated with private universities or are owned by for-profit corporations.¹⁶ These schools have given individuals who once were unable to go to law school—because of lower academic credentials or geographic restrictions—the opportunity to

¹¹ *Id.*

¹² See *Historical Data: Total Number of Law Schools and Students, 1964–2012*, FACULTY LOUNGE, <http://www.thefacultylounge.org/2013/02/historical-data-total-number-of-law-students-1964-2012.html> (last visited Mar. 24, 2016).

¹³ See *ABA-Approved Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Mar. 26, 2016). As of March 2016, the ABA website listed 201 fully-approved law schools and five provisionally-approved schools. *Id.* This study does not include three fully-approved schools (Inter American University of Puerto Rico School of Law, Pontifical Catholic University of Puerto Rico School of Law, and the Judge Advocate General's Legal Center and School) or the five provisionally-approved schools. *Id.*

¹⁴ See *ABA-Approved Law Schools by Year*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Mar. 26, 2016). The law schools in this group, and the years they received provisional ABA approval, are: Widener University School of Law-Harrisburg (1988), St. Thomas University School of Law (1988), Regent University School of Law (1989), University of District of Columbia, David A. Clarke School of Law (1991), Quinnipiac University School of Law (1992), Texas Wesleyan University School of Law (1994), Seattle University School of Law (1994), Roger Williams University School of Law (1995), Thomas Jefferson School of Law (1996), Chapman University School of Law (1998), Florida Coastal School of Law (1999), University of Nevada-Las Vegas William S. Boyd School of Law (2000), Appalachian School of Law (2001), Barry University Dwayne O. Andreas School of Law (2002), Ave Maria School of Law (2002), University of St. Thomas School of Law, Minnesota (2003), Florida International University College of Law (2004), Florida A&M College of Law (2004), Western State College of Law at Argosy University (2005), Atlanta's John Marshall Law School (2005), Liberty University School of Law (2006), Faulkner University, Thomas Goode Jones School of Law (2006), Charleston School of Law (2006), Arizona Summit (2007), Elon University School of Law (2008), Drexel University Earle Macke School of Law (2008), Charlotte School of Law (2008), and University of California, Irvine (2011). *Id.*

¹⁵ See *U.S. News Ranking*, *supra* note 1.

¹⁶ *Public Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/public_law_schools.html (last visited Mar. 26, 2016). Only four schools (University of the District of Columbia, University of Nevada-Las Vegas, Florida A&M, and University of California, Irvine) are affiliated with public universities. For-profit corporations own six schools (Florida Coastal, Western State, Atlanta's John Marshall, Charleston, Arizona Summit, and Charlotte). One school (Thomas Jefferson) is a freestanding non-profit school. The other seventeen law schools are affiliated with non-profit universities. *Id.*

be lawyers. They have benefited their communities, as their graduates often serve middle- and lower-income persons who lack access to affordable legal services. Many graduates work in small law firms or as sole practitioners, while others have positions with local government agencies, such as district attorney and public defender offices.¹⁷ They represent clients in everyday legal matters such as family law, criminal law, immigration, personal injury, workers compensation, and business transactions.¹⁸

Unfortunately, many fourth-tier law schools have lost their way.¹⁹ Rather than embracing their responsibility to educate practitioners, they are trying to look, act, and spend like elite schools.²⁰ They operate as if they are research centers whose purpose is to produce academic scholarship, not places where future lawyers learn their trade.²¹ The research center model creates costs for fourth-tier law schools that ultimately fall on the students.²² Because most fourth-tier schools rely on tuition for operating expenses and capital budgets, students are paying more tuition and taking on more debt to support their professors' scholarship.²³ Students subsidize these activities but receive little benefit.²⁴ They are further short-changed when they graduate and discover their professors taught them little about the actual practice of law.

The obsession with the production of scholarship has affected the hiring of entry-level tenure-track professors.²⁵ Most law schools, including those in the fourth tier, are filling tenure-track slots with scholars.²⁶ There is a presumption in today's law school world that scholars make the best professors.²⁷ Likewise, there is a strong bias against hiring practitioners to teach doctrinal courses.²⁸ Law faculties view a substantial practice record as a taint on a candidate's resume and strongly suspect a practitioner will not

¹⁷ See Jonakait, *supra* note 10, at 864.

¹⁸ *Id.*

¹⁹ This Article focuses on tenure-track hiring at fourth-tier schools, but this Article's criticisms and suggestions will undoubtedly be relevant at many numerically-ranked schools as well.

²⁰ Dan Subotnick & Laura Ross, *Scholarly Incentives, Scholarship, Article Selection Bias, and Investment Strategies for Today's Law Schools*, 30 *TOURO L. REV.* 615, 629 (2014).

²¹ *Id.* at 620.

²² *Id.* at 616.

²³ *Id.* at 616–17.

²⁴ Maimon Schwarzchild, *The Ethics and Economics of American Legal Education Today*, 17 *J. CONTEMP. LEGAL ISSUES* 3, 5–6 (2008).

²⁵ See Jewel, *supra* note 5, at 144–45.

²⁶ *Id.* at 144.

²⁷ *Id.*

²⁸ *Id.*

be productive when it comes to publishing.²⁹ This emphasis on hiring scholars has led fourth-tier schools to narrow the job applicant pool from which they hire and to devote substantial resources for scholarly activity, including research grants, paid leaves, conference expenses, and reduced teaching loads.³⁰ Law faculties wary of hiring practitioners who they fear will retire into teaching³¹ are choosing scholars whose main interest is academic writing.³² Courses that focus on the practical side of the law—those most relevant to the work students will do when they graduate—are taught by instructors who are not on the tenure track³³ and adjuncts.³⁴

This Article challenges fourth-tier schools to rethink the criteria they use when hiring tenure-track professors. Tenured and tenure-track professors are the most powerful group at any law school.³⁵ They have the strongest voice in shaping the school's mission and in directing how educational resources are spent.³⁶ A school's mission is the justification for its existence.

²⁹ See Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL.EDU, <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm> (last visited Mar. 26, 2016).

³⁰ See DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 91–96.

³¹ David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

³² *Id.*

³³ DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 8–9. At most schools, professors who teach professional skills courses, such as legal research and writing and clinical programs, have a lower status than doctrinal teachers. *Id.* The main differences are that they are not on the tenure-track and are paid less. *Id.* The ABA Standards do not require schools to offer tenure to these instructors. A.B.A., 2015–2016 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS at Standard 405, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf [hereinafter 2015–2016 ABA Standards]. ABA Standard 405(c) requires schools to provide full-time clinical professors with a form of security “reasonably similar to tenure.” *Id.* Section (d) of the same standard requires a school to afford legal writing teachers the type of security that can attract and retain well-qualified instructors. *Id.*

³⁴ DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 10. Adjunct professors are usually full-time practicing lawyers who teach a course in the area of their expertise on an as-needed basis. *Id.* They are not on the tenure-track and do not participate in faculty meetings. *Id.* Schools use adjuncts to provide course coverage at low cost. *Id.* Adjuncts are at the bottom of the law school hierarchy and “are treated like nobodies by the regular law faculty.” Wendel, *supra* note 29.

³⁵ See DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 10.

³⁶ See 2015–2016 ABA Standards, *supra* note 33. ABA Standard 201(a) states in part, “[T]he dean and faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation.” Likewise, section (c) of the standard gives the dean and the faculty “a significant role in determining educational policy.” *Id.*

The mission of a fourth-tier school should be to teach its students how to practice law, prepare them for success on the bar examination, and help them find jobs. Energy and resources should be directed to meeting these challenges. A school should hire professors who have skills to meet the practice-centered mission and who enthusiastically embrace it. When a school hires professors based primarily on academic credentials and the ability to write law review articles, the mission is endangered. These individuals may not have the knowledge or desire to prepare students for law practice.³⁷ They may even undercut the practice-centered mission when that mission conflicts with their vision of what a law school should be. To prevent this from happening, faculties at fourth-tier schools should diversify the pool of eligible tenure-track candidates and recognize the benefits of hiring tenure-track professors with substantial, relevant practice experience.

This Article has four parts. Part I examines entry-level³⁸ tenure-track hiring at fully-approved ABA law schools for the years 2006–2009 and 2011–2015.³⁹ This Article explores the credentials of new tenure-track professors at American law schools in general and at fourth-tier schools in particular. The available data⁴⁰ show that there is a credentials arms race at American law schools, with tenure-track jobs mainly going to scholars possessing the most impressive academic backgrounds.⁴¹ Fourth-tier schools are following this practice by favoring scholars with elite law school pedigrees and post-J.D. academic accomplishments. Part II identifies some of the reasons why fourth-tier schools may be hiring scholars rather than practitioners for tenure-track positions. One reason is the legal academy's historical antipathy toward teaching practical skills and how the ABA accreditation process perpetuates the bias against practice-centered legal

³⁷ Legal educators are calling for a “seismic shift” in legal education. MARY LU BILEK ET AL., TWENTY YEARS AFTER THE MACCRATE REPORT 7 (2013). “In a system that depends, both for its teaching and governance, on a tenured faculty that is largely lacking significant practice experience . . . most professors may be ill-equipped” to change the teaching or curriculum. *Id.*

³⁸ Entry-level is in contrast to lateral hiring, where a professor already tenured or on the tenure track at one school moves to another.

³⁹ This Article does not include data from 2010 because it is incomplete. See text accompanying *infra* note 51.

⁴⁰ This Article uses extensive data compiled by Professors Solum and Lawsky. See *infra* notes 49–50.

⁴¹ See Brian R. Leiter, *Where Current Law Faculty Went to Law School*, LEITERRANKINGS.COM (Mar. 17, 2009), http://www.leiterrankings.com/jobs/2009job_teaching.shtml.

education.⁴² Another is the influence of the *U.S. News* “one-size-fits-all” ranking system that pressures fourth-tier schools to look more “academic.”⁴³ Part III identifies reasons why scholars may not be a good fit at a fourth-tier law school and explains how they can actually frustrate the school’s mission of training practicing lawyers. Part IV argues that fourth-tier schools can benefit by appointing individuals with substantial, relevant practice experience to tenure-track positions. It explains how practitioners with ties to the local legal community are uniquely qualified to prepare students to be lawyers and help them find jobs after they graduate. This part also discusses practical steps fourth-tier schools can take to find and hire qualified practitioners on the tenure track.

I. THE ACADEMIC CREDENTIALS ARMS RACE IN AMERICAN LEGAL EDUCATION AND ITS SPREAD TO FOURTH-TIER SCHOOLS

There is no definitive study on the qualifications of tenure-track professors at American law schools,⁴⁴ but the available data make one thing clear: graduates of a small group of elite law schools—places where the research model flourishes—dominate the legal academy.⁴⁵ A 2009 examination of the educational credentials of tenure-track and tenured faculty at Association of American Law Schools (AALS) member schools revealed the importance of law school pedigree: 4,481 of the more than 7,000 professors earned their initial law degrees at only twenty elite schools.⁴⁶ A 2009 AALS study of law faculty found that 32% received their law degrees from five schools: Harvard, Yale, Columbia, Michigan, and Chicago.⁴⁷

The studies do not reveal when professors were appointed or give insight about the qualifications of new tenure-track hires.⁴⁸ The goal of the research in this Article is to learn more about recent tenure-track hiring practices for new law professors, giving special attention to the backgrounds of new hires

⁴² Brian Z. Tamanaha, Opinion, *How to Make Law School Affordable*, N.Y. TIMES (May 31, 2012), <http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html>.

⁴³ See Sam Flanigan & Robert Morse, *Methodology: 2016 Best Law School Rankings*, U.S. NEWS & WORLD REP. (Mar. 9, 2015, 9:58 PM), <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

⁴⁴ Tracey E. George & Albert H. Yoon, *The Labor Market for New Professors*, 11 J. EMPIRICAL STUD. 1, 1 (2014).

⁴⁵ AALS Statistical Report on Law Faculty, ASS’N AM. L. SCHS., <https://web.archive.org/web/20101025181253/http://aals.org/statistics/2009dlt/JD.pdf> (last visited May 11, 2016).

⁴⁶ See Leiter, *supra* note 41.

⁴⁷ See AALS Statistical Report on Law Faculty, *supra* note 45.

⁴⁸ See Leiter, *supra* note 41; AALS Statistical Report on Law Faculty, *supra* note 45.

at fourth-tier law schools. The underlying inquiry is whether these schools are hiring practitioners with relevant practice experience or whether they are mimicking higher-ranked schools by appointing scholars. Although no source contains complete data, there is information available that gives a very good picture of recent hiring trends. The main sources referenced in this Article are annual “entry-level hiring reports” compiled by Professor Lawrence B. Solum of the University of Illinois College of Law for the years 2006 through 2009,⁴⁹ and by Professor Sarah Lawsky of the University of California, Irvine School of Law, for the years 2011 through 2015.⁵⁰ The year 2010 is not included because Professor Lawsky states the 2010 report is incomplete.⁵¹

A. *Entry-Level Hires*

Each year, Professor Solum or Professor Lawsky⁵² invited law school deans, professors, and others to submit information on entry-level tenure-track hiring, which the authors then compiled in the reports.⁵³ The annual reports list information about hires by each law school, including the person’s name, gender, J.D. degree school, advanced degrees, fellowship experience—including fellowships, visiting assistant professor programs (VAP), and non-tenure track teaching experience—and clerkships.⁵⁴ Notably, information on law practice experience was not collected.⁵⁵ The

⁴⁹ Lawrence Solum, *Law School Entry Level Hiring*, LEGAL THEORY BLOG (May 17, 2006), http://lsolum.typepad.com/legaltheory/2006/05/law_school_entr.html [hereinafter Solum 2006 Report]; Lawrence Solum, *Entry Level Hiring Report*, LEGAL THEORY BLOG (May 1, 2007) http://lsolum.typepad.com/legaltheory/2007/04/entry_level_hir.html [hereinafter Solum 2007 Report]; Lawrence Solum, *Entry Level Hiring Report Version 5.0*, LEGAL THEORY BLOG (June 3, 2008), <http://lsolum.typepad.com/legaltheory/2008/06/here-is-version.html> [hereinafter Solum 2008 Report]; Lawrence Solum, *2009 Entry Level Hiring Report*, LEGAL THEORY BLOG (Apr. 26, 2009), [www.http://lsolum.typepad.com/legaltheory/2009/04/2009-entry-level-hiring-report.html](http://lsolum.typepad.com/legaltheory/2009/04/2009-entry-level-hiring-report.html) [hereinafter Solum 2009 Report]. Professor Solum compiled reports for a few years before 2006, but this Article begins analysis with 2006 for a number of reasons. First, 2006 was the first year Professor Solum began collecting data on advanced degrees, fellowship, and visiting assistant professor (VAP) positions. See Solum 2006 Report, *supra*. Second, Professor Lawsky began presenting year-to-year comparisons, including some charts, beginning with the 2006 report. See *infra* note 50 and accompanying text.

⁵⁰ Professor Lawsky’s reports for 2011–2015 are compiled on the PrawfsBlawg webpage. Sarah Lawsky, *Entry Level Hiring Report*, PRAWFSBLAWG, <http://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report> (last visited May 7, 2016).

⁵¹ Lawsky, *supra* note 50, at Spring Self-Reported Entry Level Hiring Report 2015.

⁵² The reports in *supra* notes 49–50 will be collectively referred to as the “Solum and Lawsky Reports,” except where a particular report is referenced.

⁵³ See Solum and Lawsky Reports, *supra* notes 49–50.

⁵⁴ See *id.*

⁵⁵ See *id.*

authors caution that the reports do not include all entry-level hiring, as the studies reflect only the information received.⁵⁶ However, the reports contain submissions about hiring at many law schools, and the number of reported appointments for each year is substantial.⁵⁷

Other professors have made comprehensive studies of entry-level tenure-track hiring in two of the years covered in the entry-level hiring reports that confirm the Solum and Lawsky reports as having identified a substantial percentage of actual hires.⁵⁸ One study, by Professors Tracey E. George and Albert H. Yoon, covers hiring from 2007 through 2008.⁵⁹ George and Yoon did a systematic analysis of the recruitment process for that academic year that includes information on credentials of successful applicants. The authors found that Professor Solum's 2008 entry-level hiring report identified 76% of actual hires.⁶⁰ The other is Professor Alexander Tsesis's comprehensive study of entry-level tenure-track hiring for the 2012–2013 recruitment season.⁶¹ A comparison of Professor Tsesis's findings and the 2013 entry-level hiring report shows the report identified 83% of actual hires.⁶²

⁵⁶ See *id.* For example, Professor Lawsky explains that the reports only include information that schools or candidates have chosen to provide. Lawsky, *supra* note 50, at Spring Self-Reported Entry Level Hiring Report 2015. Although the reports do not give a complete picture, they certainly reveal trends. Most schools have contributed information over the years, and each year includes reports from roughly 50% of schools. The number of schools reported to have hired each year is as follows: 2006: 94 schools; 2007: 105 schools; 2008: 102 schools; 2009: 99 schools; 2011: 99 schools; 2012: 96 schools; 2013: 74 schools; 2014: 52 schools; 2015: 52 schools. Professor Solum included schools that reported but did not hire in the reports for 2006–2009, while Professor Lawsky's numbers for 2011–2015 only include schools that actually reported hiring. The numbers show entry-level hiring began falling off 2013, as many schools cut back on new hiring following the recession.

⁵⁷ See Solum and Lawsky Reports, *supra* notes 49–50. The total number of appointments for the period studied is 1,170. Appointments for each year include the following: 2006: 158; 2007: 153; 2008: 167; 2009: 151; 2011: 155; 2012: 142; 2013: 106, 2014: 73; 2015: 70.

⁵⁸ See, e.g., Brian Leiter, *Top Producers of Law Teachers at the Leading Law Schools Since 1995*, LEITERRANKINGS.COM (Jan. 31, 2011), http://leiterrankings.com/new/2011_LawTeachers.shtml.

⁵⁹ George & Yoon, *supra* note 44, at 1.

⁶⁰ Professors George and Yoon's study examined the entire recruitment process rather than only focusing on outcomes. *Id.* at 13. They gathered data on entry-level hires by using Professor Solum's entry-level hiring report for 2008, checking school websites to confirm the report's information was accurate, and contacting law schools directly if they did not contribute to the reports. *Id.* at 12.

⁶¹ Alexander Tsesis, *The 2013 Full Hiring Report*, PRAWFSBLAWG (Mar. 6, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/03/2013-full-hiring-report.html>.

⁶² Professor Tsesis's project involved contacting every ABA-approved law school. *Id.* He identified 127 hires for 2013 as opposed to the 106 self-reported to Professor Lawsky for the same year. *Id.*

The entry-level hiring reports for the nine years included in this Article's study yielded a number of findings.⁶³ When it comes to law school pedigree, there are no surprises; entry-level tenure-track jobs are going mainly to elite law school graduates.⁶⁴ The reports show that roughly two-thirds of individuals receiving tenure-track appointments earned their J.D. degree from a group of only fifteen law schools.⁶⁵ And just six schools (Columbia, Harvard, Michigan, New York University, Stanford, and Yale) accounted for over half of entry-level hires.⁶⁶ As Professors George and Yoon noted, graduating from a first-tier school—better yet, a top-three law school—dramatically improved a candidate's chance of getting a tenure-track job.⁶⁷

The entry-level hiring reports also highlighted some interesting new trends. For many years, a J.D. degree from a top school, along with a clerkship or some practice experience, had been sufficient to qualify for a job teaching law. But today, law schools require more evidence that an applicant is committed to producing academic scholarship.⁶⁸ This has led job seekers to earn advanced degrees, participate in post-J.D. fellowship programs, work as visiting assistant professors, or do a combination of these. The data show that candidates are burnishing their academic credentials to prove their worth as scholars before they enter the job market.

Advanced degrees have become a very important credential in recent years. Before the 2006–2007 recruitment year, the AALS—which sponsors the annual Faculty Recruitment Conference (FRC) where law school representatives can interview aspiring professors—did not even report information on advanced degrees of conference registrants.⁶⁹ Beginning that year it gathered data on advanced degrees from the registrants' resumes to

⁶³ See Solum and Lawksy Reports, *supra* notes 49–50.

⁶⁴ See *id.*

⁶⁵ The schools are Berkeley, Columbia, Chicago, Duke, Georgetown, Harvard, Michigan, New York University, Northwestern, Pennsylvania, Stanford, Texas, UCLA, Virginia, and Yale. *Id.* They accounted for the following number of reported hires in each year: 2006: 120 of 158; 2007: 116 of 153; 2008: 114 of 167; 2009: 119 of 151; 2011: 106 of 155; 2012: 108 of 142; 2013: 75 of 106; 2014: 59 of 71; 2015: 52 of 70. *Id.*

⁶⁶ See *id.* The numbers for each school are as follows: Harvard: 188; Yale: 182; Columbia: 66; New York University: 85; Stanford: 56; Michigan: 54.

⁶⁷ George & Yoon, *supra* note 44, at 37. The top three schools they refer to are Harvard, Stanford, and Yale. *Id.*

⁶⁸ See Solum and Lawksy Reports, *supra* notes 49–50.

⁶⁹ Richard A. White, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 2002–03*, ASS'N AM. L. SCH., <https://web.archive.org/web/20130105214200/http://www.aals.org/statistics/2002-03/page6.html> (last visited Apr. 3, 2016).

be submitted for inclusion in the Faculty Appointments Registry (FAR).⁷⁰ For the 2008–2009 recruitment year—the last year that the AALS made registrant data public—its examination of the 875 FAR resumes revealed that over 40% of applicants had advanced degrees.⁷¹ Recent entry-level hiring reports show that having an advanced degree is becoming a key credential for successful candidates.⁷² From 2011–2015, between 44% and 56% of those hired had or were expecting an advanced degree.⁷³

The most remarkable development evidenced by the entry-level hiring reports is that law schools are appointing individuals with fellowship experience—meaning they participated in post-J.D. fellowship programs or had short-term teaching experience, mainly as visiting assistant professors.⁷⁴ Aspiring law professors enroll in these programs to get a foot in the door of legal education.⁷⁵ Participants get the chance to make connections in the legal academy, do some teaching, and develop a research agenda so they

⁷⁰ ASS'N AM. L. SCH., <https://web.archive.org/web/20130105230655/http://www.aals.org/statistics/0607/FAR-spss/degree.html> (last visited Apr. 3, 2016).

⁷¹ Applicants had 269 advanced degrees in law and 328 advanced degrees in other subjects. ASS'N AM. L. SCH., <https://web.archive.org/web/20140425080228/http://www.aals.org/statistics/2009far/degrees.html> (last visited Feb. 8, 2016). After 2009, the AALS stopped posting information on FAR participants on its website. A telephone inquiry to the AALS revealed the AALS considers this information to be proprietary and not available to the public.

⁷² Lawsky, *supra* note 50, at Spring Self-Reported Entry Level Hiring Report 2015.

⁷³ *Id.* Some individuals had more than one advanced degree, but Professor Lawsky only counted the person's highest degree in her head count. Of the 157 persons reported as hired in 2011, 77 (49%) had or were expecting an advanced degree. For 2012, the number was 62 of 142 (44%). For 2013, it was 59 of 106 (56%). For 2014 the number was 37 of 73 (51%). And for 2015, it was 35 of 70 (50%).

⁷⁴ *Id.* Programs designated by sponsoring schools as fellowships, VAPs, and other non-tenure-track teaching experienced are all listed under the term “fellowship” in the entry level hiring reports, and this Article follows this protocol. See Paul L. Caron, *Fellowships for Aspiring Law Professors (2012 Edition)*, TAXPROFBLOG (Feb. 14, 2012), http://www.taxprof.typepad.com/taxprof_blog/2012/02/fellowships-for.html. There has been an explosion in the number of fellowships and VAP programs. Some law schools, such as Harvard and Yale, have over a dozen separate programs. Even fourth-tier schools have gotten into the act. *Id.* In 2012, Professor Caron listed sponsoring schools and programs on his blog, showing that over forty schools had programs. *Id.* Professor Caron identifies how these programs can benefit aspiring law teachers: “[M]any law schools offer wonderful opportunities to transition into the legal academy with one- or two-year fellowships which allow you to enter the AALS Faculty Recruitment Conference (the ‘meat market’) with published scholarship (and in many cases teaching experience) under your belt.” *Id.* These programs also benefit the sponsoring schools financially. Fellowships bring in revenue in the form of tuition. Schools with VAP programs save money by having teachers that are paid below market rates. See BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 58 (2012).

⁷⁵ See TAMANAHA, *supra* note 74, at 58.

have a publication record when they hit the job market.⁷⁶ From 2006 to 2009, the percentage of individuals with fellowship experience hovered around 50%,⁷⁷ but the number of hires with fellowship experience has soared in recent years.⁷⁸ By 2014, over 80% of entry-level tenure-track hires had this credential.⁷⁹

The entry-level hiring report data leave no doubt that—as a rule—law schools overwhelmingly prefer scholars for entry-level tenure-track appointments, and academic credentials are more important than ever before. Unless a candidate “credentials up” by getting an advanced degree or has fellowship experience, she stands little chance of becoming a law professor.

B. Fourth-Tier Hiring

This Article next examines whether fourth-tier law schools—those whose mission is to educate practicing lawyers, not to serve as research centers—are participating in this credentials arms race when filling tenure-track positions. The 2013 *U.S. News* ranking is used as the benchmark for determining ranking status. In that year, there were forty-eight fully-approved ABA fourth-tier law schools in the United States.⁸⁰ This Article compiles the credentials of tenure-track hires at these schools from the entry-

⁷⁶ For a critical discussion of this trend, see Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in Legal Education*, 62 S.C. L. REV. 105, 133–134 (2010).

⁷⁷ Solum, *supra* note 49. The percentages for these years are as follows: 2006: 57%; 2007: 35%; 2008: 51%; 2009: 50%.

⁷⁸ Lawsky, *supra* note 50.

⁷⁹ *Id.* Data on hires with fellowship experience for 2011–2015 are as follows: 2011: 107 of 157 (68%); 2012: 97 of 142 (68%); 2013: 83 of 106 (78%); 2014: 61 of 73 (84%); 2015: 58 of 70 (83%).

⁸⁰ *Best Graduate Schools 2014*, U.S. NEWS DIGITAL WEEKLY, Vol. 5, Issue 11 (2013). The 2013 edition has the ranking of 2012. Every year, there are some changes to the list of fourth-tier schools. The 2013 report was chosen because tenure-track hiring was still robust. In subsequent years, hiring at fourth-tier schools dropped off dramatically because of the recession. The forty-eight “rank not published” schools in the 2013 report are: Appalachian, Atlanta's John Marshall, Ave Maria, Barry, California Western, Campbell, Capital, Charleston, Charlotte, Dayton, Detroit Mercy, District of Columbia, Duquesne, Elon, Falkner, Florida A&M, Florida Coastal, Golden Gate, Hamline, Liberty, Memphis, Mississippi College, New England, North Carolina Central, Northern Illinois, Northern Kentucky, Nova Southeastern, Ohio Northern, Oklahoma City, Phoenix (now Arizona Summit), Regent, Roger Williams, South Dakota, South Texas, Southern Illinois, Southern University, St. Mary's, St. Thomas (Miami), Texas Southern, Texas Wesleyan (now Texas A&M), Thomas Jefferson, Thomas M. Cooley, Touro, Valparaiso, Western New England, Western State, Whittier, and Widener (Delaware). This Article does not include fourth-tier schools in Puerto Rico or provisionally-approved schools.

level hiring reports for 2006 through 2009, and 2011 through 2015. For eight of the forty-eight schools, no information was reported,⁸¹ and it is possible that some of the hires by reporting schools were not included. Nevertheless, the reports have information on the qualifications of 140 entry-level tenure-track hires at fourth-tier schools, thereby shedding light on hiring trends at this level.⁸²

With respect to law school pedigree, the data show that fourth-tier schools adhere to the trend of hiring graduates of elite law schools. Of the 140 reported fourth-tier school hires with initial law degrees from U.S. law schools, seventy-nine (56%) received their J.D. degree at one of fifteen elite schools.⁸³ Graduates of five schools alone—Berkeley, Columbia, Harvard, New York University, and Virginia—accounted for 36% of the hires.⁸⁴

Next, fourth-tier schools are hiring individuals with advanced degrees. Of the 140 hires, fifty-five (39%) had an advanced degree, such as an LL.M., Ph.D., or S.J.D., or other degree such as an M.A.⁸⁵ This percentage is somewhat lower than that of law schools as a whole.⁸⁶ A further breakdown of data on fourth-tier school hires shows that forty-eight of the hires had one advanced degree and seven had two advanced degrees.⁸⁷

An even greater percentage of fourth-tier school hires had fellowship experience. Seventy-three hires (52%) are in this category.⁸⁸ Moreover, thirty-one hires (22%) had an advanced degree and fellowship experience.⁸⁹ Although the percentage of entry-level hires with fellowship experience at fourth-tier schools is lower than at all reporting schools, it is substantial and has risen over time.⁹⁰ Only thirty-nine of the 140 tenure-track hires did not

⁸¹ The schools are: Appalachian, Campbell, Florida A&M, Liberty, North Carolina Central, Nova-Southeastern, Texas Southern, and Thomas Cooley. Nevertheless, data from 83% of fourth-tier schools were submitted over the period studied.

⁸² This Article identifies 143 entry-level hires, but does not include three in this study because they did not receive initial law degrees from U.S. schools.

⁸³ The schools are: Berkeley: 9; Chicago: 3; Columbia: 8; Duke: 2; Georgetown: 5; Harvard: 14; Michigan: 3; NYU: 11; Northwestern: 2; Penn: 2; Stanford: 3; Texas: 3; UCLA: 2; Virginia: 9; and Yale: 3.

⁸⁴ See Solum and Lawksy Reports, *supra* notes 49–50.

⁸⁵ *Id.* The breakdown is as follows: LL.M (17), Ph.D./J.S.D. (14), other areas (24).

⁸⁶ See *supra* notes 71–73 and accompanying text.

⁸⁷ See Solum and Lawksy Reports, *supra* notes 49–50. Entry-level hires with two advanced degrees are as follows: LL.M/M.B.A (1), Ph.D./M.A. (1), LL.M/S.J.D. (1), LL.M/M.A. (1), LL.M/M.S. (1), M.A./M.P.A. (1), Ph.D./J.S.D. (1).

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ See *id.* The numbers by year are as follows: 8 of 18 (2006); 4 of 16 (2007); 7 of 14 (2008); 10 of 21 (2009); 16 of 23 (2011); 11 of 22 (2012); 5 of 8 (2013); 3 of 5 (2014); 9 of 13 (2015).

have an advanced degree or fellowship experience.⁹¹ But of these thirty-nine, 67% possessed a J.D. degree from an elite law school,⁹² which may indicate that having an impressive law school pedigree can counter-balance the absence of post-J.D. academic achievements.

The entry-level hiring reports are strong evidence that American law schools—even those in the fourth-tier—are increasingly emphasizing academic credentials when hiring tenure-track professors. Law school pedigree is important, as it is almost taken for granted that elite school graduates make the best teachers. But there is new pressure on aspiring professors to do more to prove they have the credentials to be scholars.⁹³ This means taking advanced degrees and getting fellowship experience.⁹⁴ Individuals whose financial resources and family situations allow them to participate in these scholarly activities have a decided advantage over those who cannot.⁹⁵ Candidates whose main qualification is substantial practice experience have little chance of competing because they do not fit the scholar mold.⁹⁶ If this trend continues, there will be little diversification in law schools, where professors have similar credentials and experiences.⁹⁷

What is most surprising is that fourth-tier schools—ones whose mission is to prepare students for law practice—are also favoring scholars over practitioners. The available data show that these schools, too, are fixated on academic credentials.⁹⁸ Even though they have practice-centered missions, the ability to produce academic scholarship has become the most important qualification for new professors.⁹⁹ Candidates with elite law school pedigrees, advanced degrees, and fellowship experience are getting the jobs.¹⁰⁰

⁹¹ *See id.*

⁹² *See id.* The number of these hires from each elite school is as follows: Virginia: 6; Harvard: 4; NYU: 4; Stanford: 3; Georgetown: 2; Berkeley: 1; Chicago: 1; Columbia: 1; Duke: 1; Michigan: 1; Penn: 1; Yale: 1.

⁹³ *See TAMANAHA, supra note 74, at 55–56.*

⁹⁴ *See id.* at 58.

⁹⁵ *Id.*

⁹⁶ *Id.* “These programs indirectly make it harder for people from practice (those who cannot afford the pay cut or family disruption to assume a visiting assistant professor spot) to secure law professor positions because they are competing head-to-head against candidates with a polished ‘academic’ look and more publications coming in.” *Id.*

⁹⁷ George & Yoon, *supra* note 44, at 37–38.

⁹⁸ *Id.* at 37.

⁹⁹ William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, A.B.A. J. (Jul. 1, 2012, 10:20 AM), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession.

¹⁰⁰ An observer humorously wrote that if one reviewed the faculty profiles of recently-hired professors at “the goofiest-sounding law school you’ve never heard of—the kind of

II. PRESSURES ON FOURTH-TIER SCHOOLS TO HIRE SCHOLARS

The mission of fourth-tier law schools is to prepare students for legal practice, so why are they hiring entry-level tenure-track professors whose main qualification is the ability to produce academic scholarship? Although there may be no definitive answer, it is undeniable that fourth-tier schools have tremendous pressures to look and act like higher-ranked schools, and this pressure extends to the selection of tenure-track faculty. This Part of the Article highlights two important factors leading fourth-tier schools to hire scholars. One is the legal academy's deeply engrained bias against practice-centered legal education that continues to affect the ABA accreditation process.¹⁰¹ The other is the influence of the *U.S. News* law school ranking.¹⁰²

A. Bias Against Practical Legal Education

The law school establishment has a history of hostility toward practice-centered legal education.¹⁰³ Preparing students for real-world law practice has not been high on the agenda at American law schools.¹⁰⁴ For many years, the law school establishment actively opposed practice-centered legal education and worked to eliminate schools with this focus.¹⁰⁵ Before the twentieth century, most lawyers did not go to law school.¹⁰⁶ A few schools existed, but the vast majority of lawyers studied law while serving an apprenticeship with other lawyers.¹⁰⁷ This form of on-the-job practical training was the norm.¹⁰⁸ A turning point came in the 1870s at Harvard Law School.¹⁰⁹ Christopher C. Langdell, who served as the school's dean, is generally credited with making law a subject worthy of scholarly examination.¹¹⁰ Langdell viewed law as a science and used the case method

place you'd sort of snicker if you told people you worked there"—the reader would find they have impressive academic credentials. See Wendel, *supra* note 29.

¹⁰¹ See Henderson & Zahorsky, *supra* note 99.

¹⁰² See *id.*

¹⁰³ Michael L. Rustad & Thomas H. Koenig, *A Hard Day's Night: Hierarchy, History & Happiness in Legal Education*, 58 SYRACUSE L. REV. 261, 271–73 (2008).

¹⁰⁴ Michael J. Mazza, Comment, *The Rise and Fall of Part-Time Legal Education in Wisconsin*, 81 MARQ. L. REV. 1049, 1052 (1998).

¹⁰⁵ *Id.*

¹⁰⁶ George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2114–25 (1998).

¹⁰⁷ ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 24 (1983). See also Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 354 n.246 (1979).

¹⁰⁸ STEVENS, *supra* note 107, at 24.

¹⁰⁹ *Id.* at 35–36.

¹¹⁰ *Id.*

as his analytic.¹¹¹ He considered the law school to be a graduate department of a university—not a professional school—and he had little interest in everyday law practice.¹¹² Langdell’s vision of the law school as a research center had a direct bearing on who should be professors.¹¹³ For Langdell, the right choice was a person interested in scholarly study, not one with practical experience.¹¹⁴ “What qualifies a person, therefore, to teach law,” he wrote, “is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.”¹¹⁵

By the 1920s, the movement toward requiring formal law school training under Langdell’s research center model had swept the nation’s leading law schools.¹¹⁶ The ABA and the AALS, an organization representing the nation’s major law schools,¹¹⁷ began proposing standards for law schools and requirements for admission to the bar.¹¹⁸ These organizations were troubled by an explosion in the number of new law schools, mainly those in cities that offered evening programs and employed practitioners as part-time professors.¹¹⁹ These schools did not follow the research center model but rather emphasized practical training.¹²⁰ Under what one proponent called “the ideal law office model,” lawyers with actual practice experience were best qualified to serve as professors.¹²¹ After a spirited battle, the ABA and AALS triumphed over the supporters of practice-centered legal education when most states made graduation from an ABA-approved school a requirement for admission to the bar.¹²² Law schools were forced to conform to ABA standards reflecting the research

¹¹¹ *Id.* at 38–39.

¹¹² *Id.* at 37.

¹¹³ *Id.* at 38.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 41.

¹¹⁷ *Id.* at 96.

¹¹⁸ Theodora Belniak, *The History of the American Bar Association Accreditation Standards for Academic Law Libraries*, 106 *LAW LIBR. J.* 151, 155–58 (2014).

¹¹⁹ For a discussion of the growth of evening law schools in the late 19th and early 20th centuries, see Rustad & Koenig, *supra* note 103, at 275–77.

¹²⁰ *Id.* at 286–90.

¹²¹ Mazza, *supra* note 104, at 1052. The ideal law school model is credited to Edwin E. Bryant, Dean of the University of Wisconsin College of Law. *Id.*

¹²² Shepherd & Shepherd, *supra* note 106, at 2114, 2117.

center model or go out of business.¹²³ The model has dominated American legal education ever since.¹²⁴

Indeed, law schools have become even more academic.¹²⁵ The legal academy's desire to link law with other disciplines, such as economics, sociology, philosophy, psychology, political science, and history, has drawn law schools "closer to the ivory tower and further from law practice."¹²⁶ Over the last thirty years, the research center model has come under fire as critics from the bench and bar have complained that law schools are doing a poor job of turning out practice-ready lawyers.¹²⁷ The *MacCrate Report*,¹²⁸ the *Carnegie Study*,¹²⁹ and the *Best Practices Report*¹³⁰ have highlighted deficiencies in legal education and have generated some changes. However, the fact that there has been a series of reports rehashing many of the same complaints shows that law schools have not been taking the criticism seriously.¹³¹

The research center model remains firmly entrenched today, and the main reason is the ABA's control over the law school accreditation process.¹³² Most states require a degree from an ABA-approved law school for admission to the bar,¹³³ so a law school must conform to ABA Standards to gain and retain ABA approval.¹³⁴ This gives the ABA tremendous power in deciding how law schools operate. The ABA relies on members of the

¹²³ For a discussion of how ABA approval became a condition for taking the bar, thereby killing off most unaccredited schools, see *id.* at 2124.

¹²⁴ See generally 2015–2016 ABA Standards, *supra* note 33 (implementing the research model).

¹²⁵ Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1656–57 (2011).

¹²⁶ *Id.* at 1657.

¹²⁷ See *id.*

¹²⁸ MACCRATE REPORT, *supra* note 7.

¹²⁹ CARNEGIE STUDY, *supra* note 7.

¹³⁰ BEST PRACTICES REPORT, *supra* note 7.

¹³¹ See *supra* note 7 and accompanying text.

¹³² Tamanaha, *supra* note 42 (arguing that the ABA's "one-size-fits-all" standards allow for little differentiation among law schools and require every law school to be run like an expensive research university).

¹³³ The ABA website states forty-six states require graduation from an ABA-approved law school as a condition for sitting for the bar exam. See *About Us, Mission Statement*, A.B.A., www.americanbar.org/groups/legal_education/about_us.html (last visited Mar. 26, 2016).

¹³⁴ A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS 3 (rev. ed. 2013), http://www.americanbar.org/dam/aba/publications/misc/legal_education/2013_revised_accreditation_brochure_web.authcheckdam.pdf.

legal education establishment when creating standards and applying them.¹³⁵ Law school faculty and deans are heavily represented on the Council of the ABA Section of Legal Education and Admissions to the Bar, the group with final authority to make accreditation recommendations to the ABA House of Delegates.¹³⁶ The Council dispatches site evaluation teams to visit schools, conduct investigations, and submit fact-finding reports on whether a school is meeting the standards.¹³⁷ Law school deans, professors, and librarians from ABA-accredited schools dominate most teams.¹³⁸

The heavy involvement of the law school establishment in the accreditation process puts pressure on schools to look and act like other accredited schools.¹³⁹ Because Council and site evaluation team members are from institutions at which the research center model is the norm and tenure-track professors are mainly scholars, the safest choice for a fourth-tier school is to conform to the traditional model and not to experiment with something different.¹⁴⁰ This includes having a faculty of tenure-track professors with impressive academic credentials and publication records, as these are the types of professors site inspection team members expect to see.¹⁴¹

The pressure to conform is especially great for new or “start-up” schools, seeking provisional or full ABA accreditation.¹⁴² The leadership at these schools know that failure to receive ABA approval means they will be

¹³⁵ *Id.*

¹³⁶ Law school faculty and deans can hold up to ten of the twenty-one seats on the Council. *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* A typical site inspection team consists of a current or former dean, two academic faculty members, a librarian, a professor versed in professional skills training, a judge or practitioner, and an administrator. *Id.*

¹³⁹ For discussions of this trend, see Schwarzschild, *supra* note 24, at 4; Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 258–60 (2006). See generally William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201 (1996).

¹⁴⁰ One critic has written that site evaluation teams are composed of “a relatively small core of self-selected volunteers who devote themselves to legal accreditation” and that “[t]he inspection teams and their reports are generally looking for how close a school compares to the elite schools from which most have some experience, and assess program variations from the perspective of those elite schools.” Jon M. Garon, *Take Back the Night: Why an Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517, 523 (2007).

¹⁴¹ ABA accreditation standards make law schools conform to a “one size fits all” template that includes costly support for faculty scholarship. See Tamanaha, *supra* note 42.

¹⁴² I. Richard Gershon, *In Ten Years, All New Law Schools!*, 44 U. TOL. L. REV. 336, 339 (2013) (arguing start-up schools are inhibited from making innovations because of ABA accreditation constraints).

out of business in most states because graduates will not be allowed to sit for the bar examination.¹⁴³ Thus, when ABA site evaluation teams visit, faculty credentials and the school's portfolio of faculty-produced law review articles will impress the visitors and show them the school is committed to supporting scholarship. The problem is that once a school commits to the research center model and hires a faculty dominated by scholars, it is set on that course.¹⁴⁴ This type of faculty is unlikely to switch to a practice-centered mission because it would be in conflict with those professors' vision of what a law school should be.¹⁴⁵ Professors are likely to resist changes affecting their ability to produce scholarship, and a scholar-dominated faculty is also more likely to appoint like-minded individuals in the future. As the hiring trends described in Part I show, there is little background diversity in American law schools, as scholar-professors essentially "duplicate" themselves when making appointments.¹⁴⁶

B. *U.S. News Ranking*

Another reason why fourth-tier law schools are hiring scholars is the influence of the *U.S. News* annual ranking of law schools.¹⁴⁷ The *U.S. News* ranks all American law schools against the same criteria,¹⁴⁸ without taking into account that schools often have vastly different missions and resources.¹⁴⁹ Although critics claim the ranking is unreliable,¹⁵⁰ legal

¹⁴³ *Id.*

¹⁴⁴ See R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428, 430–31 (2015).

¹⁴⁵ *Id.*

¹⁴⁶ See *supra* Part I.

¹⁴⁷ Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News and World Report Rankings on the Admissions Process of Law Schools*, 40 L. & SOC'Y REV. 105, 126–27 (2006) (showing a school's placement in a previous tier is a strong predictor of its current rank); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 251 (2006) (illustrating the irrationality of the ranking system).

¹⁴⁸ *Methodology: 2016 Best Law School Rankings*, U.S. NEWS & WORLD REP. (Mar. 9, 2015 9:58 PM), <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>. Ranking is based on a possible 100 points. *Id.* The major ranking categories and percentages ascribed to each are as follows: Quality Assessment (40%); Selectivity (25%); Placement Services (20%); and Faculty Resources (15%).

¹⁴⁹ See *id.*

¹⁵⁰ In an interview, Supreme Court Justice Samuel Alito is quoted as saying, "I really don't like this categorization of schools as first, second, and third-tier. . . . The *U.S. News and World Report* ranking of law schools is an abomination. The legal profession and the country would be better off if they were eliminated. I gather that all these rankings are one of these things that keeps *U.S. News and World Report* in the black—unlike *Newsweek*." Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR, May 2014, at 26, 29.

educators believe they cannot ignore them because law school applicants rely on them.¹⁵¹ Fairly or not, a law school's reputation is tied to its place in the ranking hierarchy. Law schools brag when they move up; students, alumni, and faculty members are upset if a school slips.¹⁵² Law schools, including those in the fourth tier, seek to advance in the ranking.¹⁵³

For most fourth-tier law schools, making a meaningful jump in the ranking is very unlikely because the evaluation criteria is stacked against them.¹⁵⁴ One of the most heavily-weighted categories is selectivity, as measured by student median LSAT score, undergraduate grade point average, and the school's acceptance rate.¹⁵⁵ Because most fourth-tier schools generally accept students with lower LSAT scores and undergraduate grade point averages, schools inevitably score lower in this category.¹⁵⁶ Faculty resources is another category where most fourth-tier schools cannot compete.¹⁵⁷ These tuition-supported schools do not have the same resources as research institutions with rich endowments.

The one heavily-weighted category where fourth-tier schools may see a glimmer of hope is peer assessment.¹⁵⁸ Here, deans, academic deans, appointment committee chairs, and recently-tenured faculty members are invited to submit evaluations of schools.¹⁵⁹ These evaluators likely know little about fourth-tier schools outside their area, are not familiar with their

¹⁵¹ Bob Morse, *Recent Law School News Focuses on Rankings*, U.S. NEWS & WORLD REP. (July 5, 2012, 9:30 AM), <http://www.usnews.com/education/blogs/college-rankings-blog/2012/07/05/recent-law-school-news-focuses-on-rankings>.

¹⁵² Gene R. Nichol, *Rankings, Economic Challenge, and the Future of Legal Education*, 61 J. LEGAL EDUC. 345, 349 (2011) (questioning whether the massive costs of gaming the ranking is economically sustainable).

¹⁵³ See generally *id.*

¹⁵⁴ Sauder & Lancaster, *supra* note 147, at 128 (finding previous rank is a very strong indicator of current rank).

¹⁵⁵ The Selectivity category is weighted 25% in a school's overall ranking point total. The category is divided into Median LSAT (12.5%), Median UGPA (10%), and Acceptance Rate (2.5%). See *Methodology*, *supra* note 148.

¹⁵⁶ Sauder & Lancaster, *supra* note 147, at 128.

¹⁵⁷ *Methodology*, *supra* note 148. This category, which is weighted at 15%, includes expenditures per student, student-faculty ratio, and library resources. *Id.*

¹⁵⁸ Brian Leiter, *Why Do Almost All American Law Schools Weigh Research/Scholarly Potential So Heavily in Faculty Hiring?*, BRIAN LEITER'S L. SCH. REPS. (Oct. 25, 2011), <http://leiterlawschool.typepad.com/leiter/2011/10/why-do-all-american-law-schools-weigh-research-scholarly-potential-so-heavily-in-hiring-faculty.html> (recognizing most law schools hire faculty based on scholarly potential rather than teaching ability and suggesting the peer review component in the ranking may account for this trend).

¹⁵⁹ The Quality Assessment category counts as 40% of a school's ranking point total. *Methodology*, *supra* note 148. The category is divided into Peer Assessment, which counts for 25%, and Lawyer/Judges Assessment, which counts for 15%. *Id.*

faculty, and have not read their professors' publications. Yet fourth-tier schools may believe their faculty's scholarship will make a meaningful difference.¹⁶⁰ This can lead schools to hire scholars and support them with research grants, paid leaves, reduced teaching loads, and conference budgets.¹⁶¹

Realistically, unless a fourth-tier school has financial support from a major university or taxpayers, it has little chance of making a significant move in the ranking.¹⁶² Of the forty-eight fourth-tier schools in the 2013 *U.S. News* report, only ten—most with a university affiliation—were numerically ranked in 2016,¹⁶³ and the advances were minimal.¹⁶⁴ The *U.S. News* ranking system might be best thought of as a beauty contest among elite law schools, not for those in the fourth-tier or even those with a low numerical rank. The ranking focuses on elitism rather than education and reinforces elitist tendencies in the law school world.¹⁶⁵ Issues that are important to fourth-tier schools, such as improving student performance on the bar examination, have little bearing on the rankings.¹⁶⁶ Until someone devises a fair, relevant way of evaluating fourth-tier schools, these institutions will be pressured to mimic higher-ranked schools, including the practice of hiring scholars as professors.¹⁶⁷

III. WHY SCHOLARS AND FOURTH-TIER SCHOOLS MAY NOT BE A GOOD MATCH

Fourth-tier law schools considering appointing scholars to tenure-track positions with the goal of enhancing their prestige in the legal academy should understand there may be significant downsides to the decision. This section identifies reasons why scholars may not be a good fit at fourth-tier schools, including cultural issues, lack of relevant practice experience, few

¹⁶⁰ “Reputation may be partially historical, but the main factor that determines it is the scholarly output of the faculty, the only feature of the school that is externally observable by the academic and practitioner communities.” Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 149 (2008).

¹⁶¹ See *id.* at 150.

¹⁶² Sauder & Lancaster, *supra* note 147, at 126–27.

¹⁶³ The 2016 report includes the ranking for 2015. *U.S. News* Ranking, *supra* note 1.

¹⁶⁴ Nine of the schools now with a numeric rank are the last schools in the list of 150. *Id.* They are Oklahoma City, Southern Illinois, South Texas, and Texas A&M (formerly Texas Wesleyan) (all ranked 149); Dayton, Hamline, Ohio Northern, and South Dakota (all ranked 145); Memphis (ranked 142). *Id.* Only Duquesne (ranked 118) made a significant advance. *Id.*

¹⁶⁵ Garon, *supra* note 140, at 523.

¹⁶⁶ *U.S. News* assigns only .02 weight to bar passage rate. *Methodology*, *supra* note 148.

¹⁶⁷ Rubin, *supra* note 160, at 150 (stating the most reliable way for a law school to increase prestige is faculty research output).

connections to the practicing bar, hiring and retention concerns, and the costs of keeping scholars happy.

A. *Cultural Issues Confronting Scholars at Fourth-Tier Schools*

When fourth-tier schools fill tenure-track positions with scholars, they are mainly hiring persons who attended elite law schools or had post-J.D. experience in scholarly academic settings.¹⁶⁸ Fourth-tier schools have little in common with these major research centers; they are on opposite ends of the legal education spectrum.¹⁶⁹ The cultural differences can be surprising and disconcerting to a scholar who has preconceived notions of what a law teaching career involves.

The most striking difference between elite and fourth-tier law schools is the make-up of the student body.¹⁷⁰ Elite law schools admit students with the highest LSAT scores and undergraduate grades.¹⁷¹ For these exceptional individuals, learning may come easy, failure is rarely an issue, and academic attrition rates are low.¹⁷² Grades are generally high; some schools have dispensed with them altogether.¹⁷³ Most elite law schools have full-time programs and do not offer evening classes for part-time students.¹⁷⁴

The student body at a fourth-tier school is very different. Most students have LSAT scores and undergraduate records significantly lower than students at elite schools.¹⁷⁵ Learning does not come easy for some students, so there is need for academic support outside the classroom.¹⁷⁶ Assessment

¹⁶⁸ Leiter, *supra* note 41.

¹⁶⁹ Jonakait, *supra* note 10, at 880. “‘Intelligence’ at least as indicated by LSAT scores, has become more concentrated at the highest ranked schools and weaker at the other end of the law school spectrum.” *Id.*

¹⁷⁰ For a discussion of LSAT score differences between elite and lower-tier schools, see generally William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163 (2006).

¹⁷¹ *See id.* at 163.

¹⁷² Shawn P. O’Connor, *Learn the 5 Deciding Factors in Law School Admissions*, U.S. NEWS & WORLD REP. (Nov. 12, 2012, 10:00 AM), <http://www.usnews.com/education/blogs/law-admissions-lowdown/2012/11/12/learn-the-5-deciding-factors-in-law-school-admissions>.

¹⁷³ Berkeley, Harvard, Stanford, and Yale replaced grades with modified pass/fail standards, while other schools have moved to more lenient grading systems. *See* Catherine Rampell, *In Law Schools, Grades Go Up, Just Like That*, N.Y. TIMES (June 21, 2010), <http://www.nytimes.com/2010/06/22/business/22law.html>.

¹⁷⁴ *The Pros and Cons of a Part-Time Law Degree*, ADMISSIONS CONSULTANTS, http://www.admissionsconsultants.com/lawschool/part_time_programs.asp (last visited Mar. 26, 2016) [hereinafter *Pros and Cons*].

¹⁷⁵ Sauder & Lancaster, *supra* note 147.

¹⁷⁶ *Mission*, ASS’N ACAD. SUPPORT EDUCATORS, <http://www.associationofacademicsupporteducators.org/about.html> (last visited Mar. 26, 2016).

and grading take on a special importance in states where bar passage rates are low.¹⁷⁷ Fourth-tier schools have higher attrition rates to weed out students who are unlikely to succeed. Many have part-time programs where students attend classes during the evening after normal working hours.¹⁷⁸ These students often have job and family responsibilities that compete with law school for their time and attention.¹⁷⁹

The classroom experience at elite and fourth-tier schools is also different. At elite law schools, professors can take a theoretical approach to the law, even in core doctrinal courses.¹⁸⁰ Less time is devoted to black letter law and coverage of the subject matter in favor of more in-depth analysis of discrete topics.¹⁸¹ Students have fewer required courses and can choose from a wide range of electives.¹⁸² Fourth-tier schools, on the other hand, are more likely to emphasize black letter law and coverage to prepare students for the bar exam.¹⁸³ For the same reason, these schools have more required courses and fewer electives.

Another factor separating elite and fourth-tier law schools is the range of career opportunities available to their graduates.¹⁸⁴ Elite law schools are the training grounds for prestigious national and regional law firms that represent corporate America and the wealthy.¹⁸⁵ They produce most of the lawyers hired by the major firms.¹⁸⁶ Early in law school, students at elite schools learn they are special. Law firms hold on-campus interviews to recruit students for summer associate positions.¹⁸⁷ After graduation, the firms pay them high starting salaries and mentor them in their area of practice.¹⁸⁸ Elite school graduates also are the first choice for prestigious

¹⁷⁷ Elie Mystal, *What's the Best Predictor of Bar Exam Success? It's Not the LSAT*, ABOVE THE LAW (Sept. 13, 2013, 5:19 PM), <http://abovethelaw.com/2013/09/whats-the-best-predictor-of-bar-exam-success-its-not-the-lsat>.

¹⁷⁸ *Pros and Cons*, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 169 (2007).

¹⁸¹ *Id.*

¹⁸² Rubin, *supra* note 160, at 163.

¹⁸³ *Choosing the Right Law School*, SCOREITUP'S 3-L BLOG (Jan. 1, 2016), <http://scoreitup.com/choosing-the-right-law-school>.

¹⁸⁴ There is a "law school caste system," whereby the greatest rewards go to graduates of elite law schools. Rustad & Koenig, *supra* note 103, at 306. *See also* JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 20 (2005).

¹⁸⁵ Jonakait, *supra* note 10, at 877.

¹⁸⁶ *Id.*

¹⁸⁷ Bourree Lam, *Recruitment, Resumes, Interviews: How the Hiring Process Favors Elites*, ATLANTIC (May 27, 2015), <http://www.theatlantic.com/business/archive/2015/05/recruitment-resumes-interviews-how-the-hiring-process-favors-elites/394166>.

¹⁸⁸ Jonakait, *supra* note 10, at 878.

judicial clerkships.¹⁸⁹ At fourth-tier schools, employment opportunities are much more limited.¹⁹⁰ The major firms rarely interview their students, let alone hire them.¹⁹¹ Unlike their elite law school counterparts whom law firms actively recruit, students at fourth-tier schools must take the initiative by sending out resumes and “pounding the pavement” to find a job.¹⁹² Most take jobs with small local firms and local government agencies, while others become sole practitioners.¹⁹³ For those going to small firms or starting their own business, there is little mentoring.¹⁹⁴ The starting salaries of fourth-tier school graduates do not match those paid at the major firms.¹⁹⁵

The cultural differences between elite and fourth-tier schools greatly affect the professor’s role. A tenure-track position at an elite law school is one of the most coveted jobs in the legal profession.¹⁹⁶ Professors at elite schools make the most money, have lighter teaching loads, and can teach courses relating to their research interests.¹⁹⁷ The most attractive benefit for a professor interested in scholarship is having time to research, write, and publish.¹⁹⁸ At elite schools, scholarly accomplishment is the standard by which achievement is measured.¹⁹⁹ Tenure decisions, promotions, raises, and other perquisites depend on the quality and quantity of scholarly publications.²⁰⁰ For those fortunate enough to work at prestigious schools, there are considerable resources to support scholarship, including research grants, sabbaticals, reduced teaching loads, and budgets for conferences.²⁰¹

¹⁸⁹ Tony Mauro, *Look Beyond Elite Law Schools to Broaden Clerkships, Panelists Say*, NAT’L L.J. (Feb. 2, 2015), <http://www.nationallawjournal.com/id=1202716631688/Look-Beyond-Elite-Law-Schools-to-Broaden-Clerkships-Panelists-Say>.

¹⁹⁰ Henderson & Zahorsky, *supra* note 99.

¹⁹¹ For criticism of how law school pedigree unfairly affects career opportunities, see *id.*

¹⁹² *Id.*

¹⁹³ Jonakait, *supra* note 10, at 864.

Graduates of high-prestige law schools primarily work on the corporate side, while those from what are often called “local law schools” primarily represent individuals. Local law schools must recognize that they are not training attorneys primarily for the same segment of the bar as elite law schools, but rather for the personal-client sphere. To be successful and justify their continued existence, local law schools must better prepare their graduates for the work they will actually do.

Id.

¹⁹⁴ *Id.* at 892.

¹⁹⁵ *Id.* at 878.

¹⁹⁶ *Id.* at 903–04.

¹⁹⁷ *Id.* at 902–03.

¹⁹⁸ Rubin, *supra* note 160, at 141–42.

¹⁹⁹ *Id.* at 142.

²⁰⁰ *Id.* See also Wendel, *supra* note 29.

²⁰¹ Rubin, *supra* note 160, at 142.

Elite schools devote so many resources to scholarship as a means to enhance their reputations and compete in the law school ranking battle.²⁰² As one professor puts it: these are writing jobs, not teaching jobs.²⁰³

On the other hand, professors at fourth-tier schools must devote more time and effort to teaching.²⁰⁴ Teaching loads are heavier because resources are relatively limited and faculties are smaller.²⁰⁵ Many students are not self-learners and may require significant assistance outside the classroom, making academic support a major responsibility.²⁰⁶ This entails holding extended office hours and devoting more time to assessing student work. For example, a professor may distribute and evaluate practice exams, and work one-on-one with students who are having difficulty. At schools whose mission includes accepting students from disadvantaged backgrounds, professors must help address their special needs. For the fourth-tier school, the main measures of success are whether the students are graduating, passing the bar examination, and getting jobs.²⁰⁷ Therefore, a professor's primary job at a fourth-tier school is one of teaching, not writing.

Because the mission of a fourth-tier school is focused on preparing students to be lawyers, the school should employ professors who support the mission and are comfortable with it. The danger in having a tenure-track faculty dominated by scholars is they may refuse to acknowledge that they are at a practice-centered school—not a research center—and that preparing students for their careers must be the first order of business. It would be a serious mistake for scholars to try to reproduce their own law school experience and act as if they were working at a major research institution. A fourth-tier school does a disservice to its students by operating as a low-budget version of an elite school.

B. Scholars Often Lack Relevant Practice Experience

Graduates of fourth-tier law schools work in the trenches of the legal system—handling cases in areas such as torts, contracts, criminal law, and family law—so their schools should be preparing them to represent clients in these matters.²⁰⁸ When the law school limits the applicant pool to persons with impressive academic credentials whose main qualification is the ability

²⁰² See Wendel, *supra* note 29.

²⁰³ Professor Brad Wendel advises aspiring professors, “Teaching is of secondary importance only. In fact, I sometimes tell students not to think of their goal as getting a ‘teaching’ job at all. It’s really a *writing* job.” Wendel, *supra* note 29.

²⁰⁴ *See id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Newton, *supra* note 76, at 136.

to produce theoretical scholarship, it is probably hiring someone with little or no relevant practice experience.²⁰⁹ Although scholars often have some practice experience, it is not very extensive or relevant to the work graduates of fourth-tier schools do.²¹⁰ A short time spent as a junior associate in the corporate department of a national law firm is not ideal preparation for teaching students who will be working in small firms or as sole practitioners.²¹¹ Moreover, it is no secret that many scholars are not interested in law practice.²¹² They want a teaching job because they tried law practice and did not like it.²¹³ Their passion is for the theoretical side of the law, not the practical.²¹⁴

Fourth-tier law schools whose mission is to educate practicing lawyers must face the fact that they are professional schools, not research centers. The justification for their existence is in teaching lawyers their trade and not to produce academic scholarship.²¹⁵ They should embrace the practice-centered mission rather than treating it as a burden. The starting point is to hire professors who have considerable knowledge and experience in their subject areas, not individuals whose main interest in the law is academic. Law schools cannot expect their students to become competent practitioners when the core of the tenured faculty lacks relevant practical experience.²¹⁶ Just as a medical school would not have professors who have never treated

²⁰⁹ See Wendel, *supra* note 29.

²¹⁰ *Id.*

²¹¹ Some critics state:

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

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, 769 (2005).

²¹² Newton, *supra* note 76, at 136. “[M]ost law professors today are impractical scholars with little, if any interest, in (and sometimes disdain for) the actual practice of law. Thus they lack the knowledge and interest in the practice of law required to teach effectively students to become competent practitioners.” *Id.*

²¹³ *Id.* at 113.

²¹⁴ *Id.*

²¹⁵ See Wendel, *supra* note 29.

²¹⁶ See Newton, *supra* note 76, at 147.

patients, a fourth-tier law school should not have a tenure-track faculty dominated by professors who have little experience or interest in legal practice.²¹⁷

C. Lack of Ties to the Practicing Legal Community

When fourth-tier law schools hire scholars, they often end up with professors who are new to the area and the legal community. Schools wishing to hire scholars as tenure-track professors usually interview at the AALS Faculty Recruitment Conference (FRC) where they can meet candidates from around the country.²¹⁸ It is common for schools to hire professors who have no ties to the local bar and are not even licensed to practice in the state.²¹⁹ Generally, they are strangers to the local legal community. This lack of connection might be surmounted if there was encouragement for scholars to become active in local affairs, but there are counter-incentives that discourage scholars from cultivating ties to the world of practice.²²⁰ This is because advancement in the legal academy depends mainly on doing things that make the professor appear to be scholarly.²²¹ One hoping to get ahead must publish legal scholarship, usually law review articles.²²² The main audience for these theoretical law review articles is other professors, not judges and lawyers.²²³ Doctrinal articles such as those found in local and state bar journals—ones practitioners might actually read—are not valued in the law school world.²²⁴ Scholars are also less likely to be active in state and local bar associations because participation in bar activities is not valued highly in the academic community.²²⁵ Scholars are much more likely to attend and present at conferences that attract other law

²¹⁷ “It is frightening to imagine medical schools training doctors who had never seen patients before their graduation. Yet, although most law schools have clinics, only a minority of students participate.” Erwin Chemerinsky, *Why Not Clinical Education*, 16 CLINICAL L. REV. 35, 38 (2009).

²¹⁸ See Wendel, *supra* note 29.

²¹⁹ See Hricik & Salzman, *supra* note 211, at 769.

²²⁰ See Wendel, *supra* note 29.

²²¹ *Id.*

²²² *Id.*

²²³ Newton, *supra* note 76, at 113–17. See generally Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship? A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353 (1996); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); Gerald F. Uelman, *The Wit, Wisdom, and Worthlessness of Law Review*, CAL. LAW. 24 (June 2010).

²²⁴ “Practical” scholarship has a pejorative connotation in law schools, as law faculties expect professors to write theoretical scholarship. Wendel, *supra* note 29.

²²⁵ *Id.*

professors, not practicing lawyers.²²⁶ Being on a panel at the AALS Annual Meeting does much more to advance one's reputation in academic circles than presenting at a state bar association convention.²²⁷ The reality is that the legal academy, not the courthouse, is the center of the scholar's world.²²⁸

A scholar's lack of connection to the practicing legal community was not a glaring negative before the recent recession, when law jobs were relatively easy to find.²²⁹ But in today's job marketplace, a professor without ties to the local bar is unable to assist with a critical problem facing many law schools, especially those in the fourth-tier: helping students find jobs.²³⁰ Unlike professors who have practiced in the area and have professional and personal relationships with other attorneys, scholars are unlikely to know of open positions and, because they are essentially strangers, will have less influence when serving as references for their students.²³¹

D. Hiring, Retention, and Institutional Stability Issues

A fourth-tier law school wishing to hire scholars on the tenure track should expect to be disappointed, as it will likely have difficulty hiring its top choices and may not be able to retain professors once they are hired. Highly-credentialed candidates know all about law school ranking.²³² They understand the best way to advance their careers is by working at a prestigious school.²³³ Lower-ranked schools are rarely a candidate's first choice, so recruiting scholars can be a frustrating process.²³⁴ Anyone who has served on an appointments committee at a fourth-tier school has probably experienced the following scenario. The school wishes to hire a professor for a specific subject area and decides to attend the annual AALS FRC. The committee identifies promising candidates from resumes in the Faculty Appointments Register and calls to set up appointments at the FRC. Candidates with the most impressive academic credentials decline the invitation. Others schedule interviews, but later cancel them to meet with representatives from higher-ranked schools. After the FRC, the committee

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See George & Yoon, *supra* note 44, at 37–38.

²³⁰ *Id.*

²³¹ Brent E. Newton, *The Ninety-Five Theses: Systematic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 116–17 (2012).

²³² Wendel, *supra* note 29; Darren Bush & Jessica Peterson, *Jukin' the Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1247 (2013).

²³³ George & Yoon, *supra* note 44, at 6; Bush & Peterson, *supra* note 232, at 1247.

²³⁴ Newton, *supra* note 231, at 111–12.

invites its top choices to give job talks at the school.²³⁵ The school pays the travel expenses of those who agree to “fly backs,” and the faculty pulls out all the stops to convince the candidate to take the position. Unfortunately, the fourth-tier school’s top choices take jobs at other schools. The appointments committee suspects some candidates were not genuinely interested in their school but were using the fly backs to polish their job talks. The school ends up hiring a person who was not a top choice and whose research interests do not match the subject she will be teaching.²³⁶

These are some of the perils of recruiting scholars at lower-ranked schools. A fourth-tier school can spend time, effort, and money courting its top choices only to experience rejection. Absent personal reasons, a candidate with multiple offers usually will go to a more prestigious school.²³⁷ By putting so much stock in academic credentials, fourth-tier schools shrink the pool of candidates from which they can choose, and they fail to land their top choices.²³⁸

Even if a fourth-tier school succeeds in hiring individuals with superior academic credentials, retention is a problem. Law professors are an inherently mobile group who often switch schools.²³⁹ The main reason they change jobs is to go to a more prestigious institution where the pay and support for scholarship are better and teaching loads are less onerous.²⁴⁰ This is a serious concern at fourth-tier schools. For those whose main interest is in scholarship, an appointment at a lower-tier school may not have been the first choice, but the only one.²⁴¹ The prospect of having greater

²³⁵ A “job talk” is where a candidate makes a presentation to the faculty, usually on her current research. See Wendel, *supra* note 29. The main purpose is to give the faculty the opportunity to assess her presentation skills and ability to respond to questions. *Id.*

²³⁶ Rubin, *supra* note 160, at 161–62 (stating how scholarship that brings the author most renown is largely disconnected from the required first year curriculum).

²³⁷ See George & Yoon, *supra* note 44, at 9.

²³⁸ See Wendel, *supra* note 29 (discussing the small pool of highly credentialed candidates).

²³⁹ Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 959 (2014).

²⁴⁰ Rubin, *supra* note 160, at 141–42.

[V]irtually all the material rewards that tenured members receive, other than basic job security, depend on their research production It also determines whether they receive competing offers from other law schools, which not only provide the psychic reward of recognition, but also generally include a salary increase, and even if not accepted, can be used to extract salary increases from their home institution.

Id.

²⁴¹ Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN’S L. REV. 171, 176–77 (2013).

teaching responsibilities for less pay and prestige is not very attractive for someone whose ambition is to publish. In law school circles, fourth-tier schools are considered the “minor leagues.” Scholars may be willing to start their careers at fourth-tier schools, but they do not want to stay for the long term. Thus, they may accept the job with the intention of leaving at the earliest opportunity.²⁴² Because advancement in today’s law school world depends on publications, the incentive is to “write one’s way out” of the fourth-tier school.²⁴³

There may be some short-term benefits for fourth-tier schools that hire scholars even when they suspect the professor’s ultimate goal is to publish and leave. They can feature the individual’s accomplishments on the school website and in recruitment materials.²⁴⁴ The professor’s publications may impress others in the legal academy and score points with accrediting bodies such as the ABA and AALS. This is especially true for new schools seeking provisional or full ABA approval.²⁴⁵ The long-term costs, however, outweigh these benefits. The fourth-tier school’s commitment of time and resources in mentoring the professor in the areas of teaching and scholarship are lost when the person leaves.

E. The Costs of Keeping Scholars Happy

A fourth-tier school wishing to appoint scholars to entry-level tenure-track positions should understand the costs associated with the decision. Because the trend toward hiring scholars has limited the pool of qualified applicants, many schools are competing for the same candidates.²⁴⁶ The law

²⁴² Dean Richard Gershon of the University of Mississippi School of Law has a low opinion of what he calls “hot-house flowers,” which are professors who “view the schools that hire them as beneath their talents, and view their students as nothing more than a necessary evil—financial sponsors of the great and impactful work they will be doing.” Gershon, *supra* note 142, at 337.

²⁴³ Professor Brad Wendel gives blunt advice to a professor “stuck at Nowheresville University”:

If you decide to leave, you’re engaged in the process of trying to *write your way out* of your present position. Note the key word is “write”—lateral hiring is based entirely on scholarly prominence, reputation, or at least potential. *No one gets hired just because she’s a good teacher* although part of the vetting process on any lateral hire will be consideration of the candidate’s teaching evaluations. Rather, candidates come to the attention of appointments committees on the basis of their record of scholarship.

Wendel, *supra* note 29.

²⁴⁴ *See id.*

²⁴⁵ *See generally* Gershon, *supra* note 142.

²⁴⁶ *See* George & Yoon, *supra* note 44, at 9.

of supply and demand takes over.²⁴⁷ A fourth-tier school is already at a disadvantage when a candidate has offers from more prestigious schools. A way to overcome the disadvantage is by offering more in the way of pay and benefits.²⁴⁸ The school will have to decide whether to enter the bidding war for its top choices.

Beyond salary and benefits, it is very likely a fourth-tier school will have to make other concessions to attract scholars and keep them happy.²⁴⁹ Savvy applicants are including support for scholarship in contract negotiations, thereby inducing schools to make specific commitments as part of the employment package.²⁵⁰ Scholarship support can take various forms that are all costly to the institution.²⁵¹ Some schools are even offering paid leaves before the professor starts teaching.²⁵² These concessions can be costly, so the fourth-tier school should consider whether it can afford them.²⁵³ Giving scholars special treatment can also have a detrimental effect on the academic program at schools where faculties are not large.²⁵⁴ When professors are given reduced teaching loads or paid leaves, someone else must teach their courses, or classes must be offered in larger sections.²⁵⁵ The first option means the school will need a larger faculty, while the second may not be educationally sound.²⁵⁶ Moreover, when the school makes curricular adjustments so the scholar can teach courses related to her research interests, it may be putting the professor's interests ahead of the students.²⁵⁷

Ultimately, fourth-tier schools must understand that someone pays the costs of keeping a faculty of scholars happy. For schools whose budgets

²⁴⁷ See Wendel, *supra* note 29.

²⁴⁸ See Rubin, *supra* note 160, at 142.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See text accompanying *supra* note 201.

²⁵² See Gershon, *supra* note 142, at 337.

These are the people who have attended elite schools, clerked one year for a judge, and then want to move into legal education, avoiding the dirty work of law practice. They want reduced teaching and service loads to begin working on scholarly agendas. Their agendas will primarily further their careers.

Id.

²⁵³ See *id.*

²⁵⁴ Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 151 n.226 (2010).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

depend heavily on tuition, the students will bear the burden.²⁵⁸ Law school tuition has risen to obscene levels over the past two decades, and support for faculty perquisites has undoubtedly contributed to this trend.²⁵⁹ Students at fourth-tier law schools—and those at many numerically-ranked schools for that matter—rightfully should question whether they are getting value for their money when so much is spent financing their professors' research agendas.²⁶⁰ They should ask how their professors' scholarship relates to the school's goal of training them to become competent lawyers.²⁶¹ Law faculties should also do some collective soul-searching and consider the consequences of saddling students with outsized costs related to scholarship, especially where these activities provide little benefit to students.

IV. THE CASE FOR HIRING PRACTITIONERS ON THE TENURE TRACK AT FOURTH-TIER SCHOOLS

American law school faculties generally view substantial practice experience as a reason for not hiring a candidate to teach doctrinal courses.²⁶² Fourth-tier schools should take a fresh look at hiring criteria for tenure-track positions, widen the pool of eligible candidates to include practitioners, and consider those who do not fit the scholar mold. Rather than seeing practice experience as a reason to reject candidates, schools should recognize the benefits of diversifying the faculty by adding professors from practice backgrounds and those with different life experiences.

A. *A Professor's Relevant Practice Experience Contributes to Student Learning*

The main reason fourth-tier schools should hire practitioners to teach doctrinal courses such as contracts, criminal law, evidence, and torts, is because they have actual practice experience. Practitioners are uniquely qualified to teach future practicing lawyers because of their real-world experience. A professor with practice experience understands how the law

²⁵⁸ See Gershon, *supra* note 142, at 337; Newton, *supra* note 254, at 151.

²⁵⁹ For a discussion of increased tuition costs and resulting student debt, see generally TAMANAHA, *supra* note 74, at ch. 9. See also Newton, *supra* note 254, at 114 (arguing that the vast majority of law reviews provide little if any social utility, other than to their authors, and are a colossal amount of wasted resources and opportunity costs).

²⁶⁰ Rubin, *supra* note 160, at 139.

²⁶¹ *Id.*

²⁶² There is a distain for practitioners and judges among some full-time faculty members as “[t]he typical twenty-first century law professor has the self-identity of a ‘university professor’—one of the humanities—rather than a practitioner-teacher.” Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for “Practice-Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J. L. & POL’Y 129, 142 (2013).

actually works, which is often different from how, in theory, it was meant to operate. Practice experience also enhances a professor's credibility with students.²⁶³ She is able to answer the practice-related questions inquisitive students constantly raise in class, inquiries that a scholar lacking relevant experience may be unable to handle.²⁶⁴ For example, a professor in a torts class who has represented plaintiffs in negligence cases can explain how factors such as proof of damages, expert witness fees, liability insurance limits, and a defendant's solvency affect the attorney's decision to take a case on a contingency basis. She can explain how the jurisdiction's rule on a legal point may differ from a position found in the casebook. She can provide insights on issues of professional responsibility that commonly arise in practice. A practitioner is equipped to incorporate professional skills training in doctrinal courses by providing instruction on issues such as writing a complaint, conducting discovery, or drafting a contract. A professor who has worked in a small firm or as a sole practitioner is also familiar with the business side of law practice and can explore mundane but critical issues such as budgeting, office management, and calendar control.

Another advantage of hiring practitioners is in their experience with the human side of legal practice. Anyone with significant practice experience knows the job entails more than knowing rules and the theories that support them.²⁶⁵ Law is a "people business." A successful lawyer must be able to work with those directly involved in the legal process—clients, lawyers, witnesses, judges, and court personnel—and with others who are indirectly involved, such as lawyer colleagues, office staff, the press, and the general public. A teacher with substantial practice experience can also warn students about the need to strike a balance between work and family obligations so that overwork does not lead to destroyed personal relationships or career burnout.²⁶⁶

A professor with relevant practice experience is also equipped to serve as a mentor after students have graduated.²⁶⁷ Because graduates of fourth-tier schools often work in small firms or as sole practitioners, they do not benefit from mentoring programs usually available to new attorneys in large

²⁶³ See Gershon, *supra* note 142, at 341 (arguing that professors with substantial practice experience are valuable assets in the classroom).

²⁶⁴ *Id.*

²⁶⁵ Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 642 (2004).

²⁶⁶ Mitchell H. Cobert, *Mentoring: A Lifelong Relationship of Give and Take*, N.J. LAW., Feb. 2015, at 23, 24.

²⁶⁷ *Id.*

firms.²⁶⁸ A professor who has represented clients in similar cases can serve as a valuable resource for a graduate just starting out in practice.²⁶⁹

Despite these advantages, scholar-dominated law faculties resist hiring practitioners for tenure-track positions for a number of reasons: One is that practitioners are unfamiliar with legal theory and will teach “black letter law.”²⁷⁰ This criticism overlooks the fact that casebooks in most courses interweave theory and legal rules.²⁷¹ A professor does not have to write theoretical scholarship to be able to read, understand, and discuss it. Moreover, coverage of black letter rules is very important at fourth-tier schools where the bar exam may be a challenge for students.

Another criticism is that practitioners tell “war stories” from their own cases.²⁷² This complaint misses the point that a professor’s experiences connect the law presented in casebooks and discussed in the classroom with its application in practice.²⁷³ Relevant real life experiences used at strategic times in classroom discussions to emphasize points are useful learning tools.²⁷⁴

Another common excuse for not hiring practitioners is that they wish to “retire” into teaching and will be unproductive.²⁷⁵ The response is that every law school has tenure and promotion policies to weed out or penalize professors who do not meet faculty standards.²⁷⁶ An unproductive professor, whether the person is a scholar or a practitioner, should not be retained or promoted.

²⁶⁸ Brian M. Clary, *In Need of Mentoring*, 46 ARK. LAW., FALL 2011, at 9, 9.

²⁶⁹ Cohen, *supra* note 265, at 631.

²⁷⁰ Edwards, *Growing Disjunction*, *supra* note 8, at 60.

²⁷¹ See generally William R. Vance, *Of the Making of Casebooks*, 6 AM. L. SCH. REV. 4 (1926).

²⁷² Becky Thorson, *Tips for Their Success: How Experienced Lawyers Can Help New Associates*, FED. LAW., Aug. 2008, at 1, 4.

²⁷³ See *supra* Part IV.A.

²⁷⁴ Michael Theall, *Related Course Material to Real-Life Situations*, IDEA CTR., <http://ideaedu.org/research-and-papers/pod-idea-notes-on-instruction/idea-item-no-11> (last visited Mar. 26, 2016).

²⁷⁵ Segal, *supra* note 31.

²⁷⁶ Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, AM. FED’N TCHRS., <http://www.aft.org/ae/summer2015/kahlenberg> (last visited Mar. 26, 2016).

B. A Practitioner's Ties to the Local Legal Community Can Benefit the Educational Program and Promote Institutional Stability

A major advantage of employing practitioners as professors is their connection to the local legal community.²⁷⁷ The ideal practitioner is licensed in the state and belongs to, and is active in, state and local bar associations, including specialty sections related to her area of practice.²⁷⁸ Through her work, she has professional and personal relationships with other lawyers and judges.²⁷⁹ These connections can be of enormous benefit to a fourth-tier law school's educational program. Professors can call upon prominent lawyers and judges to serve as guest lecturers and participate in school functions such as moot court and symposia. They can identify potential adjuncts to teach electives on specialized topics, help find placements for students seeking externships and clerkships, and introduce students to the importance of professional networking by bringing them to lawyer group meetings and introducing them to members of the bar and bench.

As discussed previously, fourth-tier schools can have difficulty hiring and retaining scholars who do not have preexisting ties to the area and who wish to teach at more prestigious schools.²⁸⁰ But this is unlikely to be the case if a school hires individuals who have practiced in the area. Practitioners have roots in the local community, as this is where they have built their professional reputations²⁸¹ and settled their families. For these reasons, practitioners are much less likely to leave the area, and the school will not be pressured to devote resources and energy to professor development only to see the person leave for greener pastures.

C. Practitioners Are Uniquely Positioned to Help Graduates Find Employment

In the current post-recession economy, one of the most pressing concerns for law school graduates is finding employment.²⁸² They are frustrated when they invest time and money to earn a law degree only to find they cannot get work. Job placement is an issue that has drawn national

²⁷⁷ Catherine A. Lemmer & Michael J. Robak, *So, You Want to Be an Adjunct Law Professor?*, Jul.–Aug. NYSBA J. 10, 12 (2014), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50512>.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *See supra* Part III.C.

²⁸¹ *See supra* Part IV.A.

²⁸² Steven J. Harper, Opinion, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <http://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html>.

attention.²⁸³ Some schools have been sued for allegedly falsifying placement data,²⁸⁴ and the ABA has adopted new standards whereby schools must disclose employment information.²⁸⁵ Placing graduates in meaningful law jobs is a challenge for all schools, but even more so at lower-ranked schools.²⁸⁶

Professors can play an important role in helping students find jobs. At elite law schools, professors use their connections to help their students get major law firm jobs, judicial clerkships, and teaching appointments.²⁸⁷ At fourth-tier schools where the faculty primarily consists of scholars with few connections to the local legal community, it is unlikely they will be of much assistance.²⁸⁸ Professors who come from the local legal community and know many practicing lawyers are much more likely to learn of open positions and use their contacts to help place students.²⁸⁹

D. Practitioners Can Produce Scholarship that the Practicing Bar Will Value

A common justification law faculties give for refusing to hire practitioners for tenure-track jobs is they will not write. Of course, everyone knows practicing lawyers write all the time: everything from letters to contracts to appellate briefs. The real criticism is that practitioners will not publish the kind of academic scholarship law professors value and will not have a research agenda that law schools have come to expect.²⁹⁰

²⁸³ See generally TAMANAHA, *supra* note 74, at ch. 12.

²⁸⁴ Ameet Sachdev, *American Bar Association Taking Steps to Ensure Integrity of Employment Data from Law Schools*, CHI. TRIB. (Oct. 21, 2011), http://articles.chicagotribune.com/2011-10-21/business/ct-biz-1021-chicago-law-placement-20111021_1_law-schools-job-data-law-placement.

²⁸⁵ ABA Standard 509(b)(7). Schools are required have an Employment Summary Report on their websites with at least three years of employment data. Compliance with Standard 509 Memorandum (July 14, 2014), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_july_standard_509_compliance_memo_with_attachments_and_links.authcheckdam.pdf.

²⁸⁶ Steven Davidoff Solomon, *The Economics of Law School*, N.Y. TIMES (Sept. 24, 2012, 3:01 PM), <http://dealbook.nytimes.com/2012/09/24/the-economics-of-law-school>.

²⁸⁷ Susan Adams, *The Best Law Schools for Career Prospects 2015*, FORBES (Oct. 9, 2014, 12:29 PM), <http://www.forbes.com/sites/susanadams/2014/10/09/the-best-law-schools-for-career-prospects-2015/print>.

²⁸⁸ See *supra* Part III.C.

²⁸⁹ See *supra* Part III.C.

²⁹⁰ There is a disjunction between scholarship and teaching, with scholarship receiving the most attention and bringing its authors the most renown; but it is generally disconnected from required first-year courses and remote from all but specialized courses. Rubin, *supra* note 160, at 161–62. See also Erwin Chemerinsky, *Forward: Why Write?*, 107 MICH. L. REV. 881, 886–87 (2009).

Practitioners stand little chance in today's law school job market because promise as a scholar is the most important qualification.²⁹¹

The issue really boils down to the kinds of writing law faculties consider acceptable when it comes to hiring and promotion decisions. In today's law school climate, law review articles and books focusing on legal theory or cutting edge political issues are highly valued, while those covering doctrinal issues are not.²⁹² Academic publications are "in" and practical ones are "out."²⁹³ Writings of great twentieth century law professors such as Corbin, Prosser, and Williston are dismissed as being mainly descriptive.²⁹⁴ Applicants for tenure-track appointments and junior faculty members seeking tenure are pressured to produce theoretical scholarship if they wish to advance.²⁹⁵ They search for new twists on subjects already overworked in the literature and write on topics that may not even be related to the subjects they teach.²⁹⁶

[S]cholarship directed at the audience of law students and practitioners (and I regard casebooks and treatises as a form of scholarship) is no longer highly valued in the academy. If I were advising a young colleague who wanted to advance or more to an elite institution, I would frankly say that there are many rewards in doing casebooks and treatises, but recognition within the academy of law professors is not among them.

Id.

²⁹¹ See Chemerinsky, *supra* note 290, at 886.

²⁹² See Rubin, *supra* note 160, at 161–62; Chemerinsky, *supra* note 290, at 886–87.

²⁹³ See Chemerinsky, *supra* note 290, at 886.

²⁹⁴ See Wendel, *supra* note 29.

In the early part of the 20th century, the model of successful legal scholarship was the great treatise, like Wigmore on Evidence, Scott on Trusts, or Williston on Contracts. . . . That mode of scholarship is now pretty much dead . . . and many excellent treatises are now produced by practitioners. Now an ambitious scholar would never set out to write a treatise

Id.

²⁹⁵ See TAMANAHA, *supra* note 74, at 56–57.

[T]he scholarship of earlier generations of legal academics mainly involved the analysis of legal doctrine. Law professors would synthesize areas of the law and write on legal problems in close dialogue with and helpful to lawyers and judges. That is no longer regarded as scholarly work. Doctrinal articles tend not to be published in elite journals, and professors who wish to build a scholarly reputation and be hired by elite law schools do not write them. Theory has scholarly cachet.

Id.

²⁹⁶ *Id.* at 57.

Unfortunately, the legal academy's infatuation with theoretical legal scholarship has created a gulf between law schools and the bar.²⁹⁷ Law review articles were once written for practicing lawyers and judges, but not so much today.²⁹⁸ Instead, law professors are writing for one another.²⁹⁹ A lawyer seeking guidance on a practice issue is more likely to find it in a practice manual or bar journal article written by a lawyer or judge than in a law review article written by a professor.³⁰⁰

A fourth-tier law school is in a tremendous position to bridge the scholarship gap between academia and the practicing bar by hiring professors with real world experience who are qualified to write on the doctrinal topics that interest lawyers and judges.³⁰¹ While elite schools have little interest in this type of scholarship, professors at lower-ranked schools can help raise their school's profile and reputation in the legal community by writing on practice-related subjects.³⁰² Students will also benefit, as a professor will be a more informed teacher when her research and writing relates to the doctrinal courses she teaches.

To meet the challenge of bridging the scholarship gap, a law school must be more open-minded in evaluating scholarship when hiring and promoting professors. The faculty must recognize that major law reviews generally do not accept doctrinal articles, and therefore give credit for pieces published in reviews that the legal academy views as less prestigious.³⁰³ It should also realize that credited writings need not be law review articles. Every year, American law professors are turning out law review articles that very few people will ever read.³⁰⁴ It makes sense for a school to spend scholarship dollars on writings someone will read and find useful. An innovative school can meet this challenge by expanding its definition of acceptable scholarship. This could include practitioner-targeted publications such as articles in local and state bar journals, chapters in practice manuals, treatises on discrete areas of law, and materials for continuing legal education courses. The definition of scholarship can be expanded to include unpublished documents involving extensive research and writing, such as appellate court briefs, legislative committee reports, and state bar studies.

²⁹⁷ *Id.* at 54–55.

²⁹⁸ Richard A. Posner, *Against the Law Reviews*, LEGALAFFAIRS, Nov.–Dec. 2014, http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp.

²⁹⁹ TAMANAHA, *supra* note 74, at 57.

³⁰⁰ *Id.* at 56.

³⁰¹ *Id.* at 58–59.

³⁰² See Chemerinsky, *supra* note 290, at 886–87.

³⁰³ *Id.*

³⁰⁴ See TAMANAHA, *supra* note 74, at 56.

Finally, the faculty should consider whether the typical practice of placing so much emphasis on publications makes sense at a fourth-tier school. Law schools usually hire and promote based on a professor's performance in three areas: teaching, scholarship, and service.³⁰⁵ As one writer put it, scholarly production has become "the coin of the realm" at American law schools, and teaching a distant second at many institutions.³⁰⁶ Fourth-tier schools whose mission is to prepare lawyers for practice should rethink whether scholarship should play this outsized of a role.

E. The Challenge of Finding Qualified Practitioners

Once a fourth-tier school understands the benefits of hiring practitioners on the tenure track, the challenge is finding suitable candidates. Seemingly, this should not be difficult as there must be many qualified individuals among the thousands of practicing lawyers who would jump at the chance of being a law school professor.³⁰⁷ However, law schools have a public relations problem with the practicing bar when it comes to hiring professors.³⁰⁸ The only national recruiting event for law professors is the AALS's annual FRC,³⁰⁹ but this venue does not welcome practitioners.³¹⁰ Advice literature from voices in the legal academy and information posted on the AALS website discount practice experience as a valuable credential³¹¹ and discourage practitioners without scholarly publications from attending.³¹² The resulting message is that the more practice experience a

³⁰⁵ Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 807 (2011).

³⁰⁶ *See id.*

³⁰⁷ Ashby Jones, *Want to Adjunct at a Fancy Law School? Get in Line*, WALL ST. J. (Sept. 30, 2010, 9:31 AM ET), <http://blogs.wsj.com/law/2010/09/30/want-to-adjunct-at-a-fancy-law-school-get-in-line>.

³⁰⁸ BILEK ET AL., *supra* note 37, at 1.

³⁰⁹ Don Zillman et al., *Uncloaking Law School Hiring: A Recruit's Guide to the AALS Faculty Recruitment Conference*, 38 J. L. EDUC. 345, 345 (1988).

³¹⁰ DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 85.

³¹¹ Practitioners attending the FRC are advised,

[Do not] expect to be taken seriously with anything less than some first-rate theoretical writing published in a recognized journal. In fact, even a *single* article may well be regarded as something of a fluke. Whatever we've said about it being a writing job goes double and triple here.

Assuming you get interviews at the AALS Faculty Recruitment Conference (FRC), you will be a curiosity.

DENNING, MCCORMICK & LIPSHAW, *supra* note 3, at 85. *See also* Gershon, *supra* note 142, at 341 (arguing that the FRC is an expensive "anachronism" that favors candidates with less, not more, practice experience).

³¹² *See* Zillman, *supra* note 309, at 354.

candidate has, the less likely schools will be interested in hiring her on the tenure track.³¹³ Therefore, a law school wishing to hire practitioners is wasting time and money sending representatives to the FRC as it is a marketplace for law schools seeking scholars.

Nevertheless, there are a number of ways schools can find qualified tenure-track candidates. One is to consider adjuncts presently teaching at the school. Many adjuncts would likely apply for tenure-track positions if they thought the faculty would give them serious consideration. Schools already trust these individuals to teach their students and are well-positioned to evaluate them. The faculty can assess an adjunct's teaching ability by attending classes, reviewing course materials and examinations, and reading student evaluations. Schools actually know much more about the teaching talents of these individuals than those of scholar candidates who give one well-rehearsed job talk before they are hired.

Another option is to go into the local legal community and actively recruit practitioners. Instructors for continuing legal education courses may be promising candidates. Professors are often unfamiliar with continuing legal education, but many law school graduates believe this is where they really learned the law in discrete subject areas.³¹⁴ A school could send observers to continuing legal education courses and seek out those with exceptional teaching skills. Schools can also connect with local bar groups to find potential teachers. A faculty wishing to increase diversity can solicit applications from members of minority bar associations. A school might

[S]cholarship has a rather peculiar meaning to most law professors. It assuredly does not equate with any legal writing done since law school. The recruiter typically is most [interested] in research, analytical rather than merely descriptive in its approach, and balanced rather than adversarial in its treatment of issues. Typically, this will mean law-review articles or analytical books or chapters of books. Ordinarily, it [does] not mean appellate briefs, government committee reports, or bar journal notes. . . . An article in a major law review will be more valuable than ten articles in a bar association or practitioners' journal.

Id.

³¹³ Wendel, *supra* note 29. "One of the oddities of the legal teaching market is that candidates for classroom positions are considered tainted if they have too much of a background in practice." *Id.*

³¹⁴ Tyler White, *Continuing Legal Education Should Have an Easy Mode*, LAWYERIST.COM (Aug. 24, 2011), <https://lawyerist.com/31672/continuing-legal-education-easy-mode>. Some states require graduates to complete continuing legal education programs soon after they pass the bar. See, e.g., *NYSBA Bridging the Gap Continuing Education Program*, NYSBA, <http://www.nysba.org/BridgingtheGap> (last visited Apr. 20, 2016) (stating that "[n]ewly admitted attorneys must complete at least 16 transitional CLE credit hours in *each* of the first two years of admission to the Bar").

also consider hiring highly-qualified lawyers and judges who have retired from active law practice and are looking for a new challenge. Lawyers, as in other occupations, are retiring at an earlier age these days.³¹⁵ Retired practitioners have a wealth of knowledge and experience they can share with their students.³¹⁶ These are just a few ideas for finding qualified practitioners now. The only reason schools in areas with large attorney populations are prevented from finding candidates is the lack of willingness to look.³¹⁷

In addition to these immediate solutions, what is needed in the long term are institutional ways of attracting qualified practitioners by convincing them that law schools will give them serious consideration for tenure-track positions. This means having faculty recruitment events specifically targeting qualified practitioners who are interested in law school teaching. Fourth-tier and other schools with a vested interest in having practice-savvy professors can take the lead in creating practitioner-friendly recruitment venues. One idea is to have a consortium of law schools in a city, region, or state hold recruitment events, not unlike the FRC, targeting area lawyers who wish to make a transition from practice to teaching. This type of event would benefit law schools by providing a low-cost, efficient way to meet promising candidates. Moreover, they would convey a new message to practitioners: law schools recognize their talent, their experience, and the important contributions they can make to legal education.

CONCLUSION

This Article reveals a growing trend among American law schools of appointing persons with elite law school pedigrees, advanced degrees, and fellowship experience to entry-level tenure-track positions. Scholars who show promise as writers of academic scholarship are getting the jobs. When it comes to the make-up of their faculties, law schools—even those in the fourth tier—are becoming more academic than ever before. They have come to resemble graduate schools, not places where vocational training is a high priority.

What is difficult to fathom is why fourth-tier schools feel compelled to use the same hiring criteria as higher-ranked schools. Retaining ABA accreditation is not a reason, as there is no case in recent memory where the ABA has decertified any fully-approved school for any reason, let alone

³¹⁵ R. Michael Cassidy, *Strategic Austerity: How Some Law School Affordability Initiatives Could Actually Improve Learning Outcomes*, 17 *CHAP. L. REV.* 119, 128 (2013).

³¹⁶ *See id.* (suggesting law schools consider hiring accomplished retired lawyers and judges as teachers).

³¹⁷ *Id.*

because it disapproved of the faculty's scholarship.³¹⁸ Nor is hope of advancing in the *U.S. News* ranking a defensible justification, as fourth-tier schools rarely make meaningful jumps because the ranking criteria are skewed against them. It may be that professors at fourth-tier schools are concerned about their reputations in the legal academy, but my guess is their schools are not even on the radar at other institutions unless they are competing for the same applicants.

Instead of following the crowd, a fourth-tier school should make important decisions—faculty selection in this case—that support and advance its mission. The mission of a fourth-tier school is to prepare its students for law practice and assist graduates in finding employment. This is their niche, the justification for their existence. Their main responsibility is training lawyers, not producing academic scholarship. This is why scholars may not be a good fit at fourth-tier schools. These schools would benefit by diversifying their faculties to include tenure-track professors who are qualified to teach students how to practice law and who are committed to the practice-centered mission. A starting point is to hire new tenure-track professors who have substantial, relevant practice experience and strong ties to the local legal community, individuals with first-hand knowledge about law practice, and those who can help students find jobs. Practitioners should have a significant voice in setting the school's academic program. Paying lip service to the mission by having adjuncts and others who are not on the tenure track teaching practice courses is not sufficient.

These are challenging times for all law schools and for lower-ranked schools in particular. For a fourth-tier school, its success—and perhaps even its viability—depends on its students' success. Positive student outcomes, not the number of law review articles its professors publish, is the best measure of a succeeding mission. This is why having a faculty with the qualifications to advance the practice-centered mission is so critical.

³¹⁸ Gershon, *supra* note 142, at 339.

