

THREE RULES FOR EDUCATING TOMORROW'S LAWYERS

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ABSTRACT

Legal education reform is currently a hot topic. The most promising ideas involve elevating skills-based training from its current sideshow status (where it is taught by adjunct and clinical instructors) to a meaningful and integral part of the mainstream curriculum. This type of skills-based reform, however, not only faces some practical roadblocks, but also it glosses over legal education's deeper, more fundamental problem: the failure to adequately train students in the underlying substantive and procedural law. To address this more immediate issue, this Essay recommends three basic rules for reform. First, professors should teach an actual body of law, instead of a cobbled-together, multi-state mishmash of cases from a casebook. Second, professors should teach the complete body of law, including the many topics they mistakenly view as too pedestrian to warrant classroom time. Third, professors should publish scholarship that benefits the bench and bar, rather than the academy, thereby strengthening their understanding of the important subjects they teach their students. This Essay explains the incredible benefits that would flow to students from this proposed, three-part reform, and further demonstrates how these three rules for educating tomorrow's lawyers can be implemented today, by the existing professoriate and without any structural changes to the existing legal education model.

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I. INTRODUCTION

I recently received an email from the State Bar of Wisconsin claiming that “[e]ducating tomorrow’s lawyers is a shared responsibility.”¹ The gist of the email was that I should participate in the bar’s lengthy, online survey about legal education. The email then assured me that the study, a joint effort between the bar and the University of Denver, will “undoubtedly advance the profession.”²

Because I disagreed with both claims—that is, I believe the “responsibility” for “educating tomorrow’s lawyers” falls squarely on the shoulders of law professors, and I seriously doubt the bar’s latest dues-funded frolic will “advance the profession”—I declined to spend the required thirty to forty minutes on the survey. But after further thought, I decided that, although I have no “responsibility” to do so, I actually have something to contribute toward legal education reform. And this Essay, rather than the bar’s survey, is the best way to make that contribution.

When it comes to comprehensive, top-to-bottom legal education reform, the heavy lifting has already been done. One of the best articles ever written on the subject is Brent E. Newton’s *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*.³ First, and most importantly, Newton correctly diagnoses the underlying problem: law schools are currently being operated for the benefit of law professors rather than law students.⁴ (Then, most of his “ninety-five theses” are developed from this premise.) And second, Newton’s recommendations are comprehensive and encompass nearly every meaningful reform ever proposed, both before and since his article was published.

Part II of this Essay briefly discusses some of Newton’s theses—the most promising of which would elevate skills-based training from its current afterthought status to an integral part of the regular curriculum. As Part II also explains, however, teaching such practical skills (for example, client counseling, negotiation, fact investigation, and trial skills) would fall beyond the abilities of most tenured and tenure-track professors—many of whom have never practiced law. But even aside from this practical roadblock, focusing on skills-based reform actually glosses over a deeper, more fundamental problem: the failure to adequately instruct students in the basic substantive and procedural law.

To address this serious but often overlooked problem, Part III proposes three rules for educating tomorrow’s lawyers—rules that could easily be implemented today, by the existing law school professoriate and without

1. E-mail from George C. Brown, Executive Director, State Bar of Wisconsin, to members of the State Bar of Wisconsin (Jan. 15, 2015, 08:05 a.m. CST) (on file with author).

2. *Id.*

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

4. *Id.* at 61 (“The current systemic failures of American legal education—many of which involve the exploitation and betrayal of law students by full-time faculty members at many schools—have deleterious effects on the ethical health of the profession.”).

any structural changes to the existing law-school model. First, professors must teach students an *actual body of law* instead of the meaningless, jurisdictional mishmash of cases found in the typical casebook. Second, professors must teach students *all of the topics* within that body of law (i.e., teach the little things), including those topics they mistakenly assume are not important enough to justify classroom time. And third, in order to strengthen their knowledge of the law they are teaching, professors should produce scholarship for *the bench and bar*, not the academy.

In explaining these three rules for reform, this Essay acknowledges Newton's many contributions and also cites several other sources. But my goal is to avoid one of the plagues of the modern law review article: excessive and even circular citation to so-called authority.⁵ Instead, my three rules for educating tomorrow's lawyers are rooted primarily in my own legal education, my extensive experience practicing law, my experience educating other lawyers at continuing legal education seminars, my extensive research and writing for law reviews and book publishers, and my genuine (but admittedly morose) interest in the current state of legal education.

II. A BRIEF DISCUSSION OF THE "THESES"

As valuable as Newton's article is, I do not agree with all of his ninety-five theses—and, in fairness, he warned that even like-minded reformers would disagree with some of his ideas.⁶ For example, thesis number eighty-three recommends that law review article selection and editing duties be transferred from the law students to the professoriate.⁷ This would be unwise, and would even contradict Newton's thesis number seventy-nine which calls for more practical scholarship.⁸ Using my own body of published work as an example, if law professors had been in charge of the article-selection process my ideas may never have met the printed page. Law students, on the other hand, are far more interested in practice-related topics; most students go to law school to eventually practice law, whereas law professors come to law school to escape or even avoid practicing law.

And some of Newton's theses, while excellent in theory, have little chance of being implemented. For example, he recommends that new

5. Jeffrey Harrison, *Ethics, Citations, Gaming the Law Review Ranking System: The Circle of Deceit*, CLASS BIAS IN HIGHER EDUCATION (Jan. 28, 2015), <http://classbias.blogspot.com/2015/01/ethics-citations-gaming-law-ranking.html> (A law review footnote is not a citation to authority, but rather is merely a statement that "another author said so and, of course, that author cited another author who cited another one. A vast amount of law review writing is built on a stack of hearsay."). Perhaps in light of the problem Harrison describes, law journals are now inviting shorter, lightly-footnoted essays, and many online companion journals have been designed exclusively for very short discussion-type pieces.

6. Newton, *supra* note 3, at 60 ("I hardly expect most readers to accept all of my points, but I hope that thoughtful readers will start looking at top-to-bottom change as the surest way out of the current mess.").

7. *Id.* at 130. In fairness to Newton, he does recommend that "distinguished members of the bench and bar" also play a role in article selection and editing. *Id.* However, there likely are not enough lawyers and judges who care enough about law reviews to fill this role. As a result, article selection would eagerly be usurped by the professors who would continue to publish more of the same.

8. *Id.* at 126.

faculty be hired from a more diverse applicant pool to include top graduates of non-elite law schools⁹ who excelled as practitioners.¹⁰ While I applaud the idea of law schools hiring lawyers who have proven themselves in the legal profession, it is not likely to happen. The legal academy has been infiltrated by the elite-J.D. crowd¹¹—many of whom have never practiced law¹² and some of whom are not even licensed to do so.¹³ More recently, the legal academy has been invaded by the elite-Ph.D. crowd¹⁴—many of whom are not even law school graduates let alone lawyers.¹⁵ And in the process, this unlikely group of law professors has created a self-perpetuating hierarchy that will likely remain intact.¹⁶

But the most promising of Newton's theses involve, in one way or another, teaching students practice- or skills-based competencies such as public speaking, negotiation, client communication, strategic thinking, collaboration, fact investigation and development, general management, and courtroom-based skills. Further, Newton realizes the importance of integrating such skills training into the regular law school curriculum,¹⁷ rather than treating it as a mere sideshow to be taught by the marginalized adjunct¹⁸ and clinical¹⁹ instructors.

It is difficult to argue with Newton's skills-based recommendations, and there is no doubt that educating students in these areas is indeed possible. But there are still at least two major obstacles to this type of reform. First, law school professors—especially those that never or barely practiced law or, worse yet, never went to law school—are probably ill-equipped to

9. *Id.* at 112 (recommending that law schools abandon their “elitism and open up hiring to qualified graduates from lower-ranked schools”).

10. *Id.* at 109 (recommending that law schools hire professors based, at least in part, on “their records as successful practitioners”).

11. Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J.L. & PUB. POL'Y 179, 180 (2014) (citing evidence that “85.6% of new hires received their J.D. degrees from one of a total of twelve elite law schools”).

12. Newton, *supra* note 3, at 112-13 (explaining that “practical experience often *hurts* an aspiring professor's chances of being hired” and “the typical new professor possesses only one year of practical experience”); see Campos, *supra* note 11, at 180 (“A 2003 study found that the average amount of experience in the practice of law among new hires at top twenty-five law schools, among those hires who had any such experience, was 1.4 years.”).

13. Newton, *supra* note 3, at 113 (“It is common knowledge that, at many law schools, several members of the full-time faculty do not possess law licenses . . . [and] some professors even wear their lack of a license as a badge of honor.”).

14. *Id.* at 115 (citing evidence that, at some schools, “over one-third of new hires” possess a Ph.D.).

15. Campos, *supra* note 11, at 181 (“A new study of the top twenty-six law school faculties reveals that those faculties include sixty-six tenure-track faculty members who do not have law degrees.”).

16. Newton, *supra* note 3, at 111 (“It simply cannot be that the top graduates from the 180 or so ‘lesser’ law schools would not be as capable law professors as graduates from ‘elite’ law schools.”).

17. *Id.* at 99 (“Virtually all doctrinal courses in law schools should be experiential or skills courses.”).

18. *Id.* at 123 (“The relative pittance paid to adjunct professors is a reflection of the low value that most law schools place on adjunct faculty members and, more generally, on teaching.”).

19. *Id.* at 121 (“The law professors who teach students the most important courses in terms of preparing them to be competent practitioners—clinicians and legal research and writing professors—are generally paid less, denied the right to earn tenure, and given little, if any, faculty voting rights.”).

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provide such skills-based training. Integrating such training into the mainstream curriculum would, therefore, require major reform that would be costly and time consuming to implement. Second, there is an even more fundamental problem: skills-based competencies are of little value without a solid foundation in the underlying substantive and procedural law.

For example, a criminal defense lawyer may be a very good communicator (a skills-based competency), but that does little good if the lawyer is not well trained in the underlying substantive law (for example, lesser-included offenses and potential affirmative defenses) and procedural law (for example, pretrial procedures and discovery rules). By way of analogy, a medical doctor may have a superior “bedside manner,” but if he or she lacks an understanding of human anatomy and the available diagnostic tests, his or her communication skills are of little value to the patient with a broken arm.

It is difficult to find a medical doctor as poorly trained as the one described above. As the next section explains, however, new lawyers are commonly ignorant of the substantive and procedural law in their area of practice. And this justifiably causes a tremendous amount of stress and anxiety for the new lawyer who is thrown into the fray.²⁰ Worse yet, the true victim is not the lawyer, but the legal-services-consuming public for whom the lawyer works.²¹ In light of the seriousness of this problem, basic legal education, not skills-based training, is the first and most important aspect of law school that must be reformed.

III. THREE RULES TO IMPLEMENT TODAY

Changing basic legal education (as opposed to implementing skills-based training) is relatively easy and inexpensive to accomplish. In fact, every law professor with a J.D. degree, regardless of whether he or she has ever practiced law, is capable of immediately and dramatically improving their students’ education in the substantive and procedural law. The following sections set forth three simple rules for educating tomorrow’s lawyers—rules that should be implemented *today* by the *existing* professoriate.

A. Rule #1: Teach an Actual Body of Law

Most law school professors teach primary sources of law, such as case law, rather than secondary sources, such as hornbooks. And there is a tremendous benefit to studying the actual cases. But the cases used in class must *not* consist of a mishmash of cases from multiple states, as is typically

20. See, e.g., Joe Forward, *New Lawyers are in a Financial and Emotional Depression, Says State Bar Task Force*, WISBAR NEWS (Dec. 18, 2013), <http://www.wisbar.org/NewsPublications/Pages/GeneralArticle.aspx?ArticleID=11251> (lacking the skills to practice law and carrying staggering amounts of law-school debt, many new lawyers reported being “scared,” “terrified,” and even “suicidal”).

21. Newton, *supra* note 3, at 60 (“I also hope that readers will remember that the ultimate beneficiaries (or victims) of our system of legal education and licensure are the members of the public.”).

found in a law school casebook.²² Instead, the assigned cases must comprise an *actual body of law* from a single jurisdiction which, for most subject areas, will be the state (or the federal circuit) in which the law school is located.²³

To demonstrate the advantage of this approach, consider the teaching of substantive criminal law and, more specifically, the so-called statutory-rape crime. The classic casebook would first include a case from a strict-liability state where it does not matter, for purposes of criminal liability, whether the defendant believed the minor was an adult. Then, the casebook would present a case from a state where the crime is *not* strict liability in nature, but instead incorporates some defenses—for example, the minor’s misrepresentation-of-age defense.

This casebook approach, however, fails to teach the student anything about his or her state’s *actual* law. Instead, this casebook approach leaves the soon-to-be lawyer with many important but unanswered questions, including: What is the minor-adult age cutoff in my state? Does the age of the minor affect the maximum potential penalty for the crime and, if so, what are *those* cutoffs? Is there a mandatory- or presumptive-minimum penalty? Does my state permit any affirmative defenses at trial, such as the minor’s misrepresentation of age? Or has my state adopted a strict-liability approach to this crime? And are there any statutory mitigating or aggravating factors to consider if the case ends in conviction and sentencing?

Here, the classic saying that “a little knowledge is dangerous” rings true. At best, the new lawyer will realize that he or she is completely ignorant of the law and will have to spend numerous hours researching and studying the relevant statutes and cases from scratch. But that is the *best case* scenario. At worst, the new lawyer will recall an isolated fact from his or her criminal law casebook—for example, the defendant who *was* allowed to use a misrepresentation-of-age defense—and wrongly assume this defense is available to his or her client in his or her state. (If it seems fraught with peril, or even absurd, for a practicing lawyer to rely on a law school class as a source of actual legal knowledge, then that is further evidence our system of legal education is highly deficient.)

Conversely, had the law school taught its state’s actual body of law rather than a senseless collection of cases from around the country, the new lawyer would, much like the medical doctor with a knowledge of human anatomy and the available diagnostic tests, know the answers to the above questions (or at least would instantly know where to find them). In other

22. Newton also rejects the casebook as a teaching tool, but he argues for replacing it with secondary sources such as hornbooks. *Id.* at 103.

23. As early as my first semester of law school I found it baffling that we would use a multi-state casebook instead of our own state’s cases—especially given that Wisconsin automatically admits Marquette graduates to the bar, without taking the bar exam, via the diploma privilege. Since that time, however, at least one Marquette Law School professor has adopted a Wisconsin-centric approach. See Chad Oldfather, *Focusing Criminal Law on the Law of a Single State*, PRAWFSBLAWG (Apr. 5, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/04/focusing-criminal-law-on-the-law-of-a-single-state.html>.

words, this single-jurisdiction approach to criminal law provides an obvious and tremendous advantage for future lawyers: it equips them with a real, rather than fictional, body of law they can instantly apply in practice.

Equally important, this single-jurisdiction approach has no disadvantages; it does not short-change the student in any way. For example, assume that a Wisconsin law school taught the relevant Wisconsin case on statutory rape (instead of two or more other states' cases from a casebook). In this situation, the student will still learn that there are different versions of the law among the states—Wisconsin's high court discusses these competing viewpoints when deciding which approach it will adopt.²⁴ So the student loses nothing via this more focused, state-specific study of the law.

But what if the student graduates from a Wisconsin law school and decides to practice in, say, California? In this situation, he or she is still no worse off than if he or she had learned criminal law through the traditional casebook: under the single-jurisdiction approach he or she would have learned the law of a state (Wisconsin) that he or she cannot put to direct use where he or she practices (California); under the casebook approach he or she would have learned a cobbled-together, fictional body of law that he or she cannot put to use anywhere. And under both educational approaches, the student would have developed the same general and transferable legal reasoning skills.

It is not completely true, however, to say that this single-jurisdiction approach is better for everyone; it would create more work for the professor.²⁵ Instead of simply telling the students to purchase a pre-made (and expensive) multi-state casebook, the professor would—continuing with our criminal law example—actually have to read the state's criminal code and its annotation from which he or she would have to select the relevant cases to use in class. But this inconvenience is a small price to pay for having students emerge from the course with real knowledge about an actual and, in most cases, useful body of law.

B. Rule #2: Teach the Little Things

Once professors begin teaching an actual body of law from a real jurisdiction, the next step is to teach the *complete* body of law, including topics that might seem to the professor to be unworthy of classroom time. Newton makes essentially the same argument when he argues for constraints on academic freedom.²⁶

24. The relevant Wisconsin case on point, and one that I recommended to the Marquette professor who was adopting a Wisconsin-centric approach to his course materials, is *State v. Jadowski*, 680 N.W.2d 810 (Wis. 2004) (discussing alternative approaches and possible defenses to statutory rape crimes, and ultimately adopting the strict-liability approach).

25. Newton, *supra* note 3, at 103 (“The casebook method, which is used in conjunction with the Socratic method, allows for a relatively easy manner of instruction.”).

26. *Id.* at 100-01 (Many professors “spend an inordinate amount of time covering a small portion of the course materials that interest them, at the expense of the bulk of the course.” Instead, because their “primary mission should be to produce fiduciaries responsible for the life, liberty, and property of

I learned of academic freedom firsthand when my law school class (including myself) were victimized by it nearly twenty years ago. In constitutional law our visiting professor taught only a few topics—topics which just so happened to coincide with the subject matter of his article-in-progress. I am sure it was a fun experience for the professor, but as a result we students learned next to nothing about free speech, and even less about the commerce clause and other important constitutional subjects.

Similarly, our ethics professor ignored many of the actual ethics rules by which we future lawyers would soon be governed, and instead immersed us in cases like *Annesley v. Anglesea*, an eighteenth century dispute litigated in William the Conqueror's Court of Exchequer. Again, this was no doubt enjoyable for the professor (and perhaps even made him feel scholarly), but it left us students ignorant of many of our soon-to-be ethical obligations. And this problem is widespread. As a result of this particular brand of professorial negligence, few lawyers are aware of the scope of their duty of confidentiality to clients,²⁷ and most lawyers are surprised to learn there is a big difference between the ethics rule of confidentiality and the rule of attorney-client privilege.²⁸

The subject of criminal procedure further demonstrates this point. In my experience as a criminal defense lawyer, many lawyers and judges are confounded by even the most basic rules. This was on full display when a recent trial-court conviction was appealed to the Wisconsin Supreme Court because the defense lawyer, prosecutor, and *two* trial-court judges did not understand the substitution-of-judge statute.²⁹ Ironically, only the uneducated defendant roughly understood how the procedure worked, yet his repeated complaints were ignored.³⁰ But if any one of the four law school graduates involved in the case—three of whom graduated from Wisconsin law schools—had been taught this basic criminal procedure statute, the state's high court would not have had to explain it to them,³¹ the conviction

their clients, professors should have more limited discretion when it comes to imparting the necessary knowledge.”).

27. MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.9 (1983). The ABA Model Rules are adopted (typically verbatim) in nearly every state. Unbeknownst to most practicing lawyers, these rules prohibit them from discussing, writing about, or otherwise disclosing any information, including *publicly available* information, if such information is in any way related to the representation of the client or former client. See Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics that We Can Learn on the Road*, 15 GEO. J. LEGAL ETHICS 95, 105 (2001) (Lawyers “are ignorant of at least some of their professional obligations . . . the lawyer may never have learned the rule Law school courses in professional responsibility rarely cover every rule.”).

28. The ethics rule, “unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.” *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-4 (1983)).

29. *State v. Harrison*, 858 N.W.2d 372 (Wis. 2014).

30. *Id.* at 376 (“Although the defendant used phrases like “change of judge” and “recusal” in some of his filings, rather than consistently discussing [the judge's] “substitution” or “authority to act,” the defendant's goal was clear: He did not want [the judge against whom he had filed a substitution] on the instant case[.]”).

31. *Id.* at 377-78 (explaining that once a defendant properly exercises his statutory right of substitution against a judge, see WIS. STAT. § 971.20 (2011-12), that judge may no longer preside over the defendant's trial and sentencing). The lawyers and judges at the trial-court level may have mistakenly

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would not have been overturned, and the state would not have to spend additional resources to retry the case.³²

These examples demonstrate why professors should teach the little things. Professors should not focus on their topics of interest at the expense of what they view as the pedestrian aspects of the law—such as the ethics rule of confidentiality or the substitution-of-judge statute. And teaching the little things, much like teaching a real body of law from an actual jurisdiction, can be accomplished by any professor with a J.D. degree regardless of his or her legal practice experience.

Professors will predictably respond that there simply is not enough time to teach all topics in a single course. But first, given what I recall to be a tremendous amount of wasted time in the classroom, I doubt this is true. And second, even if it is true, the solution is simple: add an elective to follow-up on the required course (or a second elective if the first course is itself an elective).³³ Creating meaningful and comprehensive course sequences would also benefit the law schools: it would squelch critics' cries that the third year of law school is useless, and that the entire J.D. should be completed in two-thirds of the time, credits, and tuition dollars.³⁴

But again, implementing this rule would not be completely cost free. Because many important topics (including those discussed in this section) are currently not taught in law school, and because many law professors have no experience beyond law school, some professors may not even know that these topics exist.³⁵ Therefore, teaching the little things would take some preparatory effort: a professor would, once again, have to locate and read the applicable law—for example, the state's code of criminal procedure and its annotation—from which he or she would then select the relevant cases. But despite the extra work, this is a small price to pay for having students emerge from a class with complete knowledge of a relevant body of law.

Teaching a relevant (see Rule #1) and complete body of law also gives students an additional advantage: the opportunity to create a useful outline, checklist, annotation, or even a small treatise-like document on a real subject. This would not only be valuable for the end-of-semester issue-spotting exam, but, even more importantly, would serve as tangible piece of work product to bridge the worlds of academia and legal practice. That is,

relied upon subsection (3) and neglected to read as far as subsection (9). *Harrison*, 858 N.W.2d at 377-78.

32. *Id.* at 386 (A unanimous court “remand[ed] the cause to the circuit court for a new trial.”).

33. See Newton, *supra* note 3, at 87 (arguing for better topical coverage through the development of course sequences).

34. A movement backed by some law professors and even the President of the United States, suggests that the third year of law school is useless. See Peter Lattman, *Obama Says Law School Should be Two, not Three, Years*, N.Y. TIMES (Aug. 23, 2013), http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?_php=true&_type=blogs&_r=2.

35. 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, 770 (2004) (“Professors who have little practice experience are presumably less likely to be aware of, or interested in, issues that arise in practice.”).

if the student-turned-lawyer decides to practice in that area of law, he or she would have already developed, *in law school*, a relevant and comprehensive practice aid that would permit him or her to hit the ground running upon entering practice.³⁶ Then, this practice aid need only be periodically modified as the law changes.

This approach to legal education stands in stark contrast to the typical casebook method that teaches an incomplete and fictional body of law that the student (wisely) deletes from memory the moment after the final exam. Conversely, the creation of a useful piece of work product, even if only in simple, outline form, will benefit the student many years beyond graduation. Further, creating a tangible piece of work product could be a required part of every course; at a minimum, professors should encourage the activity and informally consult with students on their progress throughout the semester.

C. *Rule #3: Write for the Bar, not the Academy*

Chief Justice John Roberts famously quipped:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.³⁷

Unfortunately, this criticism is not far off; many articles published in the so-called top journals give the terrible impression that the professors who wrote them cared little for the practice of law.

One top law journal, for example, recently published a professor's article on the economics of baseball's infield fly rule.³⁸ Not the economics of player contracts or of antitrust legislation—but the economics of *the infield fly rule*. Equally bewildering, another top journal published what appears to be a professor's speech in which he argued that “solutions to legal problems . . . are arrived at through a process of inference to the best explanation that occurs within a highly interconnected set of nodes that has similarities to a neural network.”³⁹

36. Having been victimized by the traditional, multi-state casebook approach in law school, I spent the first few months of my solo-practice career educating myself on Wisconsin's law by reading state-specific statutes, cases, and practice aids, by observing trials and other hearings in court, by consulting with local practitioners, and by accepting low-end misdemeanor cases to gain some actual experience (to the potential detriment of the real-life clients). Unfortunately, few new lawyers have the time, financial resources, or even organizational ability to self-train in this manner—nor should they have to, given the tremendous amount of debt and opportunity cost they incurred in going to professional school.

37. *Chief Justice Roberts Comments on Legal Scholarship Today*, ADJUNCT LAW PROF BLOG (July 8, 2011), <http://lawprofessors.typepad.com/adjunctprofs/2011/07/chief-justice-roberts-comments-on-legal-scholarship-today.html>.

38. Howard M. Wasserman, *The Economics of the Infield Fly Rule*, 2 UTAH L. REV. 479 (2013).

39. *Allen on Rationality, the Law of Evidence, and the Nature of the Legal System*, CRIMPROF BLOG (June 3, 2011), http://lawprofessors.typepad.com/crimprof_blog/2011/06/allen-on-rationality-the-

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Other articles, however, seem to cross the line that separates the head-scratching from the bizarre, at least to the practicing lawyer. In one such article, a professor argued that “the mundane reality of the traffic stop” can destroy our fantasies—“freedom, escape, friendship, romance”—that we have come to associate with the “open road” through “books, movies, [and] songs[.]”⁴⁰ In a more extreme example, another professor wrote about how our government should tax zombies in the coming “zombie apocalypse,” and also addressed the important question of “how estate and income tax laws should apply to vampires and ghosts.”⁴¹

It took me a few minutes to identify the source of my frustration, and perhaps the Chief Justice’s frustration, when it comes to law reviews. My issue with much of the so-called legal scholarship is not that the professors wrote on such topics—I strongly believe that everyone should be free to write about sports or neural networks or movie-based fantasies or (especially) zombies. But the problem is that law professors might not be writing such articles on their own time; they could be getting paid many tens of thousands of dollars per article in what might essentially be a tuition-subsidized frolic.⁴²

In any case, all of this could be corrected if the professors, as part of their jobs, would simply write articles *for lawyers and judges* instead of for their fellow professors.⁴³ But what does this have to do with legal education? Exploring and writing about practical legal issues will strengthen and deepen a professor’s understanding of the material he or she is teaching to students.⁴⁴

law-of-evidence-and-the-nature-of-the-legal-system.html. It appears there may be an article and also a secondary article (with a slightly modified title) that is a transcription of a lecture on the same topic—possibly two CV-filling publications for the price of one. For what appears to be the lecture-based article, see Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA. L. REV. 1047 (2011).

40. Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305 (2012). This piece actually led to a tremendous amount of criticism, including some entertaining satirical criticism, by the scam-blogger movement. See, e.g., *The Law School Scam is Like a Highway to Dreamland: An Annotated Fictional Tribute to Prof. Nancy Leong’s Sholarshit [sic] Article*, OUTSIDE THE LAW SCHOOL SCAM (Oct. 25, 2013), http://outsidethelaw.schoolscam.blogspot.com/2013/10/the-law-school-scam-is-like-highway-to_25.html.

41. Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207 (2013). Unfortunately, in a case of zombie-see-zombie-do, this admittedly eye-catching and clever title is producing some copycat scholarship—at least in form if not in substance. See, e.g., Paul Caron, *Huang & Rosen: The Zombie Lawyer Apocalypse*, TAXPROF BLOG (Feb. 15, 2015), http://taxprof.typepad.com/taxprof_blog/2015/02/huang-rosen-.html.

42. Newton, *supra* note 3, at 128 (“The typical law review article published by a full-time law professor costs at least \$25,000, and in some cases, as much as \$100,000. That amount of money represents a portion of the professor’s annual salary, a very large percentage of which is funded by student tuition.”).

43. Hricik & Salzmann, *supra* note 35, at 764-66 (rejecting the false theoretical-versus-practical dichotomy in legal scholarship and instead advocating for the production of “engaged scholarship”).

44. Newton has a different but equally reasonable view on this: scholarship (at least in its current form) does not positively impact teaching; therefore, time spent writing articles should be reallocated to “teaching law students to be effective practitioners[.]” Newton, *supra* note 3, at 107. Hricik and Salzmann, however, agree that writing practical legal scholarship will make professors better teachers. Hricik & Salzmann, *supra* note 35, at 775. They further claim that this will not only benefit students in the classroom, but will also benefit the law review members that edit the articles. *Id.* at 774 (arguing

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But first, the bad news: unlike teaching an actual (see Rule #1) and complete (see Rule #2) body of law, writing for the bar rather than for the academy may not be a realistic option for professors who are on the tenure track, but have yet to earn tenure. It is no secret that, at the pre-tenure stage, writing for lawyers rather than for other professors is a surefire way to a short-lived academic career.⁴⁵ In fact, such practical scholarship is “openly discouraged” in the legal academy.⁴⁶

And now the good news: for tenured professors (and for untenured professors who are feeling rebellious), writing for the bar instead of the academy does not require any actual legal practice experience.⁴⁷ While many of my own articles certainly were the product of practice experience, others were the result of merely observing the courtroom. For example, I wrote an article titled *An Alternative to the Wrong-Person Defense*⁴⁸ because, when sitting in the courtroom waiting for a case to be called, I observed a colleague litigating a motion to introduce evidence that a third-party, and not his client, committed the crime (i.e., the wrong-person defense). But the judge prevented him from doing so unless the third-party was willing to appear at the prosecutor’s office and sign a sworn statement that he, in fact, was the true perpetrator.

Obviously, that legal standard was nothing more than a figment of the judge’s imagination. However, it led me to research the issue—where I found that other judges were also barring defense lawyers from using third-party guilt evidence—and then led me to write my article offering defense lawyers an alternative approach for introducing their evidence. The point is that just as professors should *read* the relevant statutes and case law in order to teach a body of law that is both real (see Rule #1) and complete (see Rule #2), so too should they *observe* the practice of law⁴⁹—for example, as it unfolds in the courtroom—so they can write about issues that will deepen their understanding of the topics they teach their students.

Granted, this practical-scholarship approach does not fit well within the rankings-obsessed world of legal academia where even long-since-tenured professors monitor their articles’ every citation and Social Science Research Network (SSRN) download. But practical legal scholarship actually

that, when editing impractical interdisciplinary scholarship, the law review members are not engaged and instead “become mere grammar, spelling, and punctuation checkers”).

45. Newton, *supra* note 3, at 114 (“A professor’s record of publishing practical—as opposed to academic or theoretical—scholarship also generally hurts her chances of being hired, promoted, and granted tenure.”).

46. *Id.* at 126.

47. Arguably, professors’ lack of practical experience could even provide a unique perspective when writing about practical legal issues. See Hricik & Salzmann, *supra* note 35, at 785 (“[M]ost law professors are better equipped to produce objective evaluations of the law because they are not confronted with the inherent biases of legal practice.”).

48. Michael D. Cichini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. C.R. L.J. 1 (2013).

49. Arguably, producing practical scholarship does not even require that much preparatory effort. Merely “delving into case law and other primary sources,” instead of reading impractical articles written by other law professors, may be sufficient. Hricik & Salzmann, *supra* note 35, at 776.

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has tangible, though often unquantifiable, benefits. For example, my article outlining an alternative approach to the wrong-person defense likely will not garner citations from professors writing about baseball or neural networks. But it has been cited in defense lawyers' briefs, and I have received several phone calls from defense lawyers telling me they used the article to introduce evidence of their clients' innocence—something they otherwise could not have done because, much like the judge that inspired my article, their judges prevented them from using the traditional wrong-person defense (thus making the alternative defense highly valuable).

And there is more good news for the professors who are willing to make this leap to practical scholarship: writing for lawyers is no less theoretical than writing about movie-inspired fantasies of the open road or how the government should tax zombies. One of my articles, for example, applied the discipline of economics to the Fourth Amendment's exclusionary rule. Other articles applied published social science findings to the admissibility of eyewitness identification evidence, and the admissibility of expert testimony on false confessions. There is a whole world of serious, practical, yet highly theoretical topics just waiting to be explored, explained, or simplified⁵⁰—provided a professor is willing to invest the time to observe the law as it unfolds in the courtroom (or in administrative hearings, or public meetings, or wherever their particular area of law plays out).

IV. CONCLUSION

In writing this Essay I do not mean to discourage the more dramatic reforms recommended by Newton, like hiring professors who have excelled in the practice of law. In fact, although I dismissed this particular idea as impractical, it might actually be feasible for some schools. Most law schools are slaves to the *U.S. News & World Report* rankings.⁵¹ And hiring a seasoned practitioner, instead of an unsullied J.D.-Ph.D. from an elite school, would damage the hiring school's *U.S. News* peer-reputation score and, consequently, its overall ranking.⁵² But this would not hold true for every school.

50. See *id.* at 763 (arguing that practical legal issues “are amazingly complex, often require interdisciplinary legal analysis, and present rich and intricate issues of law, theory, and practice”).

51. Newton, *supra* note 3, at 77 (discussing the “‘prestige race’ among law schools and an obsession among administrators, faculty members, and law students over schools’ rankings”).

52. *Id.* at 77 (Peer reputation is “worth 25% of a school’s total score” and is therefore “a critically important component” of a school’s *U.S. News* rank.). And a school’s peer reputation, in turn, is determined by how well its faculty can impress the faculty of other schools. The flawed nature of this system was on full display when the *U.S. News* released its 2016 rankings: “If you still wanted for proof that these rankings are utterly baseless hogwash, UC-Irvine’s immediate insertion into the [top 30] should remove the last bits of the emperor’s clothing. Here we have a law school whose oldest graduates are in their third year of practice. The school has little to no name recognition outside of California. Indeed, the entire venture seemed to have the express purpose of gaming the U.S. News methodology and jump-starting a ‘top’ law school.” *Rankings Review: The UC-Irvine Problem*, OUTSIDE THE LAW SCHOOL SCAM (Mar. 9, 2015), <http://outsidethelawchoolscam.blogspot.com/2015/03/rankings-review-uc-irvine-problem.html>.

For example, perennial fourth tier (or “rank not published”) *U.S. News* schools, in essence, have nothing to lose, and would be the perfect candidates for a complete top-to-bottom overhaul of their professor hiring practices and their curriculum. Without the risk of falling in the *U.S. News* rankings—there is, after all, no fifth tier—and with no realistic chance of rising significantly, why not hire professors who are accomplished lawyers instead of Ph.D.s? Why not design a program that integrates meaningful skills-based training from day one, instead of treating it as a third-year side-show taught by marginalized adjunct or clinical instructors?

So there is a real opportunity for some law schools to shun the rankings game—a game they never should have cared about in the first place—and instead produce lawyers who are ready to walk into a courtroom (or an administrative hearing room or a corporate conference room) and start practicing law competently from day one. Medical schools do this, and so too could law schools, or at least those law schools bold enough to shed their *U.S. News* chains.

I wrote this Essay, however, because such comprehensive reform is simply *not* realistic for the vast majority of law schools—especially those that still aspire to *U.S. News* glory. But even at these status-obsessed law schools, the professors must, at least to some degree, acknowledge that “[l]aw school should be a professional school whose primary mission is to produce competent, ethical members of the profession.”⁵³ And toward that end, the three rules proposed in this Essay would be incredibly easy to implement—even with the existing professoriate and without any fundamental changes to the existing law school model or curriculum.

Meaningful change can be immediately realized if professors would teach their students an actual (see Rule #1) and complete (see Rule #2) body of law, and write about real legal issues that affect the profession (see Rule #3). In addition to being the most important step toward creating competent lawyers, this modest, three-rule proposal could also accomplish much more. That is, relevant and thorough legal education combined with reality-based legal scholarship might, over time, bridge the existing disconnect between academia and the bar.⁵⁴ Over the long run, these three rules for educating tomorrow’s lawyers could actually return law schools, law professors, and even law reviews to a meaningful place within the legal profession.

53. Newton, *supra* note 3, at 113.

54. *Id.* at 117 (discussing the “disconnect between the legal academy and the legal profession” as well as the two groups’ “reciprocal disdain” for each other).